Does the silence of the publicadministration mean consent? Decision duty, administrative silence and tacit approval*

Administração que cala consente? Dever de decidir, silêncio administrativo e aprovação tácita

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ABSTRACT

The article addresses the steps of Brazilian law in combating the failure to decide by the public administration. It then examines the tacit approval under the terms of the Economic Freedom Act and its Regulatory Decree. It addresses its explicit and implicit requirements, the hypothesis of prohibition, effects after the fictitious act and the question of the applicability of the institute to states and municipalities.

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KEYWORDS

Decision duty — administrative silence — tacit approval — Economic Freedom Act

RESUMO

O artigo aborda os passos do ordenamento brasileiro no combate à omissão de decidir da administração pública. Em seguida, examina a aprovação tácita nos termos previstos pela Lei de Liberdade Econômica e seu Decreto Regulamentar. Abordam-se seus requisitos explícitos e implícitos, as hipóteses de vedação, os efeitos posteriores ao ato fictício e a questão da aplicabilidade do instituto a estados e municípios.

PALAVRAS-CHAVE

Dever de decidir — silêncio administrativo — aprovação tácita — Lei de Liberdade Econômica

1. Introduction: the discharging powers of the controlling State

The State is everywhere. Over the past two centuries, it has expanded in supportive, inductive, directive, regulatory and even participatory ways, based on techniques of monopolizing goods and activities or competitive market participation. As a dedicated component of the satisfaction of collective needs and the management of the state apparatus, public administration developed proportionally and in parallel. Today, it offers amenities to individuals and companies, provides them with direct and indirect benefits to induce socially desirable behaviors, institutes regulations that condition freedom and property, and imposes sanctions for offenses of commission or omission, in addition to facilitating discharging acts, as a condition of the validity of private conduct.

Administrative processes and acts of a discharging nature, such as permits, concessions and licenses, have become a common part of the life of any citizen, company or entity of the third sector. The state exercises control of private life in a large number of sectors. It is necessary to resort to its authority and obtain its consent before building, demolishing, driving,

piloting, hunting, fishing, erecting factories and other environmentally impactful structures, undertaking economic enterprises of substantial value, or carrying out certain commercial, industrial, agrarian and even professional activity. Discharging acts are incorporated in the most varied fields of human action, whether economic, environmental or social. Without them, citizens are subject to state powers, which restrict their fundamental rights. Without such acts enshrined in law, governments start to act unlawfully, applying precautionary measures, such as the suspension of activities and seizure of assets, and punitive measures, from cautions and fines to intervening determinations of cessation of activity, corporate restructuring etc.

The responsibility of the legal system for discharging acts and processes usually rests on the argument that the State needs to protect primary public interests and mitigate the risk of injury to individual rights and interests, collective and diffuse. This is why it implements prior control of social actions and more sensitive, controversial or risky economics, making use of

administrative processes for licensing, authorization, concession and such. Not infrequently, however, questions arise as to whether these techniques involving prior impositions on human behavior, are really adequate and necessary for the efficient prevention of damage to the collective.

Many discharging processes were created with the sole intention of collecting money, given the custom of instituting a fine under Brazilian law. Equally frequent are those created through an instinctive desire to control, without any proven effect on improving social, economic or environmental conditions. There are situations in which the State establishes these procedures with plausible justifications, but unfortunately without the expected level of professionalism. This results in discharging acts which are merely symbolic, incorrect or that do not fulfil their purpose of protecting public interests. Examples abound, from licenses for establishments that cannot function due to an evident risk of fire, to buildings in areas vulnerable to disasters or incompatible with the environment, as well as commercial activities incommensurate with consumer protection.

The topic of the failures and pathologies of state discharging processes is controversial, and extremely relevant to the debate about the scale and powers of intervention of public powers in public administration. This, however, is not the focus here.

For now, we should keep in mind that such processes are many and expressively affect the exercise of rights and interests of individuals on a daily basis. This is because they impose barriers and financial and technical

challenges, equally significant to the exercise of rights and freedoms. And there is no doubt that these costs are proportionately more onerous for the huge low-income population, forcing many people down the path of informal work and often illicit activity. On the other hand, consequences arise from disregarding the rules of the controlling authority. Ignoring and violating established discharging requirements of administrative law, makes room, as explained, for the imposition of measures, injunctions and sanctions that are at times burdensome. Once again, the most common bearers of these measures are those who do not have the economic or technical wherewithal to deal with the processes the legislator creates and recreates on a daily basis in the three spheres of the federation.

Given these non-negligible impacts, it is to be expected that the contemporary state worries about simplification and bureaucratic improvement and strives to conduct discharging procedures conscientiously and professionally, above all with respect for deadlines and the administrative process. However, reality does not always reflect this. There is no doubt that many public bodies and entities acheive excellence, acting according to the correct parameters, but there are countless instances of ignored deadlines, and failure to observe instructions, which drag out administrative processes unreasonably or indefinitely.

The reasons for this problem in the functioning of the state apparatus are of different orders of risk, which can be divided, for pedagogical purposes, into non-voluntary and voluntary reasons, i.e., reasons independent of the will of competent public officials and decisions that flow from their will. The first group includes factors such as the lack of technical and human resources to process a very high number of requests for licenses, authorizations and such — which is very common in municipalities. In the second, the most serious factors enter, such as corruption, abuse of authority, or the use of the process for the purpose of harassment,[1] negligence, undue renunciation of competence, fear of acting improperly under undue pressure from control bodies, lack of professionalism, etc. Such factors lead public officials, not infrequently, to practice what has been called "wilful shelving."[2]

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[1] In this sense, see also FIGUEIREDO, Caio Cesar; KLEIN, Aline Lícia. A eficácia condicionada do deferimento tácito administrativo para atos públicos de liberação: quando o silêncio advém do legislador. In: CUNHA FILHO, Alexandre Jorge Carneiro da; MACIEL, Renata Mota; PICCELI, Roberto Ricomini. *Lei da Liberdade Econômica anotada*. São Paulo: Quartier Latin, 2019. v. 1, p. 342.

[2] MARRARA, Thiago. O que precisa mudar na Lei de Processo Administrativo? CONJUR,

They force individuals into paralysis, as records are typically placed in a drawer, to be deliberately forgotten about. For more or less ethically sound motives, such as those illustrated, disrespect for decision deadlines will always generate the possibility of unlawful silence (although not necessarily culpability)[3] and be potentially harmful. Such scenarios need to be fought with legal means to guarantee the effectiveness of fundamental rights, in spite of administrative deficiencies or the incapacities or intentions of the public official. Concern about this is not new. As early as 1938, Themistocles Brandão Cavalcanti[4] published the first Brazilian studies on the subject, to which were added recent reflections by Dallari, Martins, Hachem, Vitta, Fortini, Saddy, Hadlich and others I will mention in due course.

In the wake of the many contributions published since the 1930s, the aim here is to contribute to the discussion by demonstrating how positive Brazilian legal practice fights against the illicit silence of the public administration. Thus, I will divide the advances in legislation into four steps, not necessarily sequentially or chronologically organized. The first represents the consecration of the decision duty, reflecting a guarantee fundamental to the administrative process; the second, the development of techniques for transfer of the decision duty; the third, the spread of key rules conferring a positive effect on malpractice, generating tacit approval in some situations; and the fourth step, consisting of the incorporation of "tacit approval" as an institute of general administrative law, following the passing of the Economic Freedom Act.

2. The first step: enshrining the decision duty.

The first step in the fight against illicit silence and undue inaction of the State, mainly in the processing and elaboration of admissible acts, granting

17 Feb. 2015. Digital edition, without page numbers available at www.conjur.com.br/2015-fev-17/thiago-marrara-lei-processo-administrativo-mudar2.

3 Hachem, when dealing with the issue, made an important distinction: not all silence, as regards unlawful behavior is necessarily culpable. The distinction is essential for the study of the public official's liability for non-compliance with the duty of decision. Cf. HACHEM, Daniel Wunder. Processos administrativos reivindicatórios de direitos sociais — dever de decidir em prazo razoável vs. silêncio administrativo. *Revista de Direito Administrativo & Constitucional*, n. 56, p. 153, 2014.

4 CAVALCANTI, Themístocles Brandão. A teoria do silêncio no direito administrativo. *Revista da Faculdade de Direito da USP* (RFDUSP), v. 34, passim, 1938.

of particular behaviors, consisted in the gradual activation of the decision-making duties of the administration, accompanied by rules defining clear deadlines for their exercise. As amazing as it seems, up until recently that duty was not so explicit and special laws often omitted deadlines for decisions - a situation aggravated by the lack of general administrative procedural laws that could fill gaps through subsidiary application.

From a legal point of view, the gradual recognition of decision duties is not even necessary in laws of administrative procedure or of sectoral processes, as it derives from fundamental rights anchored in the Constitution. Many administrators, such as Adilson Abreu Dallari[5] and Irene Patricia Nohara,[6] clarify that the right to petition enshrined in the Constitution

of the Republic (art. 5, XXXIV, 'a') guarantees the right of decision and, by logical imperative, a duty to decide. What good would the right to petition be without the duty to reply? It would be useless for the legislator to guarantee the right of the citizen to request something from the administration without the obligation of the state to examine such requests and issue an express decision thereon. This reasoning results in the inexorable relationship between the right to petition and the decision duty. In addition, Dallari adds that the duty in question has been reinforced by due process, constitutionally extended in 1988 to administrative procedures. He explains that the process does not end with the petition, "implicitly bringing an ordered series of acts for appreciation of the petition presented."[7] In other words, due to its complex nature, any process unfolds at least in terms of an act of opening and another of closing, pertinent to the first. Modesto, in turn, cites as basic to the right of decision the fundamental rights to obtain information and certificates.[8]

Although anchored in the Constitution of the Republic and in fundamentals consolidated therein, the national legislature considered it essential to reiterate the decision duty through infra-constitutional legislation,

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5 DALLARI, Adilson Abreu. Dever de decidir. In: BITENCOURT, Eurico; MARRARA, Thiago (Org.). *Processo administrativo brasile*iro: estudos em homenagem aos 20 anos da Lei Federal de Processo Administrativo. Belo Horizonte: Fórum, 2019. p. 113.

6 NOHARA, Irene Patrícia; MARRARA, Thiago. *Processo administrativo*: Lei n. 9.784/1999 comentada. 2. ed. São Paulo: Revista dos Tribunais, 2018. p. 393.

7 Adilson Abreu Dallari. Dever de Decidir, op. cit., p. 113.

8 MODESTO, Paulo. Silêncio administrativo positivo, negativo e translativo: a omissão estatal formal em tempos de crise. Colunistas, n. 317, 2016. Online edition, without page numbers, available at: www.direitodoestado.com.br/colunistas/paulo-modesto/silencio-administrativo-positivo-negativo-e-translativo--a-omissao-estatal-formal-em-tempos-de-crise-. Accessed on: 10 Jan. 2020.

to discourage omissions and illicit activities by public administration, mainly the harmful practice of "intentional shelving" of requests for discharging action. A symbol of this vigorous movement is the *Lei de Processo Administrativo federal* (LPA), 1999, whose chapter XI focuses exclusively on the "duty to decide", overcoming a historic gap in general administrative law.[9]

Art. 48 of the LPA provides that "the Administration has the duty *to explicitly issue decisions* on administrative proceedings and on requests or complaints in matters within its competence". With that, it imposed not only the duty to deliberate, but to decide explicitly and clearly, prohibiting implied, indirect, hidden, obscure, informal or disguised decisions. Art. 49 granted a period of 30 days from the end of the instruction for the issuing of the decision, permitting an express and motivated extension of an equal period. This maximum general period of 60 days refers to the period of preparation of the decision itself, not to the process as a whole, which may naturally last much longer, depending on the complexity of the instruction, the actions of the interested parties and also the possible existence of other deadlines for the procedural steps prior to the decision itself.[10] However, as many specific laws do not establish deadlines, not even for the general duration of the process, art. 49 took on a primary role, often extending through its subsidiary application to different fields of federal public administration and to various administrative procedures conducted in states and municipalities, given their lack of procedural devices and the possibility, by analogy, of applying the federal law directive.

In 2004, five years after the publication of the federal LPA, a new normative instruction

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[9] In 1938, Cavalcanti warned that there was a lack of general rules to deal with administrative silence, general deadlines for decisions and sanctions for non-compliance. In his view, this deficiency of the Brazilian administrative process can be attributed to the lack of administrative litigation, which presupposes greater rigidity of procedural formulas, and respect for deadlines and other requirements, very close to those existing in the judicial process. Cf. Themístocles Brandão Cavalcanti, *A teoria do silêncio no direito administrativo*, op. cit., p. 127.

[10] Regina Ferrari claims that it is possible "[...] to accept that the reasonable period for the manifestation of the public authority, in an administrative proceeding, may be up to 120 days", since, in the Writ of Mandamus, this is the term counted "from the moment that silence has become apt to produce injuries to the administrator, if there is no other legally established deadline". FERRARI, Regina Maria Macedo Nery. O silêncio da administração pública. A&C — *Revista de Direito Administrativo & Constitucional*, n. 52, p. 65-66, 2013. In a similar sense, MIGUEL, Luiz Felipe Hadlich. Silêncio administrativo — o "não ato". In: MEDUAR, Odete; SCHIRATO, Vitor Rhein (Org.). *Os caminhos do ato administrativo*. São Paulo: Revista dos Tribunais, 2011. p. 209.

reinforced the decision-making duty of the public administration. With the Reform of the Judiciary, carried out through Constitutional Amendment No. 45, item LXXVII was added to art. 5, which ensures as a fundamental guarantee the reasonable duration of an administrative process and requires the State to grant all citizens the right to prompt processing. Later, important changes were introduced in the federal LPA to give life to the constitutional directive. Concerned about reasonable timeframes for vulnerable groups, for whom slow decision-making can generate greater harm, Law No. 12.008, of 2009, imposed the accelerated and preferential processing of federal administrative procedures concerning the disabled, people with serious illnesses and the elderly.[11]

It is natural to inquire whether the consecration of a reasonable duration of procedures at the constitutional level has brought something new as regards the decision duty, in the federal LPA since 1999. Insightfully, Hachem did not overlook this. In his view, the constitutional modification carried out in 2004 allowed a theoretical differentiation between "legal deadlines" and "reasonable deadlines". The reasonable duration creates, for the public authority, the duty to "provide swift processing of the administrative process, without delays or unjustifiable stoppages", so that the decision must be taken "within as short a time *as possible*" (emphasis added).[12] In this sense, while the legal deadline sets the maximum period, normatively defined from a "generality of situations", the reasonable time is the appropriate time for the decision, and therefore shorter than the legal term in light of the circumstances of specific cases and the need to protect, with greater speed, the applicant's rights. In this way, concludes Hachem, the duty to decide may apply "(i) before the time period legally provided for the resolution of the requests or (ii) at the most, within the legal deadline."[13] However, this position is not unanimous. To illustrate, Hadlich Miguel understands that the reasonable period may, if necessary, exceed the maximum period of 60 days of the Federal LPA.[14]

Without prejudice to the numerous legislative advances affirming the duty to decide according to legal deadlines and reasonable timeframes, Brazilian

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[11] 11 For criticism of techniques to accelerate the process, cf. NOHARA, Irene Patrícia; MARRARA, Thiago. *Processo administrativo*: Lei no 9.784/99 comentada. São Paulo: Revista dos Tribunais, 2018. Commentaries on Art. 69-A, p. 566 and following.

[12] Daniel Wunder Hachem, Processos administrativos reivindicatórios de direitos sociais, op. cit., p. 149.

[13] Ibid., p. 153.

[14] Luiz Felipe Hadlich Miguel, Silêncio administrativo — o "não ato", op. cit., p. 209.

positive law continued to advance in the field by gradually establishing requirements for qualitative decisions. First, therefore, the legislation granted citizens the right of decision and, second, raised the quality of decision making offered by public administration. At least two legal acts approved in the 2010s support this: the 2015 Code of Civil Procedure (CPC) and the inclusions in the Introduction to the Rules of Brazilian Law (LINDB) of 2018.

It is hard to underestimate the role of the CPC in the administrative process for a simple reason. According to its article 15, the rules of civil procedure apply subsidiarily to administrative processes where appropriate. If there is a gap in sectoral legislation, it is up to the interpreter to seek a solution in the Laws of Administrative Procedure and, if a gap persists, in the Code of Civil Procedure, where its logic is applicable to the administrative procedure specifically in question. For this reason, two CPC elements are particularly relevant in terms of administrative scope: art. 489 and 490.

Art. 489 is relevant for Public Administration, as it offers the essential elements of decision making (report, foundation and provision), defining them clearly. In addition, it explains that a decision is not considered substantiated when: (i) it is limited to indicate, reproduce or paraphrase the normative act, without explaining its relationship with the cause or the matter decided; (ii) employ indeterminate legal concepts, without explaining the concrete reason for incidence in the case; (iii) invoke reasons that would lend themselves to justify any other decision; (iv) fall short in terms of facing all the arguments deduced in the process capable of invalidating its conclusion; (v) limit itself to invoking a precedent or summary statement without demonstrating fitness to the case; or (vi) ignore the summary, jurisprudence or precedent invoked, without demonstrating the existence of a distinction in the case in judgment or an overriding understanding. The principle at issue still pertains to reasoning in cases of contracdition of rules and provides that the decision needs be interpreted "from the conjugation of all its elements and in accordance with the principle of good faith". Art. 490 demands that the decision maker resolve the merits, accepting or rejecting, in whole or in part, the requests formulated. It thus establishes a mandatory link of coherence between the final decision and the petition - reinforcing art. 50, § 1 of the federal LPA, which requires explicit, clear and "congruent" administrative decisions.

In 2018, with changes determined by Law No. 13.655, LINDB gained an extensive set of new regulatory provisions aimed at increasing legal certainty in relations between the public administration and society. In this scope, the legislator reinforced the drafting requirements of administrative decisions,

encouraging more professionalism, care, planning and transparency in the decision-making process. This is evident, for example, in arts. 20 and 21. The first prevents the public official from deciding based on "abstract legal values, without considering the practical consequences of the decision". On the one hand, this standard shows proximity to the provision of the CPC, which considers decisions that use indeterminate concepts, without relating them to the specific case, unfounded. On the other, it goes beyond including in the motivation, beyond pre-supposed factual and legal aspects, a diagnosis of the consequences of the decision chosen. Not only that, its single paragraph requires that the motivation demonstrate the reasonableness of the choice through adequate and necessary analyses. The second relevant provision is art. 21, which imposes on the public administrator the need to indicate "legal and administrative consequences" of decisions that decree the invalidation of an act, contract, adjustment, process or administrative rule. This command, along with many others, confirms the path of Brazilian positive law in the sense of valuing the duty of decision and fulfilling the need for higher quality and greater professionalism.

3. The second step: transfer of the decision duty

The reasons why the administration is silent or fails to act within the deadline, omitting its duty to decide, are of the most varied and result from factors sometimes attributable to the public official, sometimes not. Due to this, the enshrinement in general laws of a decision duty will never be able, on an exclusively legal level, to combat the illicit silence resulting from such different factors. Aware of these various factors accounting for silence and parallel to the strengthening of the duty, the legislator considered it important to look for other means to guarantee fundamental rights of individuals and legal entities that deal with public administration and require liability.

Among these alternatives, the transfer or translation of the exercise of competences deserves focus. Brazilian law provides for certain technical cases that promote, in a binding or discretionary way, the punctual displacement of the decision-making task from one agency to another - superior, inferior or belonging to another entity. Examples of these techniques are delegation and avocation, employed on a voluntary basis, based on hierarchy, as well as supplementary or subsidiary procedural action.

Delegation and avocation are familiar to public administration and configure institutes of general administrative law, valid for all and any sector of administrative actions, prohibited only for specific situations.[15] Delegating implies transferring the *exercise* of the competence of a higher to a lower body or transfer, by consensus, of the exercise competence to a parallel body. Invoking, in turn, implies transferring the exercise of competence attributed to the inferior to the superior body by determination. Both in the delegation and in invocation, it is not the competence itself, but its exercise which is transferred. In addition, its lawful performance depends on the observance of numerous rules, such as the prohibition of transferring certain decisions, specificity (duty to transfer clear and punctual tasks), partiality (prohibition to transfer all tasks), advertising (need to disclose the displacement of the exercise of competence) and precariousness (possibility of revoking the transfer at any time).

Since they are based on hierarchical power within state entities, the powers to delegate and invoke are useful remedies to prevent the harmful effects of administrative silence caused, for example, due to lack of technical capacity of the original authority, insufficient human resources, or excessive external pressure, among other causes. Insofar as the current legal system includes general rules defining the judicial regime and procedures of delegation and invocation (such as those of the federal LPA), it has become easier for superior bodies to use these tools to hinder decisions, deadlines and judgments. Faced with the probability of untimely exercise of decision duties, it is enough for the superior body either to displace the exercise of its competences in a horizontal or descending sense, or invoke

higher bodies with regard to decision difficulties of a specific case or group of cases with particular characteristics (of a more complex or sensitive nature, for example). Delegation and invocation are, therefore, useful mechanisms for preventing unlawful silence and protecting the fundamental guarantee of individuals and legal entities to obtain an adequate response from the public administration.

Reviewing sectoral administrative law, we discover that several procedural novelties have been developed in recent years, as weapons against the violation of the duty to decide. Many of them have not yet been instituted

[15] Pursuant to art. 13 of the federal LPA, the following cannot be delegated: I - editing of normative acts; II - the decision of administrative appeals and III - matters under the exclusive competence of the body or authority.

as general administrative law, i.e., they cannot be used in all sectors of public administration. But they stimulate reflections on how conceptions about the administrative process can advance to fight the malpractices discussed here. Key examples are Supplementary Law No. 140, of 2011, which governs the administrative process of licensing and cooperation between the Union, states and municipalities in the execution of environmental policy.

In relation to coordination and cooperation in the complex tripartite federation, in view of the common competence of overseeing the environment, the aforementioned Law contributed two important tools, namely: (i) *supplementary performance* and (ii) *subsidiary performance*. Each of them operates at different procedural moments and according to their own requirements, but, as will be seen, they also attack unlawful silence and contribute to the fulfilment of the decision-making duty of the public administration by overcoming or mitigating some of the internal or external factors that make it infeasible in many agencies.

Subsidiary performance involves one federal entity providing assistance to another for it to carry out administrative processes of environmental licensing, deferral or denial of previous licenses, license operation or installation. Thus, e.g., a small municipality in Minas Gerais with few public officials serving a large number, demanding environmental license requirements or difficulties understanding a complicated licensing case may request support from the environmental agencies of the state of Minas Gerais. Thereby, it will be easier to carry out the process and lower the risk of disrespecting deadlines and the occurrence of unlawful silence. Subsidiary action is, therefore, nothing more than a kind of inter-federative cooperation designed to facilitate the performance of competences assigned to political entities with administrative difficulties, occasional or chronic. Due to this, subsidiary performance operates before the decision is taken and upon request of the entity that needs support.

In contrast to subsidiary action, requested at the discretion of the body with the original competence to decide on matters of environmental licensing, *supplementary action* entails automatic replacement of the decision-making entity by the environmental body of the higher federative sphere. If, in the same example given, the municipality in Minas Gerais is not able to comply with the terms of the license, by force of law the exercise of its decision-making competence will be automatically released into the hands of the environmental agency of the state. Here, there is an automatic transfer of public tasks by force of will of the legislator, i.e., in a binding way, with

no room for pertinent proceedings on any grounds for the authority of the originally competent body that did not fulfil its duty to request a waiver.

Paulo Modesto named this type of technique to combat omissive decision making - typical of processes that do not meet with tacit approval - a kind of translational silence, which he defines as "subrogation, by displacement provided for by law, of decision or opinion-making competence of one agency to another, independent of presumption or otherwise of the granting or denial of the claim of the individual, due to formal and unlawful inactivity".[16] The transcribed definition means, principally: what is transferred is not the competence established by law, but its appropriate exercise. Modest recognizes this in another passage, stating that the original organ that failed to act and suffered the effects of the displacement of its task in a specific case does not automatically lose its competence to act in others.

This type of transfer of administrative tasks from one entity to another is not limited to environmental law, nor to the relationships of component bodies of the Executive Branch. There are other manifestations of unwanted silence that the legislator attempts to address with analogous tools. To illustrate this statement, it should be noted that the Anti-Corruption Law expressly provides that the Public Prosecutor's Office, in a civil action, may request that the judge apply administrative sanctions (fine and conviction), in case the public entity that should carry out the administrative process of accountability has been silent or omissive in combating the practice of corruption.[17] As stated, this example does not refer to discharging processes, but to punitive ones and involves a form of supplementary Judiciary action in relation to the public administration. Furthermore, it serves to demonstrate that transfers of tasks are a basic solution, a viable method of overcoming the inertia and silence of the administration, including punitive measures, if necessary.

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[16] Paulo Modesto, Silêncio administrativo positivo, negativo e translativo, op. cit.

[17] Pursuant to art. 20 of the Anti-Corruption Law, "in lawsuits filed by the Publc Prosecutor's Office, the sanctions provided for in art. 6, without prejudice to those provided for in this Chapter, as regards the omission of the competent authorities to promote administrative accountability".

4. The third step: positive effect of silence on sectoral legislation

There is a third way of tackling the silence of the public administration regarding discharging processes, involving verification of legal effects during the decision period. To silence, can be attributed consequences ranging from excluding the behavior to editing fictitious administrative acts. To explain this last phenomenon, we may use the expressions "negative silence" and "positive silence". In the synthesis of Ricardo Martins Marcondes, the negative implies the rejection of the request of the interested party after the expiry of the term, and the positive, its approval.[18] In both, the legislator creates legal fictions, since the authority does not actually judge.

In practice, the legal system provides for these legal fictions in law so that the silence of the public administration (as a fact) redounds, after the expiry of the decision period, in an administrative provision, in external or internal legal terms,[19] of denial or approval of what is requested. This technique is generally limited to discharging beneficial acts, as expected in release processes, relating to the issuance of licenses of all kinds, authorization, concessions and so on. It is not consistent, however, with other forms of silence or inactivity, such as the execution of material acts, imposition of sanctions, issuance of opinions, such as reports and legal advice, or defense of the interests of the administration.

Either as rejection of the request (negative silence), or as deferral (positive silence), the provision of the fictitious administrative act is spread through legislation over time. At first, this happened to allow citizens judicial control in countries with administrative courts. Themistocles Brandão Cavalcanti explains that, in French law, the Law of July 17, 1900 considered silence of the administration a simple refusal and denial in cases of appeals

to the Council of State. In Italy, the Law of March 3, 1934 prescribed explicitly that the persistent and continuous silence of the administration

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[18] BACELLAR FILHO, Romeu Felipe; MARTINS, Ricardo Marcondes. *Tratado de direito administrativo*, v. 5: ato administrativo e procedimento administrativo. São Paulo: *Revista dos Tribunais*, 2014. p. 86. Sobre o conceito, cf. também MEDAUAR, Odete. Comentário ao inciso IX do artigo 3o. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 312.

[19] The tacit act is divided into internal, when referring to inter-administrative relations, or external, referring to a relationship between the administration and administered. In this sense, VITTA, Heraldo Garcia. O silêncio no direito administrativo. RDA - *Revista de Direito Administrativo*, p. 130, v. 218, 1999.

regarding a hierarchical matter was taken as confirmation of the administrative act and denial of the appeal.[20] In a recent monograph on the subject, André Saddy reveals how from then onwards this technique spread to European and American countries, such as Spain, Portugal, Argentina, Mexico and Peru.[21]

Over the years, even in countries without administrative litigation, without specialized justice for conflicts involving public administration, fictitious acts resulting from silence have begun to gain attention, mainly in terms of mitigating the risks that slowness and procedural delay of some public bodies cause to the individual, the market and society. Laws of very specific sectors began to adopt negative or positive verification techniques with the objective of protecting the citizen against disrespect of deadlines. In Brazil, examples of this can be found in: Urban law, in which the silence of the municipality authorizes the owner to dispose of property under the right of preemption; in Regulatory law, in which the silence of the ANP implies implementation of oil and natural gas exploration plans and, equally, in Competition law.

For its long and controversial history, as well as for its impact on interested third parties, the use of silence and tacit approval in Competition Law deserves separate comment. In the preventive control that Cade (Conselho Administrativo de Defesa Econômica,) carries out, in certain economic areas, the Law for the Defense of Competition sets a maximum deadline for procedural completion and, in its original wording, prescribed the following, in art. 64: "Failure to meet deadlines provided for in this Law *implies the tacit approval of the act of economic concentration*". However, this provision was vetoed by President Dilma Rousseff at the suggestion of the Ministry of Justice, which summarized its reasons as follows:

> As written, the article establishes the tacit approval of acts of concentration as an automatic consequence of non-compliance with deadlines established by Law, causing a disproportionate impact and the potential for serious damage to society. Note that the legislation offers less burdensome mechanisms and is able to ascertain the

[20] Themístocles Brandão Cavalcanti, A teoria do silêncio no direito administrativo, op. cit., p. 126-127.

[21] For an overview of foreign law, cf. SADDY, André. *Silêncio administrativo no direito brasileiro*. Rio de Janeiro: Forense, 2013. Especialmente a parte II, a partir da página 131; and SILVA, Lígia Covre da. Da modernização estatal ao silêncio administrativo e seus efeitos no direito latino-americano: uma investigação normativa. RDDA, v. 1, n. 2, p. 473, 2004.

responsibilities for disrespecting the deadlines established by law.

Although the reasons are plausible and common to every discussion about positive effects, the fact is that Brazilian Competition law has long provided for this mechanism. The *Lei de Defesa da Concorrência* of 1962 provided for this when declaring that, if Cade failed to comply with the concentration examination deadline, it would be considered valid, without prejudice to the Council examining it later — a kind of positive effect without preclusion (art. 74, § 3). Later, the 1991 Law, which amended that of 1962, provided that mergers not considered within the legal term would be "valid, perfect and finished", unless applicants had failed to submit requested clarifications or documents necessary for examination of the operation within the legal term, a situation that would automatically extend the decision deadline and conclusion of the process.[22] The same logic was maintained in the Law of 1994, which continued to provide for tacit or fictitious judgment in the specified time period, no longer allowing Cade to make the judgment. In reality, it even proposed the extinction of the tacit approval of the 1994 Law. In contradiction to Dilma's subsequent veto of the intended instruments at the 2011 LDC, President Luís Inácio Lula da Silva vetoed Law 6.955, which sought to extirpate the concept, arguing that:

> It is not convenient to withdraw the approval mechanism for acts of concentration, if Conselho Administrativo de Defesa Econômica (Cade) does not consider them within the stipulated period. This is due to the fact that, *despite the misuse of this instrument in the past, such sanctions, addressing the slowness of Public Administration, are of fundamental importance for bringing legal certainty to the business community with regard to notification of mergers, which often involve operations of uncertainty, where there is the possibility of waiting ad infinitum for a decision of the judging body. Such uncertainty could have extremely negative results, both in terms of encouraging non-notification of acts and inhibition of free initiative.* In conclusion, it is an efficient constraint for the Administration to act in the exact terms provided for by the legislator and, therefore, should remain in the legal text. [highlighted for emphasis]

[22] MARRARA, Thiago. *Sistema brasileiro de defesa da concorrência*. São Paulo: Atlas, 2015. p. 192.

This instance from Competition law is instructive when relating the problematic history and summarizing issues concerning positive silence in Brazilian administrative law. Such discussion is not new, as Themistocles Brandão Cavalcanti already dealt with it in his text in the *Journal of the Faculty of Law* of USP in 1938. The example reveals that the views on the subject are far from a consensus, as, although administrative failure generates fears of damage to the public interest, it triggers mechanisms which promote legal certainty, especially given the slowness that affects some public administration bodies. Furthermore, state controlled tacit or fictitious judgment of economic concentrations is part of an administrative discharging process of reasonable discretion and strongly impacts third parties, such as consumers, suppliers, distributors, competitors, and regulatory agents, among others. Finally, the Competition law served as a source of inspiration for the legislator to insert the mechanism into newer laws, such as the aforementioned oil law and the Economic Freedom Act.

5. The fourth step: tacit approval in general administrative law

Until recently, with greater or lesser support from experts, tacit administrative approval has spread to a few fields of special administrative law, without reaching the status of an institute of general administrative law. Without prejudice to this advance in regulated sectors there have been some legal moves towards repealing it. The Sao Paolo example serves as an example of this resistance. Instead of strengthening the positive effect, it stressed the negative, stipulating that: "When the period [of 120 days or other legally established] is exceeded without a decision, the interested party may consider the application *rejected at the administrative level*, unless otherwise provided by law or regulation" (art. 33, § 1, emphasis added). In practice, however, this has generated little or no progress. In the end, as Hachem warns, recognizing "negative effects of administrative silence for procedural purposes is redundant, because with or without this consequence, non-compliance with the legal deadline by the Administration already authorizes the judge [...] to order it to explicitly resolve the administrative proceeding, under penalty of suffering the application of various coercive means [...]".[23]

[23] Daniel Wunder Hachem, Processos administrativos reivindicatórios de direitos sociais, op. cit., p. 158.

The enactment of the Economic Freedom Act in 2019 introduced a correction aligning Brazil with other western nations, such as Peru and Germany[24]. Indeed, by virtue of the Services Directive of 2007, the positive effect had to be absorbed by members of the European Union as a general instrument to combat slowness and abuses of authority in liberation processes that conditioned the freedom of initiative and competition, mainly of service providers that wanted to expand in the zone. This is how, alongside the one-stop shop and the adoption of electronics processes, in many countries it served to guarantee economic freedoms.

In Brazil, a similar move was initiated through art. 3, item IX of Law No. 13.849, of September 20, 2019, which conferred on every individual or legal entity,

> the guarantee that, in the requests for acts of release of economic activity subject to the provisions of this Law, respecting all the elements necessary to instruct the process, the party will be informed expressly and immediately of the maximum period stipulated for the analysis of the request and that, *after expiry of the deadline fixed, the silence of the competent authority will imply tacit approval for all effects, except for the cases expressly prohibited by law*. [emphasis added]

This general command was calibrated, relativized and detailed in dispositive elements of the same Law, which deserve consideration in terms of outlining the regime of tacit approval through rules on the extension to

[24] "The figure of fictitious authorization as a general rule of the German administrative process is very recent. However, the instrument itself is not new. As in Brazilian law, there are also several special rules in the sparse German legislation that recognize the constituent effects of time in legal-administrative relations. Pursuant to § 6, IV, of the Code of Construction (Baugesetzbuch), for example, the omission of the state authority in relation to the Urban Plan for Land Use ((Flächennutzungsplan), elaborated by the municipal authority, entails its automatic approval, once the period of three months. In the same sense, § 8, Va, of the Law for the Protection of Animals (Tierschutzgesetz), in order to prevent scientific development being hampered by bureaucratic problems, determines that a request for animal testing will be automatically granted when the responsible authority does not consider it within a period of three months. In view of this, long before the last reform of the administrative proceedings law, appeared in German doctrine [...] The bases of discussion of the instrument of fictitious authorization were already present. What has changed more recently is recognition of this instrument as a general rule. The fictitious authorization was entered in the administrative proceedings law only with the 4th Law of Amendment, of December 11, 2008." MARRARA, Thiago. A "autorização fictícia" no direito administrativo. RDA — *Revista de Direito Administrativo*, v. 251, p. 203, 2009.

states and municipalities (art. 1, § 5), on the definition of release actions (art. 1, § 6), on the hypotheses of inapplicability (art. 3, § 6, § 7 and § 12) and the granting of the decision period.[25]

Subsequently, on December 18, 2019, Federal Decree No. 10.178 regulated the legal provisions indicated, and among other aspects, dealt with: (i) correction, calculation, suspension and extension of the deadline; (ii) requirements to the beneficiary of tacit approval; (iii) hypotheses of inapplicability; (iv) proof of release document, as well as (v) the waiver of the right of tacit approval, among other aspects that will be examined here.

The publication of the norms and the consequent insertion of positive silence as a general instrument of the administrative process in the Law of Economic Freedom was not immune from criticism. Caio Figueiredo and Aline Klein believe that the "modification of the effective administrative silence regime" under the Economic Freedom Act does not create a system that satisfactorily protects private interest."[26] José Cristóvan and Luiza

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[25] Art. 1, § 5. The provisions of item IX of the introduction to art. 3 of this Law do not apply to States, to the Federal District and to the Municipalities, except if: I - the public act of granting of the activity is derived from or delegated by ordinary federal legislation; or II - the federative entity or the body responsible for the act decides to be bound by the provisions of item IX of the introduction of art. 3rd of this Law by means of a valid and proper instrument. Art. 1, § 6. The provisions of this Law, grant licensing, authorization, concession, registration, permission, accreditation, study, planning and other required acts, under any name, to the office of public administration in the application of legislation, as a condition for the exercise of economic activity, including the initiation, continuation and completion of construction, operation, production, functioning, use, exercise or performance, of public or private activity, service, establishment, professions, installation, operation, product, equipment, vehicles, buildings and so on.

[A]rt. 3, § 6. The provisions of item IX of the introduction of this article do not apply when: I — it deals with tax matters of any kind or on the granting of trademark registration; II — the decision amounts to a financial commitment of the public administration; and III - there is objection expressed in a treaty in force in the country.

[A]rt. 3, § 7. The tacit approval provided for in item IX of the introduction of this article does not apply when the ownership of the request belongs to a public official or his/her spouse, partner or relative, by consanguinity or affinity, up to the 3rd level, relative to the administrative or political authority of the administrative body or entity concerned.

[A]rt. 3, § 8. The period referred to in item IX of the introduction of this article shall be defined by the body or by the requested public administration entity, observing the principles of impartiality and the limits of efficiency and parameters established by regulation.

[A]rt. 6, § 12. The provisions of item IX of the main section do not apply to activities with significant on the environment, as established by the competent environmental agency. (Wording according to Medida Provisória No. 915, of 2019).

[26] FIGUEIREDO, Caio Cesar; KLEIN, Aline Lícia. A eficácia condicionada do deferimento tácito administrativo para atos públicos de liberação: quando o silêncio advém do legislador. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 346-347.

Mallon argue that the mechanism generates risks that public bodies, with the prerogative of setting analysis deadlines, start employing more extensive deadlines, "opposite to the purpose of agility desired" by the legislator.[27] The new legal position also presages the deepening of another problem which Sérgio Ferraz and Adilson Dallari identify, associated with new technologies: the use of inadequate and exaggerated models, standardized reports, and generic, universal texts, simply copied or pasted, or slightly adapted to new cases, without attention to their particularities or due consideration.[28] In other words, to avoid exceeding the period and the resulting effect, there is a risk of intensifying the use of pre-formatted decisions and decisions simply transplanted from one process to another.

In addition to criticism, there was also strong support. Paulo Macera and Carolina Mota Mourão emphasize that the Economic Freedom Law, "ascribing positive effects to the silence of the administration in general, changed the interpretation substantially, reversing the logic hitherto adopted to attribute a denial effect to the hypotheses of silence".[29] Marcelo Saadi, in turn, emphasizes that the law has the merit of structuring a more favorable environment for entrepreneurship. Its standards serve as incentives for business and the predictability of economic agents, while discouraging corruption and political influence.[30] Besides that, it should be noted that the new law combats the delay of public bodies in meeting the needs of individuals and legal entities. It remains to be seen what the real potential of the law is, through analysis of its legal framework.

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27 CRISTÓVAN, José Sérgio da Silva; MALLON, Luiza Beckhauser. O que muda com a regra do silêncio positivo da Lei de Liberdade Econômica? *Conjur*, edição digital de 27 de setembro de 2019, available at: www.conjur.com.br/2019-set-27/opiniao-muda-regra-silencio-positivo. Accessed on: 19 Dec. 2019.

28 28 FERRAZ, Sérgio; DALLARI, Adilson Abreu. *Processo administrativo*. 3. ed. São Paulo: Malheiros, 2012. p. 240

29 MACERA, Paulo Henrique; MOURÃO, Carolina Mota. A autorização fictícia na Lei de Liberdade Econômica. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 352.

30 SAADI, Marcelo. Efeitos do silêncio da administração pública: comentários ao artigo 3o, IX, da Lei 13.874/2019. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 319.

6. Explicit Tacit Approval Requirements

The exegesis of the provisions contained in the Economic Freedom Act and its executive regulation suggests tacit approval is not so simple or easy. Aside from the written norms, explained in regulatory texts, it is essential that implicit, unwritten requirements for positive silence are recognized in specific cases. For now, it is worth examining the express requirements, which include: (i) the existence of a request from interested parties; (ii)

a liberatory administrative act; (iii) relationship to economic activity; (iv) that it is accompanied by the required instructional elements; as well as (v) the establishment of a deadline for decision by the management (that has been violated).

First, tacit approval includes discharging procedures available at the request of interested parties on a voluntary or compulsory basis. This consideration is important, as there are cases where the initial request is determined by the State. Put another way: in certain situations, the individual freely and voluntarily requires administrative action, such as a license, authorization, etc.; in others, it is compelled to request it under penalty of sanction. Take the example of Competition law, in which Cade is authorized to request, within the period of one year, the submission of acts of economic concentration that, in principle, do not need to be notified according to the criteria of the Competition Defense Law. In addition, the council, can oblige the notification and authorization of requests for concentrations that fit the parameters of preventive control, following the correct procedure (without jumping the gun).

These two examples illustrate how requirements for granting acts occur on a voluntary or compulsory basis. For the Economic Freedom Act, tacit approval may occur in either of these situations. However, acts performed by the public entity, without private initiative, are not covered by the legal hypothesis. An example of this is authorization of the use, on a certain day of the week, of space in a public park, at the initiative of the municipality, for private commercial enterprise. Here, tacit approval is not relevant.

Secondly, approval depends on the release process initiated on request, accompanied by all "the necessary elements for instruction". In other words, what the law requires is that the individual has proven, through lawful and prior evidence, all facts essential to meet legal requirements for issuing the act. Consequently, requests that are not sufficiently considered or rely on

a separate instructional phase, will not be approved automatically simply due to non-compliance with the deadline. Take the situation of an applicant depending on documents or information contained in databases or files with restricted public access. To start the process and obtain any tacit approval, it will be necessary to gain parallel access to the information. If this is not provided in the investigation phase, the interested applicant will have to use other mechanisms, such as *habeas data*, writ of mandamus, or claims based on the Lei de Acesso à Informação, whose text — it is worth remembering — prevents reliance on the hypothesis of secrecy or restriction of information to make the right of petition and defense unfeasible.[31] A more complex hypothesis is where the complete instruction of the request depends on an opinion or hearing involving public authorities. In this situation, the state's omission will make the instruction unfeasible and, thus, there will be no question of tacit approval, without a writ of mandamus or other relevant action, obliging the public entity to make the technical and testimonial evidence available.

Thirdly, positive silence will only serve for fictitious discharging acts. The question arises: what characterizes a discharging act? The legislator promptly sought to answer this by establishing that this category of acts includes "the license, authorization, concession, registration, permission, permit, accreditation, study, plan, and other acts required, under any name, by a public management body or entity in the application of legislation, *as a condition for the exercise of economic activity* [...]" (art. 1, § 6). The opening is merely illustrative and technical terms that indicate content are confused (authorization, license, permission) with legal entity terms (such as registration and permit). This sample listing also includes actions that are irrelevant to the topic, such as plans and studies, which do not seem to have any discharging function. Perhaps the legislator wanted to refer to the "approval" of plans and studies.

With these inadequacies and as a broad overview, the initial part of art. 1, § 6 has little practical use. It confuses more than it clarifies. The core of the legal provision is, in fact, in the text, which includes the definition of the discharging act as an act that conditions exercise of economic activity. It is an administrative act, usually prior to the performance of a private action, that conditions its lawfulness. When this mandatory content is recognized, the act will be of a discharging nature, whatever name is attached to it.

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[31] Pursuant to art. 21 of Law No. 12.527/2011, "access to information necessary for the judicial or administrative protection of fundamental rights may not be denied".

Fourth, the legislation restricts the definition to acts granting *the exercise of economic activity*. Several conclusions can be drawn from this. First, the legislator did not include relationships between administration and public service users (service relations), administration and employees (labor relations), administration and contractors (contractual terms). Tacit approval applies only to administrative policy! Second, it is restricted to granting actions based on economic activity, not on social or public tasks (e.g., authorizations for an economic agent, by delegation or accreditation, to perform public services in an ancillary capacity), nor to religious or merely domestic activities, such as possession of a weapon other than for professional purposes. Thus, economic liberation can be defined initially according to a residual criterion, i.e., excluding everything else. The definition, at the same time, can also be understood in a positive sense, since the final part of art. 1, § 6, includes the following: installation, construction, operation, production, use, exercise, performance, in the public or private sphere, of activity, services, professions, equipment, vehicles and building work, among others. To reiterate: all these actions must have an economic scope, relating to a productive chain of goods or services of any nature traded lawfully on the national market.

The fifth requirement for tacit approval involves setting a decision-making deadline. According to art. 3, § 8 of the Economic Freedom Act, this term "will be defined by the public administration body or entity concerned, observing the principles of impersonality and efficiency, as well as the maximum limits established by regulation". In this regard, Decree No. 10.178 provides that: (i) the deadline will be established by the highest authority of the responsible body or entity (art. 10, introduction); (ii) the maximum term does not exceed 60 days (art. 11, introduction); (iii) the authority may set different deadlines for stages of the administrative process; (iv) the regulatory act may establish longer terms due to "public interests involved and the complexity of the economic activity", certified by the highest authority of the body or entity (art. 11, § 1o); and (v) the body or entity will consider international standards for setting the term (art. 11, § 2).

Aside from the risks of failure by the authority to comply,[32] these directives regarding deadlines are confusing and to some extent out of step with what

[32] As Caio Figueiredo and Aline Klein warn, "[...] it is not very difficult to imagine the possibility of that authority omitting to set a deadline, through pragmatism or improvisation. At the end of the day, the individual will not have a maximum period for processing their application. Although omission in terms of stipulation of such a term is an illegal act in and of itself, and violation of the duty to decide in this regard, can be fought judicially, such a system

general and special legislation establishes. Before the Economic Freedom Act, it was recognized that the deadline for a decision is the provision of special legislation (laws governing administrative proceedings in the areas of competition, banking, sanitation, urban planning, environment etc.) or, in the absence of a special rule, in the general laws of administrative procedure. Following this logic, for federal entities and agencies, in case of lack of legal norms, the decision period of 30 days applies from the termination of instruction and is extendable for an equivalent period (articles 48 and 39 of the Federal LPA). A quick reading of art. 3, § 8 of the Economic Freedom Act gives the impression that the public officer can establish a deadline, ignoring what the special law says or, in case of a lacuna, the general procedural law. This solution, however, requires understanding that the law would have implicitly revoked all legal deadlines established in previous laws. This, to me, does not seem to be the best interpretation.

A solution to the impasse and contradiction between the law of tacit approval and other legal acts lies, in my view, in the distinction between legal and reasonable terms. Within the scope of the Union, it starts from the premise that the public authority must follow the deadlines of the special administrative law or, failing that, the period of up to 60 days (extension included) of the federal LPA. However, with the Economic Freedom Act, it is possible to set a shorter term or, exceptionally, one longer than 60 days, if deemed most suitable in light of concrete circumstances, reasonable duration of the process and primary public interests. So, as Lei de Defesa da Concorrência (Law for the Defense of Competition) established deadlines for the analysis and authorization of acts of concentration, they should be applied in principle, unless Cade, independently, wishes to stipulate a shorter term, understanding it to be more reasonable.

Another important clarification that needs to be registered concerns what the term encompasses. Is this a period related to the general duration of the process or just a deadline for issuing the decision? As it turns out, the 30 days, plus 30 days extension, of the federal LPA is a deadline for decision. In this general law there are no deadlines for instruction. Whereby it is understood

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may compromise the full effectiveness of the tacit acts of granting economic activity. After all, the biggest problem is precisely the Administration's chronic delay in fulfilling its legal and institutional duties". FIGUEIREDO, Caio Cesar; KLEIN, Aline Lícia. A eficácia condicionada do deferimento tácito administrativo para atos públicos de liberação: quando o silêncio advém do legislador. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 344-345.

from the Economic Freedom Act, that the deadline for tacit approval remains a decision period, not the duration of the total process. After all, if the request is not filed, setting the deadline by itself will not be enough. From this perspective, the regulatory standard that provides for tacit approval due to non-compliance with deadlines set for other phases of the process is redundant. For example, if the authority set a deadline for instruction, but failed to comply with it, tacit approval would follow, owing to improper instruction. Thus, the deadline should always be interpreted as a decision deadline and not the duration of the administrative process.

The sixth and final written requirement for tacit approval is the course of the fixed term without decision. To calculate the course, norms expressed, for example, in the federal LPA (art. 66) must be followed. In close synthesis, in the administrative processes of the three Powers of the Union, the deadlines start to run from the date of official notification, excluding

the start day and the expiration date. These deadlines include continuous days and are always extended until the first working business day, if maturity falls on a holiday or before the close of normal working hours. The term in months is counted from specific dates. Due to force majeure, the deadlines may be suspended (art. 67 of the LPA).

As the general pre-existing rules were not enough, the Regulatory Decree stipulated that the tacit approval period begins from the date on which all elements necessary for the instruction of the process have been presented (art. 12, introduction). This means that the deadline is not necessarily counted from the time the party makes their application to the authority, but from the moment the request is considered apt and instructed for examination. For example, if the authority claims that the request will be reviewed in 60 days from March 1st, but the instruction ends only on April 1st, the deadline of 60 days will run from April onwards [date of end of instruction], not March [date of definition of the decision period].

The deadline for examination of the request allows for suspension in three scenarios, essentially. The first involves force majeure, which makes the process unfeasible, such as a virus that attacks a computer system, or a flood or fire that destroys facilities and prevents their operation (article 67 of the LPA). The second results from a request for supplementary instruction, which may be undertaken once, in a clear and exhaustive way, by the public authority (Article 13 of the Regulation). The adjective "exhaustive" makes it evident the authority must request such instruction transparently, avoiding possible claims that the request was not properly instructed for the purposes

of judgment. The third scenario results from a new fact that impacts the production of evidence and the examination of the request (art. 13, § 2 of the Regulation). This includes: (i) previously unknown facts that become known (ii) previously non-existent facts that occur during the instruction.

7. Implicit Tacit Approval Requirements

Alongside the various requirements of tacit approval which the Economic Freedom Act and its regulation expressly provide, other factors are important for the logical and systematic interpretation of the legal system. Those implied requirements include: (i) clarity and determination of the application submitted to the public administration; (ii) formal and material legality of the request; (iii) absence of harmful effects to third parties; and (iv) absence of responsibility of the applicant for the delay and the expiry of the deadline.

The clarity and determination of the request are logical premises for the occurrence of tacit approval. Requests characterized by obscurity, vagueness, or indeterminacy, do not authorize the applicant to benefit from the positive silence established by the Economic Freedom Act. A trader who requests, for example, authorization to sell food in public spaces must necessarily indicate the nature of the business, the specific times, where, how and all relevant information.

The formal and material legality of the object of the action leads to a second requirement. There is no point in specifying details for which the administrative act is requested if such activity violates administrative, legal or constitutional rules. The legal requirement is complex, as it requires full harmony between the object of the request and the legal system at all levels. In addition, the application must satisfy legal examination in the formal sense. If, for example, the request is made by a party with no legitimacy to do so, positive silence may result.

The third and most controversial requirement entails that the need for tacit approval does not imply restriction or illegitimate negative interference with the rights or legally protected interests of third parties. The reason is simple. The administrative process does not only affect the person who petitions in order to assert an individual right or self-interest. In the terms of the Federal LPA (art. 9, item II), equally legitimated interested parties in the administrative process are "those who, external to the request, have rights or interests that may be affected by the decision to be adopted". The concern of

procedural law for third party rights does not mean failure to act, however. With regard to validation of administrative acts, the LPA must still respect the following: "in a decision that evidently *does not harm the interest of the public or third parties*, acts that present remediable defects may be validated by the Administration" (art. 55). An act cannot be validated nor fictitious authorization given without balancing how the rights and interests of third parties will be protected in practice, for example, through the imposition of conditions that accompany the discharging act.

Fourth and lastly, tacit approval cannot benefit applicants acting in bad faith. Actions that cause delays or any other expedient, such as corruption, mean the authority will not respect the decision period to unnecessarily trigger the effect of silence. In this case the party should not only be prohibited from obtaining the benefit, but be sanctioned in the appropriate manner, including criminal. Positive silence does not benefit those who act in bad faith.

8. Other hypothetical prohibitions

Knowledge of the explicit and implicit requirements for tacit approval not only identify situations where the positive effect will be triggered, but also indicate hypotheses in which it will remain closed. The likelihood of prohibition of tacit approval are much more numerous than those expressly stated by the legislator in the Economic Freedom Act. On the one hand, the positive effect is obstructed when one or more of the cumulative requirements are no longer met. This can be seen, for instance, in the case of obscure, indeterminate requests, requests submitted by a subject without legitimacy to do so, request for an act without disclaimer content, for an act unrelated to economic activity or to facilitate illegal behavior.

At the same time, the legislation allows for additional circumstances for prohibition that will apply even when the explicit and implicit requirements are met. Tacit approval will not apply in relation to the following:

1. Granting acts related to tax matters of any either kind or registration of intellectual property rights. Thus, e.g., application for patent registration or a trademark not resolved within the deadline requires that the interested party reinforce the request or resort to a control body - such as ombudsmen or the Judiciary, which can determine the action, it the requirements are fulfilled, or will set a deadline for

the administration to issue the discretionary decision, even following the deadline.[33]

2. Administrative decisions involving financial commitment, such as access to development funds, or financial assistance, or administrative support involving public costs and so on.
3. A decision on appeal, against an administrative act denying the granting of economic activity. If the action has been dismissed in the first instance, the positive effect will be blocked during the appeal phase with the acceptance of the interested party. Despite the legislative gap, this same logic extends to partial approval. In this case, the positive effect in the appeal phase can only extend to what has already been authorized in the first instance. Another controversial hypothesis is that in which the lower court decision fully approvesthe application, but it is taken to the higher court by virtue of an ex-officio appeal or similar technique of reappraisal by force of law or at the request of a public authority. In cases like this, the positive effect may fully apply in the appeal instance if, as said, the original decision approved the application.
4. When the request has been made by a public official to the entity within which they exercise their function. That prohibition extends to spouses, partners or direct relatives, to children and parents and in-laws. Furthermore, it does not only cover the organization in which the official operates, understood as the internal subdivision of the legal entity, but all other bodies of the same entity. Not included in the prohibition, in summary, are: (i) requests made by officials to state entities, under public or private law, in which they do not act, whether in the same or another federative sphere and (ii) requests made by more distant relatives onwards, such as cousins.
5. When the object of the request has a significant impact on the environment, as established by the competent body (hypothesis inserted by Provisional Measure No. 915, of 2019). Regardless of the transformation of this into law, the scenario will not change, as the prohibition was already expressly stated in Supplementary Law 140, of 2011, which governs environmental policy, including licensing processes, and establishes standards of cooperation

[33] In this sense, regarding the powers of the judge in the face of the administration's inertia, cf. p. 208.

between federated entities. Art. 14, § 3 provides that "the end of licensing period, without the granting of the environmental license, does not imply tacit approval nor authorizes the practice of an act that depends on or arises from it, but establishes supplementary competence [...]". Regardless of the legal prohibition, Rafael Maltez maintains that tacit approval should not apply to environmental granting processes, because: (i) ecological issues are fundamental and, thus, an essential component of the Federal Constitution; (ii) environmental protection is an integral element of the principles of the economic order, it being lawful for economic activity to degrade it; (iii) activities with an environmental impact require, under the Constitution, preparatory studies; and (iv) the prohibition of the Supplementary Law No. 140 could not be changed by way of a common law, such as that of Economic Freedom.[34] In practice, there seems to be consensus on this, especially in light of the stipulations of Supplementary Law No. 140, on the use of tacit transference to the supplementary performance of a higher federative entity in case of non-compliance with the deadline by the entity originally competent.

6. When the applicant waives the right of tacit approval at any time pursuant to art. 15 of the Regulatory Decree of the Economic Freedom Act. The waiver of rights is fully compatible with the Federal Administrative Procedure Law, which grants the interested party the right to renounce or withdraw a request through written statement and without prejudice to other interested parties (art. 51). However, under the terms of Decree No. 10,178, the waiver of the positive effect of tacit approval will not exempt the body or entity from complying with its decision deadlines (art. 15, § 1o). If the deadline is not met where there has been a waiver of the positive effect, the records must be sent to the immediate head of the official responsible for analyzing the application, who can immediately make the decision or appoint another official to accompany the process (art. 15, § 2). Significantly, therefore, the regulatory decree

[34] MALTEZ, Rafael Tocantins. A Lei 13.874/2019 (*Lei de Liberdade Econômica*) e a impossibilidade de licença ambiental tácita no contexto do direito fundamental ao meio ambiente ecologicamente equilibrado. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., passim.

guarantees supplementary action (or tacit transference) to ensure a reasonable duration of the process, despite any waiver of the positive effect by the interested applicant.

7. All other hypotheses prohibited by special law under the terms of the final part of art. 9, item IX of the Economic Freedom Law. An example of this, already mentioned, can be seen in art. 14, § 3 of Supplementary Law No. 140, of 2011, which prohibits the positive effect of administrative silence in environmental licensing.

9. How to act after tacit approval?

Like fictitious administrative acts granting tacit approval to requests, the failure of the administration to process and decide in a timely manner does not end the problem. First, it is possible that the beneficiary needs to prove tacit approval to third parties, including other public administration bodies. In light of this situation, article 14 of Decree No. 10.178 authorizes the applicant to "request a document evidencing the granting of economic activity from the first business day following the end of the term [...]". If it depends, however, on another action by the authority concerned, this declaratory act will certainly not be issued quickly, if at all. With that in mind, the Regulation stipulates that public entities which hold authorization powers should "automate the issuance of the document evidencing the granting of the economic activity" (art. 14, § 1). When issuing the declaration, management will be able to circumvent a new inertia, impeding the exercise of economic activity even after the triggering of positive silence. Strangely, however, the decree requires that this document does not contain an indication of the tacit nature of the administrative decision (art. 14, § 2). This rule seems unreasonable and, in practice, may prevent ascertainment of the illicit omission of the competent public official, making accountability more difficult.

Another problem that accompanies tacit approval is legal uncertainty for the applicant benefitting from it. The conduct dependent on the decision not issued in time needs to observe legality, i.e., with respect to internal regulatory acts, from laws to Constitutional principles. How may a reasonable degree of certainty about legality in complex situations be assured? The problem seems insurmountable. However, art. 10, § 2 of the Regulatory Decree offers an interesting solution. On the one hand, this paragraph provides that tacit approval "does not exempt the applicant from complying

with rules applicable to the exercise of the economic activity concerned". Then it prescribes that it does not remove the applicant from subjection to the requirement of adjustments identified by the government in subsequent inspections. This subjection to the "performance of adaptations" is an important conclusion. By virtue of the principle of legal certainty, verifying that there are signs of illegality in the conduct, before taking punitive measures, the competent authority must request adjustments, including through the use of commitments or through creation of transitional regimes under the terms permitted by LINDB (arts. 26 and 23). In other words, if the behavior derived from tacit approval is interpreted as potentially unlawful, before sanctioning a decision the administration shall notify the beneficiary applicant, seeking, with it, to obtain behavioral adjustment. If this solution is not possible, then the administration will be able to use the proceedings to impose sanctions, without prejudice to declaring the nullity of the tacit approval due to irremediable defects.

10. Extension to states and municipalities?

We cannot end this set of reflections on tacit approval in the Economic Freedom Law without considering federative aspects. Does the positive silence included in Law No. 13.874/2019, regarding failure to decide on requests for discharging acts, extend to states and municipalities? The issue is not so simple, as Congress has the power to edit general norms of economic law and urban law — areas in which many discharging acts are practiced - but it does not have generic competence to address all disciplines of administrative law, especially the administrative process, seen as inherent to the self-administration of member entities of the federation. To answer this question, respecting the broader applicability of tacit approval, it is necessary to put aside recognition of the constitutional division of competences and examine briefly two articles of law under discussion.

To explicitly address the subject of federative applicability, art. 1, § 5 provides that tacit approval does not occur in administrative proceedings under the jurisdiction of the states, the Federal District and the municipalities. This is, therefore, the general rule, based on the recognition of federal autonomy of political entities to take care of administrative law. However, the same instrument states two exceptions.

The first applies to "public acts granting economic activity [...] *derived from* or *delegated by* ordinary federal legislation" (emphasis added). The delegated granting act is that practiced by a state or municipality which receives from the Union the right to exercise authority in its name. An example of this would be authorization of the transfer of activities of competence of a federal entity to a state agency based on a cooperation agreement involving assignment of tasks. The expression "discharging act *derived from* ordinary federal law" (emphasis added) expresses the idea of state and municipal acts issued in light of general rules approved by the National Congress with support in competing legislative powers. Following this, positive silence would affect the requirements of dischargin acts provided for in national laws dealing with trade boards, sanitation, fauna, hunting, fishing, environment, sport, education and other areas under concurrent jurisdiction.

The second hypothesis of exceptional application of tacit approval occurs when "the *federative entity* or the body responsible for the act decides to be bound" to the rules of the Economic Freedom Act "through a separate agreement" (art. 1, § 5, II, emphasis added). This item covers two different situations. The first is obvious and simple. A state or municipality, as a federative entity, may pass a law that enforces the federal rules in its administrative processes (in all of them or in just a few). Through its own legislative decision, the state or municipality adopts the mechanism discussed in the Economic Freedom Act.

The second situation is that in which "the agency responsible" decides to be bound by the tacit approval ruling provided for in the federal law. The question arises: can a state agency or municipality, as a depersonalized division of a state entity, decide independently that it will respect another procedural legislation in administrative practice? Of course, if the state and municipality have their own procedural law, it cannot be set aside and replaced by another isolated model. Exactly for this reason, art. 1, § 5, item II deals with a "public body" which displays evident unconstitutionality, insofar as it suppresses federative autonomy. Equally critical of this point, Macera and Mourão warn that adherence to the application of positive silence cannot be done on a case-by-case basis, "according to the choice of the administrator in each process", as it would violate the constitutional principle of impersonality. More suitable

would be an adherence to the instrument of tacit approval by a prior general or abstract decision.[35]

11. Conclusion

a) The Brazilian legal system has responded continually, for decades, against omissions and illicit procedures of public administration: through constitutional reinforcement and the legal duty to decide; by setting decision deadlines, the length of due process and a reasonable duration of the administrative process; by adopting techniques of voluntary or compulsory transfer of the exercise of competence of decision-making bodies, by means of inter-administrative cooperation and rules that ensure through the silence of the authorities the effect of fictitious administrative acts.

b) In this historical journey, the Economic Freedom Act innovated the adoption of positive silence as a general rule in the face of violations, by federal public administration, of the deadlines to analyse requests for granting action for economic activities.

c) Tacit approval, however, remains rather difficult in practice due to its dependence on the observance of a series of requirements expressed in the law and its regulations, as well as implicit requirements, deduced by logical, teleological and systemic interpretation of the legal system.

d) In addition, the ways of blocking the positive effect in licensing processes are numerous and greatly limit the effectiveness of the regulation. There are obstacles resulting from non-compliance with one or more explicit or implicit requirements and other obstacles arising despite the meeting of all requirements.

e) Another obstacle to the effectiveness of the ruling under discussion lies in its enforceability and verification before third parties. The Economic Freedom Act did not address the issue, but its regulation allows interested applicants to request the declaration of the expiry date and the positive effect, in addition to encouraging public entities

[35] MACERA, Paulo Henrique; MOURÃO, Carolina Mota. A autorização fictícia na Lei de Liberdade Econômica. In: Alexandre Jorge Carneiro da Cunha Filho et al., *Lei da Liberdade Econômica anotada*, op. cit., p. 359.

to adopt systems of digital certification to prevent further omission compromising the exercise of economic activities dependent on the discharge.

f) In federative terms, where there is a legislative option for the state or municipality to adopt the positive silence of the Economic Freedom Act and also in cases of delegation of the federal release acts to state and municipal entities, there will not be great difficulty in applying the regulation outside the scope of the Union.

g) However, there are still doubts about the proper interpretation given to the expression "acts [state and municipal] derived from ordinary federal legislation" provided for in the Economic Freedom Act, as well as various questions regarding the constitutionality for the state or municipal public official to independently decide to adopt positive silence in one or another dischargin process under its competence.

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