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THE NOVELTIES IN THE MACEDONIAN LAW ON GENERAL ADMINISTRATIVE PROCEDURE

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Abstract. *In this paper authors analyzed the new changes of Macedonian General Administrative Procedure Act, especially the ones regarding the so called "silence of administration", and in particular the consequences that these changes have on the two instances principle of administrative proceeding.*

Key words: *general administrative procedure, administrative silence.*

INTRODUCTION

The Law on the general administrative procedure of the Republic of Macedonia was passed on May 26th, 2005[1] and represented a logical continuation of the founding principles that were a basis for the first codification of the administrative procedure in the world – the Austrian Law on the general administrative procedure of 1925. Using the groundwork of this Law, the Kingdom of Yugoslavia, in 1930, codified the procedure in front of state organs, thus becoming the fourth nation in the world that had passed a law on the basic administrative procedure. As it led to the creation and development of such an, entirely new, kind of societal relations, in 1956 a new Law on the general administrative procedure (coming into power in 1957) was brought. Even though this new law contained changes, it was still based on the already established fundamentals of the administrative procedure. A few unimportant, yet still necessary revisions of the same law were made in 1965, and later in 1977 and 1978. Finally, the year 2005 saw the passing of the first Macedonian Law on the general administrative procedure (following the independence the Republic of Macedonia) that foresaw new and more adequate methods for delivery, as well as new principles of the administrative procedure, that are in accordance with modern times. Yet, the legal regulative that anteceded the current Law on the general admin-

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istrative procedure represented an excellent fundament for regulating a large number of questions connected to implementing the basic activities of the public administration – deciding administrative cases, or in other words bringing concrete administrative acts. Still, the legislator was careful not to abolish the fundamentals of the law.

The latest changes in the LGAP from the year 2008[2] are not numerous, but for the first time an attempt was made at changing the core of some systematic solutionswhich had existed and functioned within the legal system for decades. We hereby refer to the institute "silence of the administration" and its legal regulation, which shall be the question of our further discussion.

1. CONTENT OF THE "SILENCE OF THE ADMINISTRATION" INSTITUTE

What does the silence of the administration mean in the daily lives of citizens? It means that the requests that are sent to the public administration are ignored, or in other words that their requests are not responded to within the time frames defined by legislative acts.

What is the legal importance of the "silence of the administration" institute? For the first time since the existence of legal-procedural rules in our nation, a singular answer to this question cannot be found. Until September of this year (when the law for changing and amending the law on the basic administrative procedure was passed) silence of the administration represented a basis for initiating an appeal procedure, or in other words the initiation of an administrative dispute. Here we will briefly present the legal meaning of "silence of the administration", as it is regulated by administrative-procedural rules:

A characteristic of the appeal procedure within "silence of the administration" is that the appeal can be filed directly to the second-tier body, and doesn't have to be given to the body to which the complainee filed the initial request, so that it can bring a decision, while it has not reached a decision at all. In such cases (when the first-tier body did not bring a decision within one month, and for more complicated cases two months; with the newest changes in the LGAP the periods are 15 or 30 days), the second-tier organ acts on the complaint in the following way. First, it can request that the first-tier organ announce the reasons for not bringing the decision in the prescribed period. If it finds that the reasons for not bringing the decision within the prescribed period were appropriate or if it happened because of liability on the side of the complainee, the second-tier organ will give the first-tier organ a period (not longer then 30 days) in which the decision must be brought. Yet, if the reasons because of which the decision was not brought, within the prescribed period, are not justified, the second-tier organ can request the writings of the case of the first-tier organ. If it is possible for the second-tier organ to decide on the case in accordance with the writings of the case, it will bring a decision; if it is not possible to do so, the second-tier organ will conduct a procedure, or, exceptionally, will order the first-tier organ to conduct a procedure and to send back the received information within a prescribed time-frame; after receiving the information, the second-tier organ will bring a final decision. This decision is ascertained as a second-tier decision even though a formally legal first-tier decision was not brought.

[2] "National Gazette of the Republic of Macedonia" No. 10/2008

2. THE CASES WHEN SILENCE MEANS ACCEPTANCE: REALITY OR DECLARATION?

One of the most important changes in the formal administrative-procedural rules in our nation happened in September of this year when within the LGAP a new article was added – article 129-a page 2[3] which states that silence of the administration becomes acceptance. In order to explain the essence of this new article, as well as its applicability, or possible inapplicability in practice, it is necessary to provide an overview of a few changes that had led to the change of this article.

The first, more serious, change was made in the component of the LGAP that contains the basic principles of the administrative procedure. We here refer to the principle of two-tiers, or in other words the right to an appeal given in article 14 part 1 of the LGAP, which until the changes made in September stated: "The party has the right to an appeal against a decision brought in the first-tier". With the change of this article, now the two-tier principle cannot be counted on as a basic principle of the administrative procedure, as the article states: "The right to an appeal against a single legal act brought in a first-tier procedure in front of an organ of the state administration, organization or other organ that conducts public competence's are regulated by law". With this novelty an attempt is made at literally operationalizing the amendment of the constitution of the republic of Macedonia, according to which an appeal or other legal protection against first-tier administrative acts is allowed. So, when there is no organ higher than the one that brought the first-tier administrative act, instead of an appeal the constitution allows for a direct initialization of an administrative dispute. This article, within the constitution, is interpreted by the legislator in a very rigid and narrow manner, because the possibility that the constitution gives does not mean a divergence from the two-tier principle, but rather an exception. Instead, the changes to the LGAP prescribe a full derogation of this principle, even as a general principle, and the right of a citizen to an appeal becomes a possibility that can (but not must) be prescribed in every material act, individually. On the other hand, this article remains in the component of the Law entitled "Basic Principles". This is just one more nomo-technical mistake of the legislator, or more concretely the creator of this legal text.

Finally, we can go on to analyze article 129-a, which in the public at large is represented as a foundation for exceeding the efficiency of the public administration and the so-called "regulatory guillotine", created by the Government of the Republic of Macedonia. In the first part of article 129-a, a novelty is implemented in terms of the form of the request through which a party can initiate an administrative procedure. Until the changes in the LBAP (September 2008) no such form was established, in terms of the requests of parties with which they addressed state organs or organizations with public authorization. Now, with the latest changes and additions to the Law there is an explicit possibility (not obligation), through which specific law the form and contents of the request of the party be established, as well as the time-frame during which the organ must bring a decision. This part of the article is of the utmost importance, because only if the conditions set forth are fulfilled will silence of the administration be interpreted as the acceptance of the request. So, for there to be a possibility of the existence of "silence-accep-

[3] Same.

tance", it is necessary to cumulatively fulfill the following conditions, defined by the law: 1) for it to be a procedure initiated by a request from a party; 2) the form and content of the request are established by the law; 3) the period for acting, or in other words bringing a decision, by the organ competent for acting on the procedure is established with a material act.

These are the conditions prescribed in article 129-a part 1. In the second part of the same article it is established that "In the cases of part 1 of this article, if the competent organ does not bring a decision in the foreseen period, it will be considered that the request of the party is accepted, within the procedure and conditions legislated by law". At first sight these legal changes do not foresee stringent conditions so that it comes to the application to the new principle of "silence-acceptance", but if one goes into the essence of the problem, the conclusion is entirely opposite: for the new procedural principle to be applied in an administrative procedure it is necessary to change ever existing material act through which government organs and organization with public authorization function when deciding on rights, obligations and legal interest of citizens. So, every material law must foresee the form and content of the form that every competent organ will bring, as well as establish a specific period that will be evasive from the basic periods for conducting an administrative procedure, as foreseen with the LGAP.

The changes of the LBAP connected to the institute "silence of the administration" are also in relation to the twofold shortening of periods for passing acts, on the part of the organ that leads the procedure. So, the basic period for simple cases for which a decision does not make it necessary to undertake all legal procedural actions is cut short from one month to 15 days, whilst for more complicated cases the period that was once two months is now cut short to 30 days.

Further on, article 221 part 2, which foresees that if a competent organ does not bring a decision within the foreseen time-frame and does not send it to the party, and a complaint is permissible, the party has the right to a complaint as if its request is rejected. The fact that this article still remains within the legal framework is a tad odd, because it is in full collision with the newly legislated "principle" that silence of the administration means acceptance of the request. Still a change is made to article 221 part 2, with which the article is supplemented with the words "unless it is not define otherwise by the law". That would mean the creation of a, new, fourth condition for a request that is not answered, to be seen as approved by an organ – in material acts it is explicitly stated that silence does not mean rejection, or in other words that silence represents acceptance. Now we can refer to four conditions that cumulatively must be fulfilled for every concrete case to lead to "silence-acceptance":

1) the procedure begins with a request from a party;
2) the form and content of the request are established by law;
3) the period for acting by the organ that is conducting the procedure is legislated with a material act;
4) it is established by the law that the party does not have the right to an appeal as if its request was rejected, when in the prescribed period a decision was not made.

Article 227 of the LGAP regulates the competences of organs that in an administrative procedure decide on complaints. Partial changes were made in this article, as well. Speaking on the solutions of the Government of the Republic of Macedonia, the newest

legal changes established an explicit possibility with which, through the usage of a lawsuit, an administrative proceeding can be launched against these decisions, as appeal is not permitted. This change represents an attempt at conformity with the Law on Administrative disputes, which was brought one year before the LGAP (2006), and within which there is an article that explicitly states that all concrete administrative acts brought by the Government are under the jurisdiction of the Administrative Court. Another novelty within the administrative procedure is inserted by the new part 5 of the existing article 227 of the LGAP that states: "In all cases within an administrative procedure when an organ is not prescribed for deciding in the second tier, the party can decide to file a lawsuit and launch an administrative dispute, against the first-tier decision". This article would have made more sense if the erasing of the first part of article 227 was foreseen. Within that part it is established that the competent organ for deciding on complaints against first-tier decisions, of the organs of the state administration, is the Government committee on Deciding in the Second-Tier. Recently within the public a promotion of an excellent idea was put through; one that suggested eliminating the second-tier government committees that are formed in accordance with material acts. From everything set out, so far, it is not difficult to conclude that the Government prepares changes in every material act that regulates specific questions of administrative matter, including articles within these acts with which the existences of second tier government committees and their competences, are foreseen. Yet, for the elimination of their existence it is necessary to eliminate the article from the basic regulation (LGAP) with which they are established as a second-tier organ.

In article 242 a new part 3 is added, according to which the second-tier organ, when deciding on a complaint for the second time (against a decision that has already been nullified once and returned so that a second decision is permitted), is obligated to solve the case in a meritory manner. This would have to be the brightest spot in the changes to the LBAP, and represents a deepening of the concept of strengthening the responsibility of the organ that overseas the control, as well as the controlled subject. The meritory deciding on behalf of the administrative court is immensely widened with the Law on administrative disputes, and now with the LGAP as well. As the current procedure is set, the second-tier (controller) organ is obliged, when deciding a second time on a complaint against an already abrogated decision, to solve the case in meritum without leaving a possibility for the party to lead an administrative procedure into abyss, while changing only the organs that proceed. Whatever the case may be, such a situation also allows silence – this time the silence of the second-tier administration. Yet, because in such a situation the legislator did not make an attempt at transforming silence into acceptance, the articles from the Law on administrative disputes remain in power. According to these articles, the party has the right to a lawsuit against the silence of the second-tier organ, as if its request was rejected.

3. THE PROCEDURE ACCORDING TO WHICH SILENCE SHOULD TRANSFORM INTO ACCEPTANCE

After the short overview of the most important changes in the LGAP, connected to the institute "silence of the administration" and its meaning, we will move on to an analysis of the last two articles that relate to the question of the procedure through which "silence is

acceptance" is operationalized. Concretely, it is crucial to look at articles 293-1 and 293-b that are moved into an entirely new section XVIII-a entitled "SPECIFIC ARTICLES WHEN IN EXCEPTIONAL CASES ARTICLE 129-a OF THIS LAW IS APPLIED". Through these two new articles an entirely new, specific, and fairly complex administrative procedure is established; one that must be taken only if the previously mentioned 4 conditions, according to which silence means acceptance, apply. In essence, the legislator made an attempt, through these two articles, to implement in a declarative manner, the principle set forth in article 129-a, which states that silence sometimes means acceptance. The procedure is as follows:

1.) Once again, the condition that form and content of the request of the party must be set forth ahead of time, so that not answering is seen as acceptance, is reiterated. Still, a serious problem arises through the clash of two articles from the same law – article 129-a part 1 foresees that the form and content of the request be established with a material law, while in article 293-a it is foreseen that this can be done either with a material law or by-law. The legislator made a flagrant mistake by allowing the collision of two articles from the same (brought at the same time) legal changes, with which organs that conduct the administrative procedure now have the discretion to choose which article from the law they will apply. There is no need to overview the changes that are created between the regulation of one issue with a law, and its regulation with a by-law.

2.) The request should be filed in a form prepared by the organ that is conducting the procedure. Without such a form the party cannot initiate the carrying out of an administrative procedure. Other than a form the organ is also obliged to write instructions for filling in the form.

3.) The party is obliged to fill in and file two identical forms, (and one enclosure of evidence) of which the second (that must be signed by the entity authorized in receiving filings) is kept by the party. The entity authorized for receiving filings is obliged to denominate the name of the organ, the date of reception, as well as any enclosures, on the forms.

4.) Further on, the competent organ cannot remove the filing as incomplete if it is correctly filled in, and has all the requested and necessary supplements incorporated and filled in within the form.

5.) The competent organ is obliged to decide on the basis of this filing in a **period established with the material law**. The accent on the latter part of the sentence has a point to remind that in the entire procedure where silence should be acceptance the basic time-frames foreseen in LGAP do not count, but rather the time-frames foreseen in the specific material laws are applied, if such exist.

6.) Further on, the competent organ has a period of 3 days, from the moment the filing is received, to check whether or not it contains all the necessary information. If the filing contains formal shortcomings, the organ will call on the party that filed it to remove the shortcomings, within a foreseen period. If that is not done, then the organ will bring a conclusion with which it will establish that the filing was not filed at all (a specific complaint against such a procedure is allowed).

7.) Within article 293-b, the legislator answers the question of what will occur if the competent organ is "silent", or in other words does not bring a decision within the period established with the material act. In such a situation, the party that filed the request, within a period of 3 days (from the expiration of the period for bringing a decision) can request from the official that heads the organ, to bring a decision in which the official will conclude that all conditions for silence of the administration have been fulfilled, and that the request is accepted. This would mean that if within the material act there is a period of 8 days for the competent organ to bring a decision, and it does not do so, the citizen within the three days following the passing of the 8 days can refer to the official. In a case where this period of three days is foregone, the procedure finished before it began, for the party that filed. This would mean that it would be necessary to once again file two new forms; they would need to be archived, completed with supplements, and so on.

8.) Once the official has received the request from the citizen (on the basis of silence of the administration) he (the official) is obliged, within a period of five days, to bring a decision that will establish that the preconditions for silence of the administration exist, and that the request of the party is accepted (article 129-a). This is a declarative act in which the official establishes an existing situation. In administrative-legal theory it is well known that declarative administrative acts do not create action all by themselves, but rather serve only as a basis for bringing constitutive acts, which can create legal consequences in legal traffic. For that reason, the legislator was inconstant and did not answer the question of where the side should refer, and what it should do with the decision given by the official, which in a declarative manner states that the request of the party is accepted. Does the official *ex officio* send this decision to the competent organ that was silent, or does that have to be done by the party? Is the competent organ, after receiving the decision, obliged to bring the act that it previously had not, in the foreseen period? Does the official have the right to order the competent organ to bring a certain act? Does this not lead to a breach of the principle of independence on deciding on administrative issues, as a basic principle of the Law on organization and work of the organs of the state administration? Many issues have arisen with the implementation of these new changes in the LBAP, and the legislator has not answered proficiently, or in other words has left a curtailed legal text.

9.) The following situation that is solved with the new article 293-b part 3 is "silence of the official". In that manner, the legislator established that if the competent official does not, within a period of five days, bring the foreseen declarative act, the party has the right to initiate an administrative dispute. Of the entire criticism aimed at this legal text it seems that this aspect deserves the most! It is absolutely unclear against whom, what kind, and whose act the party will launch an administrative dispute? Administrative disputes can only be conducted against final acts, yet here, because of the new concept of periods, it is unclear when decisions not brought by competent organs become finalized. Actually, administrative disputes can only by conducted against decisions that were not brought by the official, which is not really that necessary for the party. On the contrary, it would mean a lot more to the party if it received the concrete permit, license and similar, rather

than receiving a declaration that its right is accepted. Thus, it would have been much better if the party could file an administrative dispute against the organ competent in giving the specific permit. Yet, that cannot occur, because a complaint against silence of the organ is not permitted, but rather only a request to the official to give a decision for constituting that the request should be accepted. Here there is no definiteness in the act (as in the past where there was a legal assumption that after the passing of 30 days if the organ did not answer it acknowledged that the request/complaint has been rejected, so the party has the right to initiate an administrative dispute), so it is unclear how the administrative court will act on such lawsuits.

CONCLUSION

Administrative- procedural material is regulated with two key laws, which are brought by a two-thirds majority in the Assembly of the Republic of Macedonia: the Law on the general administrative procedure and the Law on administrative disputes. From everything that has been exposed so far it is obvious that both laws need to be conformed to practice, to genuine societal relations between adminstrave organs and citizens. Simply said, certain legal articles, within both laws, lack applicability – the possibility for their application in the everyday lives of citizens. Thus, the point of our publicity is to inform on the mistakes, contradictories and empty spaces that are found within both of these key procedural legal acts, in the area of adminstrave matter. The final decision in terms of (not) taking tangible measures still remains in the hands of the competent organs: the Ministry of Justice, Government and Assembly of the Republic of Macedonia.

NOVITETI U MAKEDONSKOM ZAKONU O OPŠTEM UPRAVNOM POSTUPKU

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U radu autori analiziraju nove promene Makedonskog zakona o opštem upravnom postupku, posebno one u vezi takozvanog "ćutanja uprave", a pre svega posledice koje ove promene imaju na princip dvostepenosti u upravnom postupku.

Ključne reči: *opšti upravni postupak, ćutanje uprave.*