



**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
  - No
  - Only in certain areas of law

Please specify your answer briefly, if necessary

*There is special legislation in which time limits are specified according to the interests involved. It can i.e. be questions on public procurement or compulsory care of children.*

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 time limits are included in the specific legislation concerned.*

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

*To a certain extent. It follows from general administrative procedure that all decisions or actions should be taken as soon as possible with regard to the complexity of the issue at hand, costs and other interests concerned. The Parliamentary Ombudsman ("Justitieombudsmannen") and other supervisory authorities make reports and decisions on what reasonable time for a particular issue might be and these serve as guidance for the administration in general.*

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

*See answer above (4).*





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

*In cases where distinct time limits are given, sometimes exceptions are acceptable given certain circumstances.*

6. Does a person have the right to complain about the authority's decision to extend the time limit?
7. If an administrative decision is unfavourable to the submitter or the potential addressee of the decision, can it still be made after the expiry of the time limit?
- Yes
  - No
  - No, unless the delay on the part of the institution has a proper justification
  - Other

Please specify your answer briefly, if necessary

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 main reasons for unreasonable long time for an authority to act are resources (i.e. lack of personal) and inapt organization of how cases are handled within the administration (i.e. technical issues or overcomplicated routines).*

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

*Yes. There are labour law disciplinary penalties for staff that knowingly or with negligence ignore time limits. In grave cases, criminal liability can be relevant. The responsible managers etc. are generally focus of such inquiries in to accountability.*





### Administrative silence

1. Does your national legislation define "administrative silence" as a legal concept? Please specify.  
*No.*
2. Does your legal system provide for a negative model of administrative silence (deemed refusal of a claim)?  
*Yes, according to 12 § of the Administrative Act (Förvaltningslagen, 2017:900) if a public authority does not provide an individual who is applying with an answer within 6 months, the individual can demand to have his or hers errand dealt with speedily and such a request must be considered by the head of the authority. A negative answer can be appealed to an administrative court, that can uphold or quash the decision and decide that the issue should be dealt with at once or within a specific time (49 §).*
3. Does your legal system provide for a positive model of administrative silence (a claim not refused in due time is deemed granted)?  
*No.*
4. Which regulatory model of administrative silence is more typical for your legal system?  
*The negative model.*

### 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.

*For this and the following questions, please see the answer to question 2 of the section above, as the Swedish model does not provide for "fictitious decisions" by the authority, but rather provides a way to compel the authority to make a decision.*

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)?
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.
4. Can the "fictitious refusal" resulting from an administrative silence be appealed in court?
5. What is the competence of the court if the "fictitious refusal" is found to be unjustified:
- X The court can order the administrative authority to issue a decision, but cannot set a specific time limit in which it shall be done
  - X The court can order the administrative authority to issue a decision within a certain time limit
  - o The court can decide upon the matter itself
  - o Other

Please specify your answer briefly

*See above under 2.*

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?  
*No direct remedy, the legislation is based on the assumption that public authorities will always follow a courts decision, if the do not criminal responsibility may follow (see above under the section on time limits, question 10). If an authority does not comply with a courts ordering, a case concerning damages can be directed against the authority and a complaint to the Parliamentary ombudsman may also be done, resulting in an investigation and possible critique or prosecution.*
7. In which cases the court has the competence to decide upon the matter itself instead of the "silent" authority:
- o In all cases
  - o Only in cases of objective urgency
  - o Only in cases which concern significant rights of the person
  - o Only in cases in which the authority has no discretionary power or it is limited to zero
  - X Never, because only the authority can make a decision
  - o Other

### **The positive model**

1. What is the main purpose of the positive model in your legal system?
- o To simplify certain administrative procedures
  - o 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?
3. When (a specific moment or particular circumstances) is the person's claim deemed to have 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?
5. Are there any legal remedies available to third parties affected by the "fictitious decision" of granting a claim, if necessary?
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?
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?

#### **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?  
*Sueing for damages or complaining to the Parliamentary ombudsman.*
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?  
*Both.*

#### **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
  - 4.2. Social security
  - 4.3. Freedom of information

*There is, as explained above, no special legislation on this subject in various legal areas, but rather a general provision in the Administrative Act (12 §) that is applicable to all public authorities unless otherwise specified in law. There is a specific regulation concerning the freedom of information, as this is constitutionally regulated in the Freedom of Press Act of 1948, in which it is stipulated that a request for access to public document should be dealt with promptly or as soon as possible (Chapter 2 § 15). This is strictly upheld.*

#### **Administrative discretionary power**

1. How is administrative discretionary power defined in your legal system?  
*In several different ways, often by introducing exceptions or options to legislated requirements by “special reasons” or “exceptional circumstances”. Another variant is to connect an authority’s power to act to a “may”, so that it is clear that it has discretion in the matter.*
2. Does your legal system distinguish between discretion (*deutsch – Ermessen*) and margin of appreciation (scope of appraisal) in the interpretation of undefined legal concepts (*deutsch – Beurteilungsspielraum*)?  
*Yes, but not in a formal way. In Swedish legal thinking, the scope of interpretation in regard of vague legal norms is a different thing than norms that are open for discretion as such. However, it is possible that they may be cases where they are very similar or even indistinguishable.*
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.





*There is no official or generally recognized method, instead the applicable legislation will by its wording and context determine whether such a power is relevant in a case. Swedish legislation often provides authorities with room for discretion. This applies for both discretion and interpretation.*

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.

*In general, judicial control of public authorities decisions after appeal may both concern the legality of the decision and the way the discretion has been used. Concerning judicial review, here understood as control of whether legal norms are in conformity with higher norms, courts will in practice be careful to substitute the discretion of the government or the parliament with their own assessment. In certain special cases concerning decisions by the government, judicial control is in principle restricted to questions of legality.*

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 courts control of the use of discretionary powers in areas that affect individuals and their personal or economical interests in a concrete way can be more intense and the requisite for the authority to motivate its decision may be higher than in other cases. In cases concerning human rights this might be most obvious, but it is not restricted to such situations as such, but rather focuses on the impact on the individual.*

