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CHAPTER 6

Remedies Against Administrative Silence in the Netherlands

Kars J. de Graaf, Nicole G. Hoogstra, and Albert T. Marseille

6.1 The Legal and Administrative Background for Analyzing Administrative Silence

The Netherlands is a decentralized unitary state. That means that within the public domain the state is composed of primarily general-purpose governmental bodies. Although exceptions to that general rule exist, for instance for water management, the Dutch state in addition to the central government is made up out of decentralized public bodies, such as "municipalities" that are situated within "provinces," that fulfill legislative and administrative tasks. The Netherlands became a kingdom in 1815, of

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which Belgium and Luxembourg also belonged until 1830. The Netherlands is a parliamentary constitutional monarchy, in which the king is the ceremonial head of state and governs under the responsibility of the ministers without having any legal influence. The Netherlands is one of the founders of European cooperation, and in 1952 joined the European Coal and Steel Community, the predecessor of the European Union.

Om general there are two kinds of legal rules concerning administrative law in the Netherlands. First, administrative authorities are granted the power to act for the purpose of performing a public service in many statutory provisions; those provisions usually regulate such action in detail. This includes substantive rules in numerous areas of public law, such as social security law, immigration law, or environmental law. Second, in 1994 the Netherlands introduced the General Administrative Law Act (GALA), or in Dutch the *Algemene wet bestuursrecht* (Awb), which contains rules for orders made by administrative authorities and creates the right of appeal to an administrative court against single-case decisions or orders. The GALA provides provisions on the process of administrative decision-making in a general sense and also a general framework for legal protection against the orders issued.

In the past two decades, administrative silence has been given high priority on the political agenda. In many cases, timely decision-making by administrative authorities has been a problem. Research shows that administrative authorities have a hard time responding to a variety of license applications within the set time limit. Not only does this mean that an applicant was left in the dark for too long with regard to the authorization of starting an activity or project, but in the past, it was also problematic to force the administrative authority to make a decision. There has therefore been much attention devoted to both administrative practice and the introduction of legal remedies against administrative silence. This attention was necessary in spite of the general rule that an administrative authority is obliged to take a decision on a license application within a prescribed limit of time.

Timely decision-making by the administration ensures predictability and legal certainty in the relationship between government and its citizens. For any government to function properly within a democratic society that is based on the rule of law, it is also important that public authorities take decisions within a reasonable time and certainly within the time period prescribed by law. In the past few years, the Dutch national legislator has invested in various legal instruments to stimulate

timely decision-making. The objective of these instruments is to sanction the administrative authority in case decisions are not made within the prescribed time limit. Non-legislative causes of failures in timely decision-making, such as insufficient employee competence, the workload being too high for government officials, or the complexity of applications, are generally not considered potentially successful arguments to justify administrative silence. However, the legislator does acknowledge the fact that finding a solution for the problem cannot be guaranteed with (only) legislation and regulation. In this contribution, we will discuss the rules and provisions that the Netherlands has introduced to guarantee that government takes decisions on time.

6.2 Legal Framework for Timely Decision-Making

6.2.1 Constitution, the General Administrative Law Act and Sector-Specific Acts

The Dutch Constitution (*Grondwet*) does not refer to timely decision-making by public authorities specifically and does not provide specific provisions on judicial protection against untimely decision-making by government.[1] The Netherlands is however familiar with regulation stimulating timely decision-making and sanctioning administrative silence. In the past, there have been relevant provisions in sector-specific legislation concerned with this issue, but since its introduction the GALA provides general provisions on timely decision-making and on several different sanctions. However, as it is a general act on administrative law, there is always the possibility of prevailing provisions of sector-specific legislation.

The GALA provides one of the key provisions on timely decision-making in Article 4:13(1) GALA. For single-case decisions that are requested by an interested party, this provision provides as follows:

> An administrative decision shall be made within the time limit prescribed by statutory regulation, or, in the absence of such time limit, within a reasonable period after receiving the application.

[1] Article 6 ECHR implies a right to a fair and public hearing within a reasonable time by an independent and impartial tribunal. Case law concerned with this right does not apply directly to administrative silence.

Article 4:13 GALA stipulates that the statute in which the particular public competence to make the single-case decision is provided (e.g., a permit or a license) can provide how much time an administrative authority has to decide on an application. Nowadays, many of the sector-specific regulations provide not only specific competences but also prescribe a time limit for making a decision when a request has been made. An example can be found in the General Act on Environmental Licensing (*Wet algemene bepalingen omgevingsrecht*, GAEL). Article 3.9 GELA provides that an application for a building permit should be decided on within 8 weeks. Another example is Article 5.1 of the Dutch Nature Conservation Act (*Wet natuurbescherming*); it provides for a term of 13 weeks to decide on an application.

When a specific legislative act awards an administrative authority the competence to decide on a permit application but does not provide a specific time period to decide on an application, Article 4:13 GALA stipulates that the decision shall be taken within a reasonable period after receiving the application. Then also Article 4:13(2) GALA is relevant. It stipulates the following:

> The reasonable period (…) shall in any event be deemed to have expired if the administrative authority has not made an administrative decision or given communication as referred to in article 4:14, subsection 3, within eight weeks of receiving the application.

This means that unless specified otherwise, the general time period to take a decision is eight weeks. The provision does however also refer to Article 4:14(3) GALA in order to ascertain what is in fact a reasonable period to decide on an application. It reads:

> If, in the absence of a time limit prescribed by statutory regulation, an administrative decision cannot be made within eight weeks, the administrative authority shall inform the applicant within this time limit, stating a reasonable time limit for the administrative decision to be made.

From these two relevant provisions, read in conjunction with each other, the following can be deduced.[2] Starting point is that a reasonable period is eight weeks after the application is received but it can be longer. This

[2] *Parliamentary Papers II* 1988/89, 21 221, 3, pp. 105–107.

is the case when there is not a reasonable possibility for the administrative authority to take a decision within eight weeks after receiving the application. Extending the reasonable period should not just be notified by the administrative authority to the applicant but this should be done in writing before the eight-week period is over. On the other hand, the reasonable period can also be shorter than eight weeks; if a permit is requested for a demonstration to be held in a week's time, then—if reasonable—a decision should be taken before the date the demonstration is planned.[3]

6.2.2 *Assessing the Length of the Decision Period*

For both the situation that a period is stipulated in a sector-specific legislative act and for the situation that, in the absence of a statutory time period, the "reasonable" period applies, the GALA provides a number of provisions on assessing the beginning and the end of the decision period. Article 4:13 GALA provides that the decision period starts after the public authority has received the application and ends after the time period provided in a specific statute or after a reasonable time period, which is in principle eight weeks.

Article 4:15 GALA mentions a number of reasons for suspending the decision period. Perhaps the most important reason for suspension occurs when the applicant has not complied with all the requirements stipulated in either the GALA, a sector-specific act or a regulation for sending in a complete application. A proper assessment of the received application is only possible if the application provides all relevant information. If the applicant has not supplied the administrative authority with the required information, the time limit for making an administrative decision will be suspended from the day the administrative authority requests of the applicant to complete his application until the day the application has been completed or the day the time limit set for this purpose expires. This way of calculating the time period seems—where applicable—at odds with Article 13(3) Services Directive as this provision states that the period "shall run only from the time when all documentation has been submitted." Suspension of the decision period is also possible when the applicant has agreed to an extension, when there is a delay for which the

[3] Van Wijk et al. (2014, p. 306).

applicant is to blame or when the administrative authority is unable to make a timely decision due to *force majeure*.

The GALA provides in cases where the public authority comes to the conclusion that the time limit for making a decision will not be met, that the public authority is obliged to notify the applicant and inform him of the timeframe for expecting a decision, which should be as short as possible (Article 14(1) GALA). This notification was originally not intended to extend the time limit for taking a decision and was simply meant to make sure the applicant was notified. Many of the sector-specific regulations explicitly provide a possibility to extend the deadline (e.g., Article 3.9(2) GAEL). However, there has been some discussion whether the GALA implies the opportunity for extending the time period. In the explanatory memorandum for the implementation of the Services Directive (2006/123/EC)[4] in the Dutch Services Act (*Dienstenwet*) the government argued that Article 4:14(1) GALA does offer the possibility to extend the time period.[5] In that perspective it is also noteworthy that Article 31 of the Dutch Services Act explicitly states that—for any decision that falls within the scope of the Services Directive—Article 4:14(1) may only be used once, for a limited time and only if extending the time period can be justified by the complexity of the issue. Furthermore, it states that the notification provided for in Article 4:14(3) GALA shall take place before the end of the original time period and shall be accompanied by reasons for the extension.

6.2.3 Timely Decision-Making in Practice?

In the Netherlands, as far as our knowledge is concerned, there has recently been no systematic research into the extent to which administrative bodies make a decision before the deadline. However, there are countless indications that administrative bodies do not decide on time in a substantial number of cases. An illustration is provided by an analysis concerned with the handling of appeals by the administrative courts, which is currently being conducted by one of the authors of this contribution. In the context of that research, we looked at how quickly

[4] Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (*PbEU* 2006, L 376/36).

[5] See *Parliamentary Papers II* 2007/08, 31 579, no. 3, pp. 108–109.

administrative bodies decide on objections to their decisions. In most cases, the period for deciding on an objection is 12 weeks after the period to lodge an objection of 6 weeks. The research shows that in less than half of the cases (45%) a decision on the objection is made within these 18 weeks. In particular in cases in the field of environmental law and in disputes about compensation, decision periods are frequently exceeded.

6.3 Responses to Administrative Silence in the Netherlands

6.3.1 Different Legal Consequences of Administrative Silence

Dutch administrative law provides several possible legal consequences in cases where a public authority does not make a decision within the given time limit. Before the introduction of the General Administrative Law Act in 1994, one could point to the Administrative Law Act on Administrative Decisions of 1976 (*Wet administratieve rechtspraak overheidsbeschikkingen*, ALAAD) that provided in Article 3 that administrative silence should be interpreted as a refusal of the administrative decision requested. The ALAAD was revoked and the GALA now regulates the main legal consequences of administrative silence. What is the prevailing model in Dutch administrative law? From the moment the GALA was introduced, Article 6:2(b) provides that administrative silence as a response to an application by an interested party will be considered as an order that is subject to judicial review. Only the provisions of the GALA that are concerned with judicial review are applicable to administrative silence (Chapters 6, 7 and 8 GALA). Besides the opportunity of judicial review (see Sects. 6.4 and 6.6), Article 4:17 GALA stipulates that the public authority could be subject to a penalty for its silence if certain specific conditions are met (see Sect. 6.6.2).

Although these sanctions could be considered sufficient, the legislator has in 2009 also introduced a system of fictitious positive decision-making in section 4.1.3.3 GALA which is considered an alternative to the sanctions mentioned above. The reason for the introduction has been to strengthen the applicant's position vis-à-vis the public authority and to stimulate that authority to decide within the given time limit, but also to implement the EU Services Directive. The provisions in this section 4.1.3.3 GALA provide for an immediate legal consequence when the time period has been exceeded: A fictitious positive response to the

application is created automatically (*ex lege*). The decision-making period therefore has a fatal character and for the public authority it is no longer possible to allow the time period for taking the decision to expire unused with impunity. However, we should keep in mind that this particular section of the GALA is only applicable when its applicability is explicitly stipulated in a specific legislative act, regulation, or ordonnance. An important example of this can be found in the General Act on Environmental Licensing (*Wet algemene bepalingen omgevingsrecht*, GAEL) which prescribes that section 4.1.3.3 GALA applies to applications for licenses that will be decided upon after using the so-called standard decision-making procedure, with the exception of Article 4:20b(3) and Article 4:20f GALA.[6] For these specific provisions, the GAEL provides its own regulatory scheme which will be discussed below. Another example is provided by the Dutch Services Act that implements the European Services Directive in the Netherlands.[7] Although normally sector-specific legislative acts will designate a specific permitting system to which section 4.1.3.3 GALA is applicable, the Dutch Services Act simply stipulates that this section is applicable to all licensing systems that fall within the scope of the European Services Directive, except when the applicability is specifically ruled out by a legislative act.

6.3.2 The EU Influence on National Rules and Practices

When the EU Services Directive was implemented in the Netherlands in December 2009, there were changes to the GALA and a dedicated legislative act was introduced, the Dutch Services Act. In Sect. 6.2.2, we discussed some provisions of the Services Act that changed the Articles 4:14 and 4:15 GALA in case of an application for a decision that falls within the scope of the Services Directive. The implementation also led to the introduction of section 4.1.3.3 GALA that provides general provisions on fictitious authorizations. The provisions in this section are only applicable when another legislative act has stipulated that they are and can

[6] It is hardly surprising that a strict deadline for taking an administrative decision is incorporated in the GAEL, since this instrument did already apply to several licensing systems—for example the building permit based on the former Housing act—that now are included in the ELA.

[7] In Dutch: *Dienstenwet*. Also see on this subject K. J. de Graaf and N. G. Hoogstra (2013) and Sect. 6.3.2.

therefore potentially be relevant for all applications by an interested party to use a competence awarded by the legislator to a public authority.[8] Article 13(4) of the Services Directive was one of the main reasons to introduce section 4.1.3.3. GALA. Member states are obliged to introduce a system of fictitious positive decisions when the nature of a specific decision falls within the scope of the Services Directive, although exceptions can be justified. It reads as follows.

> Failing a response within the time period set or extended in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place, where justified by overriding reasons relating to the public interest, including a legitimate interest of third parties.

The Services Directive therefore demands the implementation of a system of fictitious positive decisions in case where the time period set is exceeded, but allows the member states some leeway. The Dutch Services Act therefore stipulates in Article 28 that all licensing systems that fall within the scope of the European Services Directive are subject to a system of fictitious positive decisions, except when the applicability is specifically ruled out by a legislative act.

Despite the fact that section 4.1.3.3 GALA has only been in force since 2009,[9] tacit authorizations were not a new phenomenon in the Netherlands. For some licensing systems, legislation already stipulated that failure on the part of the administrative authority to take a decision within the given time limit would result in fictitious approval. An important example of this system of tacit authorization is the permitting system for building permits. For a long time these could be granted tacitly under the Housing Act if no decision has been taken within the statutory time

[8] In other words, this section can be applicable to application for decisions within and outside the scope of the Services Directive. Before introducing the new section, the Government launched a project to assess whether existing permitting systems could be deleted or converted into a system of general binding rules and many were. Remaining licensing systems now usually include a strict deadline to take a decision. See *Parliamentary Papers II* 2007/08, 29 515, no. 224.

[9] In the Netherlands, this part of the implementation of the European Services Directive has been discussed most. Stelkens et al. (2012, p. 37).

limit.[10] Section 4.1.3.3 GALA has introduced important general provisions to replace and enhance different regimes of fictitious approvals in specific legislative acts.[11] Legal scholars in the Netherlands quite often refer to the rules on fictitious authorizations as the *Lex silencio positivo* (LSP), which seems to be a strange mix between Latin and Spanish.

6.4 From a Negative Interpretation to a Procedural Instrument

In the first years after the introduction of the GALA in 1994, the appeal against the failure to process an application within the set time limit on the basis of Article 6:2(b) GALA was treated by administrative courts as a fictitious refusal. The omission of a decision was interpreted as a substantive reaction and the judicial review therefore also covered the substance of the matter as if the application was refused. Judicial review against administrative silence did not only concern the question whether the administrative authority had exceeded the decision period, but also whether the administrative authority could lawfully refuse the application. This situation was explained as being a continuation of the case law under the ALAAD, that provided explicitly in Article 3 that administrative silence shall be considered a refusal of the application.

However, a judgment of the highest administrative court (the Administrative Jurisdiction Division of the Council of State) in December 1998 changed this role of the courts in judicial review against administrative silence quite drastically.[12] The Administrative Jurisdiction Division decided that from now on an appeal against the failure to deliver an administrative decision within the set period would not be considered an appeal against a refusal but will simply be seen as the appeal lodged against the omission of a decision.

[10] Other former examples are the Monuments and Historic Buildings Act and the Mining Decree.

[11] This division only applies when stated in a specific Act. For legislation within the scope of the Services Directive this is the standard based on Article 28(1) of the Services Act. For legislation outside the scope of the Services Directive an explicit provision that division 4.1.3.3 of the GALA is applicable is required.

[12] Administrative Jurisdiction Division of the Council of State 3 December 1998, ECLI:NL:RVS:1998:ZF3644.

> Using Article 6:2(b) of the GALA by making an objection or lodging an appeal against the absence of a decision can primarily be seen as a procedural means to get an administrative body to take a decision. In general, the administrative body is still obliged to take a real decision – which can also be done pending the procedure for not taking a decision in time – against which judicial review is possible. The GALA does not stipulate that non-timely decision-making shall be considered a substantive decision of any kind. […] In the absence of such a provision, the Council of State considers that there is no reason in general nor in this specific case to equate the absence of a decision with a real substantive decision based on what the administrative body has put forward in the course of the procedure.[13]

In short, an appeal against failure to take a timely decision should no longer be interpreted as being a substantive decision, but is merely a procedural instrument for an interested party to allow the administrative court to force the public authority to take a real decision. It was rather remarkable that the Administrative Jurisdiction Division of the Council of State choose a different route than the legislator had envisaged according to the explanatory memorandum of the GALA, which states the following.

> Because an untimely decision on an application is equated with a real decision for the purpose of the provisions concerned with the objection and appeal scheme, the content of the decision to be taken can also be discussed in the objection and appeal procedure. If, for example, it becomes apparent during the proceedings before a court which decision should have been taken, then it is not sufficient to state that the administrative body did not make a timely decision, but the court can also provide judicial review against the content of the decision.[14]

In general, this approach of the Administrative Jurisdiction Division is explained by legal scholars in literature as being justified, specifically because a substantive interpretation of untimely decision-making can put administrative courts in a difficult position as many believe that the judge shall not take over the task of the administration to take decisions.[15]

[13] Translated from the judgment.

[14] *Parliamentary Papers II* 1988/89, 21 221, no. 3, p. 120 (translated).

[15] Ten Veen and Collignon (2010, pp. 319–341).

The main and mostly only question within such an appeal is whether the administrative authority did indeed fail to process the application within the set time period. This is often a simple calculation: Whether the set time period to decide has expired without the administrative authority having taken a decision or whether the decision period did not expire (yet). Consequence of this procedural change in judicial review is that, from a substantive point of view, the applicant's substantive legal position is not made clear by the outcome of the appeal procedure since the court's ruling will only be about the question whether there was a case of untimely decision-making. If that is the case, the administrative court shall order the administrative body to take the decision within a time period under penalty of paying a penalty if this period is exceeded, which obligation has been laid down in Article 8:55d GALA since October 2009. An appeal procedure against untimely decision-making does of course not relieve the administrative body of the obligation to take a real decision. If this decision is taken during the procedure against the untimely decision-making, the judicial review will also include the real decision. In principle, however, the appeal procedure is regarded as simply a procedural means for encouraging the public authority to make a real decision.

6.5 Fictitious Positive Authorizations: Positive Silence

6.5.1 Introduction

The introduction of a broad system of fictitious approvals has been severely criticized.[16] In fact the idea of the system of tacit authorization is that it stimulates administrative authorities to decide within the prescribed time limit. So, in an ideal scenario the instrument will be never applied, because the administrative authority always decides before the end of the strict deadline. Looking at the case law based on the GAEL this is not the case in practice. In particular, the Council of State, in its advisory role, was

[16] Jacobs (2010) and see also Schiebroek and De Waard (2011).

not in favor of the introduction of tacit authorizations and even recommended to withdraw this legal instrument from national administrative law in the Netherlands.[17]

The main point of criticism directed at this instrument is that it is very likely that the public interest and the interests of third parties are not (sufficiently) taken into consideration. In addition, a tacit authorization places the applicant's interest above the public interest and the interests of third parties. In other words, public interests, as well as private interests of third parties, can be set aside in favor of the licensee. The exercise of activities requiring prior authorization must now be allowed without, as is customary, being tested for compatibility with the public interest. In a system of tacit authorization, activities contravening the public interest are all of a sudden allowed, which means that, as with the legal certainty of third parties, protection of this interest is no longer safeguarded without further regulation.

A fictitious approval will cause legal uncertainties, considering the fact that this type of permit does not comply with the procedural and substantive demands which normally apply to formal administrative decisions. Moreover, the Council of State, in its advisory role, notes that a tacit authorization is not based on an adequate balancing of interests.[18] The interests of third parties are not properly weighed up against other interests, either because a substantive assessment of the license application has not taken place at all or because this assessment has not resulted in an actual administrative decision.[19] In addition, the decision will not be properly motivated, especially because of the fact that there is not even a written decision. Normally, the administrative authority has to fulfill the

[17] The Council of State has been reserved with regard to the introduction of a system of tacit authorization. See *Parliamentary Papers II* 2007/08, 29 515, no. 224, *Parliamentary Papers II* 2007/08, 31 579, no. 4, *Parliamentary Papers II* 2007/08, 32 844, no. 4 and *Parliamentary Papers II* 2009/10, 32 454, no. 4.

[18] The Council of State believes that a fictitious approval can have harmful effects for third parties or society as a whole. This is especially the case when the tacit authorization occurs with licensing systems regulated in the ELA, because these licensing systems do almost always affect the physical living environment, the interests of third parties and the public interest. See *Parliamentary Papers II* 2007/08, 32 844, no. 4, pp. 9–10.

[19] See Article 1:3(2) of the GALA: "Administrative decision" means an order which is not of a general nature, including rejection of an application for such an order.

obligation to provide reasons for the administrative decision that explain why the decision was taken.[20]

The legislator took notice of the criticism and acknowledged that a tacit authorization might have harmful effects on the public interest and the interests of third parties. In order to protect these interests several provisions were introduced in the GALA.[21] These provisions will be discussed in this section. In addition, there will be attention to supplementary provisions in the GAEL that are also designed to safeguard the public interests and the interests of third parties.

We will focus here on three questions. The first question is when a fictitious approval enters into force and how interested parties are given notice that authorization has been granted. A second question is which legal powers an administrative authority has to protect the public interests and the interest of third parties, after an authorization is granted tacitly. A third question is how legal protection against tacit authorizations is regulated.

6.5.2 Notification and the Entering into Force of Tacit Authorizations

When section 4.1.3.3 of the GALA has been declared applicable to a certain licensing system, then tacit authorization can be granted if the statutory time limit has expired and the administrative authority has not responded to the application.[22] In case a statutory time limit is missing in a specific Act, the "reasonable time limit" of eight weeks will apply.[23] Since exceeding the strict deadline results in a fictitious approval, it is important that both the applicant and third parties stay informed of the strict deadline. For that reason, it is strongly recommended that the competent administrative authority send an acknowledgment of receipt of the application as soon as possible, stating both the time limit for

[20] Article 3:46 of the GALA.

[21] The expectation of the legislator is that these instruments will only be used in exceptional cases. *Parliamentary Papers II* 2006/07, 30 844, no. 3, p. 36.

[22] For example, there is a prescribed time limit of eight weeks for applications covered by the standard preparatory procedure as set out in Article 3.9(1) of the ELA. This time limit can only be extended once by the administrative authority for 6 weeks at most. So the time limit is fourteen weeks at most.

[23] See also Article 31 of the Services Act and Article 4:14 of the GALA.

the response and the fact that tacit authorization will be granted if no response is sent within the given time limit.[24] In case a tacit authorization is deemed to have been granted, this approval takes effect on the third day after the time limit has expired.[25] The legislator has chosen the third day after expiry of the time limit to ensure that a formal decision sent by the administrative authority on the last day of the time limit could be delivered by mail.

A notice that the authorization has been granted tacitly based on the GALA is not required for the entry into force of the fictitious permit. Normally, an administrative decision shall not take effect until it has been notified.[26] Positive consequence of the rule that a tacit authorization enters into force automatically is that the administrative authority has no influence on the moment the license takes effect.[27]

Article 4:20b(3) GALA is however not applied mutatis mutandis in the GAEL.[28] According to the GAEL, a fictitious permit needs to be notified before it can become effective. In addition, the licensee that holds such a fictitious permit can only benefit from this license once the time limit for formally lodging an objection against it has expired or in case a notice of objection has been filed, after a decision has been made in the following objection procedure.[29] And in Dutch law the time limit to formally lodge an objection will start after official notification of the permit that was tacitly granted. In other words, the entering into force of a tacit permit on the basis of GAEL will be automatically suspended for a number of weeks after the official notification of the permit.[30]

[24] This is mandatory by applications for an environmental license. See Articles 3.8 and 3.9(1) of the ELA.

[25] Article 4:20b(3) of the GALA.

[26] Article 3:40 of the GALA: "An order shall not take effect until it has been notified." Article 3:41 of the GALA: "Orders which are addressed to one or more interested parties shall be notified by being sent or issued to these, including the applicant."

[27] *Parliamentary Papers II* 2007/08, 31 579, no. 3, pp. 129–130.

[28] This means that a tacit authorization based on the GAEL does not enter into force after three days after the time limit has expired.

[29] Article 6.1(4) of the ELA.

[30] Moreover, it is possible for the licensee of the fictitious permit to ask for a preliminary injunction in order to reverse the suspensive effect. See also C. M. Saris, "Tijdig beslissen. Het doel dichterbij met de Wet dwangsom en beroep bij niet tijdig beslissen en de verruiming van de lex silencio positivo?", *De Gemeentestem* 2008, nr. 30.

Nevertheless, for both the regime in the GALA and the GAEL the administrative authority is obliged to give notice of the fictitious authorization within two weeks of its entry into force (GALA) or its emergence (GAEL). In addition, the administrative authority is required to give public notice that an approval has been awarded fictitiously instead of a formal (real) license. With this public notification, third parties are informed of the fictitious approval. However, it is questionable whether public notification of tacit authorization always takes place. It has been discussed whether an administrative authority, unable of making a decision within the prescribed time limit, would announce an issued fictitious license in time.[31] In other words, it would be highly likely that the administrative authority fails to give a notification within two weeks after the strict deadline, the expiration of which has led to a tacit authorization.

If the administrative authority fails on the duty of notification, there is a risk that the administrative authority has to pay a penalty.[32] This is the case when the applicant has asked for notification by a written notice of default and the administrative authority has not answered this request within two weeks.[33] The penalty is the same as when there is an untimely decision.[34] The exact amount of the penalty payment depends on the amount of time it takes before the administrative authority notifies the tacit authorization. With this instrument, the administrative authority is once again sanctioned for the fact that a decision has not been made before a strict deadline. Next to the sanction of a penalty, it is also possible to force the administrative authority to officially send notice of the granted permit by filing an appeal with the administrative court, again after a written notice of default has been issued and two weeks have passed.[35] The court will be able to order the administrative authority to officially notify or publish the permit that was granted tacitly.

[31] Robbe (2011) and see also Robbe (2012).

[32] Article 4:20d of the GALA.

[33] Article 6:12 of the GALA.

[34] See the rapport "Monitor Wet dwangsom" attachment by *Parliamentary Papers II* 2012/13, 29 934, no. 29.

[35] Article 8:55f of the GALA.

6.5.3 Competence to Amend or Revoke Tacit Authorizations

One of the key consequences of the fact that a permit has been granted tacitly is that the administrative authority is no longer competent to issue a valid act or order. The legal basis for such a substantive decision on the matter is non-existent because a decision was already "taken." Judicial review must lead be to annulment of the decision.

In order to safeguard interests after a license has been granted tacitly, so-called standard conditions are automatically considered conditions of the fictitious approval. If a statutory provision or a policy guideline stipulates the standard conditions that are normally to be included in the permit, they apply by operation of law to tacit authorizations.[36] This particular regulation aims to equalize license conditions for substantive administrative decisions and fictitious decisions.[37]

Besides standard conditions the administrative authority has the power to either add conditions to the fictitious approval or to revoke the license if this is needed to avoid *serious consequences for the public interest*.[38] Both can be done within a time limit of six weeks after sending a notification of the tacit authorization.[39] The licensee is entitled to compensation if the administrative authority decides to amend or revoke a tacit authorization. Only the damage resulting from the amendment or revocation of the license is considered for compensation, not the damage which may arise after a license issued by right is granted.[40]

The GAEL contains specific other provisions about the competence of public authorities to either attach conditions to the environmental license that was tacitly granted or to revoke it in case of serious consequences

[36] By way of example, in the explanatory memorandum attached to this instrument, the case of a license that gives permission to set up a terrace is mentioned. Attached to this type of license, most municipalities in the Netherlands have a standard condition with regard to closing times. The same closing time applies in case of a fictitious terrace permit, irrespective of whether or not this is included in the license application (*Parliamentary Papers II* 2007/08, 31 579, no. 3, p. 133).

[37] A standard condition is a rule which is included in a legal provision or a policy rule. However, which exact rules can be seen as standard conditions is unclear. This has led to some debate in Dutch literature. See De Kam (2010) and see also Kocken (2011).

[38] Article 4:20f of the GALA.

[39] Notification in the sense of Article 4:20c of the GALA.

[40] Article 4:20f(3) of the GALA.

for the physical living environment.[41] As a consequence of the provisions regulating when such a license will enter into force, no detrimental effects for the environment will occur within at least six weeks after the license is notified. This gives the administrative authority the opportunity to examine if the fictitious license has detrimental consequences for the environment and which measures might offer an adequate solution. Consequently, together with the notification of the tacit license to the applicant, the conditions attached to the tacit decision or the (partial) revocation of the license can also be notified. The wording used in the GAEL is different from the terminology used in the GALA. The scope of this regulation in the GAEL appears to be more restrictive, since "*serious consequences for the environment*" is a more restricted concept than "*serious consequences for the public interest*," which is used in the GALA. Furthermore, the GAEL provides for quite a rigorous obligation for the administrative authority to amend or to revoke the fictitious approval, whereas the GALA only stipulates the competence to do so. Also, in the GAEL, the administrative authority is not subject to a strict period of time in which conditions need to be attached to the license or in which the license has to be revoked. Naturally it would be best if the administrative authority takes measures within a short period of time in light of the serious detrimental consequences that the tacit authorization might have.

6.5.4 *Empirical Evidence*

How often are administrative bodies allowing positive fictitious decisions to come into existence? Research that was conducted in 2013 shows that quite a number of administrative bodies are occasionally confronted with the fact that they did, but very few administrative bodies experience this frequently (Fig. 6.1).[42]

38% of the administrative bodies indicates that, in the 5 years following the introduction of this instrument, they were never confronted with the fact that a positive fictitious decision was granted, 53% occasionally (1–10 times), 9% regularly (10 or more times).

[41] Article 2.31 and 2.33 of the ELA.

[42] https://www.wodc.nl/onderzoeksdatabase/evaluatie-van-de-werking-van-de-lex-silencio-positivo.aspx.

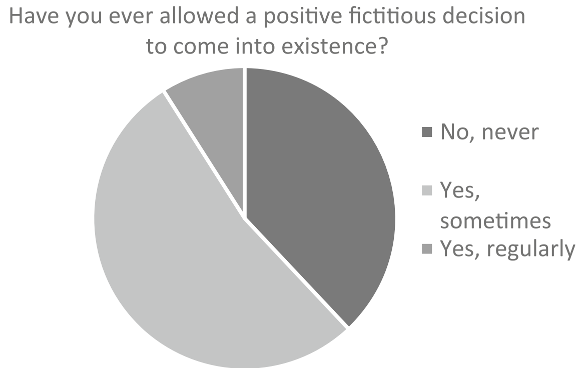

Fig. 6.1 Positive fictitious decisions

Looking at the nature of the applications that were tacitly granted, we see that most decisions relate to permits in the field of environmental and planning law.

What is the impact of the introduction of the *lex silencio positivo*? Does the decision-making process proceed more quickly now than before the introduction of this law? 38% of the administrative bodies believes this is the case, whereas 62% believes this is not the case. A number of administrative bodies believe that the law has a positive effect on the punctuality of decision-making. They believe that the most important reason for this is an increased alertness to respecting the decision period. This alertness seems to be greater compared to situations where the *lex silencio positivo* is not applicable and where there is, at most, a risk that a party concerned will put the administrative body into default on the grounds of failure to make a timely decision. To forfeit a penalty is annoying, but if it happens, the damage is manageable. Administrative bodies are, however, much more reluctant to allow a positive fictitious decision to come into existence. They want to avoid a permit from being granted *ex lege*. The reason for this is that such a permit has unwanted social consequences, especially if the permit is contrary to the law. If, for example, an entrepreneur obtains a fictitious positive decision (permit) that should have been denied by the administrative body, his competitors will be damaged and are likely to lodge an objections or an appeal.

In practice, the following occurs in situations where the *lex silencio positivo* applies and where there is a risk of not meeting the deadline for

rendering a decision. The administrative body contacts the applicant and asks him to withdraw his application and to submit a new one, so as to allow the administrative body to render a timely decision. Applicants often comply with this request, also because they have an interest in the administrative body rendering a real decision.

More side effects are mentioned in response to one of the open questions of the survey. One of these is that the creation of a positive fictitious permit will generate false expectations on the part of the permit holder, as the positive fictitious permit is not carved in stone. Another negative side effect is that, in situations where the decision period for the administrative body has almost expired and where there is a risk that a positive fictitious decision will be rendered, the application is denied for safety reasons. The ball is then in the applicant's court: If they still want to obtain a permit, they must file an objection against the denial. Another negative side effect mentioned is that the positive fictitious permit weakens the position of third parties. In the event that a positive fictitious permit is granted while the rules do not allow the granting of such a permit, the third party must take action to avoid the unlawful permit from applying.

6.6 Legal Remedies

6.6.1 Appeal Against the Failure to Take a Timely Decision

The standard in the GALA is that an appeal to the administrative court is only allowed against written decisions of public authorities. No appeal can be made to the administrative court against other acts or omissions of public authorities. That would mean that if an administrative authority did not make a (timely) decision (yet), no legal remedy would be available with the administrative court against that act or omission. In the case of administrative silence or untimely decision-making, there is no decision. The legislator has deemed such a situation undesirable. That is why a number of provisions have been introduced in the GALA that make it possible to litigate before the administrative court against the absence of a decision.

To this end, Article 6:2(b) GALA stipulates the following: "For the purposes of statutory regulations governing objections and appeals, the following shall be equated with an order: failure to make an order in due time."

This provision allows interested parties to lodge an appeal against untimely decision-making with the administrative courts in the Netherlands.

Article 6:12 GALA stipulates special provisions about the appeal against administrative silence or late decisions in cases an interested party has applied for a single-case decision, like a permit. In the past, that provision meant not only that it was possible to appeal against the absence of a decision to the administrative court, but also that the appeal with the administrative court could only be lodged after the interested party had first lodged a formal objection with the administrative authority about the decision that was not taken. In 2009 Article 6:12 GALA was amended and now reads:

1. If the notice of appeal is brought against failure to make an order in due time or against failure to notify that an authorization is deemed to have been granted, it shall not be subject to any time limit.
2. A notice of objection or appeal may be submitted at such time as
   a. the administrative authority has failed to make an order in due time or has failed to notify that an authorization is deemed to have been granted and
   b. two weeks have passed since the day the interested party sent the administrative authority a written notice of default.
3. If it is not reasonably possible to require the interested party to declare the administrative authority to be in default, the notice of appeal may be submitted as soon as the administrative authority fails to make an order in due time;
4. The objection or appeal shall be ruled inadmissible if the notice of objection or appeal is submitted unreasonably late.

The provision provides that as soon as an administrative authority has allowed the decision period to expire, an interested party (Article 1:2 GALA) can send the administrative authority a notice of default. Two weeks later, he is allowed to lodge an appeal with the administrative court against the absence of the decision. There is, however, a limit to the possible appeal against the absence of a decision. Such an appeal shall not be lodged "unreasonably late." When an appeal is made "unreasonably late" depends on the circumstances of the case. The case law of the

highest administrative courts shows that those who wait more than half a year before appealing against the absence of a decision run the risk that their appeal will be declared inadmissible because it was submitted unreasonably late.[43]

The way in which that appeal is handled is provided in Articles 8:55b up to and including 8:55f GALA. The arrangement entails the following. In the first place, the appeal is handled by the court in a simplified manner. This means that the appeal is not handled at a hearing (Article 8: 55b(1) GALA). The judge will rule on the appeal within eight weeks (Article 8:55b(1) GALA). If the appeal is well founded and the administrative authority has still not taken a decision at that time, the court will determine that the administrative body shall take a decision within two weeks (Article 8:55d (1) GALA). The administrative court shall attach a penalty to this decision for each day that the administrative body fails to comply with the decision (usually a penalty of 100 euro until a maximum of 15.000 euro).

The only available remedy against the ruling of the court in a procedure against administrative silence is the possibility to object against the judgment of the court with (another chamber of) the court. The administrative court will then decide within six weeks on the objections brought forward. If the objection is well founded, the administrative law court will then again decide as quickly as possible on the appeal (Article 8:55e GALA).

The administrative court can refrain from the simplified handling of the appeal against administrative silence. The appeal will then be dealt with at a hearing (Articles 8:55b(2 and 3) GALA). In that case, the court decides if possible, within thirteen weeks (Article 8:55b(3) GALA). Appeal against the court's decision is possible.

The Articles 8:55b to 8:55f GALA show that the legislator does not consider the absence of a decision as a fictitious negative decision. The assessment of the appeal against the absence of the decision therefore only concerns the question whether the administrative body has exceeded the decision period that applies to him. However, this was not always the case.

[43] Trade and Industry Appeals Tribunal (*College voor Beroep van het bedrijfsleven*) 16 April 1998, ECLI:NL:CBB:1998:AN5693, Administrative Jurisdiction Division of the Council of State (*Afdeling bestuursrechtspraak van de Raad van State*) 15 January 2003, ECLI:NL:RVS:2003:AF2904, Central Appeals Tribunal (*Centrale Raad van Beroep*) 4 October 2005, ECLI:NL:CRVB:2005:AU4243.

6.6.2 Penalty for the Failure to Take a Timely Decision

Due to the entry into force of the Act on Penalty Payment and Appeals in the event of administrative silence in October 2009, the GALA was amended in the sense that an interested party that is waiting for a decision of an administrative body has been given an alternative instrument (in addition to the appeal against the failure to take a timely decision) to persuade an administrative body that is in default to decide within the set time limit. The administrative authority can forfeit a penalty for each day that it is in default to take a decision, with a maximum of 42 days. The regulation, included in section 4.1.3.2 GALA, applies to both decisions on demand and decisions on objections, but only when the decision is considered a single-case administrative decision (in Dutch a *beschikking*). With this penalty payment scheme, the legislator has intended to include a financial incentive in the GALA to stimulate timely decision-making.

The penalty payment is due from two weeks after the administrative authority has received a written notice of default. The way to give notice to an administrative body of late decision-making is not subject to any other legal requirements than that it must be done in writing (Article 6:12(2)(b) GALA). A notice of default is therefore free of form. However, the baseline is based on consistent case law that it must be sufficiently clear to which application for a decision the notice of default relates.

Similar to a notice of default in the context of an appeal procedure for late decision, the administrative authority is also warned by the notice of default that the decision period has been exceeded. Equally similar is that the administrative body in this way obtains an additional time period, as it were, to still take a decision. If the administrative authority is able to take a decision on the application within two weeks' time, it will not owe a penalty payment to the applicant.

This penalty payment is €23 per day for the first 14 days, €35 per day for the second 14 days, and then €45 per day. The total amount could rise to a maximum of €1442. A penalty payment by an administrative authority is not required under all circumstances. Article 4:17(6) GALA stipulates three exceptions. The first exception is the situation in which a notice of default is received by the administrative authority unreasonably late. Secondly, no penalty payment is due if the applicant of the penalty is not an interested party. It is unclear whether the legislator has thought this to mean that the person applying for the penalty payment could be a different person than the applicant for the decision. After all,

the alternative is that the applicant is not considered an interested party for his own request. A third exception is that no penalty payment is due if the application is non-admissible or manifestly unfounded. This legislative text is somewhat remarkable since the term inadmissible or manifestly unfounded is normally used in legal procedures as the objection procedure and the procedure of judicial review. In the words of the GALA an application can be put out of consideration (see Article 4:5 GALA).

Within two weeks after the last day a penalty payment was owed, the administrative authority must, by decision, determine the total amount of the penalty payment. This last day may mean that maximum penalty payment of €1442 has been reached or that the administrative body has taken a decision and published it. Payment of the penalty must be made within 6 weeks of the announcement of the decision determining the total amount of the penalties.

The penalty payment scheme aims to stimulate the administrative authority to decide on an application in time. It is clear to the attentive reader that although the administrative authority can be sanctioned in the event of a time limit, it is not necessarily guaranteed that the administrative authority ultimately takes a decision either granting or refusing the application. After all, the payment of a penalty is not equivalent to obtaining a decision on the original application. In order to force the administrative authority to take a decision, the applicant has no choice but to (also) lodge an appeal procedure for failure to take a decision timely.

6.6.3 Legal Protection in Case of Tacit Authorizations

A fictitious authorization can be legally challenged the same way a formal (real) decision on an application is challenged.[44] This generally means that first an objection shall be made by submitting a notice of objection to the administrative authority which "made" the fictitious approval.[45] Next, the fictitious approval can be challenged at the district court and the decision can be appealed the Administrative Jurisdiction Division of the Council of State.[46] The six-week period during which an appeal can

[44] Although theoretically a tacit authorization is not an "order" (defined in Article 1:3(1) of the GALA as a written decision of an administrative authority constituting a public law act), Article 4:20b(2) simply states that it is regarded as an order.

[45] Article 6:4 of the GALA.

[46] Articles 8:1 and 8:104 of the GALA.

be lodged against a tacit authorization begins when notice is given of the authorization.[47] As explained earlier there can be a substantial difference between the moment the tacit authorization takes effect and the moment an administrative authority gives notice of this license.[48] This means that third parties have to wait until notice is given before they can officially object against the tacit authorization.

Judicial review of a decision that was tacitly granted starts with the obligatory objection procedure by lodging an objection with the competent authority. The time period to lodge an objection commences at the moment the decision is officially notified in accordance with Article 3:41 or 3:42 GALA, as follows from Article 6:8 GALA. The notification of the fictitious decision is therefore essential for both the applicant and third parties with an interest as it marks the start of the time period set to officially lodge an objection and also determines the moment when the fictitious authorization becomes irrevocable as lodging an objection is no longer possible.

Although Article 4:20c GALA contains an explicit obligation for the administrative body to notify that a fictitious authorization was granted, it is conceivable that—certainly now that it is clear that the administrative body has not taken a decision within the time period set—timely notification is also not to be expected. The GALA therefore provides interested parties access to the administrative courts in case a fictitious authorization is not notified correctly (see Article 8:55f and 6:12 GALA).

Another issue—which automatically occurs in case of a fictitious license—is that there is no written document in which the reasons for the decision are stated. It is assumed that it is not really possible to check for compliance with procedural requirements, such as the requirement that sound reasons are given; that would mean that any legal action would lead to a successful appeal which could hardly have been, the intention of the legislature.[49] If the administrative court completely or partially annuls the tacit authorization, the authority must make a new decision. Failure

[47] Article 6:8 of the GALA: ‘The time limit shall start on the day after that on which the order is notified in the prescribed manner’.

[48] See in detail Sect. 6.3.2.

[49] See also Buteijn (2009).

to comply with the administrative court's order to make a new decision cannot lead to another tacit authorization.[50]

6.6.4 The Role of the Ombudsman

An analysis of the National Ombudsman's annual reports of the past years reveals that a large number of complaints per year relate to the lack of timely decision-making. The lack of will of the power to expeditiously grant or refuse applications is a persistent problem. Timeliness is included in the most recent version of the National Ombudsman's Guide to Good Administration and is described as follows.

> The government is acting as quickly and decisively as possible. The legal deadlines are final deadlines. The government strives for shorter periods whenever possible. If decision-making takes longer, the government will inform the citizen in good time. If no period is specified, the government acts within a reasonable - short - period.[51]

In the annual report of 2000, the National Ombudsman states that a fictitious granting of a permit can offer a solution in a number of cases and suggests the legislator to investigate in which licensing systems this can be introduced.[52] It is striking that the National Ombudsman is relatively positive about a system of fictitious licensing.

The moment a citizen turns to the National Ombudsman to lodge a complaint about untimely decision-making, he has often waited a considerable time for a response from an administrative authority. The National Ombudsman finds it unacceptable that the patience of the citizens is put to the test by the government that does not comply with the stipulated terms of the GALA for timely decision-making. According to the National Ombudsman, failing to take timely decisions leads to a deterioration of confidence in the government.

[50] *Parliamentary Papers II* 2009/10, 32 454, no. 3, p. 4.

[51] www.nationaleombudsman.nl.

[52] Jaarverslag 2000, *Kamerstukken II* 2000/01, 27 645, 1–2.

6.6.5 Empirical Evidence

Introduction
How often these legal remedies are used? In 2013, the use and impact of the penalty for and the appeal against the failure to make a timely decision were extensively analyzed on behalf of the Research and Documentation Centre (WODC) of the Ministry of Justice of the Netherlands.[53] To this end, a written survey was conducted among 253 administrative bodies as well as 16 face-to-face interviews within administrative bodies.

Penalty for Failure to Make a Timely Decision
The survey shows, in the first place, that a vast majority of the administrative bodies has been put into default one or more times for failure to make a timely decision.

Figure 6.2 shows that, since the introduction of this instrument, 15% of the administrative bodies has never been put into default, 70% occasionally, and 15% frequently.

Administrative bodies that are put into default do not necessarily also forfeit a penalty. This clearly happens less often (Fig. 6.3).

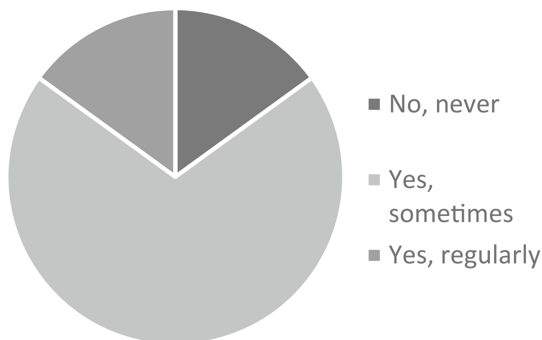

Fig. 6.2 Put into default?

[53] https://www.wodc.nl/onderzoeksdatabase/evaluatie-van-de-werking-van-de-lex-silencio-positivo.aspx.

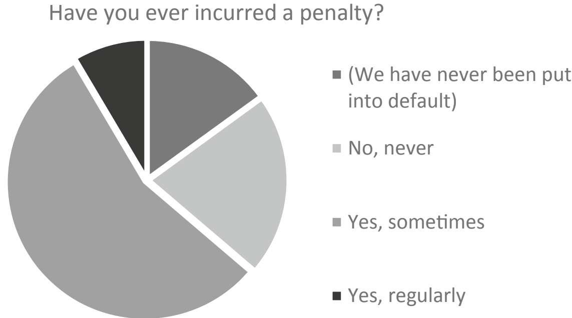

Fig. 6.3 Incurred a penalty?

25% of the administrative bodies that have been put into default has never incurred a penalty, 65% occasionally (1–10 times), and 10% (relatively) frequently (10 or more times).

What is the effect of the possibility to put an administrative body failing to make a timely decision into default and to ensure that it incurs a penalty? A minority of the civil servants to whom this question was submitted (33%) indicated that the effect of that possibility is that decision-making procedures proceed more quickly. A clear majority (67%), however, saw no effect. Of the group that saw no effect, a clear majority considered that the positive effect is limited.

The group that saw an effect was asked to explain that effect. Two explanations prevailed. Firstly, administrative bodies are more alert to respecting the decision period since the introduction of the arrangement. Secondly, the increased alertness to timely decision-making is consistent with the general efforts to increase the quality of the provision of services by public authorities.

The interviews within administrative bodies show, more clearly than the survey does, that the introduction of the instrument of a penalty does have an impact. Civil servants who were subjected to a face-to-face interview indicated that this is an important incentive to respect the decision period.

The arrangement not only has a direct impact, but also some side effects. One of the negative side effects mentioned is that the risk of forfeiting a penalty for failure to make a timely decision results in less careful decision-making. There is more pressure to make a timely decision,

which may negatively affect a careful preparation of the decision. There are, however, also positive side effects. Since it has become possible to put an administrative body into default for failure to make a timely decision and to have it forfeit a penalty, it has been easier for administrative bodies to highlight the importance of timely decision-making. In addition, administrative bodies have become more alert to meeting deadlines. The citizens involved are contacted earlier if there is a risk of not meeting a deadline. The introduction of the arrangement has made administrative bodies more aware of the importance of good communication. People who are not informed by the administrative body will put that body into default more quickly than those who are informed that the deadline will not be met.

Appeal Against the Failure to Make a Timely Decision

One of the questions of the survey held among administrative bodies was how often, in the past 5 years, the arrangement was invoked. It appeared that the arrangement was invoked only occasionally (Fig. 6.4).

70% of the administrative bodies indicated that the arrangement was never invoked, 25% occasionally (1–10 times), 5% frequently (10 or more times). Appeal on the grounds of failure to make a timely decision mainly pertains to decisions pursuant to the Government Information (Public

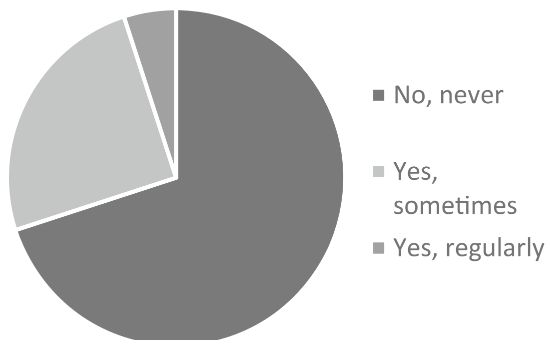

Fig. 6.4 Appeal against the failure to make a timely decision

Access) Act, enforcement decisions, environmental permits, and decision on objections.

Administrative bodies believe that the arrangement has limited impact because it is not invoked very often. What they find positive about the arrangement, is the obligation to put the administrative body into default before lodging an appeal before the court. This allows the administrative body to take action. In many cases, the notice of default is not followed by an appeal on the grounds of failure to make a timely decision.

One of the reasons why the arrangement is so little used is that citizens want to maintain constructive contacts with the administrative body. If an applicant hopes for a positive decision by the administrative body, he often finds it too risky to put the administrative body into default if it has not yet rendered a decision on the expiry of the decision period. Applicants fear that a notice of default reduces the chance of a positive decision.

Citizens who want to take action, if an administrative body has exceeded the decision period, may invoke the penalty arrangement for failure to make a timely decision, or lodge an appeal on the grounds of failure to make a timely decision, or do both. A significant factor in making this choice is the importance attached to the decision. If, for example, the decision relates to a large infrastructure project, the administrative body may decide to postpone its decision, even if this means that it will incur the full penalty of €1442. In this case, it may be more efficient for the person who is waiting for the decision to lodge an appeal on the grounds of failure to make a timely decision. After all, incurring the penalties is, in this case, no incentive for the administrative body to render an early decision. However, an order from the administrative court to render a decision is a real incentive.

It is not easy to find out how often proceedings are brought before the administrative courts in the Netherlands about the failure to make a timely decision. The study from 2013 does not address this question. Courts do not provide information about this question on their own initiative. Moreover, not all judgments of administrative courts are published. Those court judgments that are published almost always concern cases that have been discussed during a formal hearing, while cases about the failure to make a timely decision are almost never dealt with in a procedure with such a formal hearing.

Nevertheless, we can make an estimate of the frequency with which disputes about the failure to make a timely decision are brought before the court. From information that we have obtained from three of the eleven

districts courts in the Netherlands, it can be deduced that in one court almost 3% of the total number of administrative cases concern an appeal about the failure to make a timely decision, in the second court almost 4% of the cases, in the third court in more than 5% of the cases. It should be noted that for some of these cases, incidentally, the administrative body still makes a decision during the court-procedure against the absence of a decision. In that case, the nature of the dispute will change from the relatively simple question about untimely decision-making to a substantive argument on the merits of the decision during the court proceedings. In such a case the central question at the time the appeal is lodged is whether the administrative body has exceeded the decision period, but in the judgment the court gives a judgment on the legality of the decision that has since been taken.

6.7 Overall Assessment of the Legal Regime and the Practice of Administrative Silence

Legislation in the Netherlands usually provides competent administrative authorities with a specific decision period that it shall not exceed. Is no specific time period for making the decision prescribed, then Article 4:13 GALA provides that a decision shall be made within a reasonable time, which it stipulates as being 8 weeks. The period to decide on an application starts when the application is received but will be considered suspended for a number of reasons. The most important is when an application is considered incomplete, for instance, when the applicant does not provide all relevant and required information in his application. This applicant has to be warned and offered the opportunity to make his application complete. During the time between the warning and the moment when the application is complete, the decision period will be suspended. Also, other reasons for the suspension of the decision period are mentioned in the Dutch General Administrative Law Act (GALA). What will happen if the decision period is exceeded by the competent administrative authority?

The remedies that the Dutch legislator over time introduced against untimely decision-making by administrative authorities are stipulated in the GALA. Dutch administrative law basically provides for three different remedies when the period to make a decision has expired. The first is the possibility for an interested party to ask for judicial review of the administrative silence. This legal procedure allows the administrative courts to

review questions such as whether the competent administrative authority has indeed not taken a decision and whether the decision period to take the decision has indeed expired like the interested party has claimed. Although there are some formalities that the interested party has to overcome, this procedure seems an accessible legal instrument that can potentially lead to a court order to make a decision subject to a penalty payment (Sect. 6.6.1).

The second and third remedy against administrative silence in the Netherlands have a scope that is slightly less broad since these remedies only apply in cases where a single-case decision has been applied for by an interested party. The second remedy is applicable for all single-case decisions that were applied for by an interested party and comes down to a penalty payment by the administrative authority for each day that has passed while is has been put in default and two weeks have passed since then (Sect. 6.6.2). The third remedy was discussed in Sect. 6.5, the so-called *Lex silencio positivo* (LSP). While the Netherlands had some experience with tacitly granted authorizations since 1993, a specific section in the GALA was introduced in 2009 with general provisions about the fictitious approval in order to properly implement the EU Services Directive. This remedy is only applicable when a specific legislative act provides a provision that activates the applicability of this section of the GALA. The legislator introduced in section 4.1.3.3 GALA some special provisions in order to safeguard the public interest and the interests of third parties in cases where an authorization is tacitly granted.

After describing the three legal remedies against administrative silence, we looked at the practical use and the impact of those three instruments. The effectiveness of the various instruments to persuade the government to make timely decisions seems rather limited. With the remedy that provides for the penalty payment the administrative body can forfeit penalty payments if it is late in making its decision. However, invoking the regulation cannot effectively force the administrative authority to actually take a decision. On the other hand, civil servants (experiential experts) have the impression that since the introduction of the possibility of the penalty payment for administrative silence the government has been more alert to taking decisions within the prescribed decision period. Also, administrative authorities seem more aware of the importance of good communication with the applicant, certainly if there is a risk that the decision period is not long enough to take the decision. The provisions that

stipulate that any interested party can lodge an appeal against the administrative silence of any administrative authority have a limited scope (the court order is no more than a relevant new incentive for the administrative authority to decide) and there are very few cases that have been brought to court. Striking about the effects and the use of the tacit authorization scheme (in the Netherlands named *Lex silence positivo*) in many cases is that the cure is worse than the disease itself. The occurrence of a fictitious positive decision results in so many complications that administrative authorities do everything they can to prevent them from having to issue and notify a fictitious positive decision. The effect of the *Lex silencio positivo* is often not that decisions are taken more often within the prescribed decision period, but that procedural techniques are applied to avoid the negative effects, without the potential positive effects (timely decision-making) being realized.

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