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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.

a. 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.
b. The seminar is also intended to discuss issues of administrative discretionary power. The most ambiguous aspects of this matter relate to the identification

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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 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?

   a. Yes
   b. No
   c. Only in certain areas of law

   Please specify your answer briefly, if necessary

   The general regulation on the administrative procedure (Administrative Procedure Code) sets out time limits within which administrative authorities are obliged to take their decisions (see point 2). These time limits apply to all administrative procedures unless special laws regulating some areas of public administration provide otherwise. For example, the Associations Act sets a shorter than a general 30-day period for issuing a refusal decision to register an association (period of 15 days after the initiation of proceedings), on the contrary, the Asylum Act sets a 6-month period for deciding the application, which may be repeatedly extended by a superior head employee up to a total of 9 months; next, pursuant to the Citizenship Act, the Ministry shall take a decision on an application for granting citizenship of the Slovak Republic no later than 24 months after receipt of the application.

2. Where are the administrative time limits set:

   a. The Constitution
   b. The general code of administrative law or administrative procedure law
   c. Special laws
   d. Other

   Please specify your answer briefly, if necessary

   According to the complexity of the matter, the law sets time limits for decision making, namely
   a) without delay in simple cases,

b) within 30 days in other cases,
c) within 60 days in cases of a particularly complicated nature,
d) the period accordingly extended by an appeal body,
e) the period set by special laws (see examples above, point 1).

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" is not defined in our legal system. It is a legally indefinite term, the content of which is defined by administrative authorities in their decision-making practice. Reasonableness is to be assessed on a case-by-case basis, having regard to the nature of the matter and the administrative authority´s workload.

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

Pursuant to the Administrative Procedure Code, the administrative authority shall decide *immediately (without delay)* in simple matters. In other cases, the administrative authority shall decide the matter *within 30 days* from the opening date of the proceedings (see point 2).

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

Yes. The Administrative Procedure Code gives the *appeal body* an option to extend the time limit if it is not possible to issue a decision in time. The extension of a period must occur before its expiry based on a justified *request of the first-instance authority*. This administrative authority *must inform* parties to the proceedings about the fact that the matter cannot be decided in time and state the reasons thereof. It shall further *inform* parties of the *estimated period* within which a decision will be taken.

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

Yes. The time limits for issuing a decision are not binding and there is no sanction mechanisms for the administrative authority. Non-compliance with the time limits does not affect the legal position of the parties to the proceedings.

The Slovak law, however, grants parties to the proceedings several remedial measurements against administrative authority´s inaction:

- motion to initiate the procedure under section 50 of the Administrative Procedure Code, i.e. transfer of the decision power on an appeal body;
- institution of the complaint addressed to a superior body;
- motion addressed to a public prosecutor;

- action against the inaction of an administrative public body under section 242 et seq. of the Administrative Court Procedure Code.

Finally, a violation of the right to have one's case timely decided may create an entitlement to compensation for damage caused by maladministration under the conditions laid down by the Act on Liability for Damage Caused in the Exercise of Public Power.

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

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

   The causes of the inactivity by public administration bodies are varied. Indeed, individual and, in few cases, systemic failures by authorities and legal as well as non-legal causes can be identified. The legal causes of the inactivity lie in the deficient or missing regulation. Non-legal causes include a lack of financial resources that has impacts in terms of personnel and material.

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

    The inactive staff of an administrative authority

In Slovak Republic, the civil servant may be held liable for breach of the service discipline pursuant to section 117 of the Civil Service Act. The breach of the service discipline may only result in the imposition of *immediate termination of the civil service* or in the *dismissal* of the civil servant. The Civil Service Act does not explicitly provide for the competence of the Service Office to decide upon other disciplinary measures/sanctions.

The Act on Civil Service of Professional Soldiers and on Amendments to Certain Laws and the Act on Civil Service of the Members of the Police Force, Members of the Slovak Intelligence Service, Members of the Corps of Prison Wardens and Judiciary Guards and Members of Railway Police and on Amendments to Certain Laws include specific regulation related to the disciplinary accountability in civil service.

The inactive administrative authority *(see the* ***previous reply to point 6****)*

As regards the institution of complaints, the Complaints Act provides for the possibility of a public administrative body competent for handling complaints to impose a fine up to EUR 650, and even repeatedly.

Further, if the administrative court upheld the action under section 242 et seq. of the Administrative Court Procedure Code and the defendant public administrative body didn´t unreasonably begin to act within a given period, the administrative court could impose a fine of up to EUR 2000, and that even repeatedly. However, such an option is not commonly used in the decision-making practice.

Finally, the inaction by an administrative authority may result in *liability for damage* caused by maladministration under the conditions laid down by the Act on Liability for Damage Caused in the Exercise of Public Power.

Administrative silence

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

The concept of "administrative silence" as a general way of positive or negative decision-making by a public administrative authority is not legally defined in the Slovak legal order. The specific regulation of the "administrative silence" is contained in special laws. The legal theory uses the term "fiction of decision/ fictitious decision" which is the consequence of inaction by an administrative authority.

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

Yes. Issuing of fictitious negative decision is one of the three ways of handling requests under the *Free Access to Information Act*. The fiction of the decision occurs when a

person obliged to make information available fails to act within the period set by law. Indeed, the so-called fictitious decision is not a desirable or appropriate way of handling a request for information; it is only a procedural consequence of an unlawful inaction by administrative authorities which reinforces the applicant´s possibility of obtaining redress.

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 Act no. 136/2010 Coll. transposing the Directive 2006/123/ES provides the possibility to grant authorization based on the so-called tacit approval, given that such granting is permitted by special law.

   Thus, a positive model of administrative silence is regulated, for example, by the Act on Mediation as regards the registration of mediators, mediation centers and educational institutions. In this case, the legislator resolved the inactivity of the Ministry of Justice in handling registration by introducing the presumption of granting the request.

   Similarly, protection against the inactivity of the Chamber of Surveyors and Cartographers or the Slovak Chamber of Social Workers and Social Work Assistants is established as regards to the registration on the list of Chambers members.

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

   The Slovak legal order does not provide for a general regulatory model applied in cases of "administrative silence."

   The “fiction of a negative decision” is laid down in the Free Access to Information Act and the concept of the "fiction of a positive decision" is regulated by special laws (see point 3 above).

The negative model

We note that in the Slovak legal order the negative model of "administrative silence" is applied only in the field of free access to information. The questions below, except for question number 6, are therefore answered under the terms of the Free Access to Information Act.

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 negative model of "administrative silence" as one way of handling a request under Free Access to Information Act means that a person's application or claim is automatically considered to be rejected (for more details, see point 3 below).

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 appeal process under Free Access to Information Act is in principle the same as that set out by general regulation on the administrative procedure (Administrative Procedure Code).

   Only the delivery of a fictitious negative decision is specifically regulated by Free Access to Information Act. Based on that Act, the day of delivery of a fictitious decision is considered to be the third day after the expiry of the period set for handling a request.

   An appeal may be then lodged within 15 days from the delivery of the (fictitious) decision. If a superior authority annuls such a fictitious decision upon the appeal, it may also impose an obligation to handle a request (e.i. make the requested information available).

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

   Yes, but the judicial review of the fictitious decision is possible only after the exhaustion of the ordinary legal remedies (appeal).

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

Depending on the nature of the request, the administrative court:

a) annuls the fictitious (negative) decision of a person obliged to make information available ("obliged person"),
b) annuls the fictitious (negative) decision and refers the case back to the obliged person for a new decision,
c) annuls the fictitious (negative) decision and orders the obliged person to make the information available pursuant to section 193 of the Administrative Court Procedure Code.

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?

In general, in cases of inaction by the public administrative body, the person concerned has the right to bring an action under section 242 of the Administrative Court Procedure Code or to use other means of protection against inactivity specified in point 6 under the heading "Administrative time limits."

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 administrative courts do not rule on the merits; as regards the models of judicial decisions in the field of free access to information, see the reply to point 5 above.

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?

The Slovak legal order contains no specific restriction on the application of the positive model of "administrative silence."

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

   The special laws regulating a positive model of administrative silence link a moment when a person's claim is deemed to have been granted with the expiry of a period set for handling a request. For example, pursuant to the Mediation Act, the registration in the Register of Mediators is considered to have been made after the expiry of the 30-days period set for handling a request.

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. In case of the fictitious decision on registration in the Register of Mediators, the acknowledgment of receipt of the application must be sent to the applicant. After the receipt of the application, a period for the decision on registration begins to run. Upon the expiry of that period, the registration shall be deemed to have been made.

   Pursuant to the Act on Services on the Internal Market, the competent authority shall inform in the acknowledgment of receipt of application on the so-called tacit approval/presumption of authorization.

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

   The Slovak legal order does not contain any special provision on remedies available to third parties affected by the fictitious decision.

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

   No.

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?

   Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market was transposed into Slovak legal order by the Act No. 136 / 2010 Coll. on Services in the Internal Market and on Amendment of Certain Acts as Amended; thus, it is a field of general administration.

The positive model regulation enshrined in the Act on Services in the Internal Market refers to the provisions of special laws (e.g. the Mediation Act mentioned above) concerning the registration of applicants in the respective registers/lists.

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?

   See the reply to point 6 under the heading "Administrative time limits."

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. In case of inactivity by the administrative authority, it is possible to seek compensation for damage caused by maladministration under the conditions laid down by the Act on Liability for Damage Caused in the Exercise of Public Power.

Case law and regulation in non-harmonised sectors of law

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

   No.

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.

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

The Construction Act regulation related to the procedure for issuing a building permit contains provisions on the fiction of the positive opinion issued by the competent authority (e.g., if a nature protection authority fails to notify its opinion with regard to the construction that is subject to the building permit procedure within the prescribed time-limit, its consent, in terms of its interests pursued, shall be deemed to be given).

4.2. Social security

The positive model of "administrative silence" in this field is enshrined in the *Act on Social Work and on the Conditions for the Performance of Certain Professional Activities in the Field of Social Affairs and the Family* as regards registration with the Slovak Chamber of Social Workers and Social Work Assistants.

4.3. Freedom of information

See the answers to questions under the heading "The negative model."

Administrative discretionary power

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

   "Administrative discretionary power" is not defined in the Slovak legal order; the content of this term has been defined by case law or legal doctrine. In this context, Slovak courts frequently refer to Recommendation No. R (80) 2 of the Committee of Ministers concerning the exercise of discretionary powers by administrative authorities adopted by the Committee of Ministers on 11 March 1980 at the 316th meeting of the Ministers' Deputies).

   The recommendation states that the term *"discretionary power" means a power that leaves an administrative authority some degree of latitude as regards the decision to be taken, enabling it to choose from among several legally admissible decisions the one which it finds to be the most appropriate.*

2. Does your legal system distinguish between discretion (deutsch – Ermessen) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (deutsch – Beurteilungsspielraum)?

   No. Slovak courts often confuse the terms "discretion" and "margin of appreciation" and use them as synonyms.

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 possibility of “discretion / margin of appreciation” most often follows directly from the wording of the legislation and in some cases from the nature of the matter.

For instance, an administrative authority applies “discretion/margin of appreciation” by choosing the type of sanction when imposing penalties for administrative offenses provided that the law allows for alternatives, or when deciding on the amount of the fine within the range set by the law.

“Discretion / margin of appreciation” is also when the administrative body gives the content of vague terms such as “principles of morality”, “good faith”, or “reasonable time limit” (see point 3 under the heading "Administrative time limits") in the process of applying the law.

In general, this is when the law leaves scope for the subsumption of facts under one or another legal norm.

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.

According to the Administrative Court Procedure Code, the administrative courts shall not assess the expediency, economic impacts or *appropriateness* of the decision taken by an administrative authority.

The task of the court is not, in principle, to replace the administrative discretion with the discretion of the court but, on the contrary, to assess whether the administrative public body sufficiently dealt with the established facts in the contested decision and whether, where its decision was based on a discretion/margin of appreciation, there has been any deviation from the limits set by the law.

The only exception which may apply constitutes an exercise of mitigating power by a judge in cases where an administrative authority has imposed a penalty manifestly disproportionate to the nature of the act and its consequences (see last point 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?

The Constitution of the Slovak Republic provides that the review of any decisions concerning fundamental rights and freedoms should not be excluded from the jurisdiction of the court. Thus, if a discretionary power used by the administrative

authority had resulted in a restriction of human rights, a judicial review by the administrative court would be possible even though otherwise inadmissible.

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