



**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





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

Please specify your answer briefly, if necessary

*Yes, the obligations are valid for all administrative authorities deciding in administrative procedure on rights and obligations of persons, parties to these procedures.*

- 2 Where are the administrative time limits set:

- The general code of administrative law or administrative procedure law

Please specify your answer briefly, if necessary

*There is a special article in the General administrative procedure act (GAPA) which sets the time limit for the administrative authority in which the decision must be issued and served to the parties.*

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

*It is deemed that the specified time limits (as stated above) are reflecting the "reasonable time" needed to decide on the subject matter. There is a general principle recognized in the Constitution (Art. 22) as well as in subsequent GAPA interpretation to support the necessity to decide in reasonable time in general.*

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

*Administrative authority must issue a first-instance decision within one month (from receipt of a complete application from the party) if there is no need for a specific investigative procedure for determination of the facts (e. g. use of documents not provided by the applicant, hearing of a*





witness) and if there are no parties of opposing interests participating in the administrative procedure. Otherwise the general time limit for first-instance decision making is two months time, unless special law determines a longer or shorter time limit. Two months is also the time limit for the second-instance administrative authority to decide on appeal.

There are statutory exceptions that set shorter (e. g. administrative decision that a protest cannot take place must be issued within two days) or longer time limits (e. g. complex proceedings for issuing of a building permit – 5 months).

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

Generally no, however there are some exceptions. Following GAPA the second-level administrative authority, when deciding on appeal because of the failure of first level administrative authority to issue a decision in the determined time limit, can extend the time limit for up to one month, if the reasons for the delay are justified (e. g. caused by the party).

There are some specific regulations in this regard, e. g. based on Freedom of information act, administrative authority must decide on the party's application within 20 days, but in complex cases this time limit can be extended for additional 30 days, if the decision of the decision-making body decides that it is necessary in a certain case.

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

No.

7 If an administrative decision is unfavorable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?

- Yes

Please specify your answer briefly, if necessary

Regardless of the time limit being exceeded, the administrative authority can issue any type of decision (positive or negative for the party). The time limit does not preclude the following actions of administration, it just enables a party to use a legal remedy if it decides to do so.

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

- Rather yes

9 What are the main reasons for failing to comply with administrative time limits in your country?





- Lack of institutional capacity
- Deficiencies in the administration of the authorities

Please specify your answer briefly

*The administrative authorities claim that all time limit violations are based solely on the excessive volume of work (too many applications), when they occur in certain areas (e. g. work visas and permits).*

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

*In general no. Disciplinary proceedings may be initiated against an individual civil servant if there are additional circumstances, e. g. showing lack of due attention to the case.*

### **Administrative silence**

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

*Yes. If the administrative decision was not issued within the statutory set time limit, it is considered that the administrative silence (silence of administration) has occurred.*

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

*Yes, it is the general rule.*

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

*Yes, it is an exception from the general negative model, but has to be explicitly determined by a special provision of a law, regulating a certain administrative area.*

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

*Negative model is the general rule, positive model is an exception.*

### **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

*In any proceedings brought against the party (on an application or ex off), the administrative silence presupposes a negative decision for the party (its application denied or imposition of new obligations on the party), which can be challenged in appellate proceedings.*

- 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 procedure before the first instance administration authority, the administrative silence automatically means that the negative decision has been issued for the party and it can be directly challenged before appellate authority.*

*Appellate authority must issue the decision on the appeal of the party within two months (general time limit), if not, the party must file a special claim with the authority in which additional time limit of seven days is set (for the adoption of the decision), after which a lawsuit can be filed with the administrative court. Also in this case, it is considered that the appellate authority has rejected the party's appeal.*

- 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.

*There are no differences in general. The only difference being that the appellate authority will ask first instance administrative authority for the reasons for the delay.*

- 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 within a certain time limit
- The court can decide upon the matter itself
- Other

Please specify your answer briefly

*If the court finds that the lawsuit is well-founded, it will mostly order the administrative body to issue a decision with a certain content in a certain time limit, or if additional conditions are met (all of the facts are already determined or were determined by the court), the court can also decide on the case (dispute of full jurisdiction). The judgment will replace the decision of the authority.*

- 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?

*The court can decide on the matter itself and replace the decision of the authority (the administrative decision will not be issued as the court ruling will take its place).*

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

- Only in cases in which the authority has no discretionary power or it is limited to zero

### **The positive model**

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

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

Please specify your answer briefly

*Due to the pursuit of greater efficiency in administrative matters and to avoid unreasonably long procedures, the fiction of a positive decision is also known in Slovenian law. It is intended primarily in cases where the administrative authority must issue a certain approval and has to be specifically determined by an explicit provision of law (e. g. permission to provide services in the internal market, permission to hold a protest, approval of the merger of two insurance companies).*

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

*It is an exception to the general negative model and can only be used in specific cases.*





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

*If the administrative authority does not issue a decision in the set time limit, it is considered that the permission or approval has been granted.*

- 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?

*No proof is needed. Party's application is granted on the basis of statutory article.*

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

*In the event that the decision affects a third party, it may participate in the procedure and file legal remedies in its own name.*

- 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, only provisions of general procedure (GAPA) apply.*

- 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?

*Special law was adopted for its implementation. The law applies to the issuance of licenses necessary for the start of the provision of services and for the free cross-border provision of services by service providers based in member states. So far there were no difficulties in its 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?

*The general negative model is applicable in all situations.*

- 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?





*There is no specific liability of the state for administrative silence. General rules on state liability apply. It can be claimed, however, that not all legal options on parties' disposal have been used in practice so far.*

### **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

*General negative model applies. The time limits are extended from two months to three months (if opinions from special government agencies need to be acquired – e. g., for water protection, for cultural inheritance protection,...) and five months (in complex cases where special measurements need to be taken for protection of e.g. water reserves,...).*

#### 4.2 Social security

*A general negative model is used.*

#### 4.3 Freedom of information

*A general negative model is used. The time limits are shorter (20 days).*

### **Administrative discretionary power**



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

*The administrative authority is given, in certain cases of pursuance of the public interest, authorization to decide with discretionary power. It is used in cases of application of substantive law, which cannot predict all actual situations and solutions for its implementation. When exercising discretion, however, the administrative authority must always follow the purpose for which discretion was given in the first place. Administrative authority must also always use the solution that is the most favourable for the concerned party and can still achieve the desired level of public interest.*

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, since there is no official definition of discretionary power in Slovenian 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 recognized. If your legal system distinguishes between discretion and margin of appreciation, please describe both.

*The specific act will use wording that is nomotехnically associated with discretionary power, such as; the administrative authority will decide, or the administrative authority can, should,...(e. g. the administrative authority can grant citizenship to a foreigner, bypassing the general rules, if he is a descendant of a Slovenian citizen and has lived in Slovenia for at least one year prior the date of the application for citizenship and also meets additional conditions regarding economic security, not being part of any criminal proceedings,...).*

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 court can examine whether all the statutory conditions were met, in order for the administration authority to use its discretion, and further whether the discretion was exercised within statutory criteria (limits) and for the purpose for which it was granted.*

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?





*In principle, there is no room for use of the discretionary power of the administrative authority in the enforcement of human rights and also other legal rights of the parties. The right of a party must be recognized in full if the statutory conditions are met, there is no room for discretionary ruling of the administrative authority. Any interference or restriction of human rights must always pass a strict test of proportionality. When legal remedies are used, this is always subject to judicial review regardless if discretion was used or not.*

