Silence of the EU authorities: the legal consequences of inaction by the EU administration

CHAPTER 2

Silence of the EU Authorities: The Legal Consequences of Inaction by the EU Administration

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2.1 The Legal and Administrative Context of Regulating Silence in EU Law

2.1.1 The Distribution of Administrative Competences Between the EU and the Member States

The European Union (EU) is based on a system of so-called indirect administration; hence, most of EU legislation is implemented at national level, by national authorities and their own administrative decision-making procedures and structures. However, in some areas, a system of

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"direct administration" is in place, meaning that it is the EU institutions (mostly the European Commission and the relevant EU executive and decentralized agencies) that implement EU legislation.[1]

There are also increasingly more mechanisms of "composite" or "shared" administration, which comprise administrative decision-making processes, including actors from multiple jurisdictions (i.e., either the EU and national level, or horizontally multiple national levels).[2]

This contribution is only concerned with the instances of "direct administration" and the silence of EU institutions acting as administrative authorities (i.e., implementing EU legislation). Hence, it does not deal with the EU law requirements for national administration and the consequent Europeanization process brought onto national systems of administrative law.[3]

2.1.2 The Broader Cultural Context of Understanding Timeliness of Administrative Procedure by the EU Authorities

The legitimacy of the EU administration is based to a large extent also on its modus operandi. The Treaty on the Functioning of the EU (TFEU) proclaims the EU administration as an administration built on the principles of openness, transparency, and accessibility to EU citizens (see in particular art. 15 TFEU). From the early stages of the EU integration process, the Court of Justice of the European Union (CJEU) developed in its case-law the "reasonable period principle," which, in light of the fundamental requirements of legal certainty and good administration, prevents the institutions from indefinitely delaying the exercise of their powers and obliges them to act within a reasonable time.[4] The timeliness

[1] Further on these concepts, see Ziller (2014) and Craig (2018, p. 80).

[2] See, e.g., Hofmann (2009) and Eliantonio (2014).

[3] This matter will be indeed covered in each of the national chapters of this edited volume.

[4] Case 57/69 ACNA v Commission (ECLI:EU:C:1972:78), para 32; Case C-282/95 P Guérin automobiles v Commission (ECLI:EU:C:1997:159), para 36 and 37; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission (ECLI:EU:C:2002:582), para 167–171.

of the administrative action became a component of the right to good administration, as enshrined in the EU Charter (art. 41 EU Charter).[5]

Already in the founding Treaty of the European Economic Community (EEC) of 1957, it was established that any physical or legal person could seize the Court of Justice in case an institution fails to address to that person any act other than a recommendation or an opinion (art. 175 of the EEC Treaty). This legal remedy, which is to be found in the current art. 265 TFEU, does not transform administrative silence into a negative or positive decision, but constitutes a means of control of the legality of inaction.

These provisions have created an administrative culture of fixed and relatively tight deadlines, in particular as regards access to the documents of the EU institutions or other procedures which involve applications. In general, the EU administration is characterized by its high responsiveness to queries by citizens. This is reinforced by the existence of platforms through which citizens may obtain information within fixed deadlines.[6]

2.1.3 The Main Principles of Administrative Law Regarding Timeliness of Administrative Procedures by the EU Authorities

The CJEU, drawing from the national constitutional traditions, used from the beginning of the EU integration the general principles of legal certainty and legitimate expectations in order to develop the obligation of the administration to act within reasonable time-limits which have to be foreseeable for the citizens.[7] This obligation exists even in the absence of a specific time-limit for a certain action and was defined by the court as the

[5] On the right to good administration in EU law, see Azoulai and Clément-Wilz (2014, p. 671), Chevalier (2014), Craig (2018, p. 348), and Galetta et al. (2015).

[6] For example, general questions on the EU may be sent via the "Europe Direct" platform and a reply is due within three working days (due to complexity a reply may take longer), available at https://europa.eu/european-union/contact/write-to-us_en; access to documents requests may be sent via a special platform and a reply is due within 15 working days, unless the deadline is extended because of the complexity of the request, available at https://ec.europa.eu/transparency/regdoc/index.cfm?fuseaction=fmb&language=en.

[7] Case 57/69 ACNA v Commission (ECLI:EU:C:1972:78), para 32; Case C-282/95 P Guérin automobiles v Commission (ECLI:EU:C:1997:159), para 36 and 37; and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P Limburgse Vinyl Maatschappij and Others v Commission (ECLI:EU:C:2002:582), para 167–171.

principle of reasonable time.[8] This "reasonable time principle" became one of the elements of the principle of good administration, which was elevated to a fundamental right with the EU Charter.[9]

The right to good administration (art. 41 EU Charter) guarantees the right of every person to have their affairs handled impartially, fairly and *within a reasonable time* by the institutions, bodies, offices, and agencies of the Union (emphasis added). This article of the Charter aims to confer a justiciable right to individuals in the sense that it can be directly invoked before court.[10]

The elements of good administration have been rendered more concrete through codes of good administrative behavior, which had been existing even before the Charter became legally binding with the Lisbon Treaty. The European Ombudsman has compiled a code containing minimum standards of good administration relevant for all EU institutions when assuming administrative duties.[11] This code was first endorsed by the European Parliament through a resolution in 2001.[12] The European Commission follows its own code which is annexed to its rules of procedure[13] and which is in line with the one compiled by the European Ombudsman but adjusted to its own needs and specificities. Both codes crystallize the principle of reasonable time-limit and the need to inform the person who has addressed a request of the date on which they should expect a reply, as required by the principle of legal certainty (see Sect. 2.1).

[8] See Jansen (2016, p. 630).

[9] Case C-282/95 P Guérin Automobiles v Commission (ECLI:EU:C:1997:159), para 37; Case C-447/13 P Riccardo Nencini v Parliament (ECLI:EU:C:2014:2372), para 38.

[10] Case T-138/14 Randa Chart v European External Action Service (ECLI:EU:T:2015:981, para 113.

[11] Cf. European Ombudsman, European Code of Good Administrative Behaviour. On this, see Harlow and Rawlings (2014, p. 115 et seq).

[12] Cf. European Parliament Resolution on the European Ombudsman's Special Report to the European Parliament following the own-initiative inquiry into the existence and the public accessibility, in the different Community institutions and bodies, of a Code of Good Administrative Behaviour.

[13] Cf. European Commission, Rules of Procedure [C(2000) 3614], as last amended by Commission Decision of 9 November 2011 amending its Rules of Procedure [COM 2011/737/EU, Euratom].

2.2 The Legal Framework of Timeliness for EU Institutions

2.2.1 General Provisions on Timeliness

At the level of primary law, the EU Charter, as aforementioned, guarantees the right to good administration which encompasses the right of every person to have his affairs handled within a reasonable time by the institutions, bodies, offices, and agencies of the Union (art. 41 EU Charter). This fundamental right is safeguarded through the system of judicial protection before the CJEU. In case an institution or other body of the Union fails to act, including cases when it does not comply with a time-limit, the other institutions, Member States, or natural or legal persons may bring an action before the CJEU to have the infringement established under certain conditions (art. 265 TFEU). It derives from this provision that the EU Treaties do not deduce specific legal consequences from administrative silence in the sense of transforming it into a positive or negative decision, but they contain a specific legal remedy to challenge administrative inaction.[14]

At the level of secondary law, the EU does not dispose of a General Administrative Procedure Act which could have regulated in a horizontal way issues related to timeliness, and the legal consequences in case time-limits are not respected by the administration. However, there is legislation which contains horizontal rules on administrative procedures, but they cover a specific topic without being part of a general codex. In relation to the topic of time-limits, Regulation (EEC, Euratom) No 1182/71 determines the rules applicable to periods, dates, and time-limits.[15] An important horizontal rule in this respect is that any period mentioned in EU rules includes public holidays, Sundays and Saturdays, save where periods are expressed in working days.[16] In general, this horizontal piece of legislation regulates how time-limits are to be calculated,

[14] On the different choices of legal orders as to how to react to silence see Auby (2014, p. 22) and Jansen (2016, p. 623).

[15] Regulation (EEC, Euratom) No 1182/71 of the Council of 3 June 1971 determining the rules applicable to periods, dates, and time limits [1971] OJ L 124.

[16] Art. 3(3) Regulation (EEC, Euratom) No 1182/71.

but it does not mention the legal consequences in case of non-compliance with a deadline.[17]

Currently, there is an ongoing discussion on the codification of administrative procedural rules for the EU institutions, from both the academic and the policy-making side. The Research Network on EU Administrative Law (ReNEUAL) presented in 2014 model rules on EU administrative procedure, drafted by academics and aiming at inspiring the policymakers to this direction.[18] These model rules contain inter alia an article on time-limits in procedures leading to the adoption of individual administrative acts (rule III.9). Pursuant to this model article, there should be a default time-limit of three months unless otherwise provided by sector-specific rules (rule III.9(1)). The administration should have the possibility to extend the prescribed time-limit with adequate justification in cases of complex decisions, while informing the individual concerned about the expected time of the final decision (rule III.9(3)). The model rules do not provide for a consequence in case of violation of a time-limit, but mention the obligation of the sectoral rules to do so (rule III.9(4)).

This academic initiative triggered action from the European Parliament, which drafted a proposal for a Regulation for an open, efficient, and independent European Union administration and invited the Commission to consider it.[19] This draft Regulation includes a similar article on time-limits to the aforementioned model rule by ReNEUAL (see art. 17 of the draft Regulation). The added point concerning administrative inaction is that the administration, according to this draft Regulation, has an active obligation to inform the individual concerned about the legal consequences in case it violates the prescribed time frame (see art. 6(4)(f) and 7(3)(e) of the draft Regulation).

At the moment, no concrete steps have been taken by the Commission to propose legislation on this point. In particular, the Commission has expressed the opinion that relying only on sectoral law is not to be regarded as a problem, since this allows for flexibility to adapt to the

[17] See in detail von Danwitz (2008, p. 444).

[18] See Hofmann et al. (2014).

[19] European Parliament Resolution of 9 June 2016 for an Open, Efficient and Independent European Union Administration.

different policy areas.[20] As a consequence, administrative decision-making at the EU level is currently governed by general principles of EU administrative law, such as the principle of proportionality and legal certainty, the applicable sectoral laws, and the internal rules of procedure of the various institutions and EU agencies.[21]

These internal rules of procedure, as aforementioned, contain certain general guidelines on timely functioning, which reflect the European Code of Good Administrative Behaviour as drafted by the European Ombudsman. This code in its art. 14 provides that every letter or complaint to an institution shall receive an acknowledgment of receipt within a period of two weeks, except if a substantive reply can be sent within that period. No acknowledgment of receipt and no reply need to be sent in cases where letters or complaints are abusive because of their excessive number or because of their repetitive or pointless character. Art. 17 of this code crystallizes the so-called principle of a reasonable time-limit. According to this, every official shall ensure that a decision on a request or complaint to the institution is taken within a reasonable time-limit, without delay, and in any case no later than two months from the date of receipt. If a request or a complaint to the institution cannot, because of the complexity of the matters which it raises, be decided upon within the above-mentioned time-limit, the official shall inform the author as soon as possible. In such a case, a definitive decision should be communicated to the author in the shortest possible time.

The code which is annexed to the Rules of Procedure of the European Commission, in its Section 4 on "dealing with inquiries," restates these principles and adds that whenever the Commission services are not able to abide by a time-limit due to the complexity of the request or due to the need for interdepartmental consultation or translation, they should send a holding reply, indicating a date by which the addressee may expect the definitive reply. It is evident that the holding reply aims to restore legal certainty, which requires that the person who made a request should be able to foresee the time of the administration's reply.

These internal rules apply horizontally in every field of action, unless there are sectoral laws which provide otherwise. Sectoral rules normally

[20] See the position of the European Commission represented by the then Commission Vice-President Jyrki Katainen (2016) Protocol of the plenary debate, PV 8.6.2016-26; on this, see Athanasiadou (2017, p. 298).

[21] See Hofmann et al. (2011, p. 67) and Craig (2018, p. 263).

provide for specific time-limits, provide for any possibility of prolongation of deadlines, and often mention whether administrative inaction may be treated as a negative or positive administrative act. There are also instances, when secondary legislation does not determine a time-limit, e.g., the time-limit within which the Commission has to respond to complaints concerning State aid or anti-competitive behavior. However, also in these instances of absence of a time-limit in law, the Commission continues to be bound by the "reasonable time principle." For this reason, the Commission in internal codes of best practices sets indicative time-limits, i.e., in the codes on best practices for the conduct of State aid control procedures[22] and in proceedings concerning arts. 101 and 102 TFEU.[23]

2.2.2 Sector-Specific Legislation

In order to present the heterogeneous and wide-ranging sectoral laws in a comprehensive and systematic way, this contribution examines five representative pillars:

1. "*the EU administration as market regulator*": this pillar concerns rules in the field of market regulation, in particular notification procedures in competition and State aid law (where the main actor is the "Directorate-General Competition/DG COMP" within the European Commission);
2. "*the EU administration as risk regulator*": this pillar concerns rules on authorizations involving risk management (where the main actors are the Commission and several EU agencies, namely the European Chemicals Agency/ECHA, the European Medicines Agency/EMA, and the European Food Safety Authority/EFSA);
3. "*the EU administration as funding actor*": this pillar encompasses rules in the field of funding applications by private or public entities (where the main actors are various Directorates-General within the European Commission);

[22] European Commission, Code of Best Practice for the conduct of State aid control procedures.

[23] European Commission, Notice on best practices in proceedings concerning articles 101 and 102 TFEU.

4. "*the EU administration as transparent actor*": this pillar concerns rules on requests for access to documents by EU citizens (where the main actor is the institution to which the request is submitted); and
5. "*the EU administration as employer*": this pillar covers rules in the field of EU civil service law concerning employees of the EU institutions (where the main actor is the institution acting as the employer of the concerned civil servant).

For each of these four pillars, representative decision-making procedures are selected; for each of these procedures, the procedural steps are retraced and the average length of time-limits is examined. Furthermore, it is examined when a procedural step begins and what the rules about deadlines' expiry are. The legal character of the deadlines and the possibility of prolongation are also considered. Lastly, the consequences of deadlines' expiry beyond the general judicial remedies are investigated.

The EU Administration as Market Regulator

In the field of market regulation, two sets of rules have been considered, namely those concerning the authorization of mergers[24] and those concerning the authorization of State aid.[25] Both processes can be regarded as highly proceduralized, and they are composed of several steps, entailing the exchange of views and data between the Commission and the Member States. The aim of these exchanges is to acquire information on the relevant market in which the concerned enterprises operate, or the specifics of a certain national measure or scheme, in order for the Commission to be able to assess where a certain merger or aid is compatible with EU law.

Despite the high proceduralization in both areas, one notable difference is that while in the field of merger control, many steps have to be carried out by the European Commission "without delay" (such as the transmission of the applicant's submission concerning the effects of a

[24] Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004] OJ L 24.

[25] Council Regulation (EC) No 659/1999 of 22 March 1999 laying down detailed rules for the application of Article 93 of the EC Treaty [1999] OJ L 83.

proposed merger to all Member States[26] or the transmission of the information to all Member States of one Member State's disagreement on transfer of proceedings concerning a proposed merger[27]), this is not the case in the field of State aid which contains exact deadlines.

What is furthermore peculiar in the field of merger control is that, where deadlines are provided in legislation, their expiry produces positive implicit decisions on the part of the European Commission. For example, the Commission has 25 working days starting from the receipt of the applicant's reasoned submission concerning effects of a proposed merger to refer the procedure to a specific Member State if a "distinct market" is deemed to exist. According to art. 4(4) of Regulation 139/2004, if this deadline expires "the Commission shall be deemed to have adopted a decision to refer the case in accordance with the applicant's submission."

Similarly, the Commission has 25 working days from receipt of the notification to examine a notified merger.[28] If a formal investigation is opened, the Commission is obliged to take a decision of the compatibility of the merger with the common market within 90 working days of the date on which the proceedings are initiated.[29] In both cases, if no decision is taken, the concentration shall be deemed to have been declared compatible with the common market.[30]

Interestingly, the same system of positive implicit decision is to be found in the rules concerning the authorization of State aid. While there are certain steps of the procedure which have to be completed within a "desirable" time-limit (such as the deadline to close a formal investigation),[31] whenever a fixed time-limit is provided, the consequence of its expiry is the creation of a positive implicit decision.

Hence, the Commission decision finding that the notified measure does not constitute aid, the decision finding that no doubts are raised as to the compatibility with the common market of a notified measure, and the decision finding that doubts are raised as to the compatibility with

[26] Art. 4(4) Regulation (EC) 139/2004.

[27] Art. 4(5) Regulation (EC) 139/2004.

[28] Arts. 6(1) and 10(1) Regulation (EC) 139/2004.

[29] Art. 8(1) and 10(3) Regulation(EC) 139/2004.

[30] Art. 10(6) Regulation (EC) 139/2004.

[31] In this case, the Commission has to "as far as possible endeavour to adopt a decision within a period of 18 months". Cf. Art. 7(6) Regulation (EC) 659/1999.

the common market of a notified measure have to be taken within two months from the day following the receipt of a complete notification.[32] In all of these cases, failure to comply with the deadline will cause the aid to be deemed to have been authorized by the Commission.[33] Whenever deadlines are not foreseen, according to the CJEU, the Commission should nevertheless act "diligently and take account of the interest of Member States of being informed of the position quickly in spheres where the necessity to intervene can be of an urgent nature by reason of the effect that these Member States expect from the proposed measures of encouragement."[34]

The EU Administration as Risk Regulator

Under this heading, a number of rules in the field of industry and market regulation have been considered, namely the procedure for marketing authorizations of medicines,[35] the procedure for marketing authorizations of GMOs,[36] and the procedure for marketing authorizations of plant protection products.[37]

The first two decision-making processes are characterized by similar procedural steps. As far as marketing authorizations for GMOs for cultivation are concerned, Regulation 1829/2003 foresees a procedure whereby, first, the opinion of the European Food Safety Authority (EFSA) needs to be obtained by the Commission. Thereafter, the Commission submits a draft authorization to the relevant comitology committee and, in case of a positive opinion on the draft authorization by the committee, the Commission issues a final decision in the form of an Implementing

[32] Arts. 4(2), 4(3), 4(4), and 4(5) Regulation (EC) 659/1999.

[33] Art. 4(6) Regulation (EC) 659/1999.

[34] Case 120/73 Gebrüder Lorenz GmbH v Federal Republic of Germany and Land Rheinland-Pfalz (ECLI:EU:C:1973:152).

[35] Regulation (EC) No 726/2004 of the European Parliament and of the Council of 31 March 2004 laying down Community procedures for the authorization and supervision of medicinal products for human and veterinary use and establishing a European Medicines Agency [2004] OJ L 136.

[36] Regulation No 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed [2003] OJ L 268.

[37] Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [2009] OJ L 309.

Decision. The marketing authorization for medicines, when the so-called centralized procedure is activated, follows similar steps in that the application is first subject to an opinion by an agency (in this case the European Medicines Agency/EMA), with a subsequent step constituted by a comitology procedure and a final Commission Implementing Decision.

Despite the similarities in procedural steps, the regulation of deadlines in the two procedures is different. For example, while the opinion of the EMA must be received within 210 days after receipt of a valid application,[38] the EFSA shall only "endeavor" to provide an opinion within six months as from the receipt of a valid application.[39] Furthermore, according to the same provision, this time-limit may be extended (for a period of time which is not determined in legislation) whenever EFSA seeks supplementary information from the applicant.

Also, on the side of the Commission, which is in charge of issuing the final authorization, the deadlines in the process of marketing authorizations of medicines are shorter, since the Commission is obliged to submit the draft decision to be taken in respect of the application to be submitted to the comitology procedure within 15 days after receipt of the opinion of the EMA.[40] With regard instead to the regulation of GMOs, the same action must be undertaken by the Commission within three months after receipt of the opinion of the EFSA.[41]

The most striking difference is related to the deadline for finalizing the decision-making process. While the Commission has the obligation to take a final decision on the marketing authorization of a medicine within 15 days after the end of the comitology procedure,[42] there does not seem to be any deadline for the conclusion of the process with regard to the marketing authorization of GMOs.

A similar procedure to the one discussed above is that applicable to the marketing authorization of plant protection products. The relevant secondary rules also provide for some deadlines for the EFSA to circulate a draft assessment report prepared by the rapporteur Member State (at

[38] Art. 6(3) Regulation (EC) No 726/2004.

[39] Art. 6(1) Regulation No 1829/2003.

[40] Art. 10(1) Regulation (EC) No 726/2004.

[41] Art. 7(1) Regulation No 1829/2003.

[42] Art. 10(2) Regulation (EC) No 726/2004. See also Temple Lang & Raftery (2011).

the latest 30 days after its receipt)[43] and for the conclusion concerning the safety of product by the same authority (within 120 days of the end of the period provided for the submission of written comments by the Member States).[44] In the latter case, the rule provides for a possibility of extension until three months in certain circumstances.

Finally, as in the case of GMOs authorizations, while there is a deadline for the Commission to submit a draft Regulation to the comitology procedure (i.e., within six months of receiving the opinion from the EFSA),[45] there is no deadline foreseen for the final decision by the European Commission on the application. It is also to be noted that in none of these cases is there a specific regulation of the consequences of exceeding the time-limits set out above.

The EU Administration as Funding Actor

One of the major tasks of the EU administration consists in the distribution of various grants based on EU programs or actions adopted by the EU budgetary authorities (Parliament and Council). On the basis of such programs or actions, the Commission or its executive agencies adopt a "work program," which is subsequently implemented through the publication of calls for proposals (art. 110 Regulation (EU, Euratom) 2018/1046, "Financial Regulation").

The Financial Regulation requires that calls for proposals specify the planned date by which all applicants should have been informed of the outcome of the evaluation of their application and the indicative date for the signature of grant agreements or notification of grant decisions (art. 194 (1) (e)). Those dates shall be fixed on the basis of the following periods: (a) for informing all applicants of the outcome of the evaluation of their application, a maximum of six months from the final date for submission of complete proposals; (b) for signing grant agreements with applicants or notifying grant decisions to them, a maximum of three months from the date of informing applicants they have been successful (art. 194(2) Financial Regulation). Those periods may be adjusted in order to take into account any time needed to comply with specific procedures that may be required by the basic act and may be exceeded

[43] Art. 12(1) Regulation (EC) No 1107/2009.

[44] Art. 12(2) Regulation (EC) No 1107/2009.

[45] Art. 13 Regulation (EC) No 1107/2009.

in exceptional, duly justified cases, in particular for complex actions, where there is a large number of proposals or delays attributable to the applicants. The authorizing officer shall report in his or her annual activity report on the average time taken to inform applicants, sign grant agreements, or notify grant decisions (art. 194(2), sub-para 2 Financial Regulation). In the event of the aforementioned periods being exceeded, the authorizing officer shall give reasons and, where not duly justified in accordance with the third subparagraph, shall propose remedial action (art. 194(2), sub-para 3 Financial Regulation).

The EU Administration as a Transparent Actor

Openness is placed in the heart of the functioning of the EU institutions, because it guarantees that the administration enjoys greater legitimacy and is more accountable to the citizen in a democratic system (see recital 2 of Regulation (EC) No 1049/2001). One of the main elements of openness is the possibility of every EU citizen to have access to the documents of the EU institutions, which is guaranteed as a fundamental right.

In order to ensure that the right of access is fully respected, Regulation (EC) No 1049/2001 provides for a two-stage administrative procedure with precise deadlines. According to art. 7 of the Regulation, an application for access to a document shall be handled promptly. An acknowledgment of receipt shall be sent to the applicant. Within 15 working days from registration of the application, the institution shall either grant access to the document requested or state the reasons for the total or partial refusal. In the Commission Internal Rules of Procedure, it is provided that if an application is imprecise, the Commission shall invite the applicant to provide additional information making it possible to identify the documents requested; the deadline for reply shall run only from the time when the Commission has this information.[46]

The Regulation gives also the possibility, in exceptional cases, for example in the event of an application relating to a very large number of documents, to extend the time-limit by 15 working days, provided that the applicant is notified in advance and that detailed reasons are given (art. 7(3) Regulation (EC) 1049/2001). In the event of a total or partial

[46] Art. 2 of the Detailed Rules for the application of Regulation (EC) No 1049/2001 of the European Parliament and of the Council regarding public access to European Parliament, Council and Commission documents, annexed to the European Commission Rules of Procedure.

refusal, the applicant may, within 15 working days of receiving the institution's reply, make a confirmatory application asking the institution to reconsider its position (art. 7(2) Regulation (EC) 1049/2001).

The Regulation does not mention what happens in case of inaction of the administration following the first application. Nothing, however, prevents the applicants from making a confirmatory application also in the case that the administration does not respond to the first application within the prescribed time-limit.

For the administration's reply to the confirmatory application, the same time-limit and prolongation possibility apply. Failure by the institution to reply to a confirmatory application within the prescribed time-limit shall be considered as a negative reply and entitle the applicant to institute court proceedings against the institution and/or make a complaint to the Ombudsman (art. 8(3) Regulation (EC) 1049/2001). So, although for the first application the Regulation does not provide any legal consequences in case the administration violates the deadline, in the second stage of the confirmatory application the eventual silence of the administration is transformed into a negative decision.

The EU Administration as Employer

The rules which govern the relations between the EU institutions and agencies and their employees are the Staff Regulations and the Conditions of Employment of other servants. The Staff Regulations provide for general time-limits concerning requests and complaints of employees. According to art. 90(1), of these Regulations, any concerned person may submit to the competent authority a request that the latter take a decision relating to him. The authority has to notify the person concerned of its reasoned decision within four months from the date on which the request was made. If at the end of that period no reply to the request has been received, this shall be deemed to constitute an implied decision rejecting it, against which a complaint may be lodged.

Complaints may be submitted against an act affecting the person concerned adversely, or against an implied rejection of a request (art. 90(2) Staff Regulations). The complaint must be lodged within three months. The period shall start to run on the date of expiry of the period prescribed for reply where the complaint concerns an implied decision rejecting a request. The authority shall notify the person concerned of its reasoned decision within four months from the date on which the complaint was lodged. If at the end of that period no reply to the

complaint has been received, this shall be deemed to constitute an implied decision rejecting it, against which an appeal may be lodged before the General Court (see art. 270 and 256, para 1, TFEU).

It can be concluded that in EU civil service law exist general provisions which transform administrative silence into an implied negative decision in all cases of requests and complaints by employees, unless otherwise provided by a *lex specialis*. The only *lex specialis* to be found in the Staff Regulations which provides for an exception to this general rule is art. 17a of the Staff Regulations. This article regulates the exercise of the right of freedom of expression by EU officials. More specifically, it requires that an official who intends to publish any matter dealing with the work of the Union shall inform their hierarchical superiors in advance. Where the hierarchical superiors are able to demonstrate that the matter is liable seriously to prejudice the legitimate interests of the Union, they shall inform the official of their decision in writing within 30 working days of receipt of the information. If no such decision is notified within the specified period, the hierarchical superiors shall be deemed to have had no objections.

It comes as no surprise that the only case of implied positive decision in the Staff Regulations concerns the fundamental right to freedom of expression (art. 11, para 1, EU Charter). The fact that staff members need to obtain prior authorization for any intended publication which concerns EU policies constitutes per se a significant limitation of their right to freedom of expression. The brief deadline of 30 days, which is one-fourth of the regular deadline of four months, alongside the creation of a fictitious positive decision in case of administrative inaction, aims to shape this limitation in a proportionate way.

2.3 The Responses to the Administrative Silence of the EU Authorities

2.3.1 No Prevailing Model of Administrative Silence at EU Level

From the analysis carried out above, it follows that the EU does not adhere to one specific model of administrative silence and any conclusion can only be sector-specific.[47]

As a general rule, unless it is expressly dictated by secondary law, no implied decision can be lawfully created. This has been confirmed by the

[47] On this, see also Sant'Anna (2016, p. 736).

Court of Justice of the European Union, which held that "as a rule, mere silence on the part of an institution cannot be placed on the same footing as an implied refusal, except where that result is expressly provided for by a provision of Community law."[48]

The two main sectors which contain general provisions on the creation of an implied negative decision in case of non-compliance of the administration by the prescribed time-limits are EU civil service law and the rules on access to documents. In these fields, the applicant requests from the administration to proceed to an action or to issue an act, i.e., to transmit a document, to make a payment, etc., and thus, an implied positive decision is here per definition not possible.

Among the examined fields, the main areas where general rules providing for fictitious decisions are absent are the areas of risk regulation and the distribution of funds. In these fields, the absence of fictitious positive decisions is easily comprehensible, since a delay from the side of the administration should not lead to fictitious decisions which, for instance, authorize substances unsafe for human health or lead to distribution of funds from the EU budget. What could have been indeed possible in these fields is the creation of implied negative decisions.

Lastly, EU secondary law provides for implied positive decisions in cases when the applicant seeks permission in order to proceed to a desired action which does not involve a risk for human health or the environment. The instances identified in the analysis above are to be found in the rules on merger control, authorization of State aid, and in EU civil service law when employees seek permission in order to make a publication.

2.3.2 The Legal Consequences of Non-compliance with a Time-Limit

As it was shown in the analysis of EU secondary law, sectoral rules often give to the administration the possibility to prolong the prescribed time-limit while providing for justification. This justification normally pertains

[48] Case C-123/03 P Commission v Greencore (ECLI:EU:C:2004:783), para 45. See also Case T-30/01 Diputación Foral de Álava v Commission (ECLI:EU:T:2009:314); Joined Cases T-189/95, T-39/96 and T-123/96SGA v Commission (ECLI:EU:T:1999:317), para 27 and 28; Joined Cases T-190/95 and T-45/96 Sodima v Commission (ECLI:EU:T:1999:318), para 31 and 32; Case C-27/04 Commission v Council (ECLI:EU:C:2004:436).

to the complexity of the case or the need to consult other departments, to make translations, to gather additional information, etc.

Even when the administration does not or cannot formally prolong the deadline, but nevertheless issues the given act after the time-limit has expired, this delay does not normally affect the validity of the act. For example, regarding the deadlines for the finalization of a disciplinary procedure in EU civil service law, the CJEU has ruled that the period prescribed by art. 7 of Annex IX to the Staff Regulations is not a mandatory time-limit. It constitutes a rule of sound administration the purpose of which is to avoid, in the interests both of the administration and of officials, undue delay in adopting the decision terminating the disciplinary proceedings. It follows that the disciplinary authorities are obliged to conduct disciplinary proceedings diligently and to ensure that each procedural step is taken within a reasonable period following the previous step. Failure to comply with that time-limit may render the institution concerned liable for any harm caused to those concerned but does not in itself affect the validity of a disciplinary measure imposed after it has expired. Infringement of the "reasonable time" principle can justify annulment of a decision taken at the end of an administrative procedure, only where the undue delay is likely to have an effect on the actual substance of the decision.[49]

However, there are also instances, when secondary law rules prevent the EU administration from acting after a specific deadline. For example, in the case of anti-dumping investigations concerning third countries, if the Commission has not completed an investigation within the prescribed time-limit, it cannot validly adopt a decision.[50]

2.4 Legal Remedies Against the Silence of the EU Authorities

2.4.1 Administrative Remedies: The Internal Review Procedure

Administrative remedies against the inaction of the EU authorities are mainly provided in the field of EU civil service law and in the rules on

[49] See Case C-39/00 P SGA v Commission (ECLI:EU:C:2000:685), para 44; Case T-390/10 P Füller-Tomlinson v Parliament (ECLI:EU:T:2012:652), para 116, and Joined Cases F-138/06 and F-37/08 Meister v OHIM (ECLI:EU:F:2009:48), para 76.

[50] See art. 11(5) Regulation (EU) No 2016/1036.

access to documents, as shown in the analysis of the sectoral law. The Staff Regulations (art. 90(2)) provide for the possibility to submit a complaint against the implied rejection of a request. Regulation (EC) 1049/2001 guarantees the right to submit a confirmatory application in case of a rejection (partially or in full) of a request of access to documents (art. 7(2) Regulation (EC) 1049/2001).

It is not expressly provided that such confirmatory request can be made also in case of inaction of the administration following the first request; however, this cannot be excluded.

2.4.2 The Action for Failure to Act Under Article 265 TFEU

The general remedy against silence of the EU authorities, when this is not transformed into an implied decision through secondary law, is the action for failure to act contained in art. 265 TFEU.[51] The subject matter of an action for failure to act is a determination as to whether an omission to issue a decision was unlawful. According to the case-law of the court, a failure to act, for the purposes of art. 265 TFEU, means a failure to take a decision or to define a position.[52] The action may be brought not only against a failure to adopt a final decision that is legally binding, but also against the failure to adopt a preparatory act, if it is a necessary preliminary act in a procedure leading to an act that has binding legal effects.[53] The case-law is consistent in that a failure to take a final or preparatory decision is unlawful only if the institution was under a duty to act, which can be derived from a provision of primary or secondary EU law.[54]

An action for failure to act will be admissible only if the institution concerned has first been called upon to act. The case-law has clarified that the claimant's request must be specific in that it must be clear what decision the institution should have taken.[55] There is no time-limit within

[51] On the action for failure to act see Lenaerts et al. (2014, p. 419), Hofmann et al. (2011, p. 848), Barents (2016, p. 305), and Cremer (2015).

[52] Case 8/71 Deutscher Komponistenverband v Commission (ECLI:EU:C:1971:82), para 2, and Case 196/12 Commission v Council (ECLI:EU:C:2013:753), para 22.

[53] Case 302/87 Parliament v Council (ECLI: EU:C:1988:461), para16.

[54] Case C-141/02 P Commission v T-Mobile Austria (ECLI:EU:C:2005:98); Case T-277/94 AITEC v Commission (ECLI:EU:T:1996:66).

[55] Case 25/85 Nuovo Campsider v Commission (ECLI:EU:C:1986:195), para 8.

which the request must be made. The Court of Justice has held, however, that the claimant may not delay the exercise of his rights indefinitely.[56] If, within two months of this request, the institution concerned has not defined its position, the action may be brought. Certainly, it can be considered that, by complying with the request, the institution will have defined its position. The Court of Justice has clarified that the same can be considered when the institution adopted a decision different from that which the claimant requested.[57]

If an action for failure to act is brought by a national or legal person, it will only be admissible if it concerns an EU institution's failure to adopt a binding act[58] which should have been addressed to them or whose lawfulness they are entitled to contest by bringing an action for annulment pursuant to art. 263 (4), TFEU.[59]

If the EU Courts declare an EU authority as having failed to act, the ruling has a mere declaratory nature. The courts cannot issue injunctions to the EU authorities.[60] In case the authority at stake defined a position even through a non-binding act, which cannot be challenged with an action for annulment, the action for failure to act will be declared inadmissible.[61] The action will also be declared inadmissible if there is a provision of EU secondary law creating an implied negative decision. In such a case, the person concerned will have to proceed with an action for annulment.

[56] Case 59/70 Netherlands v Commission (ECLI:EU:C:1971:77), para 19.

[57] Joined Cases 166 and 220/86 Irish Cement Ltd. v Commission (ECLI:EU:C:1988:549), para 17.

[58] art. 265 TFEU mentions 'any act other than a recommendation or an opinion'.

[59] See Case C-68/95 T. Port v Bundesanstalt für Landwirtschaft und Ernährung (ECLI:EU:C:1996:452), para 58 and 59 and Case T-773/16 Salehi v Commission (ECLI:EU:T:2017:739).

[60] Joined Cases C-199/94 P and C-200/94 P Pevasa and Inpesca v Commission (ECLI:EU:C:1995:360), para 24; Case C-137/16 P Petraitis v Commission (ECLI:EU:C:2016:904), para 31 and 32.

[61] Case T-407/09 Neubrandenburger Wohnungsgesellschaft v Commission (ECLI:EU:T:2012:1).

2.4.3 *The Action for Annulment Under Article 263 TFEU*

When EU secondary law transforms administrative silence into an implied decision, the person concerned may bring before the CJEU an action for annulment under art. 263 TFEU. In the course of the judicial proceedings, the administration may withdraw this implied decision and adopt an explicit one. In this case, the person concerned has to challenge the explicit decision, because the court acknowledges no interest anymore in challenging the implied one.[62] If the explicit decision is adopted by the administration after the person concerned has challenged the implied action, the applicant has to modify the form of order sought and challenge the explicit decision within two months from its adoption. If the applicant fails to do so, his claim against the implied decision will be declared inadmissible for reasons of lack of interest.[63] This approach is stricter than in other legal orders, where an explicit decision taken after the addressee has already challenged the implied decision is automatically co-challenged, as for example in Greece.[64]

2.4.4 *The Action for Union Liability Under Article 340 TFEU*

Pursuant to arts. 268 and 340(2) TFEU, an action for damages against the EU can be brought in order to have the Union held non-contractually liable for any damage caused by its institutions or its servants in the performance of their duties. It is possible to bring such action also if a prior action for annulment or for failure to act has not been brought.[65] The court has stated that the conditions under which the Union or a Member State may incur liability for damage caused to individuals have to be aligned, because the protection of the rights which individuals derive from Union law cannot vary depending on whether a national authority or a Union authority is responsible for the damage.[66] According to the case-law, Union law confers a right to reparation where three conditions

[62] Case C-127/13 P Strack v Commission (ECLI:EU:C:2014:2250), para 89.

[63] Case T-214/13 Rainer Typke v Commission (ECLI:EU:T:2015:448), para 25 et seq.

[64] Spiliotopoulos (2015, p. 102) and Gogos (2005).

[65] Case 5/71 Zuckerfabrik v Council (ECLI:EU:C:1971:116); Case 4/69 Alfons Lütticke GmbH v Commission (ECLI:EU:C:1971:40).

[66] Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame

are met: the rule of law infringed must be intended to confer rights on individuals; the breach must be sufficiently serious; and there must be a direct causal link between the breach of the obligation resting on the State and the damage sustained by the injured parties.[67]

The decisive test for finding that a breach of Union law is sufficiently serious is whether the Member State or the Union institution concerned manifestly and gravely disregarded the limits on its discretion.[68] Where the Member State or the institution in question has only considerably reduced, or even no, discretion, the mere infringement of Union law may be sufficient to establish the existence of a sufficiently serious breach.[69] In case of administrative silence, a "sufficiently serious breach" would arise in cases in which there is a duty to act. According to the case-law, the institutions, bodies, offices, and agencies of the European Union enjoy no margin of discretion insofar as concern the observance of time-limits as required by the principle of sound administration. Consequently, a finding that the administration infringed that principle is sufficient in itself to establish the existence of a sufficiently serious breach within the sense of the criteria on Union liability.[70] Furthermore, in cases concerning omissions, the Court of Justice requires a rigorous examination as to whether the claimed damage can be attributable to the omission.[71]

(ECLI:EU:C:1996:79), para 42; Case C-352/98 P Bergaderm and Goupil v Commission (ECLI:EU:C:2000:361), para 41.

[67] Joined cases C-46/93 and C-48/93. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame (ECLI:EU:C:1996:79), para 51.

[68] Joined cases C-46/93 and C-48/93. Brasserie du Pêcheur SA v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factortame (ECLI:EU:C:1996:79), para 55; Joined Cases C-178/94, C-179/94, C-188/94, C-189/94 and C-190/94 Dillenkofer and Others v Germany (ECLI:EU:C:1996:375), para 25; Case C-352/98 P Bergaderm and Goupil v Commission (ECLI:EU:C:2000:361), para 43.

[69] Case C-5/94 The Queen v Ministry of Agriculture, Fisheries and Food, ex parte Hedley Lomas (ECLI:EU:C:1996:205), para 28.

[70] Case T-138/14, Randa Chart v European External Action Service (ECLI:EU:T:2015:981), para 114.

[71] Case T-138/03 É. R., O. O., J. R., A. R., B. P. R. and Others v Council and Commission (ECLI:EU:T:2006:390); Case C-85/09 P Portela v Commission (ECLI:EU:C:2009:685).

2.4.5 The Possibility to Submit a Complaint to the European Ombudsman

The European Ombudsman is empowered to receive complaints from any citizen of the Union or any natural or legal person residing or having its registered office in a Member State concerning instances of maladministration in the activities of the Union institutions, bodies, offices, or agencies, with the exception of the Court of Justice of the European Union acting in its judicial role (art. 228 (1) (1), TFEU). Inquiries may be conducted also on the Ombudsman's own initiative. Where the Ombudsman establishes an instance of maladministration, the matter is referred to the institution, body, office, or agency concerned, which has a period of three months in which to inform him of its views. The Ombudsman then forwards a report to the European Parliament and the institution, body, office, or agency concerned. The person lodging the complaint is always informed of the outcome of such inquiries (art. 228 (1) (2), TFEU). The Ombudsman submits an annual report to the European Parliament on the outcome of his inquiries (art. 228 (1) (3), TFEU).

It derives from these provisions that the Ombudsman's decisions and recommendations are not legally binding for the institution concerned in the sense that they cannot be legally enforceable. However, the institutions tend to comply with the Ombudsman's recommendations. According to the Ombudsman's annual report of 2017, the EU institutions complied with the Ombudsman's proposals in 85% of instances.[72]

Examining the Ombudsman's annual reports from 2013 until 2017, it can be concluded that administrative inaction in the sense of total absence of a decision is not an issue when assessing the functioning of the EU administration. However, administrative delays constitute a recurrent issue in the work of the Ombudsman. In the annual report of 2013, it was mentioned that the European Commission took more than four years to take action following a complaint in relation to a State aid complaint concerning four Spanish football clubs.[73] In the annual report of 2014, the Ombudsman flagged the issue of delays in handling access to documents requests concerning the TTIP negotiations.[74] The

[72] See the European Ombudsman Annual Report for 2017, p. 44.

[73] European Ombudsman Annual Report for 2013, p. 26.

[74] European Ombudsman Annual Report for 2014, p. 9.

subsequent report of 2015 mentions the handling of complaints by the Ombudsman in relation to delays without mentioning a systemic problem or a specific case. The report of 2016 puts emphasis on the handling of 20 complaints concerning delays in the authorization procedures for genetically modified food and feed.[75] Finally, the last available annual report of 2017 mentions the carrying out by the Ombudsman of a strategic inquiry on delays in chemicals authorizations.[76] Chemical authorizations, such as other risk regulation procedures (see Sect. 2.2.2), often do not provide for legal deadlines for all different administrative steps.[77] For this reason, the Ombudsman stressed the importance of abiding by the "reasonable time principle" even in the absence of a specific deadline.[78]

None of the examined reports mentions total administrative inaction. The Ombudsman has so far dealt only with delays. Looking at the two latest reports, it can be concluded that administrative delays are observed mainly in risk regulation procedures, in the course of which many actors, including Member States, the Commission, and EU agencies, are involved. In general, the role of the Ombudsman toward ensuring that the EU administration is acting in a timely way can be assessed as crucial and complementary to judicial action, because it is not bound to the strict admissibility conditions which courts are. This means that the Ombudsman can act and make recommendations in cases where the principle of good administration is compromised, even if all the conditions required for a successful action before the CJEU are not met, for example the conditions for claiming damages.[79]

2.4.6 Empirical Evidence

Apart from the investigations carried out by the European Ombudsman, evidence on whether the EU administration indeed applies by the rules on

[75] European Ombudsman Annual Report for 2016, p. 8.

[76] European Ombudsman Annual Report for 2017, p. 35.

[77] For example, art. 51(7) Regulation (EC) No 1907/2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH).

[78] See European Ombudsman, Decision of 18.07.17, Case OI/2/2016/RH.

[79] See European Ombudsman, Decision of 18.07.17, Case OI/2/2016/RH, para 23, where it is recalled that "the Ombudsman looks at this issue from the perspective of good administration, and not simply from the perspective of enforceable legal rights."

timeliness can be extracted from the case-law of the CJEU. The main indicator is constituted by the cases brought before the court on the basis of art. 265 TFEU, which constitutes the main judicial means against administrative inaction. No official statistics on the proceedings brought on the basis of this article exist. For this reason, the authors of this contribution conducted a research using the search engine of the CJEU.[80] From the beginning of the functioning of the CJEU until the end of 2018, 263 cases were brought to court alleging a failure to act by an EU institution, body, office, or agency.[81] Out of this total number, only thirteen cases have been successful. When assessing these thirteen cases and after having subtracted those with peculiar facts,[82] two main categories of cases have a recurring significance. The first category concerns instances in which the Commission failed to investigate complaints concerning the functioning of the internal market, more specifically about anti-competitive behavior (art. 101 TFEU)[83] or unlawful State aid (art. 108 TFEU).[84] The second category consists of cases where the Commission did not act in a timely manner when exercising its role as risk regulator.[85] Given the very limited amount of cases over time, it can be concluded that administrative inaction is not a major issue in EU governance.

The vast majority of cases that were found to be manifestly inadmissible consist of instances where the Commission had no legal obligation to act. A recurring example are cases brought by individuals because the Commission did not start an infringement procedure against a Member

[80] http://curia.europa.eu/juris/recherche.jsf?language=en.

[81] Please note that appeals are not counted as separate cases.

[82] Joined Cases 42 and 49/59 S.N.U.P.A.T. v High Authority (ECLI:EU:C:1961:5); Case 13/83 Parliament v Council (ECLI:EU:C:1985:220); Joined Cases 167 and 212/85 Assider and Italy v Commission (ECLI:EU:C:1987:195); Joined Case T-79/96, T-260/97 and T-117/98 Camar and Tico v Commission and Council (ECLI:EU:T:2000:147); Case T-306/10 Yusef v Commission (ECLI:EU:T:2014:141).

[83] Case T-127/98 UPS Europe SA v Commission (ECLI:EU:T:1999:167); Case T-74/92 Ladbroke Racing Deutschland v Commission (ECLI:EU:T:1995:10).

[84] Case T-442/07 Ryanair v Commission (ECLI:EU:T:2011:547); Case T-95/96 Gestevisión Telecinco v Commission (ECLI:EU:T:1998:206); Case T-17/96 TF1 v Commission (ECLI:EU:T:1999:119). On this, see Laule (1999).

[85] Joined Cases C-596/15 P and C-597/15 P Bionorica v Commission (ECLI:EU:C:2017:886); Case T-521/14 Sweden v Commission (ECLI:EU:T:2015:976); Case T-164/10 Pioneer Hi-Bred International v Commission (ECLI:EU:T:2013:503); Case C-107/91 ENU v Commission (ECLI:EU:C:1993:56).

State following their complaint or did not respond to their complaint at all.[86] It is established case-law that the Commission enjoys a wide margin of appreciation when deciding whether to start an infringement procedure and therefore no failure to act may be established in this respect.[87]

However, an exception exists in two cases, in which the Commission, according to the case-law, is legally obliged to act following a complaint alleging violation of EU law rules, namely when such a complaint concerns the application of the rules on anti-competitive behavior[88] or State aid.[89] The Commission applies an indicative time-limit of four months to respond to a complaint concerning State aid[90] and four months in case the complaint concerns anti-competitive behavior.[91] In all other cases, if a complaint alleging violation of EU rules is left unanswered, the action for failure to act brought by a natural or legal person is deemed inadmissible on the ground that the Commission has no legal obligation to act.

[86] Case C-412/18 P King v Commission (ECLI:EU:C:2018:947); Case C-137/16 P Petraitis v Commission (ECLI:EU:C:2016:904); Case C-235/12 P H-Holding v Commission (ECLI:EU:C:2013:132); Case C-130/16 P Gaki v Commission (ECLI:EU:C:2016:731); Case C-570/12 P Concal v Commission (ECLI:EU:C:2013:440); Case C-569/12 P Micsunescu v Commission (ECLI:EU:C:2013:439); Case C-568/12 P Ioanovici v Commission (ECLI:EU:C:2013:438); Case C-567/12 P Barliba v Commission (ECLI:EU:C:2013:437); Case C-566/12 P Baleanu v Commission (ECLI:EU:C:2013:436); Case C-25/12 P Trevisanato v Commission (ECLI:EU:C:2012:409); Case C-474/11 P Smanor v Commission and Mediator (ECLI:EU:C:2012:121); Case C-411/11 P Altner v Commission (ECLI:EU:C:2011:852); Case C-52/11 P Fernando Marcelino Victoria Sánchez v Parliament and Commission (ECLI:EU:C:2011:693); Case C-26/10 P Hansen v Commission (ECLI:EU:C:2010:260).

[87] Ibid. See also Lenaerts et al. (2014, p. 423).

[88] Case T-127/98 UPS Europe SA v Commission (ECLI:EU:T:1999:167); Case T-74/92 Ladbroke Racing Deutschland v Commission (ECLI:EU:T:1995:10).

[89] Case T-442/07 Ryanair v Commission (ECLI:EU:T:2011:547); Case T-95/96 Gestevisión Telecinco v Commission (ECLI:EU:T:1998:206); Case T-17/96 TF1 v Commission (ECLI:EU:T:1999:119).

[90] Cf. European Commission (2004), para 61.

[91] Cf. European Commission, Code of Best Practice for the conduct of State aid control procedures, para 71.

In any event, despite the absence of a legal obligation for the Commission to initiate an *infringement* procedure following a complaint, the principle of good administration requires that such complaints, in particular if they are well substantiated, should not be left unanswered.[92]

2.5 Overall Assessment of the Rules and Practices Around Administrative Silence

Timeliness of administrative action is highly valued at the level of the EU administration and constitutes an element of the fundamental right to good administration as enshrined in the EU Charter. The average duration of time-limits depends on the complexity of each procedure, ranging from only three days for a general query on the EU to an undetermined maximum amount of time in the complex procedures of risk regulation. In general, it can be concluded that simple procedures such as queries on information or requests for access to documents are timely and citizen-friendly. In EU civil service law, the handling of requests and complaints by employees of the Union also follows stringent time-limits. In EU competition and State aid law, reasonable time-limits are provided for each procedural step. Mainly, only when the EU acts as risk regulator, procedures can be lengthy, and their total duration is not always foreseeable from the outset.

The respective sectoral rules which set the time-limits normally allow for a prolongation, mainly for reasons of complexity of the case at hand. The administration has to justify why it makes recourse to a deadline prolongation and it needs to preannounce when the final act will be issued. In case the administration issues an act after a prescribed deadline, this might trigger the Union's obligation to pay damages, but in general it does not affect the validity of the act, unless the substance of the act is affected by the delay.

As regards the legal treatment of administrative silence, EU law does not contain a general rule which transforms inaction into a positive or negative implied decision. The main tool against administrative action, which is provided in primary law, is the possibility to make a claim before the CJEU, so that it is declared that an institution, body office, or agency of the Union failed to act. In such a case, an action for damages may also

[92] On this, see Harlow and Rawlings (2014, p. 156 et seq).

be brought before the court. Secondary law contains specific rules which may transform silence into an implied act. The two main sectors which contain general provisions on the creation of an implied negative decision in case of non-compliance of the administration by the prescribed time-limits are EU civil service law and the rules on access to documents, i.e., fields which presuppose an action by the EU and are thus not suitable for the use of implied positive decisions. EU secondary law provides for implied positive decisions in cases when the applicant seeks permission in order to proceed to a desired action which does not involve a risk for human health or the environment, such as merger control and authorization of State aid.

Among the examined fields, the main areas where general rules providing for fictitious decisions are absent are the areas of risk regulation and the distribution of funds, i.e., areas where a decision has important consequences for human health or the EU budget.

The examination of the European Ombudsman's annual reports and the case-law of the CJEU has shown that administrative inaction and delays are not major issues in EU administrative governance. The main field which forms the subject matter of Ombudsman's investigations in the last two years has been risk regulation procedures. In this field, the foreseeability of the total length of a procedure should be strengthened. To conclude, the EU administration has achieved not to be a "silent" administration and this contribution may thus convey a positive "sound."

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