

Silence is Golden? Tacit Authorizations in the Netherlands, Germany and France

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Abstract

Article 13(4) of the Services Directive provides that subject to certain conditions, member states have an obligation to introduce a system whereby tacit authorization is granted if an application is not processed within the set time limit. This article discusses the implications of this provision for national administrative law in the Netherlands, Germany and France. How have the national lawmakers dealt with this European obligation? The study in this contribution examines the extent to which these countries have opted to make exceptions for national authorization schemes to the basic European rule that tacit authorization will be granted if a decision is not made on time. Overriding reasons relating to the public interest, including the legitimate interests of third parties, play a major role. There is a particular focus on the way the various member states have determined when and on what conditions tacit authorization can be granted, how the administrative authority in question can protect the public interests involved after such a tacit authorization is deemed granted and how any third parties involved can seek legal protection against the tacit authorization.

I Introduction

The aim of the Services Directive (2006/123/EC)¹ is to facilitate the exercise of freedom of establishment for service providers and the free movement of services, while maintaining a high quality of services. For this purpose, provisions are included about simplifying national administrative procedures which affect access to and the exercise of service activities. Among other things, the Directive creates an obligation to simplify administrative procedures and provides that those procedures must be transparent. The substantive rules to encourage the free movement of services, which are justified by the European objectives, prompted the European legislature to also set explicit re-

¹ 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).

quirements for national administrative law and its application.² The standardization of certain aspects of administrative law is intended to be an instrument to attain the substantive objective. The immediate target of the requirements for administrative law within the scope of the Service Directive is therefore not standardization or coordination of national administrative law systems; the main question is to what extent those requirements are needed to achieve the objective of the Service Directive. We are interested in the implementation of one of those requirements for national administrative law: Article 13(4) of the Services Directive.

Apart from the obligations set out in Chapter 2 of the Directive, namely to examine the applicable administrative requirements and to simplify and digitize them as much as possible, to establish points of single contact and to provide information about the national requirements for the establishment of a service provider, another obligation is specified in Section 1 ('Authorisations') of Chapter 3 of the Services Directive: Article 13. In particular, this contribution focuses on Article 13(4) of the Services Directive, which makes it mandatory for member states to introduce the instrument of 'tacit authorization' as a last resort to address complaints about licensing procedures.³ In the opinion of the European Commission, this instrument will help to simplify licensing procedures and it fits in with existing initiatives to facilitate the free movement of services:

'[...] it is necessary to establish principles of administrative simplification, inter alia through the limitation of the obligation of prior authorisation to cases in which it is essential and the introduction of the principle of tacit authorisation by the competent authorities after a certain period of time elapsed. Such modernising action, while maintaining the requirements on transparency and the updating of information relating to operators, is intended to eliminate the delays, costs and dissuasive effects which arise, for example, from unnecessary or excessively complex and burdensome procedures, the duplication of procedures, the red tape involved in submitting documents, the arbitrary use of powers by the competent authorities, indeterminate or excessively long periods before a response is given, the limited duration of validity of authorisations granted and disproportionate fees and penalties. [...]'⁴

² Such provisions are not unusual; see for instance Article 13 of the Renewable Energy Directive (Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC) and the interesting application of that provision in ECJ 21 July 2011, Case C-2/10 (*Azienda Agro-Zootecnica Franchini and Eolica di Altamura*). There are also examples which relate to enforcement.

³ See COM(2004) 2 (*Proposal for a Directive on services in the internal market*).

⁴ Recital 43 Services Directive; see also COM(2004) 2 (Recital 22).

In the legislative process at the European level a lot of criticism has been directed at the introduction of this instrument, one which ensures that if an application for a licence or permit is not processed within the set time limit, tacit authorization or 'fictitious approval' will be granted. It was even suggested that this paragraph of the Article, proposed by the European Commission, should be deleted from the Services Directive because of the risk of evidentiary problems, danger to safety and public health, and legal uncertainty associated with it. Moreover, according to the critics tacit authorization would not necessarily benefit the consumer.⁵ Nevertheless, the instrument was included in the final version of the Services Directive and it had to be implemented in national law by 28 December 2009.

A tacit authorization system might in fact compromise precisely those public interests for which the licensing requirement was introduced. If a licence is granted tacitly, then clearly the public interest which the licensing system aims to protect is potentially sacrificed to the interests of the applicant. In other words, if tacit authorization is granted, the assessment framework which justifies the existence of a licensing system is disregarded, since a decision in favour of the applicant is made without any consideration of the public interest. Much the same thing applies to the interests and rights of third parties: they are not discussed, and it is more difficult to arrange for them to be protected if tacit authorization is given. These two aspects of tacit authorization did not remain unnoticed during the development of the Services Directive. In the original draft there was some room to reject tacit authorization on the grounds of the public interest involved:

'4. Failing a response within the time period set in accordance with paragraph 3, authorisation shall be deemed to have been granted. Different arrangements may nevertheless be put in place in respect of certain specific activities, where objectively justified by overriding reasons relating to the public interest.'⁶

In the wording ultimately adopted, the legitimate rights of third parties were also taken into consideration. Article 13(4) of the Services Directive reads as follows:

'4. 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

⁵ European Parliament, Amendments 747-941, 2005, PE 360.092v02-00 (p. 3/142).

⁶ See COM(2004) 2 (*Proposal for a Directive on services in the internal market*).

reasons relating to the public interest, including a legitimate interest of third parties.’⁷

Clearly the European Services Directive leaves room for member states to make ‘different arrangements’ and specifically to make exceptions to the basic rule of tacit authorization for certain licensing systems if this can be justified ‘by overriding reasons relating to the public interest, including a legitimate interest of third parties’. The concept of ‘overriding reasons relating to the public interest’ has been developed by the Court of Justice in its case law on the Articles 49 (ex Article 43 EC) and 56 TFEU (ex Article 49 EC) and may continue to evolve.⁸

In view of the above, several questions have prompted us to conduct this comparative study. The main focus of this contribution will be on the circumstances in which national legislatures accept that a licensing system can be subjected to the basic rule of tacit authorization set out in Article 13(4) of the Services Directive. Another issue that arises is the length of the time limit set for cases in which tacit authorization can in fact be granted and how that time limit is calculated. We were particularly interested to find out how the various national systems have regulated situations in which tacit authorization has been granted. The first question in this context is how notice is given that authorization has been granted and how the applicant can gain certainty about the authorization. The second relevant question is whether the national lawmakers have provided legal remedies for authorities to invalidate tacit authorizations in retrospect to serve the public interest. Our third question is how the national lawmakers have introduced or maintained regulations to protect those same interests and how legal protection for third parties against tacit authorizations is regulated.

To answer these questions, this article will first examine the introduction of the instrument of tacit authorization at the European level (section 2). In the subsequent three sections the questions outlined above regarding the implementation of Article 13(4) of the Services Directive will be answered for the Netherlands (section 3), Germany (section 4) and France (section 5). The article will end with comparative and concluding remarks (section 6).

7 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).

8 Also see Article 4(8) and Recital 40 of the Services Directive.

2 The European Context of Tacit Authorization

The rationale behind the introduction of both the Services Directive in general and the provisions of Chapter 3 section 1 in particular plays an important role in determining the impact and significance of the fourth paragraph of Article 13 of the Services Directive. One of the reasons for the introduction of the Services Directive was that the administrative licensing procedures service providers had to follow in order to set up business in different member states were perceived as complicated and time-consuming.⁹ This observation or assessment is not unique to the services sector; it applies to many sectors of administrative law and is generally seen as a reason to reconsider licensing systems and administrative procedures with a view to reducing the bureaucratic burden. Articles 9, 10 and 13 of the Services Directive are important in relation to the adaptation of certain aspects of national administrative law. Articles 9 and 10 deal mainly with substantive aspects relating to granting authorization while Article 13 deals with authorization procedures and formalities. The idea behind the provisions is obviously that licensing procedures should not discourage service providers from setting up business in another member state.¹⁰

From the European perspective, an important provision in Article 9 of the Services Directive is that an authorization scheme, defined in the Directive as ‘any procedure under which a provider or recipient is in effect required to take steps in order to obtain from a competent authority a formal decision, or an implied decision concerning access to a service activity or the exercise thereof’, can only be introduced if it does not discriminate against the service provider. However, a point more relevant to this contribution is that the need to introduce or maintain a national authorization scheme must be justified by overriding reasons relating to the public interest. Moreover, another requirement is that the objective of such an authorization scheme cannot be achieved by less drastic measures. An example of a situation in which less drastic measures are not possible is if a retrospective check would be too late to effectively safeguard the public interest protected by the authorization scheme (Article 9(1) of the Services Directive).¹¹ Under this provision of the Directive, member states must therefore consider whether or not existing authorization schemes are justified and, if not, abolish them or put less stringent measures in place to protect the public in-

⁹ See COM(2002) 441 (*The state of the internal market for services*), p. 19-20.

¹⁰ The scope of the Services Directive covers only services performed for an economic consideration (see Recital 17 and European Commission, *Handbook on implementation of the services directive*, Luxembourg: Office for Official Publications of the European Communities 2007, p. 10-13). Pursuant to Article 2(2) SD activities for the general interest and audiovisual services do not fall within the scope of the Directive.

¹¹ See Recital 54 Services Directive.

terest. This means that – at least theoretically – only those authorization schemes may remain which are justified by the perceived need to protect the public interests involved. In the application of these remaining authorization schemes, the only conditions which can be attached are those justified by overriding reasons relating to the public interest (Article 10 of the Services Directive).

Article 13 of the Services Directive goes on to formulate requirements for administrative procedures and formalities, which must be sufficiently clear and accessible to the public to ensure that applications are dealt with objectively and impartially. It is of course also a crucial condition for the introduction of a system of tacit authorization that a reasonable period of time, made known in advance, is set for the processing of an application and that that period begins – at the latest – as soon as all the formalities for submitting a complete application have been completed. Under the Directive, the time limit for processing the application may be extended once only, and only if the complexity of the application so requires; any decision to grant an extension, specifying its duration, must include a statement of the reasons and must be communicated to the applicant before the original time limit has expired (Article 13(3) of the Services Directive). If all these conditions have been met, then as a last resort against an idle administrative authority Article 13(4) of the Services Directive provides that a permit application within the scope of the Services Directive must be deemed to have been granted approval if the authority has failed to respond to that application within the time limit. Exceptions may be made to this basic rule if there is an overriding public interest, including the legitimate interests of third parties.¹² Although Article 13 of the Directive clearly opts for a system of tacit authorization if an application is not processed on time, in our opinion it cannot be said that Article 13(4) is so precise and unconditional that it must be deemed to have direct effect.

It should be noted that one reason for introducing a new authorization scheme or maintaining an existing one, namely because it is justified by overriding reasons relating to the public interest (Article 9(1)(b) of the Services Directive), is also crucial in determining whether a member state may decide that a certain authorization scheme will not be subjected to the basic rule – set out in Article 13(4) of the Services Directive – of tacit authorization if no decision is made within the time limit. This is interesting in that it could be seen as circular.¹³ In our opinion, a member state might legitimately argue that any authorization scheme that it justifiably wants to introduce or maintain will not be subjected

¹² European Commission, *Handbook on implementation of the services directive* (Luxembourg: Office for Official Publications of the European Communities 2007), p. 28.

¹³ See also Dirk Berhardt, 'Fingierte Genehmigungen nach der Dienstleistungsrichtlinie. Möglichkeiten der Regelung und Einschränkung', *Das Gewerbearchiv* 2009, p. 105.

to the basic rule of tacit authorization, because the justification for the exception is ‘overriding reasons relating to the public interest’. It seems appropriate in such a case that the legislator states its reasons for that position. Nevertheless, that position would imply that not only the public interest would be protected, but also the legitimate interests of third parties. However, others still see possibilities for the considerations to lead to a different outcome. For instance, according to Krajewski Article 9(1)(c) of the Services Directive also requires that an assessment be made as to whether the objective of the authorization scheme can also be achieved by a retrospective check, while Article 13(4) of the Services Directive compels the member state to assess whether the achievement of that objective would be impeded by tacit authorization.¹⁴ In view of the discretionary powers granted to the member states, the two provisions are not necessarily completely circular, but there is certainly some overlap.

It is often suggested – at least in the Netherlands – that the origin of systems of tacit authorization lies in Spain.¹⁵ A basic rule of tacit authorization if an application is not processed within the time limit was included in the general administrative law system when Spanish administrative law was reformed in the 1990s. Although the basic rule is that failure to respond by the end of the time limit could be regarded as a positive decision (*silencio positivo*), in practice there were so many exceptions that the failure of an administrative authority to respond to an application more often resulted in a tacit refusal (*silencio negativo*) than a tacit authorization.¹⁶ Over the past few years, in other countries the desire to simplify licensing systems, reduce red tape for both the public and businesses and to view the government as a service provider has also led to increased popularity of the tacit authorization system in the political arena. At the time when Article 13(4) was included in the Directive, several countries already had systems of fictitious or implicit decisions if deadlines were not met. This does not mean that an authority’s failure to respond in time always resulted in tacit authorization. In fact, many administrative law systems had and have tacit, fictitious or implicit refusals, sometimes even as a general principle of law.¹⁷ A system of tacit refusal ensures that the applicant can seek legal protection from an administrative court against such a refusal and it also prevents the silence of the authority from damaging the public interest for whose protection

¹⁴ M. Krajewski, ‘Anforderungen der Dienstleistungsrichtlinie an Genehmigungsregelungen und ihre Umsetzung im deutschen Recht’, *Neue Zeitschrift für Verwaltungsrecht* 2009, p. 933.

¹⁵ Oswald Jansen, *Comparative Inventory of Silencio Positivo*, 2008, p. 4; Rodrigo Pinto Scholtbach & Marc-Paul Stufkens, *De Lex Silencio, Een studie naar de werking van het Spaanse model van fatale termijnen en fictieve beslissingen en de toepasbaarheid van dit model in Nederland*, 2005, p. 5.

¹⁶ Scholtbach & Stufkens 2005, p. 8.

¹⁷ Cf. the French *Conseil Constitutionnel* in its decision No. 94-352 DC of 18 January 1995 (consideration 12).

the lawmakers deemed it necessary to create a licensing system.¹⁸ Legitimate interests of third parties also remain unharmed in a system like this. The advantage for applicants is that after the time limit has expired, they can use procedural instruments to induce the authority to make a formal decision.

Due to the introduction and implementation of the Services Directive, it can be expected that within national legal systems more applications will lead to tacit authorizations¹⁹ and it seems fair to assume that national regulations regarding tacit authorization will be added to general administrative law. A crucial question is what consequences the introduction of tacit authorization will have for the public interest for which the licensing system in question was adopted, for the legal protection of third parties involved in the authorization and for the applicant's legal certainty.

In recent years the European Services Directive has been implemented in the national legislation of the member states and Article 13 of the Services Directive has certainly influenced the development of national administrative law in relation to tacit authorization. In the following sections of this contribution we will examine how the Netherlands, Germany and France have dealt with the obligation to implement tacit authorization in their legislation and how these member states have tried to protect the public interest which the introduction of a certain authorization scheme sought to serve. We also want to find out how the interests of third parties affected by the tacit authorization have been protected in the national administrative law systems, particularly regarding the legal remedies for third parties contained in those systems.

3 The Netherlands: Enthusiastic

3.1 Introduction of Tacit Authorization and the Services Directive

'Fictitious decisions' have been a part of Dutch administrative law for a long time. In the General Administrative Law Act of 1994 they were endorsed in an explicit rule that if an authority failed to respond on time to an application, this failure would be regarded as the equivalent of a decision which could be legally appealed.²⁰ Until 1998, this provision was interpreted by the highest administrative courts as meaning that failure to respond could be seen

¹⁸ Cf. Case C-400/08 *Commission v. Spain*, Judgment of 24 March 2011.

¹⁹ A. Guckelberger, 'Die Rechtsfigur der Genehmigungsfiktion', *Die Öffentliche Verwaltung* 2010, p. 109.

²⁰ See Article 6:2(b), 7:1 and 8:1 General Administrative Law Act.

as a tacit refusal. However, from that year the highest administrative courts ruled that legal proceedings about failure to respond to an application within the time limit could relate only to whether or not a decision had been made on time. The authority's silence was no longer taken to imply a refusal.²¹ Apart from such fictitious decisions for the purpose of granting applicants access to the administrative court, Dutch administrative law also included a diminishing number of application procedures in which failure to respond within the time limit meant a fictitious refusal, and a few important systems with 'fictitious authorization', such as applications for building permits. However, the General Administrative Law Act contained no general rules relating to fictitious or tacit authorizations. This changed with the implementation of Article 13(4) and other provisions of the Services Directive in 2009.

The introduction of the general rules relating to fictitious authorizations was prompted both by Article 13(4) of the Services Directive and by the widespread desire of Dutch politicians to reduce the administrative burden caused by licensing systems that could potentially limit economic growth.²² At one point in time the government stated that it wanted as many licensing systems as possible subjected to the rule of tacit authorization; only when such a system would be contrary to international or European law would different arrangements be allowed.²³ The incorporation of tacit authorizations into Dutch administrative law attracted a lot of criticism. The Council of State, in its advisory role, severely criticized the instrument of tacit authorization, which is known in the Netherlands as a system of *Lex silencio positivo*.²⁴ However, this did not prevent the legislature from introducing general rules on tacit authorizations.

In the Netherlands the European Services Directive is mainly implemented in the Services Act (*Dienstenwet*).²⁵ Apart from this Act, a new division was added to the General Administrative Law Act. Division 4.1.3.3 of the General Administrative Law Act contains general rules on fictitious authorizations. In the Netherlands, this part of the implementation of the European Services Directive

²¹ Administrative Jurisdiction Division of the Council of State 3 December 1998, ECLI:NL:RVS:1998:ZF3644; the legislature responded by designing a fast track within the administrative courts for such disputes and by allowing interested parties to appeal directly to the court without first having to lodge an objection procedure.

²² *Government Gazette* 2009, 503 (on 4 December 2009).

²³ An example is Article 3.9 (3) Environmental Law Act, which specifies a strict deadline for administrative decisions based on standard preparatory procedures, such as for building permits.

²⁴ *Parliamentary Papers II* 2007/08, 31 579, No. 4. The term '*Lex silencio positivo*' seems to be nothing more than a strange mixture of Latin and Spanish.

²⁵ *Government Gazette* 2009, 503 (on 4 December 2009).

has been discussed most.²⁶ Before we discuss the Dutch approach to fictitious or tacit authorization, we would like to note that the definition of an ‘authorization scheme’ in the Services Directive is broader than the licensing systems through which entrepreneurs generally have to apply for authorization to set up business in the Netherlands. In most cases these authorizations are in the form of decisions or ‘orders’ in individual cases.²⁷ Division 5.1 of the Services Act contains specific conditions for applications for permits which are within the scope of the Services Directive and which complement the rules on application procedures in the General Administrative Law Act. In view of the definition of an ‘authorization scheme’ in the Services Directive, the Dutch national legislator deemed it necessary to stipulate rules for notification procedures in Division 5.2 of the Services Act as well.

Article 28 of the Services Act implements Article 13(4) of the Services Directive. The first draft of the former article stated that an authorization within the scope of the Services Directive could be granted fictitiously in licensing systems designated by the legislature. However, the Dutch parliament adopted an amendment implementing a system of tacit authorization for all licensing systems within the scope of the European Services Directive, unless a specific Act stipulates otherwise.²⁸ This means that it is necessary to know whether a particular authorization scheme falls within the scope of the Services Directive in order to know whether the rule of tacit authorization is applicable. The Annex to the Regulations on Indicative Establishment of the Scope of the Services Act (*Regeling indicatieve vaststelling reikwijdte Dienstenwet*) that was drawn up for this purpose is not exhaustive and moreover has not been updated since 2009, so that these regulations do not provide a conclusive answer.²⁹ The Services Act itself does not contain any general rules regarding fictitious authorizations, but simply refers to Division 4.1.3.3 of the General Administrative Law Act, which sets out general rules on this matter. These general rules are applicable only when a specific Act refers to them. In this article we will focus on the general rules relating to fictitious authorizations set out in Division 4.1.3.3 of the General Administrative Law Act, even though there are some differences between the general rules for permit applications and the rules in the Services Act. For instance, the Services Act and the General Administrative Law Act differ as regards the suspension and extension of time limits for decisions. Under the rules of the Services Act, a time limit may be extended once only, on account of the

²⁶ U. Stelkens, W. Weiß & M. Mirschberger (eds), *The Implementation of the EU Services Directive. Transposition, Problems and Strategies* (The Hague: T.M.C. Asser Press 2012), p. 37.

²⁷ See Article 1:3 General Administrative Law Act.

²⁸ *Parliamentary Papers II* 2008/09, 31 579, No. 14.

²⁹ It has been observed that at least new European Commission proposals consider the consequences these regulations will have for the application of the *Lex silencio positivo*.

complexity of the matter in question,³⁰ and reasons must be given.³¹ These requirements are explicitly set out in the Services Act and in some other statutes,³² but not in the General Administrative Law Act.

3.2 Fictitious Decisions: Division 4.1.3.3 of the General Administrative Law Act

It was mentioned above that the Dutch Services Act contains no general provisions relating to tacit authorization, but refers to Division 4.1.3.3 of the General Administrative Law Act. The first Article of the Division, Article 4:20a, states that this Article will apply only if a specific Act expressly provides that it will apply, as is the case with Article 28(1) of the Services Act. For other authorization schemes explicit references must also be made to Division 4.1.3.3 of the General Administrative Law Act.

If Division 4.1.3.3 of the General Administrative Law Act has been declared applicable, then tacit authorization can be granted under Dutch administrative law if the statutory time limit has expired and no response to the application has been received from the authority. If there is no statutory time limit, then pursuant to Article 31 of the Services Act a time limit of eight weeks will apply. The competent authority must send an acknowledgment of receipt as soon as possible, stating in it both the time limit for the response and the fact that tacit authorization will be granted if no response is sent within the time limit. Unlike in the General Administrative Law Act, but rather in accordance with the Services Directive the time limit may be extended once only, on account of the complexity of the application. However, the Dutch regulations seem to deviate from the Services Directive as regards the time limit for a decision. Article 13(3) of the Services Directive provides that the period of time in which a response must be given will commence as soon as all documentation relevant to the application has been submitted. Article 4:13 of the General Administrative Law Act, on the other hand, provides that the period of time for a response commences on the date of receipt of the application – regardless of whether it is complete. However, the time limit will be suspended for the period offered to the applicant or the time the applicant needs to complete the application. The number of times that the time limit may be suspended is not regulated. According to the Dutch legislature, adopting the regulations in the Services Directive would be detrimental to the applicant, because upon receiving the incomplete

³⁰ Article 13(3) of the Services Directive.

³¹ Articles 31(2) and (3) of the Services Act.

³² Another example is Article 3:7 (2) of the Environmental Law Act, which allows the competent administrative authority to extend the prescribed time limit for deciding on applications covered by the standard preparatory procedure set out in Article 3:9(1) of the Act to 14 weeks.

application, the authority in question would have no incentive to promptly request the additional documentation required. In the opinion of the legislature, the objective of the Directive is better served by the Dutch regulations. Nevertheless, the question arises whether the Directive does not in fact provide explicit standardizing regulations on this matter, and whether the EU Court of Justice will permit deviation from those regulations.³³ Perhaps it would have just have been better to model the legislation on Article 13(3) of the Services Directive.

By virtue of Article 4:20b(2) of the General Administrative Law Act, a tacit authorization takes effect on the third day after the time limit has expired.³⁴ This means that notice that the authorization has been granted is not required for it to take effect. However, it does not mean that the authority does not have to send any notice at all. Under Article 4:20c(1) of the General Administrative Law Act, the authority must give notice of the fictitious authorization within two weeks of its taking effect. If the applicant has asked for notification after the expiry of those two weeks and no notice of the authorization is sent within the subsequent two weeks, the authority will have to pay a penalty for each day that no notice is sent. It is also possible to force the authority to send notice by asking the administrative court to issue a direct order for the authority to do so.³⁵

3.3 Safeguarding the Public Interest and the Interests of Third Parties

To protect the public interest, the legislature provided that if a statutory provision or a policy guideline were to stipulate the standard conditions that are normally to be included in the permit, they would apply by operation of law to tacit authorizations. There is some debate in the literature as to what exactly can be regarded as standard conditions.³⁶ Apart from the provisions about standard conditions which will apply to tacit authorizations by operation of law, during a period of six weeks after sending notice of the authorization the authority still has the power to attach conditions to the authorization or to revoke it if this is necessary to avoid serious consequences for the public interest. The intention was that this power could only be used in 'exceptional cases', so that the authority in question could not decide lightly to revoke the authorization

³³ Cf. M.R. Botman, 'De Dienstenwet en het algemeen bestuursrecht. Een ménage à trois!', *Regelmaat* 2011/5, p. 251.

³⁴ The legislature chose the third day after expiry of the time limit to ensure that a formal decision sent by the authority on the last day could be delivered by mail.

³⁵ Articles 4:20d General Administrative Law Act and 8:55f General Administrative Law Act respectively.

³⁶ Article 4:20e General Administrative Law Act; see B. de Kam, 'De vergunning van rechtswege en standaardvoorschriften', *De Gemeentestem* 2010.107.

or to attach additional conditions to it.³⁷ This provision is reminiscent of the phrase ‘overriding reasons relating to the public interest’ in the Services Directive, but the Dutch legislature has indicated that the wording is broader in scope, though it certainly includes those reasons.³⁸ The special provision about amending and revoking tacit authorizations does not compromise the Dutch general standards regarding amendments to and revocations of decisions,³⁹ so that the provision is mainly supplementary. Apart from that, the amendment or revocation of a fictitious authorization may of course be the result of an objection procedure. If the authority revokes or amends the fictitious authorization on its own initiative, it will be liable for any damage incurred as a result of the revocation or amendment. If the amendment or revocation is the result of an objection procedure, there will be no liability for compensation.⁴⁰

A fictitious authorization is regarded as an ‘order’⁴¹ which can be legally challenged in the same way as other orders.⁴² This means that an authorization granted by operation of law can be challenged at the district court and in the second instance appealed to the Administrative Jurisdiction Division of the Council of State. The six-week period during which legal remedies can be sought against a tacit authorization begins when notice is given of the authorization. In principle the authority is required to give notice of the fictitious authorization within two weeks after the expiry of the time limit for the decision. The notice and the time limit linked to it for legally challenging the decision mean that applicants can remain uncertain for a long time whether it is wise to act upon the fictitious authorization that has come into force. Third parties must wait to receive notice before they can lodge a formal objection or appeal a decision.

There is a certain lack of clarity as regards the standards against which a fictitious authorization should be assessed, since there is no written document giving the reasons for the decision.⁴³ It is assumed that it is not really possible to check for compliance with procedural requirements such as the requirement that sound reasons be given; that would mean that any legal action would lead to a

³⁷ *Parliamentary Papers II* 2007/08, 31 579, p. 133.

³⁸ See also M.J. Schiebroek & B.W.N de Waard, ‘In alle talen zwijgen: de Lex silencio positivo’, *Jbplus* 2011/2, p. 106.

³⁹ If there are no statutory provisions about this particular topic in the General Administrative Law Act, the standards are mainly to be derived from case law.

⁴⁰ *Parliamentary Papers I* 2011/12, 32 454, C, p. 4.

⁴¹ Although theoretically a tacit authorization cannot be seen as an ‘order’ (defined in Article 1:3(1) of the General Administrative Law Act 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. See also see *Parliamentary Papers* 2007/08, 31 579, No. 3, p. 51.

⁴² *Parliamentary Papers* 2009/10, 32 454, No. 3, p. 3.

⁴³ See also M.I.P. Buteijn, ‘Lex silencio positivo: spreken is zilver, zwijgen is goud...of niet’, *Jaarboek Bestuursrecht* 2009, 15, p. 238.

well-founded appeal which can hardly have been, some argue, the intention of the legislature. If the administrative court completely or partially annuls the tacit authorization, the authority must make a new decision. Failure to comply with the administrative court's order to make a new decision cannot lead to another tacit authorization.⁴⁴

4 Germany: Reluctant

4.1 Introduction of Tacit Authorization and the Services Directive

Before the implementation of the European Services Directive, German general administrative law did not include any specific provisions regarding tacit authorizations or tacit refusals.⁴⁵ However, some legislative acts on specific topics provided for authorizations to be granted tacitly when an administrative authority failed to respond to a licence application within a set time period. Such provisions were already applicable in several building Acts at the federal state level.⁴⁶

The implementation of the Services Directive in 2009 led to amendment of the German Administrative Procedures Act (*Verwaltungsverfahrensgesetz*, *VwVfG*). There are two reasons why implementation of the Services Directive in Germany was particularly complicated. Firstly, instead of the usual one-to-one implementation, the legislature opted for overall modernization and simplification of administrative procedures and the Directive was implemented on a broader scale than was required by the scope of the Services Directive. The amendments introduced in connection with the implementation of the Directive related to general rules for administrative procedures.⁴⁷ Secondly, implementation was complicated because in principle drawing up general rules for administrative

⁴⁴ *Parliamentary Papers II* 2009/10, 32 454, no. 3, p. 4.

⁴⁵ Unlike in France and the Netherlands, in Germany no fictitious rejection is required to gain access to the administrative court; if a German authority fails to respond within the statutory time limit, court action can be brought to force the authority to make a decision (*Untätigkeitsklage*).

⁴⁶ W. Kluth, 'Die Genehmigungsfiktion des § 42a VwVfG – Verfahrensrechtliche und prozessuale Probleme', *Juristische Schulung* 2011, p. 1078. Kluth gives the following examples: § 34 GastG (Übergangsregelung), § 46 SprengG, § 47 SprengG, § 41 GenTG (Übergangsregelung), 23a ENWG § 23A Absatz IV 2 EnWG.

⁴⁷ U. Schliesky, 'Das Ende der Deutsche Verwaltung? Die europäische Dienstleistungsrichtlinie – Anstoß zur Verwaltungsmodernisierung und Zwang zur Verwaltungsreform', in: U. Schliesky (ed.), *Die Umsetzung der EU-Dienstleistungsrichtlinie in der deutsche Verwaltung – Teil 1: Grundlagen* (Kiel: Lorenz-von-Stein-Institut für Verwaltungswissenschaften 2008), p. 30.

procedures is a matter for the federal states.⁴⁸ In this case, however, the Federation thought it was necessary to coordinate implementation and to monitor the uniformity of implementation they considered desirable. At the federation level, provisions were included relating to official assistance (§§ 8a ff VwVfG), points of single contact (§§ 72a ff VwVfG) and tacit authorization (§ 42a VwVfG).⁴⁹

4.2 Fictitious Permits: § 42a Administrative Procedures Act

Since 2008 a general provision relating to fictitious authorization (*Genehmigungsfiktion*) has been included in the Administrative Procedures Act: § 42a VwVfG, which reads as follows:

‘1. Eine beantragte Genehmigung gilt nach Ablauf einer für die Entscheidung festgelegten Frist als erteilt (Genehmigungsfiktion), wenn dies durch Rechtsvorschrift angeordnet und der Antrag hinreichend bestimmt ist. Die Vorschriften über die Bestandskraft von Verwaltungsakten und über das Rechtsbehelfsverfahren gelten entsprechend.

2. Die Frist nach Absatz 1 Satz 1 beträgt drei Monate, soweit durch Rechtsvorschrift nichts Abweichendes bestimmt ist. Die Frist beginnt mit Eingang der vollständigen Unterlagen. Sie kann einmal angemessen verlängert werden, wenn dies wegen der Schwierigkeit der Angelegenheit gerechtfertigt ist. Die Fristverlängerung ist zu begründen und rechtzeitig mitzuteilen.

3. Auf Verlangen ist demjenigen, dem der Verwaltungsakt nach § 41 Abs. 1 hätte bekannt gegeben werden müssen, der Eintritt der Genehmigungsfiktion schriftlich zu bescheinigen.⁵⁰

⁴⁸ Because of the federal system of governance in Germany, the European Services Directive is implemented at the federal level, at the state level and at the community level. See Stelkens, Weiß & Mirschberger 2012, p. 230.

⁴⁹ See *Viertes Gesetz zur Änderung verwaltungsverfahrenrechtlicher Vorschriften* (Fourth Administrative Law Amendment Act) of 11 December 2008, *Federal Law Gazette I*, p. 2418.

⁵⁰ Translation (by authors): ‘(1) Upon expiry of a specified decision-making period, an approval that has been applied for shall be deemed granted (fictitious approval) if this is stipulated by law and if the application is sufficiently clearly defined in content. The regulations concerning the validity of administrative acts and the proceedings for legal remedy shall apply *mutatis mutandis*. (2) The decision-making period pursuant to the first sentence of paragraph 1 shall be three months unless otherwise stipulated by law. The period starts upon receipt of the complete application documents. It may be extended once by a reasonable period of time if this is warranted by the complexity of the matter. Any such extension of the decision-making period shall be justified and communicated in good time. (3) Upon request, the fact that the approval is deemed granted (fictitious approval) shall be confirmed in writing to the person who would have been notified of the administrative act pursuant to paragraph 1 of section 41.’

Genehmigungsfiktion or tacit authorization is only possible if a specific Act provides that this provision is applicable.⁵¹ To this extent the German regulations are similar to those in the Dutch General Administrative Law Act. The difference is that in the Services Act the Dutch legislature provided in general terms that tacit authorization will be granted in all licensing systems that fall within the scope of the Services Directive. In Germany this is not the case, although of course subject to certain conditions the legislature is required under the Services Directive to introduce a system of tacit authorization if a licensing system falls within the scope of the Directive. It is as though Germany has implemented the system of tacit authorization in reverse. The standard rule in German administrative law is that the system of fictitious authorization will *not* apply.⁵² It is also clear that § 42a VwVfG will apply not only to authorization schemes within the scope of the Services Directive, but can potentially also be applied to all other authorization schemes.⁵³

Tacit authorization is granted if an application has not been processed within the time limit, which in principle is three months.⁵⁴ The time limit may be changed at the state level and once it has started it may be extended once in accordance with the Services Directive. It seems that in most cases the time limit is in fact three months.⁵⁵ The first condition for tacit authorization is that the application is sufficiently precise, so that it is clear which permit or licence is being applied for. It also seems to be very important that the time limit for the decision begins only when the application is complete and has been submitted to the competent authority. While in the case of an incomplete application the authority is often required by law to notify the applicant as soon as possible so that the applicant can complete the application, it is assumed that only an *objectively* complete application can mark the beginning of the response period.⁵⁶ Many conflicts might therefore arise about whether the documentation for the application is complete, because as soon as it is, the time limit for the decision will start.⁵⁷ If a tacit authorization can be granted, the documentation is complete and the authority has failed to respond within the statutory time limit, then the tacit authorization will take effect immediately. The notice usually given in other circumstances is then not required.

⁵¹ *Deutscher Bundestag Drucksache* 16/10493, p. 15.

⁵² Stelkens, Weiß & Mirschberger 2012, p. 260.

⁵³ *Deutscher Bundestag Drucksache* 16/10493, p. 16.

⁵⁴ M. Uechtritz, 'Die allgemeine verwaltungsverfahrenrechtliche Genehmigungsfiktion des § 42a VwVfG', *Deutsches Verwaltungsblatt* 2010, p. 688.

⁵⁵ www.europarl.europa.eu/document/activities/cont/201009/20100930ATT84040/20100930ATT84040EN.pdf

⁵⁶ Kluth 2011, p. 1080. Cf. § 25(2) VwVfG.

⁵⁷ Uechtritz 2010, p. 289; Guckelberger 2010, p. 114.

The person who would normally be given notice of the authorization may ask the authority to provide confirmation in writing that authorization has in fact been granted by operation of law.⁵⁸ In this way the applicant and other parties involved can have proof of the tacit authorization.⁵⁹ This provides clarity and a degree of legal certainty. It also establishes the latest possible point at which a party is notified of the authorization, which is important in connection with the time limit for challenging the tacit authorization in court.⁶⁰ If in the opinion of the administrative authority no tacit authorization has been granted because the time limit has not yet expired, for instance because the documentation is incomplete or the time limit period started at a later point, then the applicant has no satisfactory legal remedy to obtain certainty about the status of the application. An appeal to the administrative court is possible, but in view of the time this would take it is hardly an effective instrument. The applicant actually has no choice but to wait.⁶¹

4.3 Safeguarding the Public Interest and the Interests of Third Parties

The introduction of § 42a VwVfG on tacit authorizations with the aim of accelerating and simplifying administrative procedures in Germany has been controversial. Critics argue that the public interest and the interests of third parties might be harmed by a fictitious approval.⁶² To avoid tacit authorization, a public authority might choose to refuse an application simply because the time limit for processing the application is about to expire. Such a strategy could be considered contrary to the Services Directive's objective of accelerating and simplifying administrative procedures.

The same rules apply to tacit authorization pursuant to § 42a VwVfG as to formal decisions made by an authority (*Verwaltungsakt*). As regards the protection of public interests and the interests of third parties, a particularly important point is that the legitimacy of a tacit authorization is by no means established.⁶³

⁵⁸ *Deutscher Bundestag Drucksache* 16/10493, p. 16.

⁵⁹ Kluth 2011, p. 1080.

⁶⁰ *Deutscher Bundestag Drucksache* 16/10493, p. 16.

⁶¹ Kluth 2011, p. 1081.

⁶² M. Fehling, 'Beschleunigung von Genehmigungsverfahren in der Umsetzung der Dienstleistungsrichtlinie', in: Fehling/Grewlich (ed.), *Struktur und Wandel des Verwaltungsrechts* (Baden-Baden 2011), p. 52 ff.

⁶³ See Uechtritz 2010, p. 687: 'Fingiert wird die Erteilung der Genehmigung, nicht deren Rechtmäßigkeit. Dieses Verständnis des § 42a VwVfG ist unstrittig.' It had previously been asserted that due to the effect of European law the legitimacy of the authorization would also be deemed established; see J. Ziekow, 'Die Auswirkungen der Dienstleistungsrichtlinie auf das deutsche Genehmigungsverfahren', *Gewerbearchiv* 2007, p. 222; see also Stelkens, Weiß & Mirschberger 2012, p. 261.

The provisions §§ 48 and 49 of the Administrative Procedures Act about revoking, amending and annulling decisions also apply to tacit authorizations.⁶⁴ This means that an administrative authority could revoke a tacit authorization after it had been granted. However, it is clear that the mere fact that an application was not processed on time is not sufficient grounds to revoke a tacit authorization.⁶⁵ If a tacit authorization could be revoked so easily, this would mean that the interests of the applicant were not sufficiently taken into account. If this were not the case, that would undermine the idea behind tacit authorization by operation of law. The applicability of the usual rules for decisions also means that it is possible to attach conditions to the tacit authorization after the expiry of the time limit without affecting the status of the authorization.

Finally, legal remedies against tacit authorizations can be pursued to protect the public interest and the legitimate interests of third parties; under the German system of administrative law, this specifically relates to the protection of the subjective rights of third parties. Because it is clear that the legitimacy of fictitious decisions is uncertain, the question arises of what criteria must be used to test a tacit authorization in court. It seems apparent that in Germany the same rules apply to tacit authorizations as to formal decisions. An important point in this connection is that although the tacit authorization is guaranteed to take effect simply due to the fact that the time limit for a response has expired, it is still possible for third parties to appeal the authorization. The deadline for submitting an appeal begins after the third party has become aware of the authorization, because the licence in question has been used or because they have received confirmation, either at their own request or at the request of the permit holder under § 41a(3) VwVfG, that tacit authorization has been granted. For reasons of legal certainty, a permit holder will try to ensure the permit is irrevocable, which is why he will probably wait until the appeal period has started and third parties have become aware of the authorization.⁶⁶

⁶⁴ Kluth 2011, p. 1081. See K.J. de Graaf & A.T. Marseille, 'Review of final decisions in the Netherlands, Germany and Europe', in: K.J. de Graaf et al. (eds), *Quality of Decision-Making in Public Law Studies in Administrative Decision-Making in the Netherlands* (Groningen 2007), p. 92 (section 4).

⁶⁵ *Deutscher Bundestag Drucksache* 16/10493, p. 16. 'Nicht fingiert wird aber dessen Rechtmäßigkeit. Somit gelten die Regelungen über Nichtigkeit, Rücknahme, Widerruf oder Erledigung eines Verwaltungsaktes entsprechen'.

⁶⁶ Kluth 2011, p. 1081-1082.

5 France: Recent Turnabout

5.1 Introduction to Tacit Authorizations and the Services Directive

French administrative law is regarded as the homeland of the ‘implicit refusal’ of an application (*décision implicite de refus*). From 1864 onwards, for a long time an application submitted to a minister to which no response was received within four months was deemed to have been refused and this implicit refusal could be challenged before the French Council of State (*Conseil d’État*). In 1900, the same rule was extended to any application submitted to a competent administrative authority.⁶⁷ The implicit refusal approach generally chosen in France guarantees access to the court if an authority fails to respond on time and French administrative law also makes it possible to adhere to the principle of the *décision préalable*,⁶⁸ which means that access to the administrative court can be based only on an explicit or tacit decision by the authority in question.

The basic rule that if the time limit has expired the application has been implicitly refused does not mean that implicit authorizations (*décision implicite d’acceptation*) are unknown in French administrative law. In France, as under German and Dutch law, for quite some time it has been the case that building permits are deemed to have been granted if the competent authority has remained silent throughout the whole period set for the decision.⁶⁹ There are also many other examples, regulated in special Acts, of systems that make tacit authorizations possible,⁷⁰ particularly in planning law, employment law and rural law. Although in the early 1990s the French legislature toyed with the idea of providing that the absence of a response to an application by the authority in question would in principle lead to a tacit authorization, they decided against this, because it would put too much emphasis on the rights of the applicant, might fail to sufficiently safeguard the public interest and the rights of third parties⁷¹ and, in connection with this, the list of exceptions to the basic rule of tacit authorization would be too long. In 2000 the existing system was more or less codified by formulating general rules relating to both tacit refusals and tacit approvals, with the aim of finding a balance between the applicant’s in-

⁶⁷ See Article 7 of the Decree of 2 November 1864 and Article 3 of the Act of 17 July 1900.

⁶⁸ Article R 421-1 of the French Code of Administrative Justice (*Code de Justice Administrative*).

⁶⁹ See Article R 412-1 ff. of the French Urban Planning Code (*Code de l’Urbanisme*).

⁷⁰ Oswald Jansen, *Comparative Inventory of Silencio Positivo*, 2008, p. 4.

⁷¹ Cf. Stelkens, Weiß & Mirschberger 2012, p. 221.

terests and the public interest.⁷² The basic rule is therefore tacit refusal; tacit authorization can only be granted if a specific Act provides for it. The implementation of the European Services Directive has not changed this system.⁷³

Recently, however, a significant change came about. On 30 October 2013, the French Parliament (*Assemblée Nationale*) passed an extremely relevant amendment making the system of tacit authorization the basic rule in French administrative law. In section 5.2 we will discuss both the current legislation and the recent amendments.

5.2 Implied Approval: Articles 21 and 22 of Act No. 2000-321 of 12 April 2000

Since Act No. 2000-321 was passed on 12 April 2000, the basic rule in French administrative law has been that if an authority has not responded to an application within two months, this will mean tacit refusal. This is regulated in Article 21, unless Article 22 provides that in the event of failure to respond, authorization will be deemed granted. This meant that the deadline for the authority to respond was reduced from four months to two; moreover, it can be made shorter (in urgent cases) or longer (in the case of complex applications) in a specific Act. An important aspect of Act 2000-321 is that if the specific Act stipulates it, an implicit positive decision is also possible.⁷⁴ The Act referred to in the title of this section also contains rules relating to tacit authorization or implicit approval. However, under this Act introduction of a system of this kind is not permitted if it is in conflict with international treaties or constitutes a danger to public order or the protection of freedoms or other constitutional rights. In addition, an application for any kind of benefit except social security may not result in tacit consent.⁷⁵

It is interesting that while the same two-month time limit applies to tacit approvals, it is calculated in a different way than with tacit refusals. For instance, in a system with tacit authorization the period begins as soon as the application has been received by the competent authority, whereas in a system with tacit refusal the period starts even if an incompetent authority has received the ap-

⁷² Act No. 2000-321 of 12 April 2000 on the rights of citizens in their relations with administrative authorities. See also Decree No. 2001-492 of 6 June 2001 on the acknowledgment of receipt of applications submitted to administrative authorities.

⁷³ See European Parliament Directorate General for Internal Policies/Policy Department A: Economic and Scientific Policies, *Implementation of the Services Directive* (IP/A/IMCO/ST/2010-07, September 2010), p. 7, available at www.europarl.europa.eu/committees/en/studies.html; Stelkens, Weiß & Mirschberger 2012, p. 221.

⁷⁴ Article 22 of Act No. 2000-321 of 12 April 2000.

⁷⁵ See Article 22 of Act No. 2000-321 of 12 April 2000.

plication. In addition, if a licence application can be tacitly refused, the period commences on the day the application is received – even if the application is incomplete. However, if a tacit consent is possible, the period begins only when the application is complete.⁷⁶ This means that the wording of Article 13(3) of the Services Directive is followed to the letter. Receipt of the application must always be acknowledged by the competent administrative authority. The acknowledgement of receipt must specify the period within which the authority must respond to the application and whether failure to respond within that period will result in tacit refusal or tacit authorization. The only case in which acknowledgement of this kind is not required is when the time limit is equal to or less than fifteen days. If the application can in fact lead to tacit consent, then it must also be stated that the applicant may request confirmation in writing (*attestation*) that tacit authorization has been granted.⁷⁷

On 30 October 2013 the French *Assemblée Nationale* passed an Act authorizing the Government to simplify relations between administrative authorities and the public.⁷⁸ This Act will make important changes to Articles 21 and 22 of Act No. 2000-321 dating from 12 April 2000. The most relevant amendment will be to Article 21, which provides that the basic rule in the event of failure to respond within the time limit is that an application will be deemed refused. The first two paragraphs of the recently enacted version of this provision read as follows:

‘Le silence gardé pendant deux mois par l’autorité administrative sur une demande vaut décision d’acceptation. La liste des procédures pour lesquelles le silence gardé sur une demande vaut décision d’acceptation est publiée sur un site internet relevant du Premier ministre. Elle mentionne l’autorité à laquelle doit être adressée la demande, ainsi que le délai au terme duquel l’acceptation est acquise [...].’⁷⁹

⁷⁶ See Article 20 of Act No. 2000-321 of 12 April 2000 and Article 2 of Decree No. 2001-492 of 6 June 2001 respectively.

⁷⁷ See Articles 1 and 3 of Decree No. 2001-492 of 6 June 2001 and Article 22 of Act No. 2000-321 of 12 April 2000.

⁷⁸ See Article 1 of Act No. 2013-1005 of 12 November 2013 (see www.legifrance.fr and ‘Project de Loi habilitant le Gouvernement à simplifier les relations entre l’administration et les citoyens’, adopted text 2013-225 at www.assemblee-nationale.fr/14/pdf/ta/ta0225.pdf).

⁷⁹ Translation (by authors): ‘Silence on the part of an administrative authority for two months after an application will be regarded as approval. The list of procedures for which silence means approval is published on an internet site under the responsibility of the Prime Minister. It specifies the administrative authority to which the application must be submitted and also the time limit after which the approval will be granted.’

This means that when this Act comes into force,⁸⁰ the basic rule in France will be that silence on the part of the authority will lead to authorization after the expiry of the decision period.⁸¹ Although this seems a substantial change and was interpreted in the political arena as a real revolution in the relations between authorities and the public, the second sentence means that the impact of this change is actually not as far-reaching as might be expected. For various reasons, it cannot be said that the basic rule will really be reversed or that there will be major changes to the existing law. Firstly, the Act includes a generous transition period of one year during which the government has explicitly been given the opportunity to adapt various licensing systems so that the exception will apply to them instead of the new basic rule. Moreover, the list to be published on the internet is decisive as regards whether or not tacit authorization can in fact be granted. If an authorization scheme is not on that list, an application cannot be granted tacit authorization. In addition, the new Act contains a wide range of exceptions. If the decision in question is not about an individual case, if there are no statutory provisions regulating a particular application, if the application is for a benefit from the government (with the exception of social security), if granting tacit authorization is not in accordance with international and European law, and finally if tacit authorization would constitute a danger to state security, to public order or to the protection of freedoms and other constitutional rights, the new basic rule will not apply and by way of exception silence on the part of an administrative authority will result in tacit refusal.⁸² In short, the amendments to the law passed on 30 October 2013 are largely cosmetic or symbolic in nature and, while they are rated very highly in the political arena, can be assessed at their true value by legal experts. The changes to the existing system are simply not very shocking.

5.3 Safeguarding the Public Interest and the Interests of Third Parties

The general rules drawn up by the Conseil d'État regarding the revocation of formal decisions,⁸³ which provide that revocation by the authority during a period of four months is possible if the decision proves to be unlawful, do not apply to tacit, fictitious decisions. The rule for tacit authoriza-

⁸⁰ The Act passed will take effect for state administrative authorities after one year and for other administrative authorities after two years.

⁸¹ Another amendment in Article 20 made at the same time is the provision that if the authority has notified the applicant of the incompleteness of the application, the time limit will not begin until the application is complete. It is also provided that an application for which tacit authorization can be granted must state the date on which the authorization will be granted if the authority has not made a formal decision (new Article 22).

⁸² New Article 21.

⁸³ Conseil d'État 26 October 2001, case no. 197018.

tions is that on certain conditions the authority may revoke the authorization by virtue of the regulations referred to previously if there is evidence of unlawfulness.⁸⁴ Three situations must be distinguished. If no notice is given of the tacit authorization, a time limit of two months will apply for the authority to revoke it. Once notice has been given of the tacit authorization, the authority may still revoke it, but only in the period during which the decision may be appealed to the administrative court. That period is usually two months. Finally, the authorization can also be revoked so long as an appeal against it is pending before the administrative court.

It is important to note that in the vast majority of cases the power of the authority to attach conditions to a tacit authorization will be regarded as a revocation of the original authorization and is therefore linked to the powers of revocation outlined above. In short, in most cases it is only possible to change a tacit authorization within a period of two months and when there is evidence of unlawfulness.

In relation to the protection of the public interest and the interests of third parties it is important to note that the procedural rules for invoking legal protection against a tacit authorization are not substantially different from those for challenging a formal decision; once notice has been given of the decision, an appeal against it may be lodged with the district court within two months. However, an interesting point in this context is that it sometimes happens that the receipt of an application is not acknowledged or that no notice is given of a tacit authorization or notice is not given in the correct way. In all such cases, the time limit for challenging the tacit authorization in court is in principle unlimited.⁸⁵ This unlimited time to have the authorization annulled by the court is not beneficial to the applicant's legal certainty. This is why some specific statutory authorization schemes contain special rules about notification of tacit authorizations. It should also be borne in mind that for the benefit of legal certainty for holders of tacit authorizations it has been regulated that confirmation of the tacit authorization (*attestation*) can be requested from the authority.

A point of some controversy is the standards against which an implied approval can be reviewed by the administrative court. A relevant question is whether

⁸⁴ Article 23 of Act No. 2000-321 of 12 April 2000: 'Une décision implicite d'acceptation peut être retirée, pour illégalité, par l'autorité administrative: 1) Pendant le délai de recours contentieux, lorsque des mesures d'information des tiers ont été mises en oeuvre; 2) Pendant le délai de deux mois à compter de la date à laquelle est intervenue la décision, lorsqu'aucune mesure d'information des tiers n'a été mise en oeuvre; 3) Pendant la durée de l'instance au cas où un recours contentieux a été formé.'

⁸⁵ See Article 19 of Act No. 2000-321 of 12 April 2000.

decisions of this kind would be bound by the rules of *légalité externe* (external legality), such as the rules relating to the competence of the authority, the formalities of decision-making and the procedural requirements for final decisions. The prevailing opinion in the debate about this seems to be that granting tacit authorization may never undermine the obligation of the authority to adhere to the rules of *légalité externe*.⁸⁶ Another issue is the requirement to state the reasons for decisions. Although implicit decisions cannot be regarded as unlawful if the absence of stated reasons is the only thing wrong with them,⁸⁷ within the appeal period after the tacit authorization has been given a party involved may nevertheless ask for the reasons to be specified and communicated. If the authority fails to respond within one month of this request, the person in question may appeal without being constrained by any time limit. In that case the basic rule that reasons must be given for every decision will result in the appeal being upheld and the tacit authorization will have to be annulled.

6 Comparative and Concluding Remarks

Article 13(4) of the Services Directive compels the member states of the EU to implement or maintain systems for various authorization schemes in their national administrative law whereby if the authority in question fails to respond to an application within the time limit tacit authorization will be granted. Any other consequence of failure to respond on time is permitted only if prompted by overriding reasons relating to the public interest, including legitimate interests of third parties. With this provision the European legislature aimed to address complaints about the administrative procedures that have to be followed if a service provider wants to set up business in another member state. In this article we have examined the current regulations for tacit authorization in the Netherlands, Germany and France. In the following section we will present a comparison of the different systems. While they share many standards, there are also subtle differences.

In which cases do the national legislatures not allow a licensing system to be subject to the rule of tacit authorization? As regards authorization schemes which fall under the Services Directive, Article 9(1)(b) of the Services Directive and the exception in Article 13(4) of the Services Directive are formulated in the same way, and it could legitimately be argued that the option of maintaining a licensing requirement implies that a member state does not have to accept that

⁸⁶ This seems to follow implicitly from Conseil d'État, 18 July 1973, case no. 86275, *Revue du Droit Public et de la science politique en France et à l'étranger* 1974, p. 559.

⁸⁷ See Article 5 of Act no. 1979-587 of 11 July 1979.

tacit authorization can be granted. A legislative body may be compelled to make an exception to serve a specific public interest. If we look at authorization schemes within the scope of the Services Directive in the member states, it becomes apparent that member states do in fact also have authorization schemes in which tacit authorization can be granted, even when exceptions to the general rule of tacit authorization are permitted for overriding reasons relating to the public interest, including the legitimate interests of third parties. However, all of the countries examined aim to ensure that tacit authorizations cannot lead to contravention of international or European law. So far, Germany seems to be somewhat cautious about allowing tacit authorizations. In France, a recently passed Act includes a significant list of exceptions to the newly formulated basic rule of tacit authorization if an application is not processed within the time limit.⁸⁸

It is also interesting to note that in current Dutch, German and French general administrative law the general standards for tacit authorization only apply if this has been stipulated in a specific Act. However, in the Netherlands the tacit authorization system applies, without further regulation, to all authorization schemes which fall within the scope of the Services Directive, whereas in Germany the legislature must always refer in specific Acts to the basic rule that tacit authorization can be granted. In France Article 13(4) of the Services Directive has not had a major impact. For some time now the basic rule in France has been that failure to respond within the time limit results in an implicit refusal, although there are many exceptions to this rule. The Act passed by the French National Assembly will make these exceptions the basic rule after a transitional period, but it is expected that in practice the turnaround will not make much difference.

How are time limits calculated and when does a tacit authorization take effect? We are interested in the time limits set by the national legislature, when they start to run and when they expire, and when the authorization takes effect. Article 13(3) of the Services Directive requires applications to be ‘processed as quickly as possible and, in any event, within a reasonable period which is fixed and made public in advance’. The time limit is not supposed to start until all documentation has been submitted. Moreover, the time limit can be extended once only, when justified by the complexity of the application in question. With time limits which in principle are eight weeks and two months respectively, the Netherlands and France have set similar time limits. In Germany the time limit is three months. In all cases, special legislation can specify a longer or

⁸⁸ See Article 21 as amended by Article 1 of Act No. 2013-1005 of 12 November 2013 (see www.legifrance.fr).

shorter period. Interestingly, in Germany and France the time limit starts to run only when the application is complete, as Article 13(3) of the Services Directive seems to require. This means that for a tacit authorization to be granted it is very important at what point the application can be regarded as complete. Both systems seem to be having some difficulty with this issue and the Services Directive provides no guidance. The Netherlands has different regulations for this matter, because the time limit begins as soon as the application is received, regardless of whether it is complete. The Dutch legislature thought that this would be more in keeping with the objective of the Directive because it would give the authority an incentive to ask for additional documentation. The Dutch time limit is suspended if additional documentation has been requested. Although it can be argued that the Dutch lawmakers have not implemented Article 13(3) of the Services Directive entirely correctly, at least the consequences do not seem to be at odds with the objective of the Directive. In all authorization schemes within the scope of the Services Directive that were examined, the rule applies that the time limit can be extended once if the case is complicated.

A point that is relevant to the legal certainty of those involved is how notice is given that tacit authorization has been granted. It is noteworthy but understandable that in all the countries the usual rules about notification of decisions and when they take effect are brushed aside in the case of tacit authorizations. In Germany and France a tacit authorization takes effect as soon as it has been granted and the usual notification is not required. To safeguard the legal interests of the parties involved, in these systems confirmation of the tacit authorization can be requested from the authority. In the Netherlands, different regulations have been put in place for both these matters. To avoid discussion about whether or not a decision has been made within the time limit, the Dutch legislature opted to have the tacit authorization come into effect three days after the expiry of the time limit, specifically because it is possible that the authority has responded on time, but the response is only delivered by mail after the time limit has expired. Notice of the authorization also has to be given within a period of two weeks, so that the time limit for appealing the decision to the administrative court can start to run. In all systems the rights of third parties to appeal against the tacit authorization are safeguarded by the fact that the appeal period is linked to notification of the tacit authorization or in some way to the confirmation that the authorization has been granted tacitly.

Have the national legislative bodies taken measures to protect the public interest and the interests of third parties in situations in which tacit authorizations have been granted? And if so, what measures? It is clear that the national legislatures have acknowledged that tacit authorizations can adversely affect the public interest and the interests of third parties. The general rules on tacit authorizations therefore also include provisions relating to the revocation of or amendments to tacit authorizations. However, in France in particular a tacit authorization

can only be revoked or changed within a time limit defined by law, usually two months. If the decision has been appealed, the authority is still competent to revoke or to change it. The Netherlands has a special provision regulating revocation and amendment. This specific power to revoke or amend a tacit authorization is valid only for a limited period of six weeks after notice of the authorization has been given. Nevertheless, in the Netherlands, just as in Germany, all the usual powers to revoke and amend a decision also apply to tacit authorizations. In this respect the French system certainly seems stricter. As regards another aspect, Dutch administrative law has a special provision. The legislature considered it necessary to specify that the standard conditions which normally apply to a certain authorization would also apply by operation of law to tacit authorizations. This is also intended to protect both the public interest and the interests of third parties.

Finally, all three countries have of course made some arrangements for judicial review of tacit authorizations. The various systems have problems identifying the criteria against which a tacit authorization should be reviewed. On the one hand it is clear that a tacit authorization cannot meet all the usual standards. On the other hand, regulations for legal protection against tacit authorizations which make it certain in advance that the fictitious decision will be annulled do not seem to be in line with the objective of speeding up decision-making. Nevertheless, the idea prevails that an appeal by a third party against a tacit authorization is very likely to be successful, for example because the procedural requirements and the requirement to give reasons for the decision have not been met. This makes the instrument extremely uncertain and actually not very helpful if the interests or rights of third parties are involved. The phrase ‘including a legitimate interest of third parties’ in Article 13(4) of the Services Directive should therefore be taken very seriously. Only France seems to have taken these problems into account by making specific rules that reasons must be given upon request after the authorization has been granted. Greater clarity regarding these aspects is needed in all the national systems examined. With this comment we do not mean to suggest that European legislation would be desirable on this matter.

Regarding the comparative comments made above and the descriptions of national systems of tacit authorizations in the light of Article 13(4) of the Services Directive, it is fair to say that this is a tool that is considered politically desirable for the purpose of reducing administrative burdens and addressing complaints about complex and lengthy authorization procedures. In our opinion, the instrument is only useful for simple authorization procedures in which no third parties are involved and in which the public interest is not compromised – or only to a very minor degree – if tacit authorization is granted. It is only in these cases that the objective can be achieved. With this conclusion, given the rationale behind Article 9(1b) of the Services Directive, we then arrive at the question

whether in situations where the instrument seems to be helpful, an authorization scheme is actually still justifiable. Perhaps it would be better in cases like this to make do with other solutions, such as providing general binding rules. In all other situations, detailed administrative rules are required to ensure that the public interest and the interests of third parties are not violated by the tacit authorizations. In most cases these rules try in vain to remove the legal uncertainty associated with tacit authorization.