



**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

The Turkish legal system sets specific time limits within which authorities are obliged to take administrative decisions or complete administrative actions.

Moreover, as stipulated in Article 74 of Constitution of the Republic of Türkiye, citizens and foreigners resident in Türkiye, with the condition of observing the principle of reciprocity, have the right to apply in writing to the competent authorities and to the Grand National Assembly of Turkey with regard to the requests and complaints concerning themselves or the public. The result of the application concerning himself/herself shall be made known to the petitioner in writing without delay.

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

General administrative time limits are set in the Administrative Procedure Law No. 2577. Moreover, some special time limits are also stipulated in the relevant Acts.

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 Turkish legal system the administrative time limits usually are specifically set out in law .





However, the principles of "decision making in a reasonable time" and "notifying the decision without delay" are included in Article 6 "Principles of Good Administration" of the Regulation on the Procedures and Principles Regarding the Implementation of the Law on the Ombudsman Institution, which was enacted on the basis of the Law on the Ombudsman Institution No. 6328. Thus, the principle of "reasonable time" is one of the criteria used in Ombudsman audits.

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

General administrative time limits set in the Procedure of Administrative Justice Act Law No. 2577 are as follows:

#### Article 10 - Silence of the Authorities

1. The persons concerned may request the administrative authorities to implement an act or take an action that may be the subject of a lawsuit.
2. If the request is not replied within thirty days, it shall be deemed to be dismissed. The persons concerned may brought an action to the Council of State, administrative and tax courts, depending on the subject of the case, within the time limits running from the end of thirty-day period. If the response given by the authorities within thirty-day period is not final, the person concerned may either regard this response as dismissal or bring an action regarding this response as dismissal or wait for the final response. In this case, the time limit for the action shall not run. However, the waiting period cannot exceed four months from the date of application. In the case of not filing an action or dismissal of action due to the time limit, if a response is given by the authorities after the end of thirty-day period, an action might be brought within sixty days from the notification of the response.

#### Article 11- Application to Superior Authorities

1. Before bringing an action the person concerned may request the abolishment, withdrawal, alteration of the administrative act or the implementation of a new act from the superior authority, if there is no superior authority, from the authority that implements the act. This application shall stop the time limit that has started to run.
2. If no response is given within thirty days, the request shall be deemed to be dismissed.
3. When the application is dismissed or deemed to be dismissed, the time limit shall rerun and the period passed until the application date shall also be taken into account.





### Article 13- Directly Filing a Full Remedy Action

1. Those whose rights have been violated by the administrative actions must request, before filing an administrative action, for the fulfilment of their rights by applying to the relevant administration within one year from the written notification or as of the date when they become aware of these actions by other means, and within five years as of the date of the action in all cases. If these requests are partially or wholly rejected, an action can be filed within the time limit for the action as of the day following the notification of the procedure on this matter, or if no answer is given within thirty days about the request, from the end of such period.
2. The condition to apply administrative authorities prescribed in the first paragraph shall not be sought with regard to full remedy actions brought to the administrative justice courts after being brought to the ordinary or military courts and dismissed due to lack of jurisdiction.

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

Administrative time limits cannot be extended by the administration. However, it is possible provided that the necessary legal amendments are made.

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

Please see the answer to question No.5.

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

The law does not prohibit an authority to make any decision, even unfavourable to the submitter or the potential addressee of the decision, after the time limit set by law has expired.

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

- Rather yes
- Rather no





9. What are the main reasons for failing to comply with administrative time limits in your country?
- Lack of clear regulation
  - Lack of institutional capacity
  - Deficiencies in the administration of the authorities
  - Deficiencies at national policy level
  - Other

Please specify your answer briefly

Non-compliance with established administrative time limits is often due to a lack of resources (eg lack of staff) within the administrative authority to handle the large number of applications.

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

Pursuant to Article 125 of the Turkish Constitution, recourse to judicial review shall be available against all actions and acts of administration and the administration shall be liable to compensate for damages resulting from its actions and acts. Therefore, if the conditions for filing a claim for compensation have been met, the person is entitled to claim compensation.

### Administrative silence

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

"Administrative silence" is not clearly defined as a term in the Law; however, Law No. 2577 (Articles 10/2, 11/2 and 13) has stipulated the necessary periods for the acceptance of implied refusal.

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

Yes, the Turkish administrative law system provides for the negative model as a general principle in the case of administrative silence. It means that administrative silence shall be recognised as a deemed refusal of a claim unless the law provides otherwise.

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

While only including the negative model as a general principle in the case of administrative silence in the Administrative Procedure Law No.2577, the positive model is not regulated.





However, in terms of some administrative actions, the silence of the administration is regulated as a positive model in Turkish Law.

These exceptional regulations, which include positive model, are included in various laws. Some examples for those are as follows:

According to Article 30 of the Zoning Law No. 3194; if the applications made by the owners to the municipalities or governorships for a building occupancy permit are not finalized within thirty days at the latest, the use of the whole or the finished part of the building is deemed to be allowed at the end of this period.

According to Article 10 of the Law on Protection of Competition No. 3194; if the Competition Board does not respond to the undertaking's merger and acquisition applications within fifteen days or does not take any action; merger or acquisition agreements will enter into force thirty days after the notification date.

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

Turkish legal system is more typical of the negative model as a general principle in the case of administrative silence.

#### The negative model

1. What are the types of administrative procedures that the negative model can be applied to:
- Procedures that are initiated on the basis of an application or claim by a person
  - Ex officio procedures
  - Other

Please specify your answer briefly, if necessary

2. Does the negative model mean that a person's application or claim is automatically considered to be rejected or are extra actions required in order for the person to be able to appeal the rejection (for example, does the person have to provide proof that authority has been silent on the particular matter in order for it to be able to appeal the rejection)?

Administrative silence shall be recognised as a deemed refusal of an application without any extra actions required. However, when submitting a complaint to a higher authority or a court, the person may have to provide a copy of the application he or she made to the "silent" authority.





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.

Please see the answer to question No.5 related to "administrative time limits".

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

Please see the answer to question No.5 related to "administrative time limits".

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

According to Article 2 of the Procedure of Administrative Justice Act Law No. 2577, the administrative jurisdiction is limited to the supervision of the compliance of the administrative actions and procedures with the law. The administrative courts cannot review the expediency of an action. No ruling can be made that has the characteristic of an administrative action and procedure, which restricts the performance of the executive function in accordance with the forms and principles prescribed by the laws and the decree laws of the Presidency of the Republic, or in a manner that will remove discretionary powers.

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?

Pursuant to Article 138 of Turkish Constitution, legislative and executive organs and the administration shall comply with court decisions; these organs and the administration shall neither alter them in any respect, nor delay their execution.

Pursuant to Article 28 of the Law No.2577, the administration must establish a procedure or take an action, without delay, as required by the judgments and stay of execution decisions of the Council of State, regional administrative courts and administrative and tax courts. This period may not exceed thirty days starting from the notification of the decision to the administration under any circumstance.





A compensation action might be brought to the Council of State or to the court concerned for the pecuniary and non-pecuniary damages caused by the failure of the administration to implement acts and to take actions required by the decisions of the Council of State, regional administrative courts, administrative and tax courts.

If the judgments of the court are not fulfilled by the public officials within the given period of time, an action for compensation can be filed only against the relevant administration.

As to Article 129/4 of the Turkish Constitution, compensation suits concerning damages arising from faults committed by public servants and other public officials in the exercise of their duties shall be filed only against the administration in accordance with the procedure and conditions prescribed by law, as long as the compensation is recouped to them.

On the other hand, there is also the criminal liability of a public official who does not implement the judicial decision.

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

Please see the answer to question No.5.

### The positive model

1. What is the main purpose of the positive model in your legal system?
- To simplify certain administrative procedures
  - To protect the rights of individuals in case an authority fails to comply with the administrative time limits

Please specify your answer briefly

Please see the answer to question No.3 related to "administrative silence".

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

In the Turkish legal system, the positive model is only applied in exceptional cases stipulated in special laws and is applied within the framework of the provisions stipulated by the relevant law.





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

A person's claim is deemed to have been granted by the expiry of the time limit specified in the relevant law.

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 confirmation or proof is required. The fact that a claim is deemed to have been granted is specifically regulated in the law.

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

National regulation does not provide for specific legal remedies available to third parties affected by the "fictitious decision" of granting a claim.

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?

If a "fictitious decision" to grant a claim affects a person's interests, he or she can only bring an action against such a decision within the framework of general procedures.

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?

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### 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 Turkish administrative legal system provides for the negative model as a general principle in the case of administrative silence, unless a specific provision states otherwise.





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?

Pursuant to Article 125 of the Turkish Constitution, recourse to judicial review shall be available against all actions and acts of administration and the administration shall be liable to compensate for damages resulting from its actions and acts. Therefore, if the conditions for filing a claim for compensation have been met, the person is entitled to claim compensation.

#### 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, there is no such a case-law in Türkiye.

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.

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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, Türkiye is not a member of the European Union.

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

4.1. Construction, spatial development planning and environmental protection

Please see the answer to question No.3 related to “administrative silence”.

4.2. Social security

The general principle of negative model described previously is applied.

4.3. Freedom of information

The general principle of negative model described previously is applied.



## Administrative discretionary power

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

The discretionary power of the administration is not explicitly defined in our legislation. However, if a legal provision allows the administration to choose whether to take a certain decision or to choose one of the different solutions in case of certain conditions and circumstances, it is considered that this legal provision gives the administration discretionary power. However, as a requirement of the rule of law, discretion power of the administration is not unlimited, and should be exercised in accordance with the law, public interest and public service requirements.

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*)?

Our legal system does not make a clear distinction between discretion and margin of appreciation.

Legal or material facts that push the administration to act in a certain way constitute the reason element of the administrative action. It is clear that discretionary power cannot be mentioned in cases where the law indicates the reason. Administration has discretion power in cases where the law does not provide any reason or provides more than one reason.

Legal provisions sometimes use not-so-clear terms as to what they mean by reason, such as “when necessary, if necessary, when needed, public safety, general health, public order requirements”. It can be said that the administration has discretion to fill in these ambiguous concepts. It should also be noted that if vague concepts have an objective value, administration has no discretion power. For example, the concept of “immorality and decency” has an objective value in law. On the other hand, the administration has discretion in terms such as "in case of necessity".

In some cases, the Administration has discretion in the subject matter of the administrative action. For example, according to the regulation regulating aid to students in need, if the faculty administration has the right to choose one of the options of giving books, providing clothing, food aid, or providing shelter, there exists discretion here.

Another aspect of discretion of administration is the evaluation process. An evaluation is made in processes such as determining the expropriation value, grading a student, deciding whether a candidate is successful or unsuccessful. These evaluations are mostly made by staying between the lower and upper values stipulated in the law. (e.g. the legal provision provides that the administrative authority shall impose a fine of between 1000 TL and 5000 TL). The range between these lower and higher values constitutes the administration's margin of appreciation.





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.

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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 Article 125 of the Turkish Constitution and to Article 2 of the Procedure of Administrative Justice Act Law No. 2577, the administrative jurisdiction is limited to the supervision of the compliance of the administrative actions and procedures with the law. However, it is subject to judicial review whether there is a violation of the law in the elements of "authority, form, reason, subject, purpose" of an administrative action, which is based on discretion.

The administrative courts cannot review the expediency of an action. No ruling can be made that has the characteristic of an administrative action and procedure, which restricts the performance of the executive function in accordance with the forms and principles prescribed by the laws and the decree laws of the Presidency of the Republic, or in a manner that will remove discretionary powers.

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?

As mentioned above, it is subject to judicial review whether there is a violation of the law in the elements of "authority, form, reason, subject, purpose" of an administrative action, which is based on discretion. In all cases, the courts take into account of the principle of proportionality.

