SUCCESS AND FAILURE FOR PUBLIC ADMINISTRATION BY IMPLEMENTING RULES ON TACIT APPROVAL. ROMANIAN CASE

Phd. Flavia Ghencea
Faculty of Law and Public Administration Constanta, Spiru Haret University
flavia.ghencea@spiruharet.ro

Abstract

In the context of a very dynamic social life, many administrations requires an excessively increase of bureaucracy. To solving the problem is trying all sorts of approaches, in the hope that citizens will not stifle because so many procedures are required from the administration.

Any measure which seeks to improve the relationship between public administration, citizens and business is considered more than welcome when it results in quality services.

To remove administrative barriers, in Romania, was adopted, having the model of others European countries, like Italy and Spain and also the EC Recommendation nr.97/344 of 22 April 1997, *the tacit approval procedure* with the purpose to making the public authorities more responsable to comply with deadlines established by law for issuing permits.

This paper is intended to be an analysis of the manner in which the tacit approval procedure has been developed in our country, problems that have faced the authorities, but also results in the period since the adoption of regulations.

Finally, we attempt to present some suggestions on improving the effects of these regulations.

Keywords: tacit approval, public administration, administrative authorisation, administrative bureaucracy

Introduction

Silence has always been regarded as a power; the self control is considered a virtue and why not a constant (Djuvara M, 1999) of human existence.

From the social point of view, silence is an element of communication which it is said (Mânzatu I, 2006) that it does not exist without the space of silence that allows reflection. Otherwise, “the silence pre-exists and lasts in the heap of conversations”, being “a feeling, a meaning, and not a measure of ambient sonorousness. It refers to the human attitude towards the social environment”.

Around silence, religions and mystics' researches are grouped; silence is at the same time the beneficial space of concentration, search, and retrieval, and, on the other hand, it represents human helplessness facing pain, death, absence.

Silence was studied by philosophers, artists, monks, lawyers, all fascinated by the magnitude and effects had by "something that is not seen, not heard and not touchable, something that is outside any sensorial form. The Greeks personified it with the face of a God - Hippocrates, a young ephebe keeping his finger on his closed lips; the Romans said tacio facit ius (Molcu E, 2007). More or less aware of its value, we find out that "silence has always the last word".

Identifying such coverage, it was impossible for the law not to find place and sense to the concept of silence, and even in several other respects.

We find stipulations on the right to silence, about which a distinguished author (Du u M, 2004) believes that it has become today a "generally known international standard", involving two hypostases of concrete manifestation: the right to silence stricto senso, which consists of the right to make no statement and not answering questions, representing an imperative rule of procedure for the administration of evidence and the right not to contribute to one's own incrimination, not to be compelled to testify against himself, which as element of the right to a fair trial, is constituted as a genuine fundamental right. However, the author states that the right to silence may be submitted to limitations in relation to other rights related to art. 6 of the European Convention and provided that such restrictions should be in accordance with law and proportional with the legitimate aim pursued.

Current legislation regarding the tacit authorization. Critical examination of GEO 27/2003

In another sense of the right to silence, we could speak about the right to benefit of the effects of another person's silence, under the conditions provided by law, such as in the case of tacit approval procedure, when the authority's silence equals to its consent.

This procedure is a way of communication, expressly regulated by law, when silence produces legal effects.

In the framework of this procedure, we can talk, on one hand, about the right to silence of the public authority who has, thus, the possibility to communicate in writing its approval or by its silence for 30 days from filing the application for issue, renewal or reauthorization provided by Ordinance, and, on the other hand, the petitioner' right to invoke the tacit approval of his application, by the competent authority, according to law, and to operate under this right (Dabu V, 2000).

It is clear that regulating the legal effects of the rights and obligations related to silence is a necessity of modern life, of operative legal and useful communication.

For example, in communication, the right to silence allows you to ensure enough time to formulate and argue the line and to communicate properly the will, the opinion etc.., thus avoiding the risk of mistakes or of misunderstandings and obviously of some unwanted consequences.

General aspects regarding the tacit approval procedure

The regulation had as models similar procedures from other European countries, like Italy and Spain, as well as the Recommendation CE no. 97/344 of 22.04.1997 to improve the business environment and to simplify the procedures for new business, which shows that the tacit approval procedure is considered a "good practice" in the relationship between public administration and business environment.

Even from the explanatory statement described in the opening of the legislation proposed for approval, (Lazăr AR, 2003) the tacit approval procedure represents an alternative to issuing or renewing permits by the public administration authorities, being based on the following objectives:

- removing administrative barriers in the business environment;
- the empowerment of the public administration authorities to respect deadlines set by law for issuing licenses;
- boosting economic development by offering more favorable conditions to entrepreneurs, involving authorization costs as low as possible;
- reducing corruption by diminishing the arbitrary in the decision of the administration;
- promoting quality public services by simplifying administrative procedures.

These reasons concerned the legislature earlier than 2003, with an attempt to "tacit approval" included in a regulation which came into force on January 1st, 2001, concerning the allocation of marketing products on the market. The regulation provided terms of 15-45 days depending on the location, etc. The miracle did not last too long but at the beginning of February comes into force another ordinance, which eliminates not only the "tacit approval", but also the response terms from City Halls.

The proposal has long been criticized not because of its content but because of the moment considered unsuitable for Romania; in this regard, the discussions of the juridical Commission are indicative.

Scope

The provisions on the tacit authorization procedure apply to the issuance of licenses for renewal of permits and procedures of reauthorization, following the expiry of the suspension of permits or the fulfillment of measures established by the competent control entities.

Art 2 of the Ordinance regulates the application of the procedure to all permits issued by public administration authorities, except those issued in the filed of nuclear activities, those concerning the firearms, ammunition and explosives, and the drug precursors regime and permits of the national safety field.

This aspect has generated much discussion, being considered "Achilles heel" for this act. Theoreticians and practitioners considered increasingly necessary to restrict the application area of the tacit procedure, the opening too large, the possibility of tacit approval in areas of great importance (Petrescu RN, 2004) which may cause prejudices difficult to repair later. Even if the Government may establish by resolution, at the motivated proposal of each concerned public

authority and other exceptions from the tacit procedure, this rule has only a permissive character, and not a mandatory one – the proposed procedure requires a long period to establish other exceptions.

In conclusion, the present rule is, that any "authorization" issued by a "public administration authority" (as these are legally defined) benefits from the tacit approval procedure, the exceptions to this rule being expressly and limitedly provided by GEO 27/2003.

The tacit approval procedure

The main steps to be taken in order to invoke the tacit approval procedure are as follows:

1. The applicant filing the application for issuing the authorization and the complete documentation, to the competent public administration authority. The applicant of the permit must file with the application, a complete documentation, established according to legal provisions and the public authorities which have jurisdiction to issue permits and are required to post at their premises or on their own Internet page for each type of authorization, all necessary information presented in a clear form, giving, if possible, concrete examples; any interested person must be able to obtain a copy containing the information described above.

2. The notification by the competent public administration authority of the applicant in case of any irregularity of the documentation filed (if necessary). In case it finds an irregularity in the submitted documentation, the authority concerned must notify the applicant for authorization, in at least 10 days before the expiry of the period provided by law to issue such permits, if this term is more than 15 days, or with at least 5 days before the deadline provided by law for issuing the authorization, if this term is less than 15 days. The authority will also indicate how to remedy the irregularity found. In such a case, the issue or, if appropriate, the renewal term of the authorization will be properly extended to 10 days, respectively 5 days.

3. Obtaining the authorization and remedying the unfulfilled conditions

Concretely, the authorization is considered granted or, if the case, renewed, if the public administration authority does not respond to the applicant within the deadline set by law or within 30 days from its filing if the law does not provide a deadline.

After the expiry established by law for issuing the authorization and in the absence of written communications from the public administration authority, the applicant may perform the activity, provide the service or practice the profession for which the authorization was required; to obtain the official documents, the applicant could address to the authority in cause or to the Court.

If it chooses to address the concerned public administration authority, the existence of the case of tacit approval on the permit will be noted and the release of the official document will be requested, thus allowing the performing of the activity, the providing of the service or the exercising of the profession.

If the public administration authority does not respond or refuses to issue the official document which allows the performing of the activity, the providing of the service or the exercising

of the profession, the person may address to the Court of administrative jurisdiction, which will resolve the request in an emergency regime - no later than 30 days from its receiving date and will give an irrevocable decision that obliges the public administration authority to issue the official document allowing the applicant to conduct a given activity, to provide a service or to exercise a profession.

Unlike the procedure established by the administrative law, according to which the decision given at first instance can be attacked by appeal, in case of the tacit approval procedure instituted by GEO 27/2003, the decision pronounced in the first degree of jurisdiction is irrevocable, fact that generated some discussion (Nicola I, 2008). In practice it could be raised the issue of legality of acts in question.

If, after obtaining the document, it is noted the unfulfillment of important conditions stipulated for the authorization issuing, the document will not be invalidated, but the holder could be notified, not later than 3 months from the expiry of legal deadline for issuing authorization, indicating the irregularities found, how to remedy all deficiencies identified and the time within which the holder must comply with this obligation.

4. Sanctions

If, following the admission of the action, the public administration authority does not fulfill the obligation to issue the requested document, within the deadline set by court order, at the request of the plaintiff, the court can require to the head of the public administration who has the obligation to pay a judicial fine representing 20% of the net minimum wage in the economy for each day of delay, and a compensation for damage caused by delay. This request is urgently judged and it is exempt from stamp tax, but this time the decision may be attacked by appeal, within 5 days from delivery.

Finally, if the application of judicial fine is required, the head of public administration authority can summon the warranty of persons guilty of not executing the decision. To recover damages awarded and supported by the public administration authority, its leader can introduce action according to common law, against those guilty of not executing the decision, if the law does not provide otherwise.

Invoking the existence of an authorization, in front of a public authority or a public institution, as consequence of tacit approval procedure, omitting consciously the presentation of the answer or the notification received in the authorization process is *the crime of false statements* and is punishable under the Criminal Code. Thus, the act of a public servant who, having learned of the request for authorization and documentation, does not knowingly resolve the request within the time prescribed by law and determines to intervene the legal presumption of tacit approval, is an offense and it is punishable by imprisonment from 1 to 5 years.

Conclusions

Until now, the tacit approval procedure has been used extremely rarely by the adoption of GEO 27/2003. Major reasons are related, on one hand, to the evasion of institutions, that avoids

tacit approval, preferring either to explicitly give the answer within 30 days, or to believe that the specific rules make the authorization procedure for which they are responsible for not to enter under the incidence of silent approval and, on the other hand, to the ignorance of applicants who do not know the rules of GEO27/2003.

No one can say that the adoption of tacit approval proceedings brought directly major improvements to the authorization procedure; the only positive indirect effect is the additional pressure to respect a term of maximum 30 days for authorization. Therefore, GEO 27/2003 has been useful in ensuring that the negligence of public officials does not affect applicants.

The application of the new regulations did not lead to increased institutional efficiency or to the occurrence of any additional financial costs. The institutions have not operated additional hiring at the same time with the implementation of tacit approval procedure.

The tacit approval regime, existing in Romania in the present time, and regulated by GEO 27/2003:

1) does not provide penalties necessary to stimulate all the administrative authorities to comply with all obligations under the law;

2) charges the applicant with a part of the effort to rectify the authority's failure of not responding;

3) provides only limited protection to third parties affected by the acceptance of an application.

Recommendations and suggestions

The study of comparable schemes in Europe on tacit approval indicates that no other country has such a general regime that the one of Romania. Most European states (especially northern European countries) do not even have a tacit approval. Others, such as France, Italy and Spain, admit tacit approval in only few circumstances and sometimes they confer it limited legal force. The lack of comparable regimes on tacit approval in other countries seems to indicate that these schemes do not contribute to improving the procedures for approval of administrative authorities.

a) The explicit reference to sanctions against administrative authorities (similar to penalties stipulated in Law 544/2001 on free access to information of public interest) applicable when they do not fully fulfill their obligations under the rules relating to the tacit approval.

b) The regulations on tacit approval should allow the receipt received at the application to serve as proof of authorization in the event that the approval is granted tacitly. Such a clause would completely eliminate the obligation of court to sanction the authorities' obligations, would reduce costs and charge the state with the responsibility of proving that an applicant operates without authorization. Furthermore, it should be allowed to applicants that after 30 days, through an automatic procedure, to obtain on the basis of the filing receipt received, within 2-3 days, the official document of authorization.

c) to clarify the scope of implementation through a detailed list of exceptions to the stipulations of law. There are at least three possible solutions.

The first would imply to promote tacit approval as a good practice and to leave at the discretion of the public institutions, the decision on the applying or not this procedure. To encourage the application of the tacit approval, one could use incentives such as provision of stars in an administrative efficiency rating at national level and / or the awarding of officials of the institutions it applies.

A second approach would be to preserve the mandatory character of implementing the tacit approval, but only for institutions / procedures for authorizing with certain features such as deadlines for permits longer or equal to 30 days.

A third approach would be to maintain the mandatory character of tacit approval to all institutions, but respecting the deadlines specified by the specific legislation where they exist.

d) the replacement, if possible, of authorizations currently granted through a process of approval with statements on one's own responsibility, process which presents the advantages of being simpler and less expensive.

We must mention that the statements on one's responsibility are *the most advanced international best practice to reduce bureaucracy*. At the same time, however, the use of own responsibility statements involve a number of important risks. This administrative simplification can be used for illicit purposes, even more easily than with tacit approval.

A possible example of good practice is to introduce internal statement on one's own responsibility to renew permits / notices / licenses where the initial authorization conditions remained unchanged.

e) providing for a higher protection to third-parties by public notification of the authority activities, including the cases tacitly approved. A record of all requests and of their processing stage should be made public, both online and posted on paper, thus allowing interested third parties to notify the possible adverse effects. The authorities' activities include the receiving of the request, any requests for additional information and the answer given to the applicant.

f) the obligation of public posting of useful information both to the premises of the authorities and on their Internet page. Therefore GEO 27/2003 must be amended, as currently is permitted to post the information at the premises or on the Internet page.

g) A greater public awareness on the tacit approval mechanism (for instance, through a public information campaign) would create a greater pressure on the number of requests and calls to the court under GEO 27/2003. All this would contribute to a better implementation of law and facilitate the achievement of initial goal of creating optimal conditions for entrepreneurship.

Virtually all these provisions should allow obtaining rapid responses to requests for authorization by the mayors or other institutions of public administration. However, it remains to be seen but if officers are afraid of possible sanctions and settle claims on time, or it will appear a lot of tacit approvals.

References

[1] Mircea Djuvara (1999) *General theory of law, rational law, sources and positive law* Allbeck Publishing House, Bucharest, 15

[2] Ion Manzatu (2006) *Silence Psychology*, Psyche Publishing House, Bucharest, 147;

[3] Emil Molcuț (2007) *Private Roman law*, Universul Juridic Publishing House, Bucharest, 156

[4] Mircea Duțu (2004) *Criminal-procedural meanings of the right to silence*, Journal Law, no. 12

[5] V. Dabu (2000) *Judicial liability of the public official*, Global Lex Publishing House, Bucharest, 177-178;

[6] Ana Rozalia Lazar (2003) *Procedural aspects of the issue of administrative acts. Some considerations on the tacit approval procedure*, Public Law Review no.3, 91;

[7] R.N.Petrescu (2004) *Administrative Law*, Focus Publishing House, Cluj-Napoca, 308-309;

[8] Iordan Nicola (2008) *Administrative Law*, Lucian Blaga University Publishing House, Sibiu, 423;