

# **Administrative Silence as the Challenge in Regulation of Administrative Proceedings. Best Practices and Successful Measures Adopted by Selected EU Countries in the Context of Ukrainian Law "On Administrative Procedure"**

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## **Abstract**

*The issue of administrative silence is a significant challenge not only for the countries undergoing structural legal reforms, but also in established democracies with stable rule of law systems. Administrative inaction or delayed activity pose serious problems for the citizens, impact their individual rights, but also questions the overall effectiveness of public administration. In general, two models of addressing this case of maladministration are adopted: the negative (where silence means tacit rejection) and positive (where silence means approval). However, in practice of many countries, the solutions are mixed and much more complex. The effective way of dealing with administrative silence seems to be a matter of practice of public administration bodies, good cooperation with administrative courts, and respectful approach to individual rights of the citizens. Ukraine is currently undergoing a major reform of administrative procedure. The newly adopted and currently implemented Law on Administrative Procedure (LAP) provides a comprehensive approach to regulation of administrative proceedings and addresses many challenges relating to the operation of public administration. It is important to test the new solutions and observe how they function in practice, as well as to identify potential weaknesses and possibilities for improvement. Administrative silence, as a substantial challenge to the proper functioning of public administration, needs to be effectively addressed by the legal norms and practice, possibly with the inspiration of the good practices from the other European countries.*

**Keywords:** administrative silence; administrative procedure; rule of law; administrative proceedings; public administration.

# Мовчання адміністрації як виклик для регулювання адміністративного провадження. Кращі практики та успішні заходи, застосовані деякими країнами ЄС у контексті Закону України «Про адміністративну процедуру»

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## Анотація

Питання мовчання адміністрації є серйозним викликом не лише для країн, які проходять структурні правові реформи, а й для усталених демократій із стабільною системою верховенства права. Адміністративна бездіяльність або несвоєчасна діяльність створюють серйозні проблеми для громадян, впливають на їхні особисті права, але також ставлять під сумнів загальну ефективність державного управління. Загалом прийнято дві моделі розгляду цього випадку неналежного управління: негативну (де мовчання означає мовчазну відмову) і позитивну (де мовчання означає схвалення). Однак на практиці багатьох країн рішення неоднозначні та набагато складніші. Ефективний спосіб боротьби з адміністративним мовчанням, як видається, є питанням практики органів державного управління, доброї співпраці з адміністративними судами та поважного підходу до індивідуальних прав громадян. Зараз в Україні триває масштабна реформа адміністративної процедури. Нещодавно прийнятий і чинний Закон «Про адміністративну процедуру» забезпечує комплексний підхід до регулювання адміністративного судочинства та вирішує багато проблем, пов'язаних із діяльністю публічної адміністрації. Важливо протестувати нові рішення та спостерігати, як вони функціонують на практиці, а також визначити потенційні слабкі сторони та можливості для вдосконалення. Адміністративне мовчання, як суттєвий виклик належному функціонуванню державного управління, потребує ефективного вирішення за допомогою правових норм і практики, можливо, із запозиченням передового досвіду інших європейських країн.

**Ключові слова:** мовчання адміністрації; адміністративна процедура; верховенство права; адміністративне провадження; державне управління.

## Introduction

Administrative silence is one of the most relevant challenges in modern administrative proceedings. This topic will be analysed in the following article, starting with the identification of the research focus and most important questions. The article will take into account the best European practices and experiences of selected European countries. Based on the results of the analysis

and identification of the challenges of the implementation of the new Law on Administrative Procedure (LAP) in Ukraine, the conclusions will be provided in the final section of the article. Therefore, the purpose of the comparative analysis of administrative silence is to be used for future development of amendments to the legislative acts and correct implementation of the new LAP.

The measures implemented to address administrative silence include the normative strategies for preventing and combating the inactivity or excessive duration of administrative proceedings, as well as the legal force of silent consent on the side of administrative bodies. The relevant practices, provided in this article, illustrate the successful applicability of the above norms and therefore should be helpful in enhancing the effectiveness and efficiency of the Ukrainian administrative proceedings.

### **Defining administrative silence**

Traditionally, administrative law and policy were concerned with ways of controlling and sanctioning administrative action, and less preoccupied with the administrative inaction. Nonetheless, administrative silence (inaction) is as much relevant as the administrative act (positive action). It is an issue that lies at the intersection of legal and managerial aspects of governance and public administration. Moreover, it is a concept that is both reflecting and testing the principles of legal certainty, legality, and good administration and raises issues of rational organisation and governance, as well as ethics in public administration [1].

Looking at administrative silence from the international and comparative perspective, it is visible that the issue is addressed on different levels. For example, many international human rights treaties impose a duty on administrative authorities to respond to citizens' petitions. The regulation of administrative procedure on the national level also should provide the adequate level of protection against administrative activity, especially in relation to individual rights of citizens. However, when a failure in this duty happens by an administrative authority, there should be a requirement to determine how this has happened and the consequences of this failure [2].

***Administrative silence occurs when administrative authority does not reply to an application in the legally prescribed time or does not take action when such action is legally prescribed.***

It is also defined as a special institution in administrative law, in which a competent body, at the request of a party to the administrative matter, has not issued its decision and does not hand over the decision to the party within a legal

deadline during which a party has the right of appeal in case of the rejection of a request [3].

The consequence of administrative silence may result in adopting a form of legal fiction, that is of the assertion that is accepted as true for legal purposes, even though it may be untrue or unproven. The legal fiction attached by the law to this situation may be negative or positive:

- *Negative fiction* means that the law considers the silence as tacit rejection of the application, and the interested parties have the possibility of a legal challenge in administrative or judicial proceedings;
- *Positive fiction*, where the presumption is that the silence means approval (the silent consent procedure or tacit agreement). The application is considered approved, and the applicant can perform an activity.

Different legal systems tend to combine both of these legal fictions, although in different proportions. Both negative and positive assumptions are used, with different legal consequences.

The summary of the reflections on the two main administrative silence models are characterised in the table 1 below:

Table 1

	<i>Negative model or deemed refusal</i>	<i>Positive model or tacit/silent authorisation/approval/consent</i>
Social context	The model tries to insure that conflicting interests are balanced in the decisions. It relies on the pre-eminence of the public interest	The model tries to deal away with administrative red tape and to speed up administrative procedures. It relies on deregulation, legal certainty, it is business oriented
Legal context	The model is based on the fact that accountability lies with the public authority and that administrative competence is exclusive. It requires a merit review of the matter in order to insure that conditions to grant a right are fulfilled	The model relies on the principle that the burden of administrative inactivity must not be ascribed to the party, hence, any claim not refused in due time is deemed granted
Basic characteristics	Non-observance of the time limit by the administration leads to an application to be deemed to be rejected.	If there is a deadline breach in issuing an act, the application is deemed granted and rights claimed is acknowledged.

	<i>Negative model or deemed refusal</i>	<i>Positive model or tacit/silent authorisation/approval/consent</i>
	The party can lodge an administrative appeal and/or court actio, leading to a devolution of competence	However, some further procedural steps may be required in order to get the proof of that
Exceptions	When the system is mainly based on this model, the exceptions are usually those cases in which sector-specific laws regulate the positive model, mainly based on the Service Directive <sup>1</sup>	For this model, the exceptions seem to be numerous, stipulated by general and sector-specific laws for sensitive cases where tacit approval is considered to be risky: international obligations, public finances, environment, heritage, social matters, urban planning
Advantages	There is no danger that public interest and third parties' rights may not be balanced during the decision making process. Also, there is a long tradition in some legal systems to employ this model	Stimulates authorities to comply with deadlines by "threat" that they will need to allow enforcement of private rights otherwise and then be held accountable
Disadvantages	Long procedures ("late decisions"). The principle of reasonableness is ineffective alone. The model legitimises inactivity and equalises situations of delays due to objective and subjective reasons; possible intentional delays in order to transfer accountability to decide to the courts	Potential recognition of rights disregarding the public interest. Risk of corruption. Problems with operational enforcement (e.g. no proofing document, not clear dates). False expectations of the beneficiaries. The alleged speeding up of procedures does not happen, as the administration quickly adapts to the model and requests new documents before the deadline expires. The assumption that deadlines cannot be observed for lack of resources is false premise for establishing a system of decision-making

Source: [1].

<sup>1</sup> For EU Member States, a major turning point was the adoption of the Service Directive in 2006. The Directive obliged EU Member States to adopt the positive silence model in their legal orders when entrepreneurial licenses and grants are in question unless there is a specific need to regulate it differently.

What needs to be noted however, is that today it is difficult to find a legal system that is exclusively working with just one of the legal assumptions. What is even more difficult in presenting the basic principles of the two models is the fact that in many national systems there are many exceptions or mechanisms regulated outside of a general rule. The number of exemptions sometimes can even override the basic principle and established model [1].

In administrative matters, the parties usually have a right of access to the court and to a fair trial within a reasonable time limit, as defined by constitutions, only after the exhaustion of administrative appeal procedures. Judicial review is performed in a majority of EU states by a specialised administrative court in accordance with Art. 6 and 13 of the European Convention on Human Rights (ECHR). The problem arises when the authorities violate the time limits of administrative procedure. Therefore, there is need for different procedural solutions as to the remedies available to the parties for an effective realisation of their rights and the public interest. Administrative justice adds the level of ensuring a safety net by guaranteeing an effective legal action.

When analysing administrative silence, a comparative overview is helpful in understanding basic principles, rules, and dilemmas that this legal phenomenon is closely connected with. However, what is necessary when proposing a comparative analysis, is to understand the background legal tradition and system, and the general and sector-specific legal framework regarding administrative silence in a given country. The most important question is whether legal tools meant to deal with administrative silence (the positive or negative model) are effective and what is their effect in practice, as well as to identify solutions to deal with administrative silence. The conclusions could be then used in designing legal provisions and procedures that are effective in practice, taking into consideration comparative experiences.

The most recent and most comprehensive comparative analysis on European models of addressing administrative silence is published in the book *The Sound of Silence in European Administrative Law*, edited by and published by Palgrave Macmillan in 2020 – which served as a base for the comparative part of this article. In addition to that, another attempt on comparative assessment was made in the book *Administrative Silence* published in Ius Comparatum Series by Larcier Intersentia in 2023, also adding countries from outside of Europe (i.a. Brazil, Canada, Colombia, Mexico and Venezuela).

### **Administrative silence in European law**

As explained above, public administration inactivity and excessive length of administrative proceedings, are not the new phenomena. However, they still

appear to be of limited interest for the international and European comparative law. The more in-depth interest occurred particularly with attempts to develop a European convergence in administrative procedural law in a pro-business paradigm [1, p. 4]. For EU Member States, a major turning point was the adoption of the Service Directive in 2006 (Directive 2006/123/EC on services in the internal market). The importance of this Directive was that it made all the EU Member States obligatorily adopt the positive silence model in their legal orders when considering entrepreneurial licenses and grants, unless there is a specific necessity for a different regulation, i.e., considering the concept of overriding reasons relating to the public interest. For some countries, this meant a major change in their traditional understanding of the phenomenon of administrative timeliness, while for some it presented merely a confirmation of a solution already in place for some time at least for sector-specific fields.

Another important milestone for the European countries was the adoption of the EU Charter of Fundamental Rights<sup>1</sup>. Article 41 on right to good administration generally requires that every person has a right to have his or her affairs dealt within a reasonable time. Administrative silence is then generally understood to be a breach of the basic administrative law principle of good administration. It should be, therefore, necessary to legally regulate the consequences of such situations to mitigate dysfunctions and enable legal action and protection of the citizens.

It should be also noted the Article 6 on a fair trial of the ECHR, which also concerns to a certain extent inactivity of public administration, delaying or even blocking the access to the court [4]. On a national scale, usually such a guarantee is provided by a constitution and most often further on a statutory level. However, one should differ among (un)reasonable time and an infringement of a prescribed timing. In this context, an inactivity (no response at all) and a procrastination (delayed or partial activity) are both seen as maladministration. Administrative silence should be therefore analysed in relation to the principle of reasonableness.

According to the EU Ombudsman, administrative inaction in the sense of total absence of a decision is not a significant issue when assessing the functioning of the EU administration, with only a small amount of cases. Moreover, from the beginning of the functioning of the Court of Justice of the European Union (CJEU) until the end of 2018, 263 cases were brought to court alleging a failure to act by an EU institution, body, office, or agency, and out of this total number, only 13 cases have been successful [5].

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<sup>1</sup> <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012P/TXT&from=EN>.

## Comparative review and chosen case studies

The tension between silence as rejection (negative) and silence as approval (positive) is to be found not only at the level of the EU procedural law, but also at the level of the national administrative law of the Member States. In comparative law, the administrative silence has been an area of constant changes as national legislators try to find the most efficient way to tackle the issue, and then search for refinement of their legal regimes based on legal traditions, comparative law, and EU law insights [1].

In the majority of European countries, administrative silence has been regulated since the middle of the twentieth century, and in some countries, administrative silence goes back even further in time. France, Spain, Portugal, Italy, Netherlands, Slovenia, Serbia, and Croatia (among others) have quite extensive regulations on time limits, prolongation of time limits, and legal actions when time limits are exceeded. From a comparative perspective, it is interesting to note that the topic of administrative silence has received relatively little attention in Germany. Traditionally, in German administrative law and administrative science, the emphasis has been on tying and controlling the administration (arising from the rule of law) and not on fighting its inactivity. This also influenced several Central and Eastern European countries that adopted this logic [6]. In several post-communist CEE countries, the regulation of administrative silence is still scarce. An explanation for this is that during the communist regime (until 1989) it was practically impossible to challenge inaction of the public administration, as the state overlapped with the Communist Party. However, since the beginning of this century, the administrative silence has been evolving in these legal systems to positive silence (influenced by EU law) and to silent rejection.

The first state to introduce administrative silence was France, basing on XIX-th century experiences of the Council of State and introducing the specific provisions in the decree in 1965, adopting a negative model although with numerous exceptions<sup>1</sup>. Nevertheless, this legal fiction was reversed in 2013 to make room for a positive legal fiction. Spain was also one of the first countries to regulate administrative silence and its fictitious consequences in the Administrative Procedure Act (APA), whereby a negative or a sustaining decision (*silencio positivo*) implies regarding procedure type.

Additionally, in many countries sector-specific legislation determines different degrees of response timeliness as complementary solutions, whereby the principle of *lex specialis derogat legi generali* applies as long as these statutes comply with general principles and constitutional guarantees [1].

<sup>1</sup> The Decree of 11 January 1965, "Relatif aux délais de recours en matière administrative".

Most laws make reference to: deadlines to issue an administrative decision, its legal effects, and legal remedies if the time limit is exceeded. In order to establish any legal consequences, especially a legal fiction (*praesumptio iuris et de iure*), certain conditions need to be fulfilled. These are at least the following: the case must concern a specific administrative matter, i.e., single-case administrative decision-making, the prescribed time limit for decision must be set specifically, and explicit legal protection is defined in case of administrative silence by a statutory law. If these and similar prerequisites are not met, there is no silence and consequentially legal effects do not occur [1, p. 11]. For instance, in Spain, these requirements are seen as a "double silence exception", since the Spanish APA requires various elements to be fulfilled in order to give way to the positive model [7, p. 257].

In both types of legal fictions, there is a presumption that either a negative answer was given to the request addressed to the public authority, or an individual administrative act was issued. While the first model (negative) implies that only the administrative authority is competent in balancing the public and private interests, in the second model (positive) there is just a presumption that the opposing interests do not collide and therefore the claim may be granted.

If, after expiry of the time limit provided by law, the administrative body has not issued any decision nor terminated the case, it is considered that the case has been settled by the silence of administration. Depending on the design adopted in the administrative law, it may mean issuing a positive decision (positive silence) or a negative decision (negative silence) by the body [8]. A positive silence means the same effect as accepting the request of a party in all its demands. The negative silence is treated equally with the substantive refusal of the case (fiction of a negative decision), like in the French legal order, where the rule is that the expiry of four months after the application means a negative decision, which is subject to a complaint to the administrative court. The concept of a fiction of a positive decision is present, among others, in Germany, Italy, Spain.

It can be observed that the negative model, although prevailing in the last 15 years, has been at times reorganised in terms of less rigid versions for the party in proceedings and toward stronger obligations for the administration [Ibid.]. For instance, there are disciplinary or criminal liability and penalties imposed increasingly in various forms (e.g., in the Netherlands, Belgium, Spain, Italy, Serbia, Romania, and Poland) [1].

Some countries opted for a general change: from a negative to a positive legal fiction, and the most recent example is France. On the other hand, the positive model seems to allow for more and more statutory exceptions. At the same time,

case law leads to strict interpretations, like for a positive approval in Italy or Belgium. The same goes for Romania, where silent approval was rendered almost impossible according to courts' judgments. Moreover, there are hybrid solutions as well, as in Germany, when in a case of silence a party goes to the court that requires from the administration that an act is issued. Some countries even set up an additional supervision, such as the administrative inspection (e.g., Slovenia, Croatia, and Serbia) which can adopt measures to ensure accountability in the events of violation of the APA if not repaired within the body itself. Based on fair trial requirements by the ECHR, there are other additional schemes of reconciliation, such as damage compensations. Overall, there is no universal model, and the approaches used by legislators combine the best elements of the two approaches [Ibid.].

Administrative silence should be considered to occur also if the deadline for decision is prolonged or if the decision is annulled at the appellate instance or in administrative dispute and no decision is taken by such additional deadline. Explicitly, the same goes for the discretionary act, even though the judicial review in these cases is often limited [Ibid., p. 26].

The deadlines for issuing administrative decision are seen in the EU countries as instructive ones, and that is derived from the basic mission of the administrative body to conduct proceedings efficiently yet within the boundaries of law and with proportionate protection of public and individual legal interests [8]. The rights and legal interests that the parties assert in administrative procedure are positive rights, particularly social and economic rights, in relation to which the parties have legally guaranteed expectations that the state will not only protect them but also create the possibilities for their actual implementation. In case deadlines are not defined in exact time limits, the promptness of decision-making has to be respected as a basic principle and if enacted by the law, legal effects and remedies are still applicable. Moreover, good administration requires response to any motion or complaint, in particular when well substantiated [1, p. 26].

Nevertheless, when discussing the concept of administrative silence, it is important to think in the category of setting specific deadlines instead of only relying on the "reasonable time" concept. This is rather important in some legal traditions, more inclined to formalism or still in transition such as CEE countries. This is not only to make sure that decisions in the relations between authorities and individual parties are adopted within such time limits as promptly as possible, but also in order to foster the legal certainty and equality by providing exact time reference for the effects of administrative decisions [Ibid.].

**Germany.** The Basic Law for the Federal Republic of Germany – *Grundgesetz* (*GG*) does not mention the administrative procedure and the rights of the citizens against the administration. In German law, there is only one mention of silence as a legal term in Commercial Code: a merchant who gets an offer from another merchant with whom they regularly do business has to answer without undue delay. By remaining silent, they accept the offer [9].

In German administrative law there are also no general deadlines for administrative procedures. Jurisdiction and interpretation of the law gives various indications of the length of the proceedings and the timing of administrative action. Based on this information, it is possible to determine the prescribed procedure duration as well as a legal deadline from the legal requirements [10].

Silence itself has not been defined as a legal construct and therefore, originally, neither a positive nor a negative silence existed. The positive silence known as *Genehmigungsfiktionen* is a new product only established by EU law (previously mentioned Service Directive). Without any other previous positive nor a negative construct of administrative silence, instead another legal remedy, the action for failure to act, was installed [Ibid.]. Nevertheless, there is a difference between legal remedies against the silence itself and legal remedies against the fictitious administrative act. A fictitious administrative act can be challenged in court like a normal administrative act<sup>1</sup>. The citizen can file an action for failure to act against a silent authority, they may also claim damages too and additionally, the civil servant may face internal disciplinary consequences [10, p. 87].

The overall German way of dealing with administrative silence is a non-treatment, so the assumption that the system works in a more or less effective manner. Administrative silence is only scarcely mentioned in the codes and the additional remedy – the action for failure to act- has been established. While the principle of timeliness is known, a general deadline is not present in the legal system. At the same time, various deadlines are included in various laws, but failing to meet these deadlines does not necessarily have consequences [Ibid.].

**France.** The specific feature of French system of administrative law is the central role of the administrative judge, and especially of the Council of State<sup>2</sup>. It is immediately apparent in the approach adopted by French law dealing with the issue of silence kept by the administrative authorities. It is dealt with in relation to litigation, aimed at avoiding the situation when individual is in a position of endless waiting and uncertainty, but especially not to prevent him/her from having access to the administrative judge [11, p. 110]. This is closely linked to

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<sup>1</sup> According to Section 42a (1) sentence 2 VwVfG.

<sup>2</sup> The highest administrative jurisdiction.

an important rule of French administrative litigation, according to which judicial review can only be exercised against a preliminary decision (*décision préalable*) [Ibid.]. The absence of the adoption of a decision by the administrative authority therefore may hinder the access to justice for individuals.

Administrative silence in France is regulated by attempting to address the inertia of the administration, which must not hinder the intervention of the judge, and at the same time to encourage the interventionism of the judge in the control of the acts of the administration. That is why the negative model was adopted, in which the silence of administrative authorities is treated like a refusing administrative decision, which enables the individual to challenge it before the judge [Ibid.].

The French Constitution, similarly to the German *GG*, does not include any provisions related to administrative procedures and requirements. There is also no general administrative timeline referred to in the Constitution, nor the requirement to act within a reasonable time. However, the Constitutional Council, through its case law, referred to the principle of negative silence. It provided for explicitly, that "negative silence is a general principle of law of our system"<sup>1</sup>. Consequently, only legislative acts could provide for exceptions to this principle, and it is applicable if there is no text regulating timeline. To reverse the principle, a specific legislation would need to be adopted.

Nevertheless, it is not obvious that in the French administrative system the prevailing model is still of negative silence. For a long time, the principle was that silence of the administrative authority meant rejection, but following the reform of 2013, the general rule has been changed to that of positive silence [11, p. 111]. From then on, "the silence kept for two months by the administrative authority upon a request means a decision of acceptance". However, it is still difficult to consider that it is the dominant model, as there are many exceptions, impacting the scope of the general principle. But, even before the rule changed, the rule of positive silence applied already in three main fields: regulations related to the exercise of occupational activities and freedom of trade and industry, employment law, and regulations related to property rights [Ibid.].

As in other member states, also in France the European law has influenced administrative law and functioning of public administration. The right to good administration, enshrined in Article 41 of the Charter of Fundamental Rights, had its impact on the French system especially in its dimension of promoting the efficiency of the administration. And indeed, good administration is one of the grounds for derogation from the rule that silence is a decision to accept. The most

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<sup>1</sup> Decision of 26 June 1969, Protection des sites (n° 69-55 L).

significant impact is probably again due to the adoption and implementation of the Services Directive, as in the other EU countries.

When it comes to legal remedies, individuals are always entitled, unless special legislation has created special procedures, to first bring their complaints against an administrative act before the author of the act (*recours gracieux*) or before his/her direct supervisor (*recours hiérarchique*) or before the minister, who is superior internal instance in the administrative authority, and to appeal through litigation only when the complaint has been rejected. The nature of this objection procedure is, however, predominantly facultative, although regarding certain administrative decisions, an administrative appeal procedure is of obligatory character before bringing a claim to court [Ibid.].

The administrative requirement related to the compliance of deadline, or the obligation to decide within a reasonable time are binding on the administrative authorities, and therefore, are reviewed by the administrative judge in judicial review (*recours en excus de pouvoir*). However, it leads very rarely to the annulment of the administrative decision [Ibid.]. On the one hand, the judge is quite reluctant to limit the margin of discretion of the competent administrative authorities, especially in this area which is widely a matter of internal management and organisation. On the other hand, an infringement of procedural rule only leads to the annulment of the decision. Therefore, the intervention of the judge should be the last option left to the individual to make his arguments heard, and an efficient administration should be able to avoid most often the litigation step.

**The Netherlands.** The Dutch Constitution (*Grondwet*) does not refer specifically to timely decision making by public authorities and there are no specific provisions on judicial protection against untimely decision-making by the administration. However, the legal system of the Netherlands does address timely decision-making and sanctioning administrative silence. In the past, there have been relevant provisions in sector-specific legislation, but since the introduction of the GALA (General Administrative Law Act) in 1994, there are general provisions on timely decision-making and on several different sanctions [12, p. 181-182].

The general principle is that the administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application. Unless it is specified otherwise, the general time period to take a decision is eight weeks [Ibid.].

Dutch administrative law provides several possible legal consequences in cases where a public authority does not make a decision within the given time limit. The prevailing model in Dutch administrative law, from the moment the GALA was introduced, provides that administrative silence as a response to an application by an interested party can be reviewed by the court. Only the provisions of the GALA that are concerned with judicial review are applicable to administrative silence. Besides the opportunity of judicial review, GALA stipulates that the public authority could be subject to a penalty for its silence if certain specific conditions are met [Ibid., p. 185].

An additional step was the introduction in 2009 a system of fictitious positive decision making, which is considered an alternative to the other sanctions. The reason for these changes has been to strengthen the applicant's position *vis-a-vis* the public authority and to stimulate that authority to decide within the given time limit, but also to implement the EU Services Directive. These legal changes meant that after exceeding the specified time, a fictitious positive response to the application was created automatically (*ex lege*). It also meant that the public authority could not refrain from taking action without legal consequences. However, this particular section of the GALA is only applicable when its applicability is explicitly stipulated in a specific legislative act, regulation, or ordinance [Ibid.].

The Dutch system was therefore reformed from the negative to positive model, however not without challenges. In the first years after the introduction of the GALA in 1994, the appeal against the failure to process an application within the set time limit was treated by administrative courts as a fictitious refusal. However, a judgment of the highest administrative court (the Administrative Jurisdiction Division of the Council of State) in December 1998 changed this role of the courts in judicial review against administrative silence quite profoundly by procedurally forcing the public administration to take real decisions by granting the interested party with procedural instrument to challenge the failure to deliver the decision on time [Ibid., p. 188-189].

What is also interesting in the Dutch legislation is the presence of explicitly positive model in certain licensing systems with tacit authorizations, where administrative authority is obliged to give notice of the authorization. If the administrative authority fails on this obligation, there is even a risk that the administrative authority is forced to pay a penalty [12, p. 194].

Also, when it comes to the legal remedies, the Dutch system provides interesting solutions. I.a. GALA provides for the possibility to litigate before the administrative court against the absence of a decision. There are specified

provisions for administrative silence in single-case decisions (like permit), as well as an administrative court remedy against the absence of the decision [Ibid.].

**Poland.** The 1997 Constitution of the Republic of Poland establishes the principle of legality as foundation for the public administration, requiring a specific legal base for all actions of administrative bodies. Poland established a two-tier system of administrative courts (Supreme Administrative Court in 1980, and regional administrative courts in 2003), adding to the two instances of administrative procedure based on the Code of Administrative Procedure (CAP) from 1960<sup>1</sup>. This model provides the extensive review of administrative acts and other activities of public administration, however, is not without risks and challenges regarding administrative inactivity [13, p. 434-435].

There is no direct reference to the right of good administration in Polish law, however administrative judiciary frequently addressed this principle referring to Art. 41 of the EU Charter of Fundamental Rights. The European standards played an important role in administrative judgments even before the Charter was ratified, as they were often referred by the Supreme Administrative Court as the desired standards of administration [Ibid., p. 435-436].

Deadlines in Polish administrative proceedings are regulated by the Code of Administrative Procedure separately for the first instance proceedings, appeals and simplified proceedings. The basic deadline is "to deal without unnecessary delay" (Art. 35 par. 2 CAP). The standard time limit for simple cases is 1 month, whereas for more complex it can be two months. The appeals should be completed within one month at the latest. It needs to be noted also, that the deadlines could be prolonged if the administrative body cannot complete the proceedings within the standard limit – in this case the party needs to be informed about the reasons for the delay and the new deadline for closing the procedure (Art. 36 par. 1).

The most important principles and general rules relating to administrative silence are also established by the CAP. Before 2017, the only remedy was the complaint to administrative court against inactivity of administration (Art. 37 par. 1 CAP). In addition, Art. 35 par. 4 of CAP (introduced in 2011) provided the possibility to modify deadlines of administrative proceeding in special laws. Example of such a special law is i.a. the patent law – Law on Industrial Property, providing the deadline of six months for closing a contradictory proceeding, and Law on Pharmaceutical Products, setting up to 210 days to deal with an application on access to the market [Ibid., p. 439].

An important step was the introduction of amendments to CAP in 2017, regulating the silent authorisation (Art. 122a – 122f). The application of these

<sup>1</sup> It has been amended many times since then.

provisions requires however a specific legal base in special law, with reference to silent authorisation.

As it was in the previously mentioned country case studies, also in Poland the important change was brought by the EU legislation – the Services Directive. In 2004 Poland amended the Law on Freedom of Economic Activity, adding in accordance with the directive the concept of silent authorisation in Art. 11 par. 9. This provision however did not play a significant role in practice, as the practical interpretation was that this provision is not sufficient for applying silent authorisation [Ibid., p. 443]. The law since then has also been changed, and this provision removed.

After the introduction of silent consent to CAP in 2017, the concept was established in more than a dozen of special laws. As in the German model, the silent authorisation can only be applied in cases where it is explicitly stated in sector-specific legislation. Therefore, the CAP provides the general procedural framework regulating i.a. the procedure of requesting the notification of consent but cannot extent the cases where silent consent can be used.

Silent authorisation means that the authority approves settling the case in the way presented by the applicant, unless it files an objection in the form of administrative decision in the prescribed time (usually no later than one month). The administrative body is therefore bound by the positive settling of the case from the day following the deadline to issue administrative decision on its own or filing an objection (Art. 110 of CAP). The silent authorisation can only occur based on the applicant's request, and by accepting the request in its entirety [14, p. 240]. In any case, the outcome of this regulation to the applicant should be positive.

This amendment of CAP was met with mixed reaction. Some authors claimed that it can have a positive effect on increasing efficiency of administrative proceedings and simplification of the procedure. There are also opinions however, that it can have some risks and adverse effects, as it gives priority to timeliness over all other principles of administrative procedure. In some cases, this might lead to unfairness in administrative proceedings – some parties might receive a negative decision where administrative body will be able to deliver the investigation on time, whereas the others might benefit from the silent authorisation where it will not be able to finalise the proceedings on time [13, p. 444-445]. The difference brought by the introduction of silent authorisation means therefore, that without the activity of administrative body, the result for the applicant can only be positive; with the activity and issuing a decision/objection, the outcome can be either positive or negative [14, p. 242].

In addition to that, Polish legal system recognises both negative and positive models of administrative silence. In the event of the failure to act within the deadline, the party is entitled to file an urging claim and complaint to administrative court (Art. 37 CAP, Art. 3 of the Law on Judicial Administrative Procedure). The positive silence, apart from the aforementioned silent authorisation, can also appear in the form of "silent termination of administrative proceeding", which means finalising the proceeding without any negative or positive conclusion. This passive form of positive silence has a different function that administrative consent, and rather demonstrates the intention to force the administrative body to take action, instead of mainly finalising the proceeding without the administrative body's activity, in line with the applicant's request.

**Conclusions from the comparative review**

In conclusion, a comparison of the most important features of some of the European national models dealing with prescribed deadlines and administrative silence are summarised in the table 2 below:

Table 2\*

	<i>Deadlines in general &amp; special law</i>	<i>The main responses in a case of delay</i>
Spain	Three months provided by APA, and sector-specific laws cannot exceed six months; the deadlines are halved in urgent proceedings; all are valid also in <i>ex officio</i> proceedings	APA distinguishes between dispositive and official proceedings, in the latter negative model, and in the former a positive one, with some exceptions; imposed penalties and criminal liability for not complying with deadlines
The Netherlands	A decision must be given within the time limit prescribed by law or, in the absence of such <i>time limit in sector legislation</i> , within <i>a reasonable time</i> but in any event if not communicated otherwise within <i>eight weeks</i> of receiving the application	"From a negative interpretation to a procedural instrument" and a positive model, i.e. fictitious approval, unless exceptions provided by specific laws; also imposing periodic penalties when they exceed the time limit
Germany	To act within <i>a reasonable time</i> by APA, but the lawsuit may be lodged not prior to the expiry of	Legal protection entails the action for the issuance of an administrative act, as the suit for

	<i>Deadlines in general &amp; special law</i>	<i>The main responses in a case of delay</i>
	<i>three months</i> unless a shorter period is required; deadlines are set by specific laws, e.g. <i>four weeks</i> by the Pressurised Air Decree or <i>60 days</i> or <i>seven months</i> by the Medicinal Products Act	inaction, whereby the party may skip the administrative appeal (which is not the case beyond silence); fictitious authorisations ( <i>Genehmigungsfiktionen</i> ) by laws based on the Service Directive and other special statutes
Croatia	<i>30 days</i> unless fact establishing requires 60 days but only in the proceedings upon application; 60 days as well as in appellate proceedings; sector-specific law can determine only shorter deadlines as by APA	"From negative fiction to neutral position", with a devolution of competence upon a party's appeal/lawsuit; unless sector-specific law defines a positive model, if so a declaratory act is issued
Slovenia	<i>Two months</i> , also in <i>ex officio</i> and appellate proceedings; one month in summary proceedings; shorter or longer deadlines are (not often) set by sector-specific laws	Negative model, devolution of competence upon a party's appeal/lawsuit but also <i>ex officio</i> devolution if public interest is endangered

\*Source: [1].

The main conclusion stemming from the comparative review is that there is no "one-size-fits-all" solution against the failure or the unwillingness of an administration to take a decision. The most common effect is not that decisions are forced to be taken within the deadline, but that procedural provisions are invoked to avoid the negative effects to the citizens. It means also that the envisaged positive effects (gaining rights) are not realised [1].

What is also visible is a strong influence of the EU legislation in the EU countries, as shown on the example of the implementation of Service Directive. This legal development in practice paved the way to introducing (or even enforcing) the positive model in some of the EU member states, gradually offering a spill-over effect to the national legislations. This directive was therefore a strong influencing factor to all the legal systems of EU member states and provided new solution and shift in the logic of administrative procedural law.

However, as the authors note, the idea to replace the will of the administration by using a legal fiction may also raise issues of legitimacy and democracy. Consequently, best available solutions seem to be fostering the protection against

administrative silence through legal instruments like judicial review, sanctions, Ombudsman intervention, in ways that ensure proper balance between legal certainty and effectiveness [Ibid.].

In order to ensure effective and responsive administration, so what is called in EU Charter on Fundamental Rights "good administration", administrative silence should be properly addressed by both legal framework and organisational measures. Administrative silence can significantly influence administrative conduct, affecting not only individual rights and/or in some cases also public interest, but as well generally the rule of law and trust in the government. To address this challenge, countries still look for ways of improving their legal regimes based on legal traditions, comparative insights, and EU measures [3].

Therefore, the solution to administrative silence seems not to give up the legal fictions or change it from negative to positive, but rather to deal with administrative delays in an integrated manner, using legal and managerial tools. Negative fiction should be accompanied with accountability of civil servants that are responsible for the delays (as in the case of the Netherlands or Poland, where even penalties can be imposed). Finally, the courts should grant damages for not observing the deadlines, irrespective of how the case was decided on merits. Also, the competences of the Ombudsman should be strengthened, as it is an important institution that should be capable of dealing with systemic breach of administrative timeliness.

### **Regulation of administrative silence in Ukraine and recommendations**

The above comparative review of different approaches to addressing administrative silence provided many examples of measures undertaken by legal systems of several member states of the European Union. In relation to the reform of administrative procedure in Ukraine, and the implementation of the new Law on Administrative Procedure, the comparative analysis could also be used for the future development of amendments to new legislative acts.

As to the legal situation in Ukraine and regulation of administrative silence, the new LAP does not address administrative silence according to the positive model. The shape of the new general administrative procedure is closer to the German Administrative Procedure Act (VwVG) and German doctrine, and as it was mentioned in the comparative part, the regulation of administrative silence in Germany was actually missing. It was not defined as legal construct and has not really addressed ahead of the adoption of the EU Service Directive in 2006.

According to the article 55 of the Constitution of Ukraine "Everyone shall be guaranteed the right to challenge in court the decisions, actions, or *inactivity*

of government authorities, local government, officials and officers". In addition to that, the Law on Administrative Procedure addresses administrative body inactivity by providing the mechanism of administrative appeal: "Inactivity of the administrative body is appealed in the case of non-issuing of the administrative act within the period established by law or delay in the consideration of the case" (Art. 78 part 5). What needs to be noted, however, is that this provision is related to the administrative appeal, which is not obligatory according to the current version of LAP. The duration of administrative proceeding is limited by the law – general deadlines for administrative proceeding in accordance with LAP (Art. 34 part 2) is defined as "reasonable period", but within 30 days (in cases of hearing – 45 days).

At the same time, article 124 (part 3) of the Constitution of Ukraine (amendment of 2016) foresees that "The law may specify a mandatory pre-trial procedure for settling a dispute". Therefore, there seems to be an additional room for introduction of obligatory measures in the future, at least in sector-specific laws.

There are also some examples of addressing administrative silence in accordance with the positive model in some parts of administrative procedure, as well as in special laws. Article 58 (part 2) of LAP foresees internal procedure addressing, within public administration, the approval of the other administrative bodies. This procedure, used before issuing administrative act, is regulated according to the positive model of administrative silence.

Another example is the Law "On permit system in the field of economic activity" which also consists of the regulation based on positive model, including definition of the principle of tacit consent and its special regulation (Art. 4-1, part 6). In addition to that, another interesting regulation introducing the positive model is provided in part 8 of Art. 85 of the LAA: "In cases stipulated by law, if a decision on a complaint against an administrative act is not made and/or not communicated to the complainant within the time and in the manner prescribed by law, the complaint shall be deemed fully satisfied from the day following the day of expiration of the specified period". This provision contains two important aspects – reference only to the appeals (complaints) against administrative acts, and the reference to a special law (for example, such regulation is available in the Tax Code of Ukraine).

What is important to note is that in Ukrainian legal practice, the majority of administrative acts are appealed directly to administrative courts. This might mean that the burden of examination of administrative cases is often pushed to the courts, overloading the judges, who are obliged to practically carry out the initial administrative investigation. Therefore, there seems to be a strong

case in favour of shifting the appeals concerning administrative acts to the second instance of public administration bodies, instead of overburdening of the administrative courts.

In this regard, the Tax Code seems to be the area to firstly introduce a mandatory pre-trial appeal procedure. In tax cases there are often many disputable aspects, and when the case is appealed directly to the court, almost entire burden of their resolution is again placed on the administrative judges. In these instances, administrative bodies should be much more engaged in solving the administrative disputes and settling the case instead of relying on the courts. This solution is allowed by the Constitution of Ukraine and could be established to make the procedure more efficient.

What also can be recommended is to focus while training civil service professionals on the correct implementation of LAP, as well as efficient management and improved quality of the administrative proceedings. Apart from formal, organised trainings, there are many good quality handbooks and guides accessible on the internet [For example, 15] – similar one, adopted to the local legislation and conditions, could be prepared under the auspices of the Ministry of Justice. Cooperation with the specialised administrative judges who have experience in this subject could also be investigated, as the courts could provide valuable input into what needs to be improved.

In most European countries, the control of timeliness consists of legal actions by citizens in case of administrative inaction (appeal, judicial review, right to compensation). It is also common for a complaint to be submitted to the Ombudsman (Netherlands, Portugal, Croatia, Serbia, and Lithuania) [1, p. 9]. Therefore, strengthening the competences of Ombudsman is another avenue that might be taken into consideration. According to The Venice Principles [16], the mandate of the Ombudsman shall cover prevention and correction of maladministration, and the protection and promotion of human rights and fundamental freedoms. The institutional competence of the Ombudsman shall cover public administration at all levels. The mandate of the Ombudsman shall cover all general interest and public services provided to the public, whether delivered by the State, by the municipalities, by State bodies or by private entities. The competence of the Ombudsman relating to the judiciary shall be confined to ensuring procedural efficiency and administrative functioning of that system. In the future, it might also be considered to invest in professional legal services in the office of Ombudsman (for example, a dedicated Department for Administrative Proceedings), which could also enable the Human Rights Commissioner's personnel to specialise in providing support to the citizens.

## Acknowledgement

The author would like to thank her Colleagues from EU4PAR Project in Ukraine: Irina Boiko, Andriy Shkolyk and Viktor Tymoshuk for their support, providing information and useful comments to the earlier drafts of this article.

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**Suggested Citation:** Jakubek-Lalik, Jowanka. (2023). Administrative Silence as the Challenge in Regulation of Administrative Proceedings. Best Practices and Successful Measures Adopted by Selected EU Countries in the Context of Ukrainian Law "On Administrative Procedure". *Problems of Legality*, 163, 163-185. <https://doi.org/10.21564/2414-990X.163.294425>.

Submitted: 21.11.2023

Revised: 30.11.2023

Accepted: 22.12.2023

Published: 28.12.2023