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Questionnaire
The judge and inert administration. Administrative discretionary power

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

   In general, Article 21 of Law 39/2015, on the Common Administrative Procedure of Public Administrations, establishes three rules: 1) that the maximum period within which the written decision must be notified shall be that established by the rule regulating the corresponding procedure; 2) that this period may not exceed six months unless a regulation with the force of Law establishes a longer period or it is provided for in European Union Law; and 3) that when the rules regulating the procedures do not establish a maximum period, this shall be three months.

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

   As explained in the answer to the previous question, Article 21 of the Law 39/2015 on Common Administrative Procedure establishes deadlines that apply for the conducting of administrative procedures in the absence of specific provisions in sectoral laws.

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

In the Spanish legal system, the time limits for the conducting of procedures are defined in the governing rule for each procedure or, in a general and supplementary manner, in the Law on the Common Administrative Procedure, which establishes time limits in the absence of specification in each sectoral rule. Therefore, deadlines are always specified in one way or another, making it unnecessary to consider the concept of "reasonable time". It is a different matter that an unreasonable administrative delay in the resolution of cases can be assessed from the perspective of the principles of good faith and legal certainty, as well as in terms of the principle of good administration, so that an unjustified delay in the taking of a decision to resolve a case can be considered for the benefit of the citizen who acts in good faith before the Administration.

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

See the answer to question no. 1. The procedural deadlines established in the different regulations vary depending on the nature of the procedure and the complexity of the issues to be examined. If there are no specific deadlines set in the corresponding sectoral regulation, the general deadline established in the Law on the Common Administrative Procedure applies.

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

Articles 21 to 23 of the Law 39/2015 on Common Administrative Procedure establish different rules that allow for a suspension and/or extension of the deadlines to resolve the case when, depending on the characteristics of each procedure, it is considered that the initially established deadline is objectively insufficient to resolve the matter adequately. Thus, Article 21.5 establishes that when the number of applications made or persons affected could lead to a failure to comply with the maximum deadline for the taking of a decision, human and material resources may be made available to ensure adequate and timely conducting of the procedure. In turn, Article 22 provides for different instances of suspension of the maximum time limit for the taking of a decision, establishing some cases in which the suspension is optional and others in which it is mandatory. For example, it is optional to suspend the maximum time limit for the taking of a decision when a prior and mandatory ruling must be obtained from a body of the European Union. Likewise, suspension is optional when there is an unfinished procedure at the European Union level that conditions the content of the decision in question. Additionally, by way of an example of mandatory suspension, it is worth mentioning the case in which the interested parties propose the disqualification of a person intervening in a procedure, until the objection is resolved. Finally, Article 23 states that if the human and material resources referred to in Article 21.5 have been exhausted, the body

competent to resolve the matter may agree to extend the maximum period for resolution and notification, which may not be longer than that established for the conducting of the procedure.

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

Article 21.6 of the Law on Common Administrative Procedure establishes that “the staff in the service of the Public Administrations who are responsible for the handling of cases, as well as the heads of the administrative bodies competent to investigate and resolve them, are directly responsible, within the scope of their competences, for compliance with the legal obligation to issue a written decision within the deadline. Failure to comply with this obligation will give rise to disciplinary liability, without prejudice to any other liability that may arise in accordance with the applicable regulations".
In this sense, pursuant to Article 53 of the same Law, citizens have the right to know, at any time, the status of the procedures in which they are interested; the meaning of the corresponding administrative silence, in the event that the Administration does not issue or notify a written decision within the deadline; the competent body for its investigation and resolution; and the procedural acts issued. They also have the right to identify the authorities and staff in the service of public administrations under whose responsibility the procedures are being processed.

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

First of all, it must be made clear that the Spanish legal system does not prevent the issuance of late written decisions; on the contrary, the procedure must be resolved in writing in any case, even if the time limit established for this purpose has expired. Thus, Article 21.1 of the Law on Common Administrative Procedure establishes that “The Administration is obliged to issue a written decision and to notify it in all procedures, regardless of how they are initiated”.
If the response is favourable or unfavourable to the submitter is a different matter. Articles 24 and 25 regulate the effects of the lack of a written decision in procedures

initiated at the request of the interested party (Art. 24) and in those initiated *ex officio* by the administration (Art. 25).
In those procedures initiated at the request of the interested party, Article 24 states that the obligation to issue a written decision referred to in the first paragraph of Article 21 shall be subject to the following conditions: a) in cases of upholding of the application due to administrative silence, the written decision subsequent to this upholding may only be issued if the decision confirms it; b) in cases of rejection of the application due to administrative silence, a late written decision shall be adopted by the Administration regardless of that rejection, that is, it could uphold the application.
On the other hand, Article 25 provides, in procedures initiated *ex officio*, that the expiry of the time limit established without a written decision having been issued and notified does not exempt the administration from complying with the legal obligation to resolve the case, having that expiration the following effects: a) in the case of procedures from which the recognition or, where appropriate, the establishment of rights or other favourable legal situations could derive, the interested parties who have appeared may consider their claims to have been rejected due to administrative silence; b) in proceedings in which the Administration exercises powers to impose penalties or, in general, powers to intervene which can have unfavourable or burdensome effects, the proceedings shall lapse. In such cases, the decision declaring the expiration shall order the proceedings to be closed.

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

   In general, administrative procedures are resolved within the established deadlines, given that the Public Administrations strive to resolve them within the deadline in order to avoid the detrimental effects of this period elapsing without having issued a decision. When, nevertheless, the deadline expires without a decision having been taken, this is

generally due to a lack of human and material resources necessary to deal with a multitude of administrative cases that exceed the capacity of the administrations involved.

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

As explained above, Article 21.6 of the Law on Common Administrative Procedure establishes that "the staff in the service of the Public Administrations who are responsible for the handling of cases, as well as the heads of the administrative bodies competent to investigate and resolve them, are directly responsible, within the scope of their competences, for compliance with the legal obligation to issue a written decision within the deadline. Failure to comply with this obligation shall give rise to disciplinary liability, without prejudice to any other liability that may arise in accordance with the applicable regulations".

Administrative silence

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

The concept of administrative silence has been included in the Spanish legal system for many years, and it is currently referred to in Articles 24 and 25 of the Law 39/2015 on Common Administrative Procedure. Both articles address the lack of a written decision within the established time limit, and regulate the effects of the Administration's silence, distinguishing between procedures initiated at the request of the interested party and those initiated *ex officio*.

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

As will be explained in more detail in the answer to the following question, the concept of administrative silence in Spanish law has sought to prioritise the positive effects of silence in procedures initiated at the request of the interested party, establishing positive effects due to silence as a general rule, and applying negative effects due to silence only in the (certainly relevant) cases that the law specifically identifies.

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

In procedures initiated at the request of the interested party, the Law has sought to establish a general positive model of administrative silence, although with relevant exceptions. According to Article 24 of Law 39/2015, in procedures initiated at the request of the interested party, the expiry of the time limit without notification of a

written decision, legitimises the right of the interested party or parties to understand that the case has been upheld due to administrative silence, except in those cases in which a rule with the status of law or a rule of European Union Law or international law applicable in Spain establishes otherwise. When the object of the procedure is the access to activities which require an authorisation or the exercise thereof, the law providing for the rejection due to silence must be based on the concurrence of imperative reasons of general interest.

Administrative silence shall have an effect of rejection in procedures relating to the exercise of the right of petition, as referred to in Article 29 of the Constitution, in procedures whose upholding would result in the transfer to the applicant or to third parties of powers relating to the public domain or to public services, in procedures involving the exercise of activities that may damage the environment, and in proceedings demanding liability of the Public Administrations. Administrative silence will also have an effect of rejection in proceedings challenging acts and provisions.

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

This question has been answered by what has been said above. Spanish law has sought to prioritise and generalise the positive effect of administrative silence, although there are still important areas in which silence has a negative effect.

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

As noted above, Article 24 of Law 39/2015, in reference to procedures initiated at the request of the interested party, provides for a negative silence regime (i) in those cases in which a rule with the status of law or a rule of European Union or international law applicable in Spain establishes otherwise; (ii) in procedures relating to the exercise of the right to petition, (iii) in those cases whose upholding would result in the transfer to the applicant or third parties of powers relating to the public domain or the public service, in proceedings which involve the exercise of activities that may damage the

environment and in procedures demanding the liability of the Public Administrations, as well as (iv) in proceedings challenging acts and provisions of the public administration.

For its part, Article 25, referring to proceedings initiated *ex officio*, states that: "a) in the case of procedures which may result in the recognition or, where appropriate, the establishment of rights or other favourable legal situations, the interested parties who have appeared in the proceedings shall understand their claims dismissed due to administrative silence; b) in procedures in which the administration exercises powers to impose penalties or, in general, powers to intervene which may have unfavourable or burdensome effects, the proceedings shall lapse due to administrative silence.

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 or rejection effects of the expiration of the time limit without a written decision having been issued are produced immediately, due to the expiry of the time limit, without the need to issue any type of certification or document stating this. That said, if the party wishes to challenge or appeal a rejection due to administrative silence, the party must justify that this silence has occurred, for example, by providing a copy, receipt or certification of the initial application, which initiated the administrative procedure that has not been resolved within the time limit.

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.

   Once the negative effects of administrative silence have been produced, the interested party's application is understood to have been rejected and, from that moment onwards, he or she may resort to the generally established channels for challenging the decision. Negative silence has the effect of opening the door to appeals, as there is a *de facto* "fictitious refusal" of the application, and this rejection can be appealed following the same procedure as appeals against written decisions. It is a different matter if the administration issues a late written decision and this is beneficial to the interested party, then the appeal will have lost its purpose precisely because the written decision has been satisfactory to the interested party.

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

The Spanish legal system establishes without any conditions the possibility of challenging before the courts the presumed rejections produced by virtue of administrative silence. Thus, Article 25 of the Law 29/1998 on Administrative Jurisdiction states that the administrative appeal is admissible against explicit and presumed acts of the public administration; and Article 46 refers to the time limit for lodging the appeal, distinguishing between explicit and presumed acts. The expression "presumed act" refers precisely to the act that is understood to have been issued by virtue of silence.

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

   Administrative silence has the effect of opening up the possibility of challenging the presumed rejection before the courts of the administrative jurisdiction. Once the appeal has been lodged against the presumed rejection, the court has the same capacity to study, hear and resolve the case as if it were dealing with the challenge of an explicit act. It is a different matter that, precisely because it is a rejection due to administrative silence, in the absence of a written administrative decision, the court may lack essential data to decide on its own. In such a scenario, it would be possible to give a judgment ordering the administration to issue a written decision in accordance with the rules and details established by the court.

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?

   On the basis that all parties, including the Public Administrations, are obliged to comply with judgments in the form and terms set out in them, the Law on Administrative Jurisdiction provides the Administrative Courts with different means to enforce their judgments. In the extreme case that the Administration has not complied with the ruling once the deadlines set for full compliance have passed, Article 112 contemplates the possibility of imposing penalty payments on authorities or civil servants who fail to comply with the Court's requirements; furthermore, it adds the possibility of initiating criminal proceedings for the commission of a crime of disobedience.

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

    As has already been explained above, the possibilities for the hearing, examination and trial of a case in which a presumed rejection due to negative silence is challenged are, in essence, the same as when the court is faced with a challenge to an explicit act. On this basis, Article 71.2 of the Law on Administrative Jurisdiction establishes that the courts, in their judgement, cannot determine the discretionary content of the annulled acts, but this rule is applicable both when we are faced with a challenge to explicit acts and when we are faced with a challenge to presumed acts. In any case, both when we are dealing with explicit acts and when we are dealing with rejections due to administrative silence, there exist control measures of discretionality which allow administrative courts to advance in the fullest possible jurisdictional control of the discretionary activity of the administrative bodies.

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 fact, both answers can be possible, but the second answer is more correct because, as it has been explained, the Spanish legal system imposes to the administration the legal obligation to issue a written decision in all cases. From this perspective, the positive effect of administrative silence constitutes a guarantee for citizens, who can have their applications upheld even when the deadline for doing so has expired and the administration has not issued a written decision as it should have done.

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

As it has already been explained above, in procedures initiated at the request of the interested party, the expiry of the maximum period without notification of a written decision, legitimises the right of the interested party or parties to understand that the case has been upheld due to administrative silence. However, silence will have a negative effect (i) in those cases in which a rule with the status of law or a rule of European Union or international law applicable in Spain establishes otherwise; (ii) in procedures relating to the exercise of the right to petition; (iii) in those proceedings whose outcome would result in the transfer to the applicant or third parties of powers relating to the public domain or the public service; in proceedings which involve the exercise of activities that may damage the environment, and in proceedings concerning the liability of the Public Administrations, as well as (iv) in proceedings challenging acts and provisions and in *ex officio* review proceedings initiated at the request of the interested parties.

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

   In those cases in which the law provides that administrative silence will have a positive effect, the lapse of the deadline for issuing a decision implies that the interested party has obtained what was requested and that the demand filed with the administration has therefore 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?

   The positive effect of administrative silence is considered to be a genuine favourable administrative act, and it is understood to have been granted by the simple lapse of the deadline for issuing a decision, without the need for any certificate to prove it.

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

   On the assumption that the positive effect of administrative silence is equivalent to a genuine favourable administrative act or an acceptance act, those who may be harmed by such a decision have the same means of challenging it as if it were an explicit act.

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?

   As explained above, decisions obtained due to the positive effect of administrative silence can be challenged through ordinary channels just like explicit acts. Furthermore,

Article 47 of the Law on Common Administrative Procedure establishes that "explicit or presumed acts contrary to the legal system by which powers or rights are acquired" will be null and void "when the essential requirements for their acquisition are lacking". When faced with these acts that are null and void or legally void, the Administration may also promote their *ex officio* review and declare them null and void, always after hearing the interested party and in accordance with a specific procedure that is regulated in Article 106.

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?

   The transposition of Directive 2006/123 into Spanish law was carried out through Law 17/2009, on free access to service activities and the exercise thereof; and Law 25/2009, amending various laws to adapt them to the Law on free access to service activities and the exercise thereof. The latter affirmed in its explanatory memorandum that "the concepts of communication and responsible declaration are expressly introduced, and the positive effect of administrative silence is generalised". The rules thus incorporated into Spanish public law have actually been enshrined in the Law 39/2015 on Common Administrative Procedure, and they are taken on board and generalised in numerous sectors of administrative practice, such as, for example, the industrial, energy, construction, services, transport and communications sectors, in the terms established in the aforementioned Law 25/2009.

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?

   In general, the regulation of the positive model and the negative model covers any possible administrative file, so that when the deadline for issuing a decision expires, it can be assumed that the demand has been accepted or rejected, as appropriate.
   In any case, Articles 29 and 30 of the Law on Administrative Jurisdiction 29/1998 provide for cases of jurisdictional challenges that can be brought in the absence of a written decision by the Administration, but to which the general concept of administrative silence cannot be applied. Article 29 regulates the so-called appeal against the inactivity of the Administration, in reference to the possibility of appealing to the court in the event of failure to comply with a specific material benefit that has already been recognised in favour of the interested party. In turn, Article 30 regulates the appeal against a so-called "*de facto* act", in reference to the possible challenge against an action

carried out by the Administration without competence or completely disregarding any legal procedure.

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 special or specific action for compensation arising from the failure to issue a written decision within the time limit. If the interested party considers that the lack of that written decision has caused him or her damages which should be compensated, he or she can bring a claim for pecuniary liability in accordance with the general regime established for that purpose.

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?

   There are frequent administrative disputes in which the question of whether or not there has been a positive or negative effect of administrative silence is raised, and that is the reason why there are numerous rulings on this issue, depending on the different nature of the case in question.

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.

   It is worth highlighting, in this sense, the judgement of the Third Chamber of the Supreme Court of 2 June 2021, appeal no. 7477/2019, referring to the challenge to the Special Urban Development Plan for the regulation of housing for tourist use in the city of Barcelona, which extensively studies the question of limitations to the freedom of establishment and provision of services, and their mandatory justification.

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, Spain has not submitted any question to the Court of Justice of the European Union for a preliminary ruling on a specific problem of interpretation and application of the legal regime of administrative silence.

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

4.1. Construction, spatial development planning and environmental protection

The general rules described above, established in the Law on Common Administrative Procedure, are applicable. In this regard, it should be remembered that, as explained above, silence will have a dismissing effect in procedures involving the exercise of activities that may damage the environment.
It can be added that the different urban planning regulations normally provide for a positive effect of administrative silence in relation to applications for urban planning licences (licences for building).

4.2. Social security

Royal Legislative Decree 8/2015, of 30 October, which approves the revised text of the General Social Security Act, establishes in Article 129 that "In procedures initiated at the request of the interested parties, once the maximum period for issuing and notifying a decision established by the regulation governing the procedure in question has elapsed without a written decision having been issued, the request shall be understood to have been rejected due to administrative silence. Exceptions to the provisions of the previous paragraph are those procedures relating to the registration of companies and to the affiliation, registration, deregistration and variations in the details of workers initiated at the request of the interested parties, as well as those relating to special agreements, in which the lack of a written decision within the established period shall have the effect of granting the respective request due to administrative silence".

4.3. Freedom of information

There is no specific regulation in this area other than the common and general rules.

Administrative discretionary power

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

Administrative laws refer on numerous occasions to administrative discretionary powers and they also mention discretionary acts in contrast to regulated acts. However, there is no legal definition of discretionary power. Case law defines discretionary acts as those that are the result of a freedom of choice between equally fair alternatives, or between options with the same legal effect, brought to the subjective judgement of the administration.

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*)?

   In administrative case law, the distinction between discretionary acts and those applying indeterminate legal concepts is well established. Discretionality implies the recognition of a freedom of choice for the holder of the right, so that within the margin conferred by the enabling rule, any of the different options that could be exercised are legally permitted, and any of them can be chosen, given that such options have the same legal effect. On the other hand, when the right is exercised applying indeterminate legal concepts, there is no such freedom of choice between options with the same legal effect, but rather, when the legal concept applied presents some degree of indeterminacy or imprecision in its wording, such a concept can and must be individualised in its practical application in such a way as to identify the specific solution that is fair and appropriate to the circumstances of the case under consideration. From this perspective, case law states that a basically regulated right does not cease to be regulated by virtue of the fact that it is expressed by means of indeterminate legal concepts.

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.

   Case law has recognised discretionary margins of appreciation in various matters, such as, most notably, the appointment of senior officials and managerial posts in the Administration. The concept of discretionary power is also applied, for example, to urban planning. On the other hand, there are many other sectors of administrative activity in which, although the administration is recognised as having a margin of appreciation, this margin is not defined as enabling the choice between options with the same legal effect (as would be typical of a discretionary power) but as the way to individualise the most appropriate solution according to the particular circumstances of the case under examination (according to the legal doctrine on indeterminate legal concepts). Thus, undefined legal concepts are applied to a multitude of sectoral areas.

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.

Article 71.2 of the Jurisdictional Law 29/1998 establishes that "The courts may not determine the form in which a general provision is to be worded in order to replace the annulled one, nor may they determine the discretionary content of the annulled acts". However, this does not mean that acts issued in the exercise of discretionary powers are excluded from any possibility of review. Case law has repeatedly emphasised that this rule of Article 71.2 does not prevent judicial review of discretionary acts to the extent required by the administration's submission to the law, by means of a review of the regulated elements of such acts and the guarantee of the legal limits of discretionality. Thus, case law resorts to methods for the control of discretionary powers such as the control of the facts determining them as well as the regulated aspects, the observance of the procedure, the application of the general principles of prohibition of arbitrariness or misuse of power, or the implementation of general principles of law such as the principle of proportionality, among others.

On the other hand, when it comes to the interpretation and application of indeterminate legal concepts, the courts are fully empowered to carry out a full judicial review of the administrative decision, being able not only to annul it but even to replace it with a more appropriate one, when the conclusion is reached that, based on the particular circumstances of the matter examined and the evidence provided, the fairest solution is different from the one reached by the administration.

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 general, when the administration issues acts by virtue of discretionary powers, it is required that the administrative decision be adequately reasoned, in order to rule out any arbitrary exercise of the power. This duty to state reasons is required with particular rigour and intensity when the decision affects the essential core of fundamental rights. From this perspective, a decision that affects fundamental rights and is not adequately reasoned may eventually be annulled by the courts if they conclude that the lack of reasoning is indicative of an arbitrary or legally deviant exercise of power.