



LUND UNIVERSITY

Administrative Silence in Swedish Law

Larsson, Torvald

Published in:
Administrative Silence

2023

Document Version:
Publisher's PDF, also known as Version of record

[Link to publication](#)

Citation for published version (APA):
Larsson, T. (2023). Administrative Silence in Swedish Law. In P. Aberastury (Ed.), *Administrative Silence* (1 ed., pp. 411-434). (Ius Comparatum). Intersentia.

Total number of authors:
1

General rights

Unless other specific re-use rights are stated the following general rights apply:
Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Read more about Creative commons licenses: <https://creativecommons.org/licenses/>

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.

LUND UNIVERSITY

PO Box 117
221 00 Lund
+46 46-222 00 00

ADMINISTRATIVE SILENCE IN SWEDISH LAW

Torvald LARSSON

1. Introduction	411
2. The Swedish Administrative Legal System	413
3. Administrative and Judicial Review of the Activities of the Administration	414
3.1. Administrative Review of Administrative Activities	414
3.2. Judicial Review of Administrative Activities	415
3.2.1. Organisation of the Administrative Court System	416
3.2.2. Conditions of Admissibility and the Scope of the Review	417
3.2.3. Administrative-Judicial Appeal	417
3.2.4. Municipal Appeal	420
3.2.5. Legal Review of Governmental Decisions	421
4. General Requirements of the Administrative Procedure Act	422
5. The Supervision of the <i>Justitieombudsmannen</i> and <i>Justitiekanslern</i>	424
6. General Mechanisms and Remedies against Administrative Silence	425
6.1. Introduction	425
6.2. The Provisions in Administrative Procedure Act, Articles 11, 12, and 49	425
6.3. The Delay Action and Review by the Higher Instance Court or Authority	427
6.4. Comments	429
7. Sector-Specific Mechanisms against Administrative Silence	431
7.1. The Refusal Model	432
7.2. The Approval Model	432
8. Conclusions	433

1. INTRODUCTION

This report examines the legal regulation regarding administrative silence in Swedish administrative law. More specifically, it highlights the regulation aimed at preventing administrative silence and the ensuing legal consequences when

administrative silence can be identified, as well as remedies against and other mechanisms to challenge administrative silence. The main aim is to give an overview of the legal instruments used to prevent and challenge administrative silence in Swedish law, and to identify any possible gaps or weaknesses in the system.

Traditionally, the term administrative silence is not used in Swedish law. Instead, Swedish administrative regulation, case law, and literature may refer to the term “measures if processing is delayed” or “delay or passivity in administration”.¹ The content of the terms may be different depending on the legal context in which they are used. However, irrespective of the narrower meaning and consequences of a certain term, the fundamental problem, as well as the aim of the legal remedies, is the same: to prevent and challenge unreasonable processing delays in administration. In the following report, the term “administrative silence” will be used as a general term when referring to administrative inactivity or delay. Depending on the specific legal context, more specific terms may be used.

General legal mechanisms against administrative silence were introduced in Swedish law for the first time with the 2017 Administrative Procedure Act (2017:900) (*förvaltningslagen*, “FL”) that entered into force in 2018. However, even before this Swedish law contained mechanisms that could be used to some extent as instruments to challenge or prevent administrative silence. The first of these that should be mentioned is the legislation regulating administrative procedure in general. This legislation has the overarching aim to promote an efficient and legally secure procedure. A point of departure for administrative processing, according to FL, is that a matter shall be handled as simply, rapidly, and cost-effectively as possible, without neglecting legal certainty (Article 9). Hence, administrative procedure as such could be said to have the aim of being efficient in a manner that prevents administrative silence – while also maintaining the necessary legal certainty. For this reason, any discussion about administrative silence also needs to take into account the general regulation of administrative procedure. Second, prior to the passage of the Administrative Procedure Act, the law already contained sector-specific mechanisms intended as remedies for administrative silence. To a large extent, these mechanisms have been introduced to fulfil the requirements of European secondary legislation. It is also necessary to mention the supervision of the Parliamentary Ombudsmen (*Riksdagens ombudsmän*, often referred to as *Justitieombudsmannen*, “JO”, established in 1809) and the Chancellor of Justice (*Justitiekanslern*, often referred to as “JK”, established in 1713). Although these supervisory bodies are not designed with administrative silence particularly in mind, individuals may turn to them with complaints regarding administrative silence.

¹ See Rune Lavin, “Åtgärder mot långsam handläggning”, *Förvaltningsrättslig tidskrift* (2018), pp. 413–422, p. 413.

Thus, a discussion about administrative silence in the Swedish administrative law of today must consider general rules and legal mechanisms as well as mechanisms and remedies that are constructed with the specific aim of preventing and challenging administrative silence. Further, for an understanding of these rules and mechanisms, the overall administrative structure must be considered. With this in mind, the discussion below has the following outline. First, the report presents a brief, general introduction to the Swedish administrative legal system (section 2) as well as administrative and judicial review of the activities of the administration (section 3). In connection with this, the general legal requirements on Swedish legal administrative procedure are described (section 4). Thereafter, the JO and JK institutions are presented (section 5). These could be described as supervisory mechanisms that can be used to hinder administrative silence, though they are not specifically aimed at doing so. This is followed by a discussion of the general mechanisms and remedies to challenge administrative silence under FL (section 6), and a presentation of some sector-specific legal mechanisms regarding administrative silence (section 7). By way of conclusion, the Swedish mechanisms to challenge administrative silence are summarised and critically discussed (section 8).

2. THE SWEDISH ADMINISTRATIVE LEGAL SYSTEM

Administrative law in Sweden comprises the legal field that regulates the activities of public authorities as well as other bodies carrying out activities within the public sector. Traditionally, this field of law is divided into two parts. On the one hand, general administrative law (*allmän förvaltningsrätt*) covers the common provisions and legal principles that are applicable as default rules for the administration. According to the traditional Swedish understanding, general administrative law also includes administrative court procedure. The main provisions and principles regarding today's general administrative law are found in the 2017 Administrative Procedure Act (2017:900) (*förvaltningslagen*, "FL") that entered into force in 2018. The other aspect of the field is special administrative law (*speciell förvaltningsrätt*), which is an umbrella concept for various rules applicable in special fields. Among other things, special administrative law covers rules regulating public order and public safety law, environmental law, migration law, social welfare law, and education law. Since 1995, Sweden has been a member of the European Union (EU) and has implemented the European Convention on Human Rights (ECHR) as a domestic law. This has had a great impact on both general and sector-specific Swedish administrative law. As has already been touched upon, and as will be shown in the following, rules aimed at preventing and challenging administrative silence are to be found in both general administrative law (see section 6) and in special administrative law (see section 7).

The organisation of public administration under the constitutional framework in Sweden differs from the model that is used in many other countries.² A typical feature of Swedish public administration is its organisation around administrative authorities that constitute separate public bodies, with certain limitations when it comes to governmental steering. The main part of the administrative authorities at State level are organised under the Government, but separately and outside the hierarchy of the ministries (departments). The central administrative authorities at State level include, for example, the Social Insurance Agency (*Försäkringskassan*), the Tax Agency (*Skatteverket*), the Police Authority (*Polismyndigheten*), the Migration Agency (*Migrationsverket*), and the Environmental Protection Agency (*Naturvårdsverket*). In addition to the central State authorities, there are also State authorities at a regional level – so-called administrative boards (*länsstyrelser*), of which there are 21. Further, a large part of the public administration is carried out at the regional or local level by regions (*regioner*) and municipalities (*kommuner*). The legal framework for the regions and municipalities is laid down in the Local Government Act (2017:725). When exercising public authority, however, the regions and municipalities to a large extent follow the rules laid down in FL.

3. ADMINISTRATIVE AND JUDICIAL REVIEW OF THE ACTIVITIES OF THE ADMINISTRATION

3.1. ADMINISTRATIVE REVIEW OF ADMINISTRATIVE ACTIVITIES

Historically, appeal to superior administrative authorities, with the King (and later the Government) as a last instance forum, constituted the main legal remedy for individuals who were not satisfied with an administrative decision. However, during recent decades – not the least under the influence of European Convention on Human Rights (ECHR) and the law of the European Union (EU) – this has changed. Since 1998, the default rule under FL is that administrative decisions are appealed to a general administrative court. In some fields, there are still rules providing for appeal within the administrative system, sometimes with the Government as the final appellate body. However, if ECHR or EU law so requires, it should always be possible to have an administrative decision reviewed by a court. In the subsequent parts of this section, the organisation of the administrative courts as well as main principles regarding judicial review of administrative action will be described.

² Henrik Wenander, "Administrative Constitutional Review in Sweden: Between Subordination and Independence", *European Public Law* 26, no. 4 (2020), pp. 987–1010, p. 993.

3.2. JUDICIAL REVIEW OF ADMINISTRATIVE ACTIVITIES

The Swedish system of judicial review of administrative action as it is organised today has developed over several centuries.³ Back in 1695, the first administrative court in the country – the Chamber Court (*Kammarrätt*) – was established to hear cases in certain administrative fields. The Supreme Administrative Court (*Högsta förvaltningsdomstolen*, originally *Regeringsrätten* – the Government Court) was established in 1909.⁴ The number of administrative courts increased throughout the twentieth century, and in the 1970s, a three-tiered administrative court system was established parallel to the general courts. Through a major administrative law reform in 1971, an Administrative Court Procedure Act (1971:291) (*förvaltningsprocesslagen*, “FPL”) was introduced as well as an Administrative Procedure Act.⁵ Whereas the FPL, with some amendments, is still in force and applied by the administrative courts, the 1971 Administrative Procedure Act was replaced by new laws in 1986 and, most recently, in 2017 (the above-mentioned Administrative Procedure Act (2017:900), *förvaltningslagen*, “FL”).⁶

Hence, during the last decades of the twentieth century, a fully-fledged system of administrative courts in a three-tier hierarchy was established. However, in contrast to many other legal systems in Europe, the jurisdiction of administrative courts in Sweden was not established through a general clause.⁷ As mentioned above, for a long time, the default rule in Swedish administrative law was that administrative decisions could be appealed to superior administrative authorities and, by way of final appeal, to the Government (previously, under the 1809 Instrument of Government, the King in Council, *Kungl. Maj:t i statsrådet*). Only if explicitly stated in the applicable law was it possible to appeal a decision to an administrative court.⁸ It was not until 1998, after pressure from both the

³ For a detailed account of the historical development of the Swedish administrative jurisdiction, see Henrik Wenander, “Geschichte der Verwaltungsgerichtsbarkeit in Schweden” in K.-P. Sommermann and B. Schaffarzik, *Handbuch der Geschichte der Verwaltungsgerichtsbarkeit in Deutschland und Europa* (Springer, Berlin, 2018), p. 1165.

⁴ Lag (1909:38) om Kungl. Maj:ts regeringsrätt (Act on the Royal Supreme Administrative Court). See Prop. (Proposition – Government Bill) 1908:37 as well as SOU (Statens offentliga utredningar – Swedish Government Official Reports Series) 1908:2 Om inrättande af en administrative högsta domstol eller regeringsrätt. Underdånigt betänkande af Hj. L. Hammarskjöld.

⁵ Prop. 1971:30 med förslag till lag om allmänna förvaltningsdomstolar, m.m.

⁶ Prop. 2016/17:180 En modern och rättssäker förvaltning – ny förvaltningslag.

⁷ Cf. Nils Herlitz, “Regeringsrätten mot historisk bakgrund”, *Förvaltningsrättslig tidskrift* (1959), pp. 8–92, p. 88; Karl-Peter Sommermann, “Das Recht auf effektiven Rechtsschutz als Kristallisationspunkt eines gemeineuropäischen Rechtsstaatsverständnisses” in F. Kirchhof, H.-J. Papier and H. Schäffer, *Rechtsstaat und Grundrechte. Festschrift für Detlef Merten* (C.F. Müller Verlag, Heidelberg, 2007), pp. 443–461, p. 450.

⁸ See Magnus Sjöberg, “Den långa vägen till en generell regel om domstolsprövning av förvaltningsbeslut”, in G. Regner et al., *Festschrift till Hans Ragnemalm* (Juristförlaget, Lund, 2005), p. 293.

ECtHR and the EU, that Sweden introduced a default rule about judicial review of administrative decisions; since the 1998 legislative reform, the main rule under FL is now that decisions are appealed to a general administrative court, if nothing is stated in an act of law or a governmental ordinance to the contrary. If the ECHR or EU law so requires, decisions may be challenged in a court, even if national provisions prohibit judicial review.⁹

3.2.1. Organisation of the Administrative Court System

The organisation of the administrative courts is laid down in the General Administrative Court Act (1971:289). There are 12 general administrative courts of first instance, known as Administrative Courts (*förvaltningsrätt*). The second instance court is called the Administrative Court of Appeal (*Kammarrätt*, the same name as the old court, although the court now has a partly different function). There are four administrative courts of appeal. The final instance court in the system of general administrative courts is the Supreme Administrative Court, which is designed primarily to give guidance to the lower instance court through precedents (although these precedents are not formally binding).

In addition to the administrative courts, a number of so-called appeals boards hear appeals on decisions in specific administrative matters. These appeals boards serve as the final appellate court within their respective areas and are normally chaired by ordinary or former judges. Even though these appeals boards count as administrative bodies within the Swedish constitutional system, they often qualify as courts or tribunals under EU law and the ECHR.¹⁰ This means the requirement for availability of judicial review, stemming from EU law and the ECHR, can be fulfilled even when there is no legal possibility to challenge the decision of an appeals board before a general administrative or other court.

The general courts system operates in parallel to the system of general administrative courts. Because there are no mechanisms for resolving conflicts of competence between the two kinds of courts, both positive and negative conflicts of competence may arise. The right to judicial review under the ECHR and EU law has created particular challenges in this respect.¹¹

⁹ Prop. 1997/98:101 Översyn av förvaltningsprocessen; en allmän regel om domstolsprövning av förvaltningsbeslut m.m. See Wiweka Warnling Conradson, *En introduktion till förvaltningsrätten* (13th edition, Norstedts Juridik, Stockholm, 2020), p. 102 ff.; Torvald Larsson, *Domstolsprövning av förvaltningsbeslut. Svensk, dansk och österrikisk rätt i komparativ belysning* (doctoral thesis, Lund University, Mediatryck, 2020), p. 182 ff.

¹⁰ See, among others, C-407/98 *Abrahamsson and Anderson v. Fogelqvist*, EU:C:2000:367; ECtHR, *Rolf Gustafson v. Sweden*, Judgment of 1 July 1997, Application No. 23196/94; HFD (*Högsta förvaltningsdomstolens årsbok* – The Yearbook of the Supreme Administrative Court) 2015 ref. 6. See Wiweka Warnling Conradson, *En introduktion till förvaltningsrätten* (13th edition, Norstedts Juridik, Stockholm, 2020), p. 106.

¹¹ Prominent cases in this respect are NJA (*Nytt juridiskt arkiv* – the Yearbook of the Supreme Court) 1994 s. 657; RÅ (*Regeringsrättens årsbok* – The Yearbook of the Supreme Administrative

3.2.2. Conditions of Admissibility and the Scope of the Review

As described above, the Swedish system for judicial review of administrative action has developed over time. There is no *general* rule in the Constitution that guarantees access to a court in administrative law disputes.¹² However, such a guarantee follows indirectly from the reference to ECHR and to EU (Chapter 2 Article 19 and Chapter 1 Article 10 of the Instrument of Government, respectively).¹³ The question of whether a certain administrative measure may be challenged in a court depends on the form of appeal or review procedure that is available. This, in part, depends on (among other things) the public body that has made the decision – the Government, a state administrative authority, a municipal authority, or a legal entity under private law – as well as what is stated in applicable legislation and the requirements that follow from the ECHR and EU law.¹⁴

There are three distinct types of proceedings through which an administrative decision may be challenged in judicial review: so-called administrative-judicial appeal, municipal appeal, and legal review of governmental decisions. Both the conditions of admissibility and the scope of review differ somewhat among these proceedings, which has to do with their partly differing functions. It is important to note that there is no choice between the different procedures; the applicable legislation determines the kind of procedure that will apply for the appellant. The following sub-sections describe each type of review mechanism.

3.2.3. Administrative-Judicial Appeal

For decisions that may be challenged with an administrative-judicial appeal, a number of conditions of admissibility must be met. First, the appeal must be lodged in the correct forum. As mentioned above, the default rule under FL is now that the general administrative court is competent to hear a case of administrative-judicial appeal. However, provisions in special legislation could prescribe that a decision should instead be appealed to a superior administrative authority – sometimes with the Government as a final appellate body – or a

Court) 1995 ref. 58; and RÅ 1997 ref. 65. See, among others, Wiweka Warnling Conradson, *Rätten till domstolsprövning & rättsprövning* (3rd revised edition, Jure, Stockholm, 2008), p. 248 ff.; Lena Marcusson, "Verwaltungsgerichtsbarkeit in Schweden", in A. von Bogdandy et al., *Handbuch Ius Publicum Europaeum Band VIII Verwaltungsgerichtsbarkeit in Europa: Institutionen und Verfahren* (C.F. Müller, Heidelberg, 2019), pp. 543–600, p. 561 f.

¹² See Lena Marcusson, *ibid.*, p. 574 f.

¹³ In addition, however, Chapter 2 Article 9 of the Instrument of Government contains a right to access to court in situations where "a public authority other than a court of law has deprived an individual of his or her liberty on account of a criminal act or because he or she is suspected of having committed such an act."

¹⁴ See Wiweka Warnling Conradson, *En introduktion till förvaltningsrätten* (13th edition, Norstedts Juridik, Stockholm, 2020), p. 102 ff.

so-called appeals board. In these situations, the administrative court is not competent to hear the case. If a provision in special legislation contravenes the right to judicial review according to either the ECHR or EU law, this provision must be set aside.¹⁵

A second admissibility condition is that the decision must be appealable in the first place. This necessitates some remarks. First, only administrative *decisions* may be appealed. Hence, so-called factual actions (*faktisk förvaltningsverksamhet*) cannot be the object of an appeal. Here, an administrative decision is understood to be a written statement by a public body aiming to affect someone's existing circumstances. The formal requirements are not very high. In a prominent case (RÅ 2004 ref. 8, often referred to as the "Olive Oil case"), the Swedish Food Agency (*Livsmedelsverket*) had sent out an unsigned document entitled "Information" to local authorities and other actors within the food sector, warning against use of certain olive oil products. Moreover, the authority had sent out a press release and published some additional information on its own web page. After an appeal from one of the olive oil producers, the Supreme Administrative Court concluded that while the information from the authority was not legally binding, the "conglomeration" of utterances from the authority had such effects that, together, they constituted an administrative decision that could be assessed by the Court. In line with this pronouncement, the Supreme Administrative Court has allowed in a number of cases that more informal activities by administrative authorities may be subject to judicial review.¹⁶ As mentioned above, the condition that only administrative decisions may be appealed means that administrative delay as such cannot be challenged before an administrative court, if there is no administrative decision. However, this is something that the new general rules regarding administrative delay aim at making up for (see section 6 below). Second, only *individual* administrative decisions may be appealed.¹⁷ General administrative acts may be appealed only if such an appeal is permitted according to provisions in special legislation. Third, not all individual administrative decisions may be subject to appeal. As the Swedish system is constructed, the basic idea is that only decisions of a certain importance may be appealed. In recent decades, both the ECHR and EU law have contributed to an expansion of the concept of appealable decisions. According to the current general provision on appealability laid down in FL, decisions that are likely to affect a person's situation in a not insignificant manner may be appealed.¹⁸ This could be the case if the decision is legally binding. However,

¹⁵ Johan Lundmark and Mathias Säfsten, *Förvaltningslagen. En kommentar* (Norstedts Juridik, Stockholm, 2020), p. 292 ff.

¹⁶ See, among others, RÅ 2007 ref. 7 and HFD 2018 ref. 23. See also Ulrik von Essen et al., *Förvaltningsrättens grunder* (Norstedts Juridik, Stockholm, 2020), p. 269 ff.

¹⁷ See SOU 2010:29 *En ny förvaltningslag* p. 638.

¹⁸ Article 41 of FL.

a non-binding decision may also be appealable, provided that it has personal or economic consequences that are palpable. As the case law has developed, it is the factual rather than legal effects that determine whether a decision is appealable.¹⁹ Still, because FL is subsidiary to contravening provisions in both acts of law and governmental ordinances (Article 4 of FL), provisions in special legislation could stipulate that certain decisions should not be appealable, even if they are likely to affect a person's situation in a not insignificant manner. The underlying motive for this kind of ban on appeals could be, inter alia, that the decision-making authority has a certain expert knowledge or that, for economical or practical reasons, the legislative powers want to reduce the workload of the administrative courts or other appeal bodies.²⁰ In some cases, the decisions are considered to be of such a discretionary nature that they are not regarded as suitable for review in a court.²¹ This could be seen as surprising, since exactly such discretionary decisions may be especially relevant for judicial review.²² If an appeal ban contravenes either the ECHR or EU law, it should be set aside.²³ However, in some cases, the appeal ban could be upheld, if the right to effective judicial review could instead be fulfilled through an action in a general court – such as an action for damages against the State.²⁴

As a third condition of admissibility, the party appealing a decision must have standing (*klagorätt* or *talerätt*). According to the general rule under FL, a person has standing if the decision concerns him or her and he or she is adversely affected by the decision. If the appellant is a party to the matter under the administrative authority, he or she is clearly concerned in the decision in a way that gives him or her standing if the decision is contrary to his or her interests. However, individuals who are not parties to the administrative matter may also have standing if these two criteria are met. The Supreme Administrative Court has elaborated further on the meaning of the two requirements, and both the ECHR and EU law have contributed to expanding the circle of persons who are considered to have standing.

A fourth condition of admissibility is that the letter of appeal must be delivered within the prescribed timeframe. According to the general rule under

¹⁹ See RÅ 2004 ref. 8; RÅ 2007 ref. 7 and HFD 2018 ref. 23.

²⁰ Håkan Strömberg and Bengt Lundell, *Allmän förvaltningsrätt* (27th edition, Liber, Malmö, 2018), p. 204; Hans Ragnemalm, *Förvaltningsprocessrättens grunder* (10th edition, Jure, Stockholm, 2014), p. 162.

²¹ See SOU 2010:29 p. 133 f.; Prop. 2016/17:180 p. 40.

²² See Torvald Larsson, *Domstolsprövning av förvaltningsbeslut. Svensk, dansk och österrikisk rätt i komparativ belysning* (Lund University, Mediatryck, 2020), p. 195 ff.

²³ Prop. 2016/17:180 En modern och rättssäker förvaltningslag – ny förvaltningslag p. 45; Johan Lundmark and Mathias Säfsten, *Förvaltningslagen. En kommentar* (Norstedts Juridik, Stockholm, 2020), p. 292.

²⁴ Cf. HFD 2012 ref. 29. See Wiweka Warnling-Nerep, "Att överklaga förvaltningsbeslut – innefattar det verkligen några problem?", *Förvaltningsrättslig tidskrift* (2016) Nr. 2, pp. 279–302, p. 296 f.

FL, it must be delivered to the authority within three weeks from the date when the appellant was notified of the decision.²⁵ If an appeal is not made within this timeframe, the decision becomes final. A final decision may be quashed only if a re-opening of the case (*resning*) or a restoration of expired time (*återställande av försutten tid*) is allowed, which requires the existence of extraordinary reasons for reconsidering the matter owing to special circumstances or circumstances that constitute a valid excuse in the case at hand.²⁶

If all the admissibility criteria are met, the court (or other competent review body) shall decide on the case. The nature of the administrative-judicial appeal is that the reviewing body, irrespective of whether it is an administrative court or other public body, has the same decision-making power as the deciding administrative authority. This means that the court may carry out an all-round assessment of the appealed decision, including matters of legality as well as suitability or reasonableness. There is no part of administrative discretion that the reviewing court (or other reviewing body) may not scrutinise. If the administrative court finds that a decision is either illegal or unsuitable, it may change it or replace it with its own decision.²⁷

3.2.4. Municipal Appeal

The conditions for admissibility regarding the second type of review – the municipal appeal – are in some ways less complex. If there are special legislative provisions on appeal, administrative decisions made by municipal bodies are appealable under the administrative-judicial appeal described above. Otherwise, when there are no special provisions regarding appeal, all decisions made by either the directly elected municipal assemblies (*fullmäktige*) or the politically appointed administrative boards of the municipalities (*nämnder*) may be appealed to the general administrative court under the rules on municipality appeal in Chapter 13 of the Local Government Act ((2017:725), *kommunallagen*, “KL”). The only exceptions here are decisions of a purely preparatory or purely executive nature. A purely preparatory decision could be a decision to raise a case in the directly elected municipal assemblies; a purely executive decision could be a decision to charge a fee that is based on a rate already adopted by the directly elected municipal assemblies. The appeal letter should arrive at the

²⁵ Article 44 of FL.

²⁶ Articles 37 b and 37 c of FPL.

²⁷ Jesper Blomberg and Patrik Södergren, *Förvaltningsprocesslagen. En kommentar* (Norstedts Juridik, Stockholm, 2020), p. 89; Håkan Strömberg and Bengt Lundell, *Allmän förvaltningsrätt* (27th edition, Liber, Malmö, 2018), p. 226; Hans Ragnemalm, *Förvaltningsprocessrättens grunder* (10th edition, Jure, Stockholm, 2014), p. 201. See also Henrik Wenander, “Full Judicial Review or Administrative Discretion? A Swedish Perspective on Deference to the Administration” in G. Zhu (ed.), *Deference to the Administration in Judicial Review*, Ius Comparatum – Global Studies in Comparative Law vol. 39 (Springer, Cham, 2019), p. 405 ff.

administrative court within three weeks from the day that the finalised decision was announced on the municipal digital notice board, which shall be made available on the Internet. Regarding standing, KL, Chapter 13, Article 1 clearly specifies that all members of a municipality or region may appeal a decision. In comparison with administrative-judicial appeals, the grounds for review and the powers of the reviewing court are more limited. A decision appealed under Chapter 13 KL shall be quashed if it has not been duly prepared, if it refers to a matter outside the competence of the municipality, if the deciding body has exceeded its powers, or if the decision is otherwise contrary to a legislative or other statutory provision. A feature of the municipal appeal is that the administrative court may not substitute another decision for an appealed decision that is found to be illegal; the court may either quash the decision or dismiss the appeal.

3.2.5. *Legal Review of Governmental Decisions*

As mentioned above, the current default rule is that administrative decisions that may be appealed shall be appealed to a general administrative court. However, situations remain where the applicable legislation designates the Government as either the final appellate body or the only deciding forum in certain administrative matters. These situations occur when the legislator has perceived that a political perspective is required in the balancing of interests in the decision-making.²⁸ Decisions by the Government are not appealable under the FL, because the FL does not apply to the Government. To comply with the right to a fair trial under the ECHR, while retaining the role of the Government as the last instance of appeal in certain fields, an Act on Legal Review of Certain Governmental Decisions (*Lag om rättsprövning av vissa regeringsbeslut* (2006:304), "RPL") has been introduced. This law provides the possibility for an individual to challenge a governmental decision in an individual matter before the Supreme Administrative Court, provided that the decision concerns the civil rights and obligations of the individual under Article 6(1) of the ECHR. The judicial review under RPL is limited to matters of legality. According to the case law of the Supreme Administrative Court, the legality review comprises questions relating to pure interpretation of the law. In addition, the review also comprises such issues as fact assessment and evaluation of evidence, as well as the question of whether the decision is contrary to the requirements of objectivity, impartiality, and equality of all before the law. The assessment also includes procedural errors that may have affected the outcome of the case. If the applicable legal rules are designed to allow a certain freedom of action (discretion) in the decision-making, the judicial review includes the

²⁸ See Prop. 2005/06:56 En moderniserad rättsprövning, m.m. p. 10.

question of whether the limits of that freedom of action (discretion) have been respected.²⁹ If the Supreme Administrative Court concludes that the decision at issue is contrary to the law, the Court must quash the decision. If necessary, the case shall be remanded to the Government. An application for legal review of a governmental decision must have been received by the Supreme Administrative Court no later than three months from the date of the decision.³⁰

4. GENERAL REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT

The main rules and principles of the Swedish law on administrative procedure were developed during the twentieth century in the case law of the Supreme Administrative Court (founded in 1909). Other important contributors for the legal development were administrative legal scholarship and statements of the JO (see below, section 5). The Administrative Procedure Acts of 1971 and 1986 codified parts of the main principles developed over the years. The Administrative Procedure Act of today, FL, includes further codifications plus some new provisions, among which are the general remedies against administrative silence (see below, section 6).

As a default rule, FL applies to all administrative authorities and to the handling of administrative matters in the courts. Regarding the regions and municipalities, certain aspects of their activities are instead regulated by the Local Government Act (KL). An important factor here is that special provisions take precedence over the provisions in FL. Hence, sector-specific provisions – including provisions in governmental ordinances and provisions stemming from EU legislation – may deviate from the general rules in FL, for example when it comes to time limits and available legal remedies.

The bulk of FL deals with the handling of matters (*ärenden*), a central concept in Swedish administrative law. The concept of “handling of matters” refers to the activities aimed at issuing an administrative decision (*förvaltningsbeslut*), such as a statement of the authority’s conclusion in a particular case. The category of administrative decisions is divided from other forms of administrative activity; these include so-called purely administrative activities or factual actions (*faktiskt förvaltningshandlande*), for example public employees providing healthcare, operation of public-transport vehicles, or teaching.

When it comes to the handling of matters, FL lays down some general requirements addressing what could be described as the fundamental balance

²⁹ See HFD 2011 ref. 10 with reference to the preparatory works of the predecessor to the 2006 act, the Act on Legal Review on Certain Administrative Decisions, SFS 1988:205: Prop. 1987/88:69 pp. 23–25 and p. 234.

³⁰ Article 4 of RPL.

between efficient administration and legal certainty in individual matters. According to Article 9 of FL, all matters shall be handled as simply, rapidly, and cost-effectively as possible, without neglecting legal certainty. An important provision regarding the service performed by the administration is found in Article 6, which states that an authority shall ensure that contacts with private persons are smooth and simple. The authority shall give private persons the assistance they need to look after their interests. Assistance shall be given to the extent that is deemed appropriate with regard to the nature of the question, the private person's need of assistance, and the activities of the authority, and shall be given without unnecessary delay.

An administrative matter may be lodged on the initiative of either an individual or an authority, for example as an application, notification, or other type of request. The following text will focus on the situation where a matter is initiated by an individual physical or legal person. As shown below, the rules regarding administrative silence are applicable only in these situations.

A petition from an individual shall contain the name and contact details of the applicant as well as the action desired from the authority and the grounds for this (Article 19 of FL). According to the so-called service duty of the authority, as well as the normal lack of legal representation in administrative matters, the authority shall assist the individual in requesting clarification (Article 6 of FL).

For a matter to become the object of material consideration by an authority, a number of preconditions must be met. In return, if these criteria are met, the authority must decide on the matter. Hence, in these cases, the authority is allowed to conclude the matter only after issuing a decision that decides the matter.³¹

The first precondition that must be met for making a matter the object of material consideration is that the correct forum must be approached. The rules regarding correct forum are normally found in applicable special legislation or in the instructions of the authority. If it is clear that a matter falls within the sphere of competence of another authority, the administrative authority must advise the individual as to the appropriate course of action. This should normally take the form of the authority passing the document directly to the correct authority, while also informing the individual of this transfer. The second precondition is that the person who initiates the matter must have *locus standi*. Regarding an application from an individual, it will normally be the object of material consideration if the application concerns the individual him or herself. Further, as a third precondition, the application must be lodged within any prescribed timeframes. A fourth precondition is that the matter has not already

³¹ See Hans Ragnemalm, *Administrative Justice in Sweden* (Juristförlaget, Stockholm, 1991), p. 174.

been decided with legal force, and a fifth is that the matter shall not already be pending with an authority (*lispensens*).³²

5. THE SUPERVISION OF THE *JUSTITIEOBUDSMANNEN* AND *JUSTITIEKANSLERN*

Two institutions of importance for the supervision of the Swedish public administration are the Chancellor of Justice (*Justitiekanslern*, “JK”, established 1713) and the Parliamentary Ombudsmen (*Riksdagens ombudsmän*, or *Justitieombudsmannen*, “JO”, established 1809), both regulated in the Instrument of Government. Whereas the JK represents the Government, and the JO represents the Parliament (the *Riksdag*), both institutions have the task of supervising administrative authorities as well as courts at all levels. The main aim is to ensure that public bodies comply with acts of law and other statutes.³³

As supervisory organs, the main function of the JK and the JO is to make statements regarding the activities of the administrative authorities. They may issue statements in individual matters as well as from a systemic perspective. Most often, they start investigations after complaints from individuals. However, they may also initiate supervisory proceedings of their own accord.³⁴

Importantly, the JK and the JO do not constitute appeal bodies. Individuals can claim no right to an investigation, and neither institution may alter or annul administrative decisions. While the statements of the JK and the JO are not legally binding, they are nevertheless thought to have a strong impact on the behaviour of the public authorities. The decisions of the JO in particular play an important role in forming the legal framework for the administrative authorities. The JO may address issues which normally are not assessed by the courts.³⁵

In addition to their supervisory role, the JO and JK may initiate criminal proceedings before a general court regarding official misconduct (*tjänstefel*).

A matter to be mentioned here is that proposals to introduce general remedies against administrative silence have often been dismissed with reference to the JO’s existing supervision of the administration. However, these arguments against general remedies regarding administrative silence could be seen as rather misleading. As mentioned, the JO may never meet an individual’s claim to receive

³² See Ulrik von Essen et al., *Förvaltningsrättens grunder* (Norstedts Juridik, Stockholm, 2020), p. 156 ff.

³³ Lena Marcusson, “Grundzüge des Verwaltungsrechts in gemeineuropäischer Perspektive: Schweden”, in A. von Bogdandy, S. Cassese and P.M. Huber, *Handbuch Ius Publicum Europaeum Band V Verwaltungsrecht in Europa: Grundzüge* (C.F. Müller, Heidelberg, 2014), pp. 631–669, p. 655 and p. 664 f.

³⁴ Lena Marcusson, *ibid.*, p. 655 f.

³⁵ Lena Marcusson, *ibid.*, p. 655 f.

a decision within a reasonable time. Of course, a threat of possible action on the part of the JO could sometimes speed up the handling of a matter. However, as also mentioned, an individual cannot claim the right to an investigation by the JO. For this reason, it is difficult to argue that the existence of the JO could fully compensate for a lack of effective remedies against administrative silence.³⁶

6. GENERAL MECHANISMS AND REMEDIES AGAINST ADMINISTRATIVE SILENCE

6.1. INTRODUCTION

As has been mentioned above, before the entering into force of FL in 2018, Swedish administrative law contained sector-specific remedies regarding administrative silence (see below, section 7). However, with FL of 2017, the legislator introduced general rules with the specific aim of preventing administrative delay. The rules were introduced in Articles 11 and 12, under the heading of “Measures to be taken when processing is delayed”. The provisions in these sections are addressed to both the decision-making authority and to the individual concerned. The provisions require that the authority informs the individual about significant delays in the decision-making and offer the individual concerned the means to act when the decision-making authority is delayed.

6.2. THE PROVISIONS IN ADMINISTRATIVE PROCEDURE ACT, ARTICLES 11, 12, AND 49

A point of departure when the provisions regarding administrative silence were constructed was that the new remedy should fit into the traditional Swedish constitutional and administrative structure. For this reason, the legislator did not develop a model whereby administrative silence can lead to a negative or positive fictitious decision, as is often the case when EU secondary law has been implemented in national law (see below, section 7). Instead, the legislator chose a model where an administrative authority that is delayed in its decision-making may be forced to decide the case by means of a request. A decision to reject a request for the case to be decided may be appealed in a regular way. With this construction, the Swedish legal tradition could be upheld where only real administrative decisions may be challenged in an administrative court (see above, section 3.2). Thus, the system fits into the traditional constitutional and

³⁶ Cf. Rune Lavin, “Åtgärder mot långsam handläggning”, *Förvaltningsrättslig tidskrift* (2018) Nr. 3, pp. 413–422, p. 414 f.

administrative structure. However, the remedy is perhaps not as forceful as equivalent remedies in some other countries.³⁷

The provisions in Articles 11 and 12 apply only in matters initiated by a private party. Hence, they do not apply when the matter has been initiated by a public body or the decision-making authority has initiated the matter *ex officio*. Further, the provisions in Articles 11 and 12 apply only when a matter is dealt with by the authority in the first instance. Hence, the provisions are not applicable when a higher level body hears an appeal.

Article 11 of FL is addressed to the decision-making authority. The provision in this article states that if an authority judges that the determination of a matter initiated by a private party will be substantially delayed, the authority must notify the party. The provision in Article 11 of FL applies only when the determination of a matter is *substantially* delayed. Hence, it is not necessary for an authority to provide information about each delay that has occurred. There are no clear guidelines regarding when a matter should be considered substantially delayed, but the authority needs to make an assessment based on the circumstances in the individual case, such as the complexity of the matter and the number of parties involved.³⁸ The notification may be either written or verbal, depending on what appears to be most appropriate in the individual case. The notification must include an account of the reasons for the delay. This means that the authority must explain to the individual why the case cannot be expected to be decided within the timeframe that the party could reasonably have expected. Regarding how detailed the explanatory statement must be, one should take into account the purpose of the provision – to avoid unnecessary irritation about the delay, and to provide the necessary information so that the individual can plan accordingly while waiting for the decision.³⁹ It should be noted that the notification does not constitute a decision that may be appealed. If the individual is not satisfied with the information given in the notification, he or she may use the action for delay regulated in Article 12, provided that certain preconditions are met.

Hence, the actual delay action (*dröjsmålstalan*) is regulated in Article 12 of FL. This action allows the individual to speed up the final determination of the matter. The provision in Article 12 states that if a matter initiated by a private party has not been determined in the first instance within six months, that party may make a written request that the authority shall determine the matter. When an authority receives such a request, it shall either determine the matter

³⁷ For an overview of other remedies against administrative silence in other European countries, see Dacian C. Dragos, Polonca Kovač and Hanna D. Tolsma (eds.), *The Sound of Silence in European Administrative Law* (Palgrave Macmillan, Springer Nature Switzerland, 2020).

³⁸ See Ulrik von Essen et al., *Förvaltningsrättens grunder* (Norstedts Juridik, Stockholm, 2020), p. 136.

³⁹ Prop. 2016/17:180 pp. 296 and 111.

or refuse the request in a separate decision within four weeks of the day on which the request was received (Article 12 paragraph 1 of FL). An authority's decision to refuse a request to decide on the matter (a refusal decision) may be appealed to the court or administrative authority that is competent to examine an appeal of the determination of the matter (Article 12 paragraph 2 of FL). A party may request an authority's examination under Article 12 paragraph 1 on one occasion only during the processing of the matter (Article 12 paragraph 3 of FL). Provisions regarding the higher instance body's measures are found in Article 49 of FL. According to Article 49 paragraph 2, the decision of the higher instance body may not be appealed.

Thus, a request that the authority shall determine the matter may be made six months from the day that the matter was initiated, at the earliest. According to the legislative materials (*travaux préparatoires*), this period of six months is supposed to strike a fairly good balance between the interest in strengthening individuals' opportunities to speed up the procedure in an individual case on the one hand, and on the other, the interest of predictability – and that the authorities' resources should not be used to review procedural issues without genuine reasons to do so.⁴⁰

6.3. THE DELAY ACTION AND REVIEW BY THE HIGHER INSTANCE COURT OR AUTHORITY

As mentioned, if a matter initiated by a private party has not been determined in the first instance within six months, the party may make a written request, asking that the authority determine the matter. The authority then has four weeks to make a final decision in the matter or reject the request. The rationale for this time limit is to give the authority realistic possibilities to conclude the proceedings and make a final decision in the matter that is pending.⁴¹ However, if the authority is not able to conclude the matter within the four weeks, it must, within the same timeframe, issue a formal refusal decision regarding the request. There are no specific formal requirements regarding this kind of refusal decision; it may be either written or verbal. However, according to the general provision in Article 32 of FL, the decision to refuse shall include grounds for the decision. This means that the authority must explain to the individual, in a clearly understandable way, why the matter cannot yet be decided. If possible, the authority should also supplement the justification with information about when the case *can* be expected to be decided. A well-written explanatory statement is

⁴⁰ Prop. 2016/17:180 p. 121.

⁴¹ Prop. 2016/17:180 p. 122.

in practice of particular importance, as it may play a crucial role in a subsequent appeal procedure.

As has been stated, a decision of the authority to refuse a request to decide on the matter (a refusal decision) may be appealed to the court or administrative authority that is competent to examine an appeal of the determination of the matter. Hence, it is only possible to appeal the refusal decision when a court or administrative authority would be competent to examine an appeal of the determination of the matter. It is the administrative-judicial appeal that is referred to in this context (see above, section 3.2.3). As a main principle, a decision may be appealed to a general administrative court if the decision can be assumed to affect some person's situation in a not insignificant way (Articles 40 and 41 in FL). However, special legislation may state either that a decision may not be appealed or that an appeal of the determination of the matter shall be examined by the Government. Special legislation may contain so-called appeal bans, not least regarding certain discretionary decisions.⁴² Hence, for some discretionary decisions, it is not possible to appeal the refusal decision. The Government does not count as an administrative authority under Swedish law. Hence, if the Government is the entity competent to examine an appeal of the determination of the matter, it is not possible to appeal the administration's refusal decision.

It is worth re-stating that it is the authority's *decision to refuse a request to decide on the matter* that may be appealed under Article 12, not the decision on the matter as such.

As described, Article 49 of FL regulates the review by the higher instance court or authority. The provision in this section states that if the reviewing court or administrative authority grants an appeal of a refusal decision referred to in Article 12, paragraph 2, the reviewing court or administrative authority must order the refusing authority to determine the matter to which the appeal refers as soon as possible or within the period decided by the higher instance body. The law does not state the grounds on which the competent court or administrative authority may grant an appeal of a refusal decision. However, according to the legislative materials, the review by the higher instance body aims at clarifying whether the reasons presented by the decision-making authority for not deciding on the matter are acceptable. In its examination, the higher instance authority or court may consider whether the matter has been handled as effectively as is justified and whether any interruptions in the proceedings can be considered acceptable. To make such an assessment, the higher instance body normally requires access to the authority's case file. It is difficult to state a rule of thumb for what should constitute an "unreasonable" delay. A delay will often be considered unreasonable if the decision in a case has been delayed due to circumstances

⁴² See Torvald Larsson, *Domstolsprövning av förvaltningsbeslut* (Lund University, 2020), p. 195 ff.

resulting from the authority's measures or failure to act, and the delay is of more than minor importance. However, not every delay during administrative processing is to be considered unreasonable. Further, a "reasonable" amount of time in one case may be unreasonable in another. The higher instance authority or court must make an assessment based on the circumstances of the individual case and consider, among other things, the nature and scope of the case and the complexity of the issues. Delays that are attributable to the individual's own actions can often be a valid reason to delay the decision.⁴³

Thus, if the higher instance body considers that the authority has unnecessarily delayed decision-making, it must grant the appeal. The court or administrative authority must then order the authority that issued the refusal decision to determine the matter to which the appeal refers as soon as possible or within the period decided by the higher instance. If the higher instance entity judges that the case is ready for a decision, the starting point should be that the authority is ordered to decide the case within a certain time limit, for example four weeks. If the case is not judged to be ready for a decision, and it is not possible to determine with certainty when the case can be ready for decision, the higher instance entity should instead order the authority to decide the case as soon as possible.

6.4. COMMENTS

Regarding the general mechanisms and remedies against administrative silence presented above, the following aspects must be highlighted.

A precondition for having the administrative delay examined by a higher instance authority or court is, according to Article 12 of FL, that the decision-making authority must first issue a formal refusal decision. This means that an administrative authority can avoid judicial control by remaining passive. This must be regarded as a weakness in the regulation.⁴⁴ Further, in legal practice, the way in which administrative authorities have made their refusal decisions according to Article 12 of FL has been questioned.

In December 2021, the Parliamentary Ombudsmen (JO) criticised the Swedish Migration Agency (*Migrationsverket*) for its application of the regulation in Article 12 of FL. The critique concerned the application of the article in connection with matters on citizenship. During the period up

⁴³ Prop. 2016/17:180 pp. 123–125 and p. 338; Johan Lundmark and Mathias Säfsen, *Förvaltningslagen. En kommentar* (Norstedts Juridik, Stockholm, 2020), p. 339 f.

⁴⁴ Cf. Ulrik von Essen et al., *Förvaltningsrättens grunder* (Norstedts Juridik, Stockholm, 2020), 2020, p. 139. See also Olle Lundin, "2018 års förvaltningslag, några observationer av det mer ovanliga slaget", in H. Eklund, L. Lerwall and A.-S. Lind (eds.), *Vänbok till Sverker Scheutz* (Iustus, Uppsala, 2020), pp. 487–498, p. 489 f.

to 31 October 2020, the Migration Agency had received more than 80,000 delay actions regarding delays in citizenship matters. This accumulation of cases had meant a significant increase in the administrative burden of the authority. Until 31 August 2021, the Swedish Migration Agency handled the requests through an automated procedure, meaning that all refusal decisions looked the same. The Parliamentary Ombudsmen noted that the automated handling of delay proceedings did indeed mean that the Swedish Migration Agency issued formal refusal decisions within the prescribed time of four weeks. However, the enquiry of the Ombudsmen also showed that the process did not take into consideration the circumstances in the individual case. Instead, the outcome, which was decided in advance, was always that the request was rejected. For this reason, the Ombudsmen noted that the individual did not get the kind of effective remedy that the legislator had had in mind while drafting the legislation. Further, these automatically made refusal decisions did not include sufficient grounds for the decision. The authority did not explain to the individual, in a clearly understandable way, why the matter could not yet be decided. Thus, the refusal decisions did not meet the requirements that administrative decisions must include grounds for the decision (Article 32 of FL). The Ombudsmen concluded that the Migration Agency's handling of the matter did not accord with the purpose of the legislation. After the critique from the Ombudsmen, the Migration Agency now handles requests regarding delays in the administration in a different way.⁴⁵

From the field of migration law, one can also find examples of judgments from administrative courts stating that the Migration Agency has been substantially delayed in its decision-making.⁴⁶ Because the decisions of the administrative courts (or administrative authorities) regarding delay actions may not be appealed, there are no precedents from the Supreme Administrative Court.

When an individual appeals against the refusal decision to the higher instance authority or court, the higher instance has the competence only to examine the *delay* of the inferior authority. As mentioned above, if the higher instance body finds that there has been an unreasonable delay and therefore grants an appeal, it shall order the refusing authority to determine the matter to which the appeal refers as soon as possible or within the period decided by the higher instance authority or court. It must be assumed that the authorities will comply with such orders. However, there is no legal mechanism that can ensure this compliance. According to draft legislation presented by the Freedom and Rights Committee (*Fri- och rättighetskommittén*), the administrative court should itself have the

⁴⁵ See the decision of the Parliamentary Ombudsmen on 10 December 2021, case no. 6744-2020.

⁴⁶ See, among others, the judgment of the Administrative Court in Stockholm of 5 December 2018, case no. UM 13495-18.

authority in some situations to decide on the matter if the original authority does not obey the order. However, this proposal was never realised.⁴⁷ In this context, it may be noted that historically, municipalities, among others, have sometimes been defiant when it comes to obeying rulings of the administrative courts.⁴⁸ A more effective method probably would have been to allow the reviewing court or administrative body itself – after a certain period of time – to decide the matter.

Further, it may be noted that it is only possible to appeal the decision to refuse a request to decide on a matter when a court or administrative authority would be competent to examine an appeal against the determination of the matter. As has been shown above, this is the case for most administrative matters. However, the lack of a possibility to bring a delay action in cases where there is a so-called appeal ban (such as for some discretionary decisions) must be seen as a weakness.

As has also been mentioned, the decision of the higher instance body regarding the review of the refusal decision may not be appealed (Article 49 paragraph 2 of FL). A consequence of this is that such matters will never reach the Supreme Administrative Court. For this reason, the Supreme Administrative Court will not be able to give guidance to the lower instance entities concerning the question of what should constitute an unreasonable delay in administration.⁴⁹

7. SECTOR-SPECIFIC MECHANISMS AGAINST ADMINISTRATIVE SILENCE

As has been pointed out, Swedish special legislation contained sector-specific remedies against administrative silence, especially in the financial field, already before the 2017 FL entered into force. A common feature of these provisions is that they have been created to meet the requirements stemming from EU secondary legislation.⁵⁰ From the perspective of the legal consequences, these remedies may be divided into two categories, which may be referred to as the refusal model and the approval model. The following section will provide some examples of these two models in Swedish administrative law.

⁴⁷ Cf. SOU 1994:117; see Rune Lavin, "Åtgärder mot långsam handläggning", *Förvaltningsrättslig tidskrift* (2018) Nr. 3, pp. 413–422, p. 417.

⁴⁸ Rune Lavin, "Åtgärder mot långsam handläggning", *Förvaltningsrättslig tidskrift* (2018) Nr. 3, pp. 413–422, p. 421.

⁴⁹ Cf. Johan Lundmark and Mathias Säfsen, *Förvaltningslagen. En kommentar* (Norstedts Juridik, Stockholm, 2020), p. 341.

⁵⁰ Patricia Jonason, « Le traitement de l'inertie administrative en droit suédois », in J.-B. Auby (ed.), *Droit comparé de la procédure administrative/Comparative Law of Administrative Procedure* (Bruylant, coll. Droit administratif, Brussels, 2016), pp. 727–734, p. 727 ff; Henrik Leffler, "Passivitetstalan – ett nödvändigt rättsmedel enligt EG-rätten", *Förvaltningsrättslig tidskrift* (1999) Nr. 4–5, pp. 131–153, p. 151.

Before this, however, it should be mentioned that there are also examples of sector-specific rules stating that an authority must adhere to a certain timeframe, but without there being any rules regarding the legal consequences if the authority does not comply with this timeframe. An example is the regulation in Chapter 9 Article 27 of the Planning and Building Act (*plan- och bygglagen* (2010:900)). This article stipulates that the building committee must handle matters regarding certain permits urgently and notify its decision within 10 weeks of the completed application being received by the committee. If it is necessary due to the investigation, the period may be extended once by a maximum of 10 weeks. However, there are no rules on what happens if the building committee does not comply with these timeframes. As has been mentioned in the literature, it would be easy to supplement the law with a rule that the permit applied for shall be considered to have been granted if the building committee does not decide within the prescribed timeframe.⁵¹

7.1. THE REFUSAL MODEL

As mentioned above, delay actions so far in Swedish law have occurred primarily in the financial field. Examples of provisions that regulate delay actions that follow the so-called refusal model can be found in Chapter 14 Article 2 of the Law on Unit Trusts (*lagen* (2004:46) *om värdepappersfonder*), Chapter 17 Article 2 of the Law on Banking and Finance Operations (*lagen* (2004:297) *om bank- och finansieringsrörelse*), and in Chapter 26 Article 2 of the Law on the Securities Market (*lagen* (2007:528) *om värdepappersmarknaden*). The most common model according to these provisions requires the Financial Supervisory Authority (*Finansinspektionen*) to inform the applicant of why it has not decided on a matter within six months from the day it received the individual's application. After that, the applicant may turn to the general administrative court and request the administrative court to declare that the matter has been unnecessarily delayed. If the Financial Supervisory Authority has not issued a decision within six months from the day that the administrative court gave its declaration, the application shall be considered to have been rejected. The applicant may then appeal against the (fictitious) rejection to the administrative court.

7.2. THE APPROVAL MODEL

Remedies against administrative silence designed according to the so-called approval model may be found in (among others) Chapter 11 Article 3a of

⁵¹ Rune Lavin, "Åtgärder mot långsam handläggning", *Förvaltningsrättslig tidskrift* (2018), pp. 413–422, p. 419.

the Law on Unit Trusts (*lagen* (2004:46) *om värdepappersfonder*), Chapter 14 Article 2b of the Law on Banking and Finance Operations (*lagen* (2004:297) *om bank- och finansieringsrörelse*), and Chapter 24 Article 3 a of the Law on the Securities Market (*lagen* (2007:528) *om värdepappersmarknaden*). The provisions are applicable regarding certain kinds of permits for acquisitions. A decision regarding this kind of permit must be made within 60 days from the day that the authority confirmed to the acquirer that the application was received. If the Financial Supervisory Authority does not make a decision within this period of time, the application shall be considered to be granted.

A similar regulation is found in Chapter 2 Article 9 of the Law on payment services (*lagen* (2010:751) *om betaltjänster*). In this case, the Financial Supervisory Authority must issue a decision regarding a permit to provide payment services, or an exemption from the permit requirement, within three months from the date on which a completed application was received and the application fee was paid. If the authority has not issued a decision within the prescribed timeframe, a permit shall be considered to have been issued or an exemption shall be considered to have been granted.

8. CONCLUSIONS

As has been highlighted above, Swedish administrative law in general may be said to promote an efficient procedure while striving for securing legal certainty for individuals. In the light of this, general administrative law contains provisions and principles aiming at preventing delays in administration. However, for a long time, no specific legal remedies were available that aimed to prevent administrative silence. During the latter part of the twentieth century, problems of administrative delays were considered in public inquiries regarding general administrative law reforms. Further, after the accession of Sweden to the EU, sector-specific legal provisions regarding administrative silence were introduced in special legislation. However, it was only when the 2017 Administrative Procedure Act, FL, entered into force in 2018 that general mechanisms and remedies aimed at preventing administrative silence were introduced into Swedish administrative law.

Hence, when discussing legal provisions regarding administrative silence in Swedish law today, one can see two categories: the general provisions under 2017 FL on the one hand, and on the other hand, sector-specific provisions introduced to fulfil the requirements of EU secondary legislation. There is a clear difference between the two categories in terms of the function and effectiveness of their provisions. The general mechanisms introduced under FL are designed to suit the Swedish administrative system and tradition; for this reason, they could be considered as comparatively weak. The sector-specific provisions regarding administrative silence in the above-mentioned special legislation for the field of

finance contain more forceful mechanisms. They contain examples of provisions that can lead to both fictitious positive and fictitious negative administrative decisions when the administration is delayed with its decision-making. These provisions deviate from the traditional Swedish administrative model.

As noted, the general provisions regarding administrative silence under FL have been valid for about five years. It can be observed that during this time, the provisions have been used quite often, especially within the field of migration law. In this area, the regulation has not worked as well as the legislator intended it to do. The Parliamentary Ombudsmen have criticised the Swedish Migration Agency for making automatic refusal decisions instead of decisions that consider the circumstances of the individual case. Further, legal literature has highlighted that in some cases, the possibility to bring a delay action has led to efficiency problems and, paradoxically, has meant that decisions from the authorities have been further delayed,⁵² since authorities must invest time in dealing with delay actions instead performing their ordinary duties.

There are reasons to believe that the situation would have been different if the provisions regarding administrative silence had been constructed in a different way. For example, an alternative could be to give the reviewing court the power to decide the matter as such. However, this model would inevitably entail other problems: for example, it could risk endangering the division of tasks between the administration and the courts – a foundation of the traditional Swedish system.

As has been shown in the discussion above, the current general rules regarding administrative silence and their application are associated with some problems. The regulation does not seem to have fully lived up to the intended effect of speeding up the proceedings. Instead, it has to some extent meant that the authorities' resources have been used to review procedural issues instead of performing their ordinary duties. All-in-all, the general remedies against administrative silence appear to be rather weak. In these circumstances, it would be advisable to review the legislation.

⁵² Ulrik von Essen et al., *Förvaltningsrättens grunder* (Norstedts Juridik, Stockholm, 2020), p. 140.

— IUS COMPARATUM —

Pedro Aberastury (ed.)

Administrative Silence

Le silence de l'administration

 INTERSENTIA

IACL | INTERNATIONAL ACADEMY
OF COMPARATIVE LAW
AIDC | ACADÉMIE INTERNATIONALE
DE DROIT COMPARÉ

Intersentia Ltd
8 Wellington Mews
Wellington Street | Cambridge
CB1 1HW | United Kingdom
Tel: +44 1223 736 170
Email: contact@larcier-intersentia.com
www.larcier-intersentia.com

*Distribution for the UK and
Rest of the World (incl. Eastern Europe)*
NBN International
1 Deltic Avenue, Rooksley
Milton Keynes MK13 8LD
United Kingdom
Tel: +44 1752 202 301 | Fax: +44 1752 202 331
Email: orders@nbninternational.com

Distribution for Europe
Lefebvre Sarrut Belgium NV
Hoogstraat 139/6
1000 Brussels
Belgium
Tel: +32 (0)2 548 07 13
Email: contact@larcier-intersentia.com

Distribution for the USA and Canada
Independent Publishers Group
Order Department
814 North Franklin Street
Chicago, IL 60610
USA
Tel: +1 800 888 4741 (toll free) | Fax: +1 312 337 5985
Email: orders@ipgbook.com

Administrative Silence

© The editor and contributors severally 2023

The editor and contributors have asserted the right under the Copyright, Designs and Patents Act 1988, to be identified as authors of this work.

No part of this book may be reproduced, stored in a retrieval system, or transmitted, in any form, or by any means, without prior written permission from Intersentia, or as expressly permitted by law or under the terms agreed with the appropriate reprographic rights organisation. Enquiries concerning reproduction which may not be covered by the above should be addressed to Intersentia at the address above.

Artwork on cover: © Danny Juchtmans

ISBN 978-1-83970-362-1
ISSN 2214-6881
D/2023/7849/109
NUR 823

British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

PREFACE

The International Academy of Comparative Law has chosen the topic of administrative silence as the subject for a general report. This decision was grounded on the relevance that administrative silence deserves in comparative administrative law. Therefore, its study is a way to improve the knowledge of this legal device and highlight the transcendence that it has within the framework of comparative administrative law.

Since administrative silence is a necessary tool for the protection of individual rights before the administration, it has deserved, in the present century, express recognition in most of the analysed legal systems.

I have benefited from the valuable assistance of Professor Oscar Aguilar Valdez and, of course, I thank the professors of the 21 countries who have contributed as special national rapporteurs. Without their collaboration this book would not have been possible. This collaborative work has resulted in an important comparative administrative law study of this relevant institution.

The special national rapporteurs who contributed to this task, ordered by country, were the following: Argentina, Héctor M. Pozo Gowland; Brazil, Ricardo Perlingeiro, with the collaboration of Luciana F. Portal Gadelha and Patrícia Fernandes Marques; Canada, Suzanne Comtois; Chile, Jorge A. Femenías S. and Gustavo Alarcón del Pino; Colombia, Libardo Rodríguez Rodríguez and Jorge Enrique Santos Rodríguez; Croatia, Dario Derđa; France, Armand Desprairies; Germany, Hermann Pünder and Jens Gerlach; Hungary, Krisztina F. Rozsnyai and Gyula Koi; Italy, Roberto Caranta; Mexico, Carla Huerta, with the collaboration of Rogelio Robles López; the Netherlands, Tom Barkhuysen, with the collaboration of Michiel L. van Emmerik; Peru, Jorge Danós Ordoñez; Poland, Zbigniew Kmiecik, with the collaboration of Joanna Wegner; Portugal, Dulce Lopes; Romania, Violeta Stratan; Spain, Vicenç Aguado i Cudolà; Sweden, Torvald Larsson; Switzerland, Myriam Senn; Turkey, Nilay Arat and Venezuela, Allan R. Brewer-Carías.

Administrative silence is regarded under the majority of the special national reports as a constitutional guarantee, a weapon of defence of the citizen's rights vis-à-vis the powers of the administration.

Most of the more relevant international human rights treaties provide for the administration's duty to respond to citizens' petitions. However, from the infringement of this duty follows the necessity to determine how it happens and what are the consequences of that infringement. On the other hand, in our analysis, review by the judgments rendered by international courts on the matter is noteworthy because they should be observed by national courts and by the

doctrine in order to determine what the reasons have been that have led to the adoption of a certain solution to a conflict in matters of rights and freedoms.

Comparative law allows us to know what the different solutions that have been adopted in different legal regimes are; also what the reasons were that led to the incorporation of administrative silence in the legislation of the countries that formerly did not contain it, which will be the subject of study. Thus, a comparative law study allows us to examine the circulation of legal models from one system to another, and their assimilation within their particular legal structures. This is so because a certain institution in a certain epoch serves a particular interest, but its comparative exposition allows us to discover what its function has been so that the interpreter reveals the reason for its creation.¹

The comparative law methodology, which the work of the Academy highlights, allows an understanding of what happens or has happened in a certain place, country or environment, even within different constitutional systems and also reveals the common denominators that lead to a certain referential legal framework. This is what happens to administrative silence.

We will see that most of the countries where administrative silence has been adopted refer to it within the framework of administrative procedure, as a tool to ensure the obligation of the administration to issue a response to a certain request made by a citizen.

This silence as inactivity may also refer to the omission of the State to enact a norm and/or to regulate a constitutionally recognised right. Also, it refers to the State's liability that arises when the State – through its officials – fails to comply with a certain petition.

Recalling the words of René David, “comparative law is nothing more than the comparison of rights with different objectives”.² Likewise, it has also been taught by Professor David that comparative law methodology allows us to understand others' points of view and, within the study of national law, it allows us to perceive the lines of study that differentiate accidental norms or institutions from those that can be considered permanent.³

If “Administrative law is constitutional law made concrete”, as was stated by the President of the German Constitutional Court, Dr. Fritz Werner, administrative silence – like any other public law institute – must be analysed and explained on the basis of the constitutional system that governs the country in question, including, within this system, the human rights treaties that said country has ratified.

¹ Roca Sastre, Ramón Maria, Prologue to the work of José Puig Brutau, *Estudios de Derecho Comparado – La doctrina de los actos propios*, Ed. Ariel, Barcelona, 1951, p. 14.

² Vallarta Plata, Jose G. *Introducción al Estudio del Derecho Constitucional Comparado*, Ed. Porrúa, Mexico, 1998, p. 2.

³ David, René, *Les grands systèmes de Droit contemporains*, 7^o edition, Dalloz, Paris, 1978, pp. 5–14.

Based on a comparative law methodology, it has been requested that the special national reports should cover the content of questionnaire provided to them in order to facilitate a comparative analysis of its application within different legal systems.

Finally, it shall be noted that we are dealing with a general report that analyses a particular institution of administrative law. Therefore, the methodology used in this report cannot be the same as that which can be used to carry out a comparative law analysis in private or in criminal law, since, even without presuming full autonomy of administrative comparative law, administrative law has its own set of principles that governs its institutions – in this case, administrative silence.

Buenos Aires, July 2022

Pedro Aberastury