



The Sound of Silence in European Administrative Law

Edited by

Dacian C. Dragos · Polonca Kovač
Hanna D. Tolsma

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The Sound of Silence in European Administrative Law

“According to traditional theories, administrative law is the law relating to the control of government power, its main goal is to protect an individual right, and the courts decide which contrasts to impose on administrative action. While this face of administrative law is relatively well known, another is less known, that of administrative inaction. Administrative law, when viewed in this way, requires a focus on promoting rights. It also requires shaping the very form of judicial intervention in another manner. ‘*The Sound of Silence in European Administrative Law*’ helps to fill the gap that exists in legal literature, by way of a wide-ranging comparative approach, focusing on both national and EU laws. This is an interesting and important book, for both public law scholars and practitioners.”

—Giacinto della Cananea, *Professor of Administrative Law
at Bocconi University, Italy*

“This new book on administrative silence, edited by Dacian Dragos, Polonca Kovač, and Hanna Tolsma, is a significant development in the literature in this area. It brings together a wide range of essays on European experiences with the problem of administrative silence, which can variously be caused by a simple error in public bodies, by administrative inertia, and sometimes even by a misuse of power. The essays develop normative and empirically-grounded points about how administrative silence is—and might be—addressed, including at the difficult interface between maladministration and illegality. The comparative dimensions to this book are as deep as they are wide, and the editors have achieved something remarkable in synthesizing the contributions and suggesting what is—and is not—possible in European law. I can think of no better or more comprehensive study of administrative silence in recent years.”

—Gordon Anthony, *Professor of Public Law, School of Law
at the Queen’s University in Belfast, Ireland*

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Hanna D. Tolsma
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PREFACE

MAKING OF “THE SOUND OF SILENCE IN EUROPEAN ADMINISTRATIVE LAW”

This book attempts for the first time to engage in a comparative assessment of the different models employed in order to tackle the administrative silence in administrative law. The comparative work will be the first on this theme to tackle both the legal aspects and some empirical evidences of how the legal institution works in practice.

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. The legal fiction 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 venues. In the second instance, positive fiction, 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. No legal system is exclusively working with just one of the legal assumptions. Both negative and positive assumptions are used, with different legal consequences.

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* is as

much relevant as the administrative *act*. 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 organization and governance, as well as ethics in public administration.

The team of authors contributing to this book is based in most part on the network of researchers established under the umbrella of the Permanent Study Group X “Law and Public Administration” of the European Group of Public Administration.¹ The study group joins together at every annual EGPA conference in September to discuss and share research ideas related to the field of public law, but with a broader multidisciplinary perspective. Thus, the group is a permanent meeting place for scholars and practitioners from different fields: social scientists, jurists, and economists working in academia and public institutions, as well as civil servants working in national and supranational institutions. It tries to combine external and internal perspectives on law in a public administration context. Internal perspectives on law relate to juridical analysis and efforts to improve legal (sub)systems from the perspectives of rules and legal history, jurisprudence, and comments. The external perspectives can be of different kinds, as they confront (administrative) law with motives that often are external to law, like efficiency and timeliness of administration, the accountability of public agencies, transparency of government, and citizen’s participation in decision-making.

This research proposal follows the EGPA’s PSG X annual efforts to research and comparatively analyze topical issues from both a legal and empirical perspective. After research endeavors that finalized in published books—*ADR in European Administrative Law* (Springer, 2014) and *The Laws of Transparency in Action* (Palgrave, 2019)—we proposed for 2019 EGPA conferences the topic Administrative Silence in European law. The contributors are mainly from this study group, but also benefited from participation of other well-established scholars in the field of administrative law, most of them members of the ReNEUAL network (Research Network of European Administrative Law).²

¹http://www.iias-iiisa.org/egpa/e/study_groups/law/Pages/contact.aspx.

²<http://www.reneual.eu/>.

The book offers in-depth insights into the topic through national profiles provided by domestic scholars based on a common outline. The approach is mainly legal, but often enriched by an interdisciplinary perspective (such as public policy, management, and economics). Authors have gathered the most up-to-date case law and available empirical data to be able to assess the administrative silence as a complex dysfunction that needs to be dealt with systematically to enable good administration.

This book is structured as follows: Firstly, a comparative overview opens up basic principles, rules, and dilemmas that administrative silence is closely connected with. Further, an analysis of EU law is given, followed by country reports from Western and Southern (seven chapters) and Central and Eastern Europe (six chapters), respectively. Each chapter is organized in such a way to provide comparisons. Initially, the authors address the background legal tradition and system, and the general and sector-specific legal framework regarding administrative silence in a given country. The core research 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. Finally, an overall assessment of national regimes is performed in order to identify solutions for future policymaking and how to deal with the specific issues of administrative timeliness.

We hope the book will stir interest of students and academics from law, public administration, political sciences, and sociology, in Europe and elsewhere. Also, it will benefit practitioners from public administration in charge of applying or overseeing administrative procedure codes/laws, as the chapters will explain how comparable provisions from otherwise different jurisdictions are interpreted in practice. Legislators and initiators of legislation (members of parliament and of the government) could use the book in designing legal provisions and procedures that are effective in practice, taking into consideration comparative experiences.

Last but not least, lawyers should be interested in comparative examples of how administrative silence may be regulated, how provisions are interpreted, due to the fact that many national administrative procedures are similar in terms of how provisions are drafted. Cross-fertilization of legal principles and best practice may find a fertile ground here.

The editors wish to thank contributors to this book for their efforts to the European Group of Public Administration (Edoardo Ongaro and

Fabienne Maron) for enabling the research and the publication of its findings, and to Palgrave Macmillan (Jemima Warren) for considering our proposal in a timely and accommodating manner and for an excellent cooperation during production of the book.

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PART I

Introduction and Comparisons



In Search of an Effective Model: A Comparative Outlook on Administrative Silence in Europe

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1.1 INTRODUCTION

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* as much relevant as the administrative *act*. It is an issue that lies at the intersection of legal and managerial aspects of governance and public

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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 organization and governance, as well as ethics in public administration.

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. The legal fiction attached by the law to this situation may be negative (rejection) or positive (approval); over time, also various combinations thereof have been developed in individual legal regimes. Today, no legal system is exclusively working with just one of the legal assumptions.¹ Moreover, traditional national systems are lately redefined to offer more exceptions or mechanisms regulated beside a general rule, so that sometimes the number of exceptions overrides the basic principle.²

Public administration inactivity, or in other words the excessive length of administrative proceedings, is not a new phenomenon; however, it appears to be of limited interest for comparative law, and it occurred particularly as attempts to develop a European convergence in administrative procedural law in a pro-business paradigm.³ In this context, there were initiatives at the EU level that attributed administrative silence as a positive legal fiction—namely Directive 2006/123/EC on services in the internal market (Service Directive).⁴ It should be also noted that Article 41 on right to good administration of the EU Charter on Fundamental Rights generally requires that every person has a right to have his or her affairs dealt within a reasonable time.⁵

¹ More in Jansen (2008, 2016), de Graaf and Hoogstra (2013), and Kovač (2012). For the national reports, see chapters of this book for empirical data.

² See Jansen (2016). Similarly on other institutes such as access to information or administrative appeals and alternative dispute resolution mechanism (Dragos and Neamtu 2014; Dragos et al. 2019).

³ See Hofmann et al. (2014), Auby (2014), Galetta et al. (2015), and Koprić et al. (2016).

⁴ OJ L 376, 27 December 2006.

⁵ More on the EU Charter and good administration in the CJEU jurisprudence in the EU chapter of this book. See the European Convention on Human Rights (ECHR), Article 6 on a fair trial, as well. On a national scale, usually such a guarantee is provided by a constitution and most often further on a statutory level (see the national reports in this book for more details). However, one should differ among (un)reasonable and (an infringement of) a prescribed timing, as addressed later on and in the national reports of

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 this chapter, we critically synthesize the main aspects discussed in the following chapters that deal with this topic in national setting, trying to find a red line or identify common trends among the studied jurisdictions.

In comparative law, the administrative silence has been a field of constant changes as national legislators experiment 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. The issue of administrative silence has been paid little attention in comparative law until now, so we hope that this chapter offers a sneak peek into the legal and practical problems raised by this legal institution and the interest of the reader to go into the more detailed analysis of the administrative silence provided by the national chapters was already sparked.

First, the concept of administrative silence is briefly discussed in this section. Subsequently, an outline is given of the national legal and administrative background as far as relevant for analyzing the administrative silence. The main trends regarding the regulation of timeliness and the length of time limits and calculation are described (Sect. 1.2). This is followed by an in-depth analysis of the response to administrative silence: the negative and the positive legal fiction (Sect. 1.3). The chapter ends with an overall assessment explaining the lessons to be learned on the basis of the comparative law study (Sect. 1.4).

1.2 THE NATIONAL LEGAL SYSTEMS AS BACKGROUND FOR THE TREATMENT OF TIMELINESS OF THE ADMINISTRATIVE PROCEDURE

1.2.1 *The Context for Understanding Timeliness of Administrative Procedure*

In most countries, administrative silence has been regulated since (deep in) the mid-twentieth century, and in some countries, the development of

this book. More in Venice Commission (2011). In this context, an inactivity (no response at all) and a procrastination (delayed or partial activity) are both seen as maladministration. For more on the differentiation thereof, see the Lithuanian chapter of this book.

administrative silence goes back 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. Originally, neither positive nor negative silence existed within the legal framework. The German Federal Administrative Procedure Act and the Code of Administrative Court Procedure were not influenced by French law or any other foreign legal system. Positive silence, implemented in 2009 in the Federal Administrative Procedure Act, is a product established by EU law. In addition, in Romania, one of the newest Member States of the EU, the regulation of administrative silence is 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 the legal system from positive silence (influenced by EU law) shifting to silent rejection.

1.2.2 The Legal Framework of Administrative Timeliness

In most of the studied jurisdictions, the constitution does not provide *explicitly* for provisions related to timeliness of administrative decisions. General administrative deadlines are not provided in the constitution, nor specific provisions on legal protection against untimely decision-making by government. Most of the time, administrative timeliness is regulated in a general administrative law act or administrative procedure act, usually in combination with sector-specific laws.

In some countries, principles relating to administrative timeliness are laid down in the constitution. For example, the Spanish Constitution contains the principle of effectiveness, which is understood to include the obligation to resolve administrative procedures within a reasonable time. The Portuguese Constitution, in addition to codifying principles that can be associated with administrative timeliness (effective and non-bureaucratic administration), also contains a specific provision to ensure