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A judicial review of inactivity of the public administration in the Slovak Republic

Introduction

The public administration's inactivity is one of its biggest malfunctions. The legal theory widely accepts that the public administration achieves its goals by being active and staying active,[1] i.e. achieving goals set in statutes gradually, yet constantly. The legal theory derives this thought from one of the components of the public administration – the initiative component.[2] It means that the public administration is responsible for achieving goals stipulated in the statutes. It achieves them by actively influencing behaviour of its subordinate subjects.[3] If the public administration stays inactive, it means it denies its own competence laid by the law.[4]

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[1] See, for example P. Škultéty et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Bratislava 2005, pp. 199-221; J. Machajová et al., *Všeobecné správne právo*. [*General Administrative Law*]. Žilina 2009, pp. 277-294; M. Vrabko et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Par*t]. Bratislava 2012, pp. 351-381; S. Košičiarová, *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Plzeň 2015, pp. 332-337.

[2] See for example P. Škultéty In P. Škultéty et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Bratislava 2005, p. 11; A. Martvoň In M. Vrabko et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Bratislava, p. 110.

[3] Ibidem and see also P. Průcha, *Správní právo. Obecná část.* [*Administrative Law. General Part*]. Brno 2007, p. 59.

[4] K. Tóthová In M. Vrabko et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Bratislava 2012, pp. 357-361.

However, inactivity of the Slovak public administration is a very serious issue. Citizens of Slovakia file more than 60 new actions per year, seeking remedy against inactivity of the public administration.[5] It is believed that many more are still being unreported. This does not send a good signal to the public. It contradicts the perception of a good public administration[6] as a public service and therefore it lowers the general reliance on law. Moreover, the principle of legal certainty, which is one of the leading principles of rule of law, is at stake.

Legislation and the legal theory on inactivity of the public administration

Since the Slovak Republic has joined the tradition of European democratic countries, it must also create an effective system of how to prevent inactivity of its public administration. This statement is supported not only by the Constitution of the Slovak Republic,[7] but also by many international obligations that the Slovak Republic has agreed to accept and follow.

When it comes to international obligations of the Slovak Republic, we can name, for example, Article 6(1) of the European Convention on Human Rights, Article 41 of the Charter of Fundamental Rights of the European Union or Article 7 of the Recommendation CM/Rec (2007)7 of the Committee of Ministers to Member States on Good Administration.

These international documents stipulate obligation of public authorities (i.e., including administrative authorities) to act and perform their duties within a reasonable time. This obligation is a part of the rights that altogether form a general right to good governance and good administration.

The Slovak national legal regulation on obligation to act within reasonable time arises from the Constitution. Article 48(2) of the Constitution stipulates that everyone has the right to have his or her case tried publicly without undue delay, to be present at the proceedings and to comment on any evidence given therein. This constitutional order manifests itself in many acts and in many forms in the Slovak national legislation.

For the public administration and the administrative procedure conducted by administrative authorities, the most important rule on their ac-

[5] Statistics according to <http://www.supcourt.gov.sk>; official web page of the Supreme Court of the Slovak Republic, own adaptation.

[6] Good administration sums all basic legal requirements expected from public administration in all democratic and legal states. S. Košičiarová, *Správne právo hmotné. Všeobecná časť*. [*Administrative Material Law. General Part*]. Plzeň 2015, p. 102.

[7] The English version of the Constitution available at <https://www.prezident.sk/upload-files/46422.pdf>. Accessed on 23 December 2017.

tivities (on being active) is stipulated in Act No. 71/1967 Coll. on Administrative Proceeding (hereinafter: AP). This act stipulates the general time limits for issuing a decision by administrative authority.

According to § 49 AP: (1) in simple maters, in particular if the decision may be based on the documents submitted by a party, the administrative authority shall decide immediately. (2) In other cases, and unless special legislation provides otherwise, the administrative authority shall decide the matter within 30 days from the opening date of the proceedings. If the case is of a particularly complicated nature, the decision must be issued within 60 days from the opening date. If, due to the nature of the matter, the decision may be reached neither within this time period, the period may be extended by the appealing authority (the authority who shall decide on the appeal). In case the administrative authority may not decide within 30 or within 60 days, respectively, the authority must inform the party and state the reasons thereof.

If inactivity of the administrative authority occurs, § 50 AP stipulates that if allowed by the nature of the matter and if no other remedy is available, the administrative authority who would otherwise be competent to decide on the appeal, shall decide the matter on its own in case the administrative authority competent to issue the decision failed to initiate the proceedings in spite of being obliged to do so or if it failed to issue the decision within the time period specified in § 49(2) AP.

However, it is recognized that legal practice usually does not follow procedure under §50 AP.[8] As a result, the person concerned by the inactivity must seek other remedies. As it has already been mentioned, such remedies must be granted to persons seeking protection against inactivity of the public administration. As the legal theory states, inactivity of the public administration is always unlawfulness[9] and against any unlawfulness there must always exist an effective remedy.

The most important of all those remedies is the possibility to file an action against inactivity of the administrative authority under Act No. 162/2015 Coll. on Administrative Justice Proceedings (hereinafter: AJP).

This article focuses on the conditions laid by AJP to file a lawsuit against inactivity of the administrative authority and its comparison with previous

[8] See, for example, J. Machajová, *Ústavnosť rozhodovania subjektov miestnej verejnej správy v Slovenskej republike a v Českej republike* [*Constitutional Aspect of Deciding Procedures of the District Administrative Bodies in the Slovak Republic and in the Czech Republic*]. Bratislava 2001, p. 140; K. Frumarová, *Ochrana před nečinností veřejné správy v českém právním řádu*. [*Protection Against Inactivity of Public Administration in the Czech Legal Order*] Praha 2005, p. 65; M. Srebalová, *Rýchlosť správneho konania a nečinnosť správneho orgánu.* [*Time Period of the Administrative Procedure and the Inactivity of Administrative Authorities*] Bratislava 2008, p. 61.

[9] K. Tóthová In P. Škultéty et al., *Správne právo hmotné. Všeobecná časť.* [*Administrative Material Law. General Part*]. Bratislava 2005, p. 202.

legal regulation stipulated in Act No. 99/1963 Coll. on Civil Judicial Proceedings (hereinafter: CJP). Since AJP is a relatively new act,[10] the reason for an analysis of this type of action is that AJP stipulates a different set of rules and conditions on how to prevent inactivity of the public administration compared to the previous legal regulation.

A judicial review of inactivity of the administrative authority

One of the proofs that the legislator takes the issue of inactivity of the public administration very serious, is systematics of AJP. The administrative action against inactivity of the administrative authority is the first special type of administrative action[11] of all administrative actions stipulated in AJP. *In concreto*, § 242-251 AJP stipulate the administrative action against inactivity of the administrative authority.

According to § 242(1) AJP, an actor may seek remedy from inactivity of the administrative authority in any administrative proceeding initiated by his/her proposal. According to § 242(2) AJP, a prosecutor may file the action when the administrative proceeding should have initiated an administrative authority's motion (i.e. *ex officio*), but did not.

While Subsection 1 of the provision is a traditional provision stipulating administrative action against inactivity of the administrative authority,[12] Subsection 2 is a total novelty in the Slovak legislation. Therefore, the next part of the text focuses on this second type of action against inactivity of the public administration.

Before AJP came into force, there were no effective means on how to effectively propose the administrative authority to initiate *ex officio* administrative proceeding.

In general, an example of *ex officio* administrative proceeding is a proceeding where the administrative authority decides on obligations of a party to the proceeding.[13] For instance, administrative proceeding on admin-

[10] It came into force on 1 July 2016.

[11] The general types of administrative actions are: the general administrative action used when all other administrative actions cannot be used (§ 177-193 AJP), administrative action in the area of administrative punishment (§ 194-198 AJP), administrative action in the area of social security matters (§ 199-206 AJP) and administrative action in the area of asylum, administrative detention and administrative banishment matters (§ 207-241 AJP).

[12] The derogated act that had stipulated administrative justice before AJP (Act No. 99/1963 Coll. Act on Civil Proceedings), stipulated, more or less, the same provision on action against inactivity of the administrative authority.

[13] J. Sobihard, *Správny poriadok. Komentár.* [*Administrative Proceeding. Commentary*]. Bratislava 2007, p. 72.

istrative punishment is a typical proceeding initiated *ex officio*. The legal theory is of the opinion that in the matters of administrative punishment, the administrative authority is obliged to initiate the administrative proceeding; if not, such a state is not in accordance with public interest. It is public interest to ascertain the offender, to name him/her and to impose him/her with right and just sanction or to retreat from the sanction.[14]

As it can be seen, it is very important to have an effective and objective means to review if the administrative authority had to initiate the proceeding. Administrative courts based on administrative action against inactivity of the administrative authority obtain the most effective means to review the decision of the administrative authority not to initiate the proceeding.

Not everyone can be an actor and file this administrative action. AJP entitles only the prosecutor's office to file the action. However, since administrative proceeding is usually quicker, less formal and less expensive, the legislator stipulated a very strict procedure that precedes an option to file the action against inactivity.

Before filing the action, there is a vital role of the prosecutor to challenge the administrative authority to initiate the proceedings. The prosecutor must address the respective administrative authority with the so-called prosecutor's notice based on § 28(1) of Act No. 153/2001 Coll. on Prosecutor's Office. Once the administrative authority refuses to initiate the administrative proceedings even after it received a prosecutor's notice, the prosecutor is entitled to file the action against inactivity.

Prosecutor files the action and addresses it to one of the eight regional courts. Local competence is derived from the seat of the administrative authority.[15] As an exception to the general rule, a single judge decides justness of action against inactivity of the administrative authority. The general rule is that in administrative justice a senate consisting of three judges decides on respective actions.[16]

Parties to the court proceeding are prosecutor and the administrative authority.[17] Oral hearing is not mandatory unless the court produces the evidence or one of the parties specifically moves for oral hearing.[18]

Based on the court's written application, the administrative authority is obliged to express its opinion with respect to the action.[19] If the admin-

[14] See for more: M. Horvat, *Administratívnoprávna zodpovednosť právnických osôb* [*Administrative Liability of Legal Persons*]. Bratislava 2017, pp. 187-196.

[15] See § 10 and § 13 AJP.

[16] See § 23 AJP.

[17] See § 243 AJP.

[18] See § 107 AJP.

[19] See § 247 AJP.

istrative authority fails to comply, the court is entitled to impose a fine of maximum 2000 € (though the fine might be imposed repeatedly) on the administrative authority.[20]

The administrative court may decide on the action as follows:

a) discontinue the proceedings; the administrative court issues such a decision when the administrative authority remedies its inactivity, in other words when the administrative authority initiates the proceedings before the court issues its final decision (therefore the administrative authority is not inactive anymore);[21]

b) reject the action; the administrative court issues such a decision based on procedural obstacles that rule out the possibility to review the subject matter of the case;[22]

c) dismiss the action; the administrative court issues such a decision after reviewing the subject matter of the action and concludes that there is no reason to initiate the administrative proceedings;[23]

d) the administrative court orders the administrative authority to initiate the administrative proceeding; the administrative court orders such a decision when it concludes rightness of the action.[24]

The most important of these decisions is the one mentioned as the last one. The court issues such a decision in the form of a resolution (i.e. not in the form of judgement). Enunciation of the resolution consists not only of an explicit order to initiate the administrative proceeding, but also a time limit within which the administrative body must initiate the proceeding. Such a time limit must be less than three months. Upon further written application of the administrative authority, this time limit can be prolonged; however, the administrative court is not obliged to comply with such a request of the administrative authority.

What is important to say is that the court proceeding does not discontinue by issuing this resolution; the court proceeding discontinues only when the administrative court issues a special resolution to discontinue the proceeding (i.e. not the same resolution as the resolution to initiate administrative proceeding). In order to do so, the administrative authority must inform the administrative court that it fulfilled its duty to initiate the administrative proceeding. If the administrative authority does not inform the administrative court of doing so, the administrative court is not entitled to discontinue the court proceeding.

[20] See § 80 AJP.

[21] See § 248 AJP.

[22] See § 98 AJP.

[23] See § 249 AJP.

[24] See § 250 AJP.

As a very effective means of effective legal coercion, AJP stipulates that if the administrative authority does not fulfil its duty to initiate the administrative proceeding (despite the judicial resolution), the administrative court is entitled to impose a fine on the administrative authority. According to § 80(1)(d) AJP the administrative court may impose a fine on the administrative authority if the administrative authority does not fulfil the duty to initiate the administrative proceeding within time limit set in the administrative court's resolution. The maximum amount of fine is 2000 € (the administrative court is entitled to impose the fine repeatedly).

If we compare the regulation in AJP and the legal regulation in CJP, the new legal regulation is more effective and more appropriate towards actor. The most important advantage of the new legal regulation is that the administrative court is bound to monitor whether the administrative authority obliges to its resolution. The responsibility of the administrative court is, therefore, higher than it was. The previous legal regulation laid higher demands on the actor and his/her vigilance and perseverance.

According to CJP, if the administrative authority remained inactive (despite the administrative court's resolution), the actor was entitled to file another action against inactivity (a second one in a row). Only based on this second action and only after a statement of the administrative authority superior to the inactive administrative authority, could the administrative court impose a fine on inactive administrative authority. On the other hand, the administrative court could impose a fine of maximum 3280 € (though repeatedly) and not only 2000 €.

AJP allows a remedial measurement against the court's resolution to initiate the administrative proceeding. It is called a cassation complaint. However, a cassation complaint has not a postponing effect towards the court's resolution. The administrative authority is, therefore, fully obliged to follow the legal opinion expressed in the court's resolution and initiate the administrative proceeding despite filing the cassation complaint. The Supreme Court of the Slovak Republic (hereinafter: SC SR) decides on all cassation complaints.

Since the remedial measurement is a cassation complaint, the Slovak administrative justice is based on the cassation principle. That means the SC SR may only

a) affirm the former judgment or resolution of the regional court, or

b) quash the former judgment or resolution of the regional court.

Alteration of the former judgment or resolution of the regional court is not possible in the judicial system built upon the cassation principle.

A very interesting situation would occur if the SC SR quashed the former resolution. It would basically mean that there was no reason to initi-

ate the administrative proceeding. However, the proceeding had to initiate because, as already mentioned, the cassation complaint has no postponing effect. The question arises – Is the administrative authority obliged to discontinue this administrative proceeding?

A simple answer would be yes, but the question is, based on what provision of AP?

The most appropriate provision is § 30(1)(h) AP. In accordance with this provision, the administrative authority discontinues the proceeding in case the ground for the proceeding initiated by the administrative authority ceased to exist.

Commentaries state that this provision is traditionally used when the outcome of the administrative proceeding is to impose an obligation on a party to the proceeding. If the administrative authority terminates the proceeding, a party to the proceeding usually welcomes such a decision.[25] The aim of the provision is to discontinue the proceeding when ground for the proceeding no longer exists (legally or factually) and the proceeding has lost its meaning.[26] It is usually when the time period for administrative offence liability has ended, when the administrative authority cannot prove the guilt of the accused or when the administrative proceeding is about a movable thing and the movable thing ceased to exist.[27]

As seen, the commentaries do not mention a situation when the proceeding initiated based on the administrative court's resolution as an example for application of § 30(1)(h) AP. However, if the resolution ceases to exist because it was quashed, it can be said that the legal ground for the administrative proceeding ceased to exist as well. Therefore, the administrative authority is entitled to discontinue the administrative proceeding.

However, this conclusion may not fall to all types of administrative proceedings. This conclusion should be altered when it comes to, for example, administrative proceeding on an administrative offence. In this type of proceeding, if the administrative authority produced evidence that indicates an administrative offence was committed, the legal ground for the administrative proceeding would still exist. In this case, the administrative authority is obliged to decide on the guilt of the accused person.

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[25] P. Potásch, J. Hašanová, *Zákon o správnom konaní (správny poriadok). Komentár*. [*Act on Administrative Proceeding. Commentary*]. Praha 2012, pp. 137-138.

[26] S. Košičiarová, *Správny poriadok. Komentár*. [*Administrative Proceeding. Commentary*]. Šamorín 2013, p. 150.

[27] B. Cepek In M. Vrabko et al., *Správne právo procesné. Všeobecná časť*. [*Administrative Procedural Law. General Part*]. Bratislava 2013, p. 134.

Conclusion

Inactivity of the public administration is its very serious malfunction, since the public administration fulfils its purpose by actively achieving goals set up in the statutes. Since the Slovak Republic is a member of various international organisations and since it accepts traditions of democratic and legal states, it must create an effective system that eliminates inactivity of the public administration.

According to general rules set out in AP, the administrative authority must issue a decision in administrative proceeding within 30 days. If the case is of a particularly complicated nature, the decision must be issued within 60 days. Upon appealing the administrative authority may even decide to extend this time period. In case the administrative authority may not decide within 30 or within 60 days, respectively, the authority must inform the party and state the reasons thereof.

However, when the administrative authority does not follow these time limits, the party to a proceeding might file an administrative action against inactivity of the administrative authority. Administrative courts decide this type of action.

If we compare the previous legal regulation on action against inactivity with the new legal regulation, we must conclude that the new legal regulation is more effective. This derives from two facts. First, the new legal regulation allows the prosecutor's office to file an action against inactivity in case of *ex officio* administrative proceedings and two, the administrative court may impose a fine on the administrative authority that is inactive, even though the court has ordered the authority to initiate the administrative proceeding.

I believe that this new legal regulation is more effective than the previous one and that it will help to eliminate inactivity of the public administration easier.

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A JUDICIAL REVIEW OF INACTIVITY OF THE PUBLIC ADMINISTRATION IN THE SLOVAK REPUBLIC

Abstract: The article focuses on inactivity of the public administration in the Slovak Republic. It analyses this malfunction of the public administration from the point of view of the legal theory, international legal regulation as well as national legal regulation. The emphasis is on the national legal regulation that should provide effective legal remedies on how to eliminate inactivity of the public administration – namely the Constitution of the Slovak Republic, the Act on Administrative Proceeding and the Act on Administrative Justice Procedure. The article analyses the new legal regulation on a judicial review of inactivity stipulated in the Act on Administrative Justice Procedure and compares it with the previous legal regulation. The aim is to conclude which legal regulation is more effective and describe why it is so.

Keywords: INACTIVITY OF THE PUBLIC ADMINISTRATION, ACTION AGAINST INACTIVITY OF THE PUBLIC ADMINISTRATION, COURT PROCEEDING AGAINST INACTIVITY OF THE PUBLIC ADMINISTRATION, GOOD ADMINISTRATION, FINE FOR INACTIVITY OF THE ADMINISTRATIVE AUTHORITY