

# Effectiveness of Judicial Protection against Administrative Silence in the Czech Republic

Soňa Skulová, Lukáš Potěšil, David Hejč, Radislav Bražina

Masaryk University, Faculty of Law, Czech Republic

sona.skulova@law.muni.cz, lukas.potesil@law.muni.cz, david.hejc@law.muni.cz, radislav.brazina@law.muni.cz

<https://orcid.org/0000-0002-0934-1579>

<https://orcid.org/0000-0002-1797-6048>

<https://orcid.org/0000-0001-9366-7119>

<https://orcid.org/0000-0002-7924-5056>

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## ABSTRACT

This paper is devoted to the issue of judicial protection in case of (or against) administrative silence (inactivity) and its effectiveness on the case study of the Czech Republic. The aim of judicial protection against administrative silence is to help solving or terminating administrative silence quickly, otherwise, an imaginary vicious circle is created. The purpose of the paper is to verify whether judicial protection is indeed effective by surveying the related legislation and court practice (especially the length of proceedings) dealing with the so-called inactivity. The methods of analysis applied are normative analysis, literature review, statistical analysis of decision-making activities of courts and deduction. Our findings establish that due to the excessive length of court proceedings and incomprehensible legal regulation it is difficult to view the judicial protection against administrative silence as being a speedy and effective instrument of remediation of inactivity on the part of administrative authorities. The results can serve as a ground to compare the situation with other similar countries and to exchange best practices.

*Keywords:* administrative silence, administrative justice, constitutional court, effectiveness, judicial protection, Czech Republic

*JEL:* K41

## 1 Introduction

This paper deals with questions connected with judicial protection in case (or against) administrative silence (inactivity) and its effectiveness on the exam-

ple of the Czech Republic. The basic aim of judicial protection against inactivity is to solve public administration inactivity quickly and effectively. The main purpose of this article is to verify whether the judicial protection against administrative silence can be seen from the point of view of person affected by the silence as a protection, which is provided quickly, clearly and effectively. Therefore we analyze the related legislation and court practice with an emphasis on analysis of the length of the court proceedings in cases of so-called inactivity action, which is the most important judicial mean of protection against public administration inactivity. We also focus on the theoretical context of the administrative inactivity, historical context and partly on remedies against administrative silence provided by public administration itself. The methods of analysis of legal requirements of national legislation, normative analysis, literature review, deduction and statistical analysis were used to create this paper.

## 2 Public administration as an activity...

Public administration tends to traditionally (in the central European interpretation) be perceived as a dual phenomenon. The said duality includes an organizational (static) and material (dynamic) element of public administration.<sup>1</sup> Both aspects are closely interconnected with one another. The existence of public administration would lack a purpose without content, and such content is activity.

Public administration can be perceived as a purposely built organizational structure, the function of which is to provide for the exercise of public authority and administration.<sup>2</sup> Public administration is based upon activity and its potential inactivity basically negates the said defining feature. However, here we do not mean cases of legitimate self-restriction in the acting of public administration, but rather, a breach of the obligation to apply prescribed procedures, within a certain (reasonable) time (Skulová et al., 2017, p. 248).

We base this reasoning upon the well-known thesis of E. Forsthoff, according to which public administration can indeed be described, but it cannot be clearly and completely defined. We will not attempt a more detailed definition of public administration as an activity either. We thus base this work upon the fact that public administration consists in the intentional and purposeful administrating of public matters and the achievement of public objectives, in the public interest, whereby it is carried out primarily by public entities and with the application of public authority methods and means.

Public administration is created in order to function and be active wherever its activity is expected. We should add that this must be activity that is not random, but rather, it must be of a long-term and continual nature, whereby

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1 Of the German literature in regard to (not only) this issue, see Mayer, 1914, Ipsen, 2007. In the case of Austria, Raschauer, 2003. In the case of the Polish literature compare the publication of the prominent representative of the doctrine Starościak, 1969.

2 See Craig, 2012.

we get to the essence of the legitimate expectations<sup>3</sup> and the predictability of public administration.<sup>4</sup> Any inactivity thus also has such negative connotations, i.e. it can establish legitimate expectations in situations, where public administration should be active.

The said facts about functioning and active public administration reflect the expectations of society in regard to the fulfillment of goals, tasks and functions of public administration. That also finds its expression in the legal anchoring of the means of protection of the rights of individuals, but also the protection of the public interest in the fulfillment of the said tasks and functions. For the indicated reasons, a relatively broad palette of individual means has been created by which individuals can demand the protection of their rights in the event that these have been negatively encroached upon through the activity, or through the inactivity, of public administration.<sup>5</sup>

Public administration, thanks to its broadly perceived subject matter, which is public matters, is expressed outwardly in certain typical forms, which, however, are growing broader in the course of time and through the development of public administration. It is characteristic for the predominating part of central European theory that a significant portion of its attention is comprised of so-called forms of activities, otherwise known (through foreign languages) as *formy działania*<sup>6</sup> or *Handlungsformen*. The central European doctrine historically defines public administration as an activity through detailed concretization and analysis of forms in which, specifically, the activity of public administration is carried out. However, for the purposes of this article, we will not characterize them any more broadly. We will merely add that, through them, public administration impacts upon the daily life of persons, for example, by issuing (secondary) legal regulations, making decisions on rights and obligations, taking de facto actions – orders or direct interventions, issuing measures of a general nature, or entering into public contracts. These indicated forms, or their definition, are key not only in terms of activity and setting a procedural framework for the realization thereof, but also in the case of inactivity. The individual means of protection against inactivity offered legal order can be applied according to what the specific case of inactivity is, or in what procedural form the inactivity occurred. Understandably, this also applies to cases of court

3 The case law has, in regard to inactivity and predictability, expressly stated that legitimate expectations are established not only by the activity of public administration, but also by its inactivity. According to the extended branch of the Supreme Administrative Court (compare the resolution dated 21 July 2009, file no. 6 Ads 88/2006-132, no. 1915/2009 Coll. of the Supreme Administrative Court) “*administrative practice establishing a legitimate expectation is constant, cohesive and long-term activity (or potentially also inactivity) on the part of bodies of public administration that repeatedly confirms a certain interpretation and application of legal regulations. The administrative authority is bound by such practice. It can be changed if the change is made going forward, affected entities have the option of acquainting themselves with it, and it is duly justified by serious circumstances.*”

4 In terms of the legal aspect, these principles are expressly grounded in § 2 (4) of Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended (hereinafter the “Code of Administrative Procedure”).

5 More comprehensively in regard to (not only) this issue from the Czech environment, compare Skulová, Potěšil, et al, 2017.

6 In regard to this issue, comprehensively in the Polish doctrine, see Błaś, Boć, Stahl, Ziemiński, 2013.

protection against inactivity, which is not of one universal protective nature designed for all the forms of public administration activity.

At the start of the 20<sup>th</sup> century, J. Pražák defined (public) administration as “*activity sustained with the lasting purpose of managing whichever matters*” (Pražák, 1905, p. 1). It must be noted that this definition from the year 1905 is, even currently, still being presented and remains unsurpassed. In 1907, J. Hoetzel spoke of police activity and stated that public administration consists in “*positive care for the welfare and common good of the population (Wohlfahrtspolizei)*” (Hoetzel, 1907, p. 4). It is evident from that which is indicated that public administration was and continues to be based upon intentional and continual activity, whereby such activity is to have a positive quality.

That historical era provides us with the perhaps relatively interesting finding that the theory of that time basically did not concern itself with the issue of the inactivity of public administration. The legal regulations of that time did not contain as many instruments of protection against inactivity as there are today, either. However, undoubtedly, public administration did see inactivity a hundred or more years ago. Nevertheless, is it not precisely the multitude of various means against inactivity that we know today that is paradoxically one of the reasons for which inactivity does nevertheless occur? Does the knowledge of the existence of the multitude of correctional means not lead to a situation where inactivity can be looked at more benevolently, because when it does occur, it can be remedied just as any other shortcoming? And, ultimately, in the case of an absence of means of protection against inactivity in this historical era, the situation of inactivity was more burdensome, and for that reason it was also more exceptional, because the inactive administrative authority could not rely on such means.<sup>7</sup>

During the period of socialist state administration after World War Two, the attention of theory and legal regulations was not focused on inactivity either. The possible inactivity of state administration could have, at that time, been intentionally applied as an instrument against persons who were inconvenient to the regime of the time. It thus follows that the means of protection against inactivity on the public administration level were basically absent.<sup>8</sup>

In terms of the focus of this article, it must be noted that even judicial protection against inactivity on the part of public administration was excluded for a long time. The original Austrian<sup>9</sup> administrative justice and then the adopted

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7 However, it is necessary to mention the difference in the conditions and requirements in regard to the exercise of public administration in modern society, where inactivity need not, by far, be rooted only in a passive approach on the part of the administrative bodies, but also in the intricacy of the conditions, including the relevant legal regulations, and the complexity of the expected result of activity, and the demanding nature of the process that is to lead to it.

8 And this was until 1968, when the legal regulation of protection against inactivity on the part of public administration was set out (but in only a very general and brief manner) in § 50 of the then-current Code of Administrative Procedure No. 71/1967 Coll.

9 See (Austrian) Act No. 36/1876 Coll., on the Establishment of the Administrative Court.

Czechoslovak<sup>10</sup> administrative justice did allow for judicial protection, but exclusively against a (already issued) decision.<sup>11</sup>

This negative situation basically lasted until 31 December 2002, because the Code of Administrative Justice came into effect on 1 January 2003. Nevertheless, in the 1990s, this explicit lack of legal regulation of judicial protection against inactivity to a certain extent was compensated for by the Constitutional Court, which subordinated it under the category of an “other encroachment” upon the rights of an individual, which we will address further in the text below.

### **3 ... and inactivity of public administration**

As much as inactivity on the part of public administration is not an isolated phenomenon in today's Czech Republic, it is astonishing that it is basically on the periphery of the interests of theory. As a monograph, the issue of inactivity was addressed by K. Frumarová in 2012,<sup>12</sup> while a relatively representative anthology from a conference focusing on inactivity on the part of public administration comes from the same time period.<sup>13</sup> If we disregard textbooks,<sup>14</sup> the attention of theory is not focused on the issue of inactivity as such or attempts at preventing it or a comprehensive approach in dealing with it. Theory tends to rather focus on the separate individual means or instruments of protection against inactivity, specifically those that the law allows to be utilized in cases where inactivity has already occurred, and thus an instrumental approach rather tends to be applied. These are *ex post* means, although we can also find several means of a preventive nature, such as the setting of (general or entirely specific) deadlines for the issuance of a decision,<sup>15</sup> the

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10 See (Czechoslovak) Act No. 3/1918 Coll., on the Supreme Administrative Court and on the Handling of Competency Conflicts, which was amended by Act No. 164/1937 Coll., on the Supreme Administrative Court. In the 1950s, the concept of administrative justice was (in line with the Soviet model of the time) abandoned and partially renewed after 1991, whereby the true renewal of administrative justice occurred only from 2003 on.

11 See the decision of the Supreme Administrative Court dated 14 March 1936, file no. 11600/36, according to which an administrative court cannot provide parties protection against inactivity on the part of administrative authorities, or, congruently, the decision dated 22 August 1938, file no. 1764/35.

12 See Frumarová, 2012.

13 See Kadečka et al., 2012.

14 See Skulová, 2017.

15 See § 71 of the Code of Administrative Procedure and the general requirement of the speedy handling of matters according to Art. 6 (1) and (2) of the Code of Administrative Procedure.

setting of a deadline for the termination of liability for a minor offences,<sup>16</sup> or the fiction<sup>17</sup> of (a positive or negative) decision.<sup>18</sup>

Despite the fact that inactivity is perceived as negative, “*it can, in cases specified by the law, have the same legal consequences as activity on the part of public administration would have*” (Frumarová, 2012, p. 34). Inactivity can present with not only a negative aspect, but also a constitutive aspect. In view of that, for example, the Polish administrativist J. Starościak posed the question of whether inactivity may perhaps be a peculiar form of activity on the part of public administration. Inactivity on the part of public administration is a relatively complicated phenomenon and cannot be perceived as only negative without further examination. In many cases, inactivity can have positive effects for the addressees of public administration, both in terms of a lack of punishment of the perpetrator of a minor offence, as well as the acquisition of a certain right or at least the acquisition of the belief that public administration will tolerate or put up with a certain situation.

Inactivity can be generally divided up, according to its expression, into delays, which is a less serious form of inactivity<sup>19</sup> and absolute inactivity.

The first of these is when there are delays in proceedings that are currently under way (already commenced) and have not yet been concluded. An administrative authority is dilatory within the proceedings. It does act, but with long intervals in time. The case law<sup>20</sup> shows that unreasonable and impractical acts by an administrative authority, for example, with the goal of intentionally drawing out the proceedings, can be characterized as inactivity. Redundant acts that do not reasonably and practically lead to the achievement of the purpose, primarily to the ascertainment of the facts of the case significant for the matter, can also be assessed as inactivity.

A specific category is comprised of cases where an administrative authority is obligated to conduct a certain proceeding, but already delays its commence-

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16 See § 30 of Act No. 250/2016 Coll., on Liability for and Proceedings on Offenses.

17 With the fiction of issuing a decision in the situation when the administrative body does not issue a decision within the statutory time limit are connected certain risks that cause the general introduction of these fictions to legal order seems not to be an ideal solution. For example, in the case of a fictitious negative decision, the whole problem can be transferred to a superior administrative body which, due to the inactivity of a subordinate body, may be overwhelmed by a remedy against a negative decision, and the problem won't be really solved. On the other hand, a positive fiction is connected with the problem of sufficient protection of the public interest. There may be situations where an administrative body fails to issue a decision in a situation where the decision should be negative. This could lead to the approval of, for example, controversial building projects, only thanks to the overhead of the administrative body.

18 See § 9 (3) of Act No. 123/1998 Coll., on the Right to Information Regarding the Environment, as amended.

19 Nevertheless, even according to Art. 38 (2) of the Charter of Fundamental Rights and Freedoms of Czech republic, everyone has the right for his/her matter to be handled without undue delays.

20 See the judgment of the Supreme Administrative Court dated 20 December 2009, file no. 7 Ans 2/2009-38.

ment, whereby the proceeding cannot be commenced in any way other than by the administrative authority (i.e. proceedings to be commenced *ex officio*).

A special case is delays caused intentionally by affected persons who, for various reasons (typically to avoid administrative penalties), are not interested in the matter being dealt with by public administration and make efforts by various means (obstructions) to cause delays typically in *ex officio* proceedings or even to paralyze it.<sup>21</sup>

A clearly negative feature of inactivity on the part of public administration is illegal inactivity, i.e. cases where there is no (positive or negative) consequence linked with inactivity and inactivity delays a certain resolution, or does not bring one about.. In a small number of cases, a delayed decision on the part of public administration is often perceived in the same way as a negative decision, or a decision with a result that is unfavorable for its addressee.

Undoubtedly, illegal inactivity is an example of so-called maladministration and a circumstance that can play a negative role in the perception and evaluation of public administration.<sup>22</sup> The requirement of the timely handling of the matter, or the handling of the matter within a reasonable period of time, is a part of the right to fair procedure in the broadest possible sense within its constitutional or European context.

Public administration operates within time and the time factor is reflected in it very strongly. Often, even a justifiable and necessary procedure by the administrative authority (within the scope of procuring underlying documents, the assessment thereof and the showing of evidence), which requires a certain period of time, is perceived negatively by affected parties.

In a number of areas, public administration is not and cannot be a machine for the speedy resolution of individual cases and issuance of decisions. Public administration often deals with cases that are extremely complicated;<sup>23</sup> cases in which there is a conflict between various interests, or cases that require a certain period of time due to their nature. Often, it is necessary to patiently consider the individual interests and to protect and promote the public interest. Therefore, we believe that even the application of elements of com-

21 The Supreme Administrative Court in the judgment dated 10 December 2012, file no. 2 Ans 14/2012-41, No. 2875/2013 Coll. of the Supreme Administrative Court, stated that "*inactivity is an objectively existing state in which the relevant procedural acts have not been taken within the deadlines prescribed by law. However, not all inactivity is attributable to an administrative authority. The provisions of § 71 (5) of the Code of Administrative Procedure ... represent the material aspect of assessing such a state; if the origin of ascertained inactivity is in the manner in which it acts as a party in the proceedings, this is not inactivity on the part of an administrative authority and one cannot demand protection against such. The assessment of whether such a situation exists also falls within the powers of the administrative court within the scope of assessing the legitimacy of an action ...*".

22 Good administration is also, among other things, according to the Recommendation of the Committee of Ministers of the Council of Europe (2007) 7 on good governance/administration, that which (according to Art. 7 of the Code of Good Administration) fulfills obligations within a reasonable period of time. On the European Union level, we can mention Art. 41 (1) of the Charter of Fundamental Rights of the EU. See Widdershoven, R., Remac, M. (2012) p. 387.

23 A sufficient reason for reasonable delay may be the complicated scope of the procedure, the difficulty of the gathering evidence and the legal difficulty of the case (Posser, H., Wolff, H. A. (2014)).

puterization and so-called e-government will never completely eliminate as certain delay between a request and its handling. However, it can effectively contribute to such delay being truly minimal and purposeful.

However, the key issue is the fact that regardless of whether inactivity consists in objective or subjective reasons on the part of public administration, its negative consequences cannot be passed on to affected persons.<sup>24</sup> For that matter, that is also reflected in the regulation of the basis of liability for harm caused through inactivity. Such liability is of an absolute nature and cannot be relieved of in any way.<sup>25</sup>

#### 4 Role of judicial protection against inactivity

It is relatively paradoxical that the majority of means against inactivity - the administrative authority is entitled to take ex officio several types of actions against inactivity of subordinate administrative body<sup>26</sup> - rest once again in the hands of public administration, compared to those offered by judicial control (see details below). That can raise a question regarding the effectiveness of such a legal construction, although its origins were apparently based upon an attempt at finding a speedy, accessible and thus effective solution.

In this article, we address the means of judicial protection against inactivity on the part of public administration, i.e. those instruments that are available to the courts, rather than public administration.<sup>27</sup> This in itself brings about the fundamental question regarding the effectiveness of these means, as the realization thereof outside of the scope of public administration gives rise to an expectation of a speedy, unbiased and objective approach.

<sup>24</sup> According to the Constitutional Court, delays that have occurred cannot be excused or justified by anything, and thus, the rationalization that the cause of delays is overwork cannot be accepted under any circumstances. It must be emphasized that citizens cannot, under any circumstances, be made to bear the technical and organizational problems of the state authorities, especially if it results in a breach of their fundamental constitutional rights (see the ruling dated 12 January 1999, file no. I. ÚS 209/98).

<sup>25</sup> See § 2 of Act No. 82/1998 Coll., on Liability for Damage Caused in the Exercise of Public Authority by Way of a Decision or Improper Official Procedure, as amended. As Czech Constitutional Court stated in relation to the inactivity of the courts: "*The delays in the case can not be excused or justified, and in no case can be accepted a court's reasoning that the cause of the delays is the congestion of the court senate. It should be emphasized that technical and organizational problems of the state authorities can not be transferred on citizens in any way*" (ruling of the Constitutional Court dated 12. January 1999, file no. I. ÚS 209/98). This conclusion of the Czech Constitutional Court about objective reasons for delays is also valid for inaction of public administration.

<sup>26</sup> See § 80 of Act No. 500/2004 Coll., the Code of Administrative Procedure, as amended: "*A superior administrative authority may: a) order the inactive administrative authority to take appropriate action within a predefined timeline to remedy the situation or issue a decision; b) take the case over by resolution and decide in lieu of the inactive administrative authority; c) through a resolution, appoint another administrative authority within its administrative district to conduct the procedure; or d) through a resolution, adequately exceed the statutory timeline for the issuance of a decision, if it may be reasonably assumed that the administrative authority will issue the decision on the case within the exceeded timeline and if such course of action is more convenient for the parties.*"

<sup>27</sup> According to the Recommendation of the Committee of Ministers of the Council of Europe (2004) 20 on judicial review of administrative acts, the system of judicial review of administrative acts, or the category of administrative acts being thus reviewed, should also include cases where an administrative act was refused or neglected to be issued (see letter A item 1 and letter B item 1).



We put some general remarks or even expectations that are connected with the judicial protection. If we seek judicial protection it means that inactivity still continues. What does it mean for the courts and their solution? Judicial protection represents subsequent and ultima ratio measure. Therefore shall be effective and helpful. Is that such the practice? Inactivity is examined not by the administrative bodies, but by the (independent) court. Therefore shall be helpful. What is the reality? And the last remark is about (in)comprehensibility of the legal regulation.

The fact that protection against inactivity on the part of public administration is also entrusted to the (administrative) courts in the Czech Republic is one of the prime examples of a system of mutual checks between the individual branches of public authority. In the given regard, inactivity on the part of public administration and the executive branch is subjected to checks by the (independent) judicial branch. That brings with it both a possible tension between the executive branch and the judicial branch, as well as the risk of excessive judicial activism, or, on the contrary, an excessively cautious or reserved approach by the courts.

Although judicial checks in regard to public administration in the Czech Republic tend to be identified as being of an activist nature,<sup>28</sup> there is a tendency to forget that a judicial proceeding is always commenced upon the petition of an affected party seeking for the court to provide it with protection of its individual rights that have been encroached upon by public administration.<sup>29</sup> In the case of inactivity and judicial protection against it, the situation is simpler to a great extent, as the courts “merely” assess whether the contested situation bears the signs of inactivity or not. They do not deal with the matter itself directly. The courts do not determine how the matter is to be decided, but rather, “merely” that a decision is to be made in the matter.

We have already indicated that judicial protection against inactivity in the Czech Republic is being carried out by the administrative judiciary, specifically from 1 January 2003, when the Code of Administrative Justice came into effect.<sup>30</sup>

Nevertheless, thanks to the constitutional rooting of the requirement for the handling of matters without undue delays as set out in Art. 38 (1) of the Charter of Fundamental Rights and Freedoms, during the time prior to the Code of Administrative Justice coming into effect and the establishment of a full administrative judiciary, the role of judicial protection was carried out (as the first and simultaneously last judicial authority) by the Constitutional Court.

28 Cf. Mates, P. (2016). Development of law in the jurisprudence of the Supreme Administrative Court. *Právní rozhledy*, 3, p. 86.: „*The role of the courts, as at least „co-creators” of law in the case of its development, seems to be a reality at present, regardless of the skeptical or even rejecting reaction of part of the theory...*”.

29 See Art. 36 (1) of the Charter of Fundamental Rights and Freedoms, according to which “everyone can assert their rights, through the prescribed procedure, before an independent and impartial court and, in prescribed cases, before a different authority.”

30 See Act No. 150/2002 Coll., the Code of Administrative Justice, as amended (hereinafter the “Code of Administrative Justice”). Judicial protection against inactivity is regulated therein (relatively briefly) by way of an action for protection against inactivity in § 79 to 81.

For that matter, that negative fact, and the closely related overloading of the Constitutional Court, also led to a relatively strong step, consisting in the Constitutional Court repealing in 2001 (with deferred effect) as of 31 December 2002 the then-existing legal regulations on administrative justice, including in view of the fact that it did not allow for an adequate form of judicial protection against inactivity within administrative justice.<sup>31</sup> The Code of Administrative Justice therefore does regulate the form of judicial protection against inactivity on the part of public administration.

## 5 Protection against inactivity on the part of public administration before the administrative courts

Proceedings on so-called inactivity actions are a special type of proceeding, which is carried out within administrative justice. A so-called inactivity action (along with a so-called action for encroachment/intervention)<sup>32</sup> plays the role of a means of protection of rights in cases where the protection of a right cannot be sought (directly) in proceedings on an action against the decision of the administrative authority, which is precisely the case of inactivity. Therefore, by definition, it does not apply to the review of an act that has already been issued<sup>33</sup> or of an encroachment/intervention that has already occurred.

Administrative justice and the protection provided therein are conceived upon the principle of subsidiarity.<sup>34</sup> Administrative justice has its place only in cases when the means offered by the legal regulations governing the procedural steps before administrative authorities can no longer be utilized. A pre-condition for the admissibility of an action for protection against inactivity on the part of an administrative authority is thus the previous and ineffective (unsuccessful) exhaustion of means for protection against inactivity on the part of an administrative authority.<sup>35</sup>

An action can only be filed after the relevant (predominantly superior) administrative authority assesses the utilized means of protection against inactivity and makes a decision on it. Protection through the filing of a so-called inactivity action has its limits given directly within the legal regulations. It does not apply in regard to all possible inactivity on the part of public administration.

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31 In regard to this issue, see the ruling of the Constitutional Court dated 27 June 2001, file no. Pl. ÚS 16/99, according to which "*the current regulation of administrative justice shows serious deficiencies in terms of constitutional law. Primarily, some activities of public administration, as well as its potential inactivity, are not under the control of the judicial branch at all.*"

32 The so-called action for encroachment is regulated in § 82 to 87 of the Code of Administrative Justice.

33 For the purposes of reviewing the lawfulness of an (final) administrative decision the applicant can file an action against the decision (see § 65 (1) of the Code of Administrative Justice). This action has a significant role in the judicial review and serves to review the legal and factual findings of the administrative authorities.

34 See § 5 of the Code of Administrative Justice.

35 However, it is not possible to assert a means of protection against inactivity within proceedings before administrative authorities and then immediately submit an action with the courts without waiting to see how the administrative authorities deal with it. In such a case, the requirement of the previous ineffective exhaustion of means of protection would not have been fulfilled and the condition for proceedings on such an action would not be fulfilled either.

On the contrary, it is limited to inactivity in the issuance of (1.) decisions on the substance of the matter<sup>36</sup> or (2.) certifications.<sup>37</sup>

Likewise, an action cannot be filed in those cases where the administrative authority has in fact not issued the requested decision, but as a result of the fulfillment of the conditions set out by a special law, a fiction has been created that a decision of a certain content (positive or negative) has been issued. Likewise, grounds for the action are not given in cases where inactivity is linked with another legal consequence than the fiction of a decision.

The defendant is the administrative authority that is being inactive, according to the action, despite having an obligation to issue a decision or certification.<sup>38</sup> It is not the administrative authority that assessed the means of protection against inactivity (predominantly the superior/appellate administrative authority), but rather, specifically the inactive administrative authority itself.

The deadline for the filing of the action is not set in regard to the entire duration of inactivity on the part of the administrative body, but rather, it is limited to a period of 1 year. If the action is filed after the elapse of such deadline, the court rejects the belatedly filed action. By definition, the deadline for the filing of the action is a procedural deadline and failing to comply with it cannot be excused.<sup>39</sup>

36 The so-called inactivity action can only be asserted in a situation of inactivity in regard to the issuance of a decision that is to establish, change, cancel or bindingly determine a right or obligation and which is simultaneously capable of depriving a party to the proceedings of his/her rights. If an administrative authority is in delay in issuing an act that does not satisfy such requirements, it is not within the powers of the courts operating within administrative justice to provide judicial protection against such "inactivity". Therefore, one cannot successfully demand, in this type of action proceedings, the issuance of a procedural decision, such as a resolution by which the issue of participation in the proceedings is dealt with, or a decision on an objection of bias. Neither is it possible to demand the declaration of an obligation for an administrative authority to generally continue in proceedings. In this type of proceeding, the courts cannot deal with possible inactivity in delivering decisions that have already been issued or delays in forwarding (not forwarding) a file, either, nor can anyone demand the commencement of proceedings ex officio (for example, in regard to a non-entitlement extraordinary remedial measure).

37 This must be real certification. The difference between a certification and a (declaratory) decision consists in the fact that in the case of a certification, it is not dealing with a disputed issue, whereas in the case of a declaratory decision it is. A further difference is seen in the fact of whether it is an act falling within the factual level (an act officially confirming certain facts) or on a normative/legal level (an act bindingly determining that a certain person does or does not have specific rights or obligations). The possibility of judicial protection pertains exclusively to inactivity on the part of an administrative authority in the issuance of a certification, as an identified type of a so-called other act issued within the regime of Part Four of the Code of Administrative Procedure. We should also note that even in the case of inactivity in the issuance of a certification, the requirement of the previous ineffectual exhaustion of the means of protection against inactivity applies.

38 § 79 of Code of Administrative Justice.

39 When determining the commencement of a deadline for the submission of an action, there are two options to base this upon. According to the first of these, an action can be filed no later than within one year after the date on which, in the matter in which the plaintiff is seeking protection, the deadline prescribed by a special law for the issuance of the decision or certification elapsed without success. The second case is a situation in which a special law does not prescribe a deadline for the issuance of a decision on the substance of the matter or of a certification. In such a case, the deadline for the filing of an action commences on the date following after the last act was taken by the plaintiff in regard to the administrative authority or by the administrative authority against the plaintiff. The key issue is not when such last act was taken, but rather, when it entered into the disposition/knowledge of the plaintiff (e.g. when it was notified/delivered to the plaintiff). Such "last act" is, at the same

The courts hear and make decisions on actions against inactivity on the part of an administrative authority as a priority.<sup>40</sup> Possible delays and lags within the scope of court proceedings on actions for protection against inactivity on the part of an administrative authority have significant consequences and understandably decrease the effectiveness of such a means of judicial protection. The case law also states that the purpose of judicial protection is in fact achieved when the inactive administrative authority issues a decision or certification.<sup>41</sup>

The court, when making a decision on a submitted so-called inactivity action, makes the decision on the basis of the facts of the situation ascertained as of the date of its decision. The court first examines, as of the moment of its decision-making, whether the inactivity of the administrative authority exists (i.e. whether it is continuing). The court is obligated to ascertain whether the administrative authority has perhaps issued a decision on the substance of the matter or a certification after the filing of the action. That means that the inactivity of the administrative authority must exist both as of the moment when the action is filed, and also as of the date of the court's decision.

If a so-called inactivity action is found to be justified, the court imposes upon the defendant administrative authority, with its judgment, the obligation to issue a decision or certification within a reasonable period of time. When setting the deadline, the court should duly take into consideration the subject matter of the proceeding, the complexity of the matter, the number and nature of the parties to the proceedings, as well as the phase in which the proceeding is. The judgment of the court does not preconceive the result of the proceeding or the content of the decision or certification in any way. The court therefore imposes only the obligation to issue a decision or certification within the prescribed deadline.<sup>42</sup>

If the court ascertains that the administrative authority had indeed been inactive at the time when the action was filed, but, nevertheless, that it is no longer

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time, to be of a certain quality, and, as follows from the conclusions in the case law (see the judgment of the Supreme Administrative Court dated 12 June 2006, file no. 8 Ans 3/2005-107, No. 931/2006 Coll. of the Supreme Administrative Court), "it is necessary to understand it as a procedural act by a party to the proceedings or by the administrative authority within the administrative proceedings. Such an act is not a mere reminder to take action or a statement by the administrative authority stating that it believes that there are no grounds for it to make further decisions in the matter." For example, it includes a petition for the commencement of proceedings, a statement in regard to documents underlying a decision prior to its issuance, an appeal against a decision, a summons for the relevant party to the proceedings to take part in a hearing, the delivery of a decision, a notification of appeal submitted by other parties to the proceedings. On the other hand, the last act within the meaning of this provision cannot be considered to include a reminder or statement by the administrative authority that it does not intend to proceed in the matter any further.

40 See § 56 (3) of the Code of Administrative Justice.

41 See the judgment of the Supreme Administrative Court dated 16 September 2009, file no. 1 Ans 8/2009-62.

42 A somewhat specific situation is one in connection with inactivity on the part of an administrative authority in the issuance of a certification. The question arises of whether the court should merely impose upon the administrative authority the obligation to assess whether it will issue the certification or not, or whether the decision of the court will be more specific in such a case. For more, see the judgment of the Supreme Administrative Court dated 31 October 2010, file no. 2 Ans 1/2009-71, No. 2114/2010 Coll. of the Supreme Administrative Court.

inactive as of the date of the court's decision and such situation has passed, this constitutes grounds for the action to be rejected due to being unfounded. That also applies in cases when the plaintiff had not (yet) been informed of the subsequent issuance of a decision or certification, or had already been notified of the decision or certification and had despite this not withdrawn the action. It is necessary to note that the court is not entitled, within the scope of such proceedings, to declare inactivity that has already passed.<sup>43</sup>

We should add that if the inactive administrative authority does not agree with the judgment of the court by which it has been imposed with the obligation to issue a decision or certification, it can utilize a cassation complaint to the Supreme Administrative Court. The case law has clearly stated that the filing of a cassation complaint does not automatically mean the suspension of the effects of the contested court decision, and it is often in fact otherwise, including due to purely technical reasons, when the file documents are located elsewhere than with the administrative authority.<sup>44</sup>

These preliminary and fundamental limiting circumstances tend to be against effectiveness of judicial protection against inactivity. Nevertheless, this type of proceeding does not constitute a complete exhaustion of the possibilities of judicial protection against inactivity.

According to the conclusions in the case law,<sup>45</sup> which we fully agree with, it is necessary to consider different or "residual" inactivity on the part of an administrative authority than that which is stated above as a so-called encroachment/intervention.<sup>46</sup> This action is connected with (not only)<sup>47</sup> unlawful inactivity consisting in not performing some act other than a decision or a certification. A so-called encroachment/intervention action is subsidiary in nature and covers the residual activity of the public administration, which is not covered by the action against the decision and the inactivity action. The action

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43 The inactivity declaration on the basis of inactivity action is not possible, due to fact that the court decides on the basis of circumstances existing at the time of its decision. The court can declare such inactivity only on the basis of a so-called encroachment/intervention action, whereby it determines with its judgment that the encroachment/intervention consisting in inactivity was unlawful. If the action was dismissed because the administrative authority has taken a decision in the meantime, the applicant must for inactivity declaration bring an encroachment/intervention action. In that regard, it would be appropriate to consider amending the law that the courts may, in the event of an action against inaction, declare that the administrative authorities were inactive. Such a judgment could then serve to fairly rapid compensation to the parties, whom was caused harm by inaction.

44 See the resolution of the expanded tribunal of the Supreme Administrative Court dated 24 April 2007, file no. 2 Ans 3/2006-49, No. 1255/2007 Coll. of the Supreme Administrative Court.

45 See the resolution of the extended branch of the Supreme Administrative Court dated 16 November 2010, file no. 7 Aps 3/2008-98, No. 2206/2011 Coll. of the Supreme Administrative Court), according to which „an action for encroachment protects against any other acts or steps on the part of public administration oriented against an individual that are capable of affecting the sphere of his/her rights and obligations and which are not mere procedural acts technically securing the course of the proceedings”.

46 According to § 82 of the Code of Administrative Justice.

47 The encroachment/intervention action is of generally subsidiary nature and covers all activities of the public administration which are capable of interfering with the rights of the addressees of the public administration and it is not appropriate to file an action against the decision or inactivity action. The scope of encroachment/intervention action is therefore very broad and its use in the field of protection against inaction is just one of many possible uses. In this paper we are concentrating only on inactivity issues.

must be filled within two months of the date on which the plaintiff learned about the unlawful interference and at the latest an action may be brought within two years of the date on which the case occurred.<sup>48</sup>

An example of the said other inactivity is a failure to make an entry in the Real Estate Register by the Cadastral Authority. An action against inactivity cannot be filed against the failure to make the said entry, as this is not an obligation to issue a decision or certification. Protection against such inactivity is thus provided precisely by way of an encroachment/intervention action.<sup>49</sup> An encroachment/intervention action can be for purposes of this paper characterized in a simplified manner as a defence against other forms of activity on the part of public administration excepting issuing a decision or a certification.

On the contrary, a so-called encroachment/intervention action or other action before an administrative court cannot be used as a defense against inactivity consisting in the non-issuance of a normative administrative act, first and foremost due to the fact that judicial checks of the regulation-making of bodies of public administration are not within the powers of the administrative courts, but rather, only within the powers of the Constitutional Court. Nevertheless, protection against legislative inactivity cannot be sought even before the Constitutional Court.<sup>50</sup> An exceptional case in which the Constitutional Court declared unconstitutional inactivity on the part of the legislature was the long-term inactivity of the Parliament consisting in a failure to pass a special legal regulation defining cases in which a lessor is entitled to unilaterally increase rent (the issue of rent regulation),<sup>51</sup> or the long-term inactivity of the Parliament consisting in a failure to pass a special legal regulation that would settle historical assets of churches and religious societies that had been seized by the state (the issue of church restitutions).<sup>52</sup>

## 6 Effectiveness of so-called inactivity action and its positive and negative aspects

The legal regulations on so-called inactivity actions are relatively brief and do not show a greater degree of formalization than that which is absolutely nec-

48 According to § 84 (1) of the Code of Administrative Justice.

49 See the resolution of the extended branch of the Supreme Administrative Court dated 16 November 2010, file no. 7 Aps 3/2008-98.

50 According to the resolution of the Constitutional Court dated 25 July 1994, file no. I. ÚS 92/94, "an encroachment by a body of administrative authority by which a citizen's fundamental right is violated cannot be considered to include legislative activity, or the issuance of a generally binding regulation by a central body of public administration within the limits of its powers and authority". Further, according to the Constitutional Court "the failure to pass a law having a certain content cannot be, other than in solely exceptional cases, considered a so-called other encroachment by bodies of public authority into constitutionally guaranteed fundamental rights and freedoms. An "other encroachment" by bodies of public authority can be considered to include inactivity on the part of bodies of public authority in cases where the language of the law provides their obligation to do that which the law imposes upon them. However, in the case under review, the constitutional order does not provide the obligation of legislative bodies or the bodies of the executive branch to pass a certain law" (see the resolution of the Constitutional Court dated 7 September 2004, file no. Pl. ÚS 10/04).

51 Ruling of the Constitutional Court dated 28 February 2006, file no. Pl. ÚS 20/05.

52 Ruling of the Constitutional Court dated 31 August 2011, file no. I. ÚS 562/09.

essary in order for the court to be able to assess the action and make a decision on it. A certain preliminary limit can be the statutory obligation to pay a court fee<sup>53</sup> for a so-called inactivity action. Nevertheless, the legal regulations enable a partial or complete exemption from such fee obligation and also enable the plaintiff to request a representative to be appointed at the expense of the state.<sup>54</sup> The plaintiff does not have to be represented by an attorney in the proceedings and can draw the action up and file it him/herself, whereby the court shall be of assistance to the plaintiff in eliminating any deficiencies in the action.

However, it is up to the plaintiff to assess by him/herself as to whether the contested inactivity on the part of the administrative authority in his/her matter can be classified as falling under a so-called inactivity or a so-called encroachment/intervention action, which we do not find very comprehensible in regard to non-lawyers who are seeking the provision of protection by the court. Another significant circumstance is the fact that the plaintiff can turn to the court only after he/she has previously unsuccessfully exhausted all appropriate remedial actions before an administrative authority, and also that he/she has to file the action within the prescribed deadline.

Regardless of the indicated positive and negative aspects, the effectiveness of a so-called inactivity action<sup>55</sup> as a means of judicial protection against inactivity on the part of an administrative authority appears to be low.

The basic fact is that prior to the utilization of a so-called inactivity action, the means of protection against inactivity within the scope of the public administration system must be exhausted. That is, in our opinion, certainly a proper condition, but only if public administration truly wishes to decide the matter as soon as possible. In such a situation, means within the environment thereof may already be effective, and an action is thus actually superfluous. A so-called inactivity action can, in the given regard, fulfill the function of a coercive force that fulfills its function if an inactive administrative authority ceases to be inactive.

Nevertheless, if public administration is inactive intentionally, the utilization of these means will delay the whole matter even more. True rectification can only be brought about by the administrative court.<sup>56</sup> As the court can order the administrative authority to make a decision within a certain deadline, an inactivity action appears at first glance to be a very effective means of forcing inactive administrative authorities to issue a decision. Nevertheless, the option of an inactive administrative authority to file a cassation complaint with the Supreme Administrative Court can ultimately result in the whole matter

53 In the amount of CZK 2,000 according to Act No. 549/1991 Coll., on Court Fees, as amended.

54 See § 35 of the Code of Administrative Justice.

55 Primarily in terms of the speed of the whole "process", from the utilization of remedial measures within the system of administrative authorities, up to the issuance of a judgment determining the deadline for the issuance of a decision, or for the issuance of the administrative decision itself.

56 Here, we disregard the possibility of the administrative authority ignoring the obligation imposed by the court, although even such an approach can be seen within the Czech Republic.

being protracted even more, although a cassation complaint is an extraordinary remedial measure and does not have a suspensive effect under law.

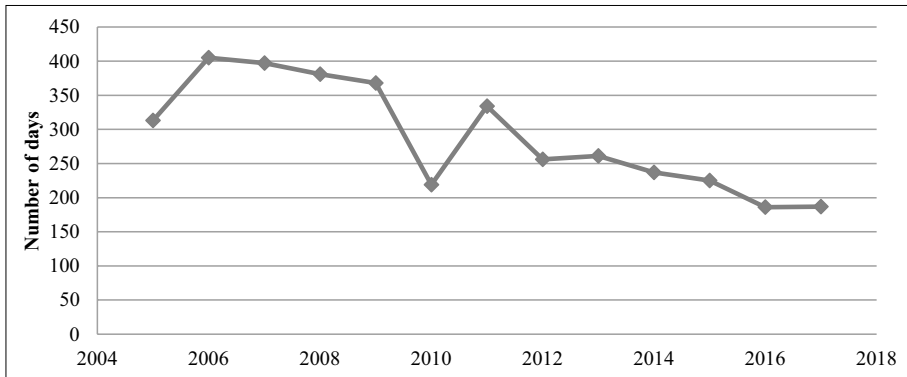
By using statistical analysis we researched into complex data collected by the Ministry of Justice on court’s decision-making activities, which include information on the average duration of court proceedings, the number of individual types of actions and the outcome of court proceedings according to the type of sentence of the resulting decision. These data were the basis of our considerations about suitability, respectively effectiveness, of the current judicial protection against the inactivity of public administration. Unfortunately, a conclusion regarding the possible effectiveness of a so-called inactivity action collides with data obtained in regard to the average duration of proceedings before the courts, and these then cast this instrument in a not very flattering light overall.

**Table 1: Duration of proceedings in days on a so-called inactivity action for individual years:**

Year	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Days	245	313	405	397	381	368	219	334	256	261	237	225	186	187

Source: <https://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html>

**Graph 1: Average duration of proceedings before regional courts in case of inactivity actions**



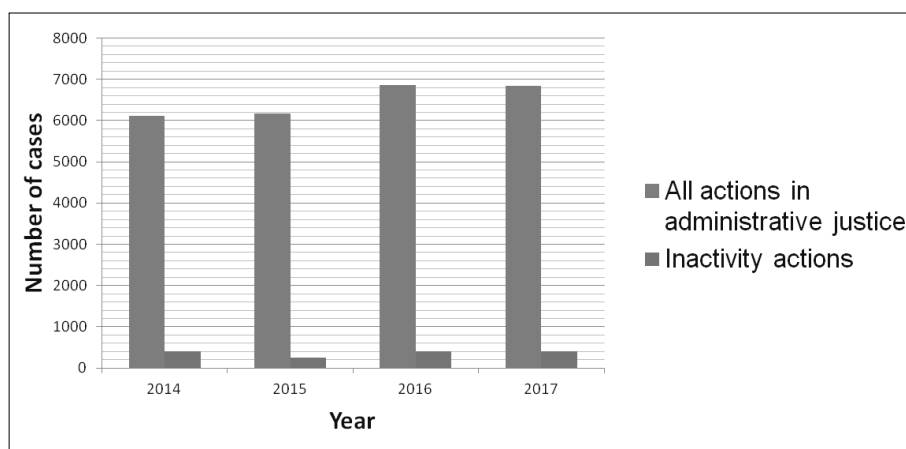
Source: <https://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html>

This proceeding, although its duration has progressively decreased by up to one half as compared to 2006, its average duration in 2017 was 188 days, even despite the fact that these are priority matters. If we also add to this duration the time that it took to assert the means against inactivity within the public administration system, we reach the conclusion that the court will issue a judgment, in the case of a justified action, after, on average, approximately 9



months from the moment when the party to the proceedings started to seek protection against inactivity. Furthermore, we must also add to such period of time a further time period, which the administrative court must impose upon the administrative authority in which it must make the actual decision. The whole procedure up to the issuance of a decision can, in total, add up to a duration of over a year. If we add to this also the fact that the administrative authority was inactive prior to the commencement of the whole “procedure”, the entire system, in terms of the addressee, is not very affable. If a cassation complaint was to be filed, that should not change anything in the matter, but practice has shown that the filing of a cassation complaint can be a means of delay.

Graph 2<sup>57</sup>: Actions in administrative justice



Source: <https://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html>

It should be noted that action against inactivity represents on average about 6 %<sup>58</sup> of total amount of cases (solved) in administrative justice.<sup>59</sup> These data confirm that the inactivity action is rather the marginal agenda of the regional courts and their amount is relatively steady. The more surprising is the fact that, despite the fact that the agenda is not too frequent, the average length of such proceedings is relatively long, although it is an agenda to be dealt with preferentially.

A weak point of the whole system of proceedings on the so-called inactivity action is also the fact that courts must request that administrative files be forwarded to them in order for them to make their decisions, and that thus, during the time when they are making a decision, administrative authorities themselves cannot (generally) make a decision, although there is the possible

57 Year(Y)/All actions(A)/Inactivity actions(I): (Y)2014/(A)6105/(I)411; (Y)2015/(A)6171/(I)259; (Y)2016/(A)6862/(I)399; (Y)2017/(A)6836/(I)401.

58 In 2014 it was 6,73 %, in 2015 it was 4,19 %, 2016 it was 5,77 % and in 2017 it was 5,87 %.

59 In 2014 regional courts dealt with 6105 cases of which were 411 inactivity actions, in 2015 6171 cases (of which 259 inactivity actions), in 2016 6862 cases (of which 399 inactivity actions), in 2017 6836 cases (of which 401 inactivity actions).

option for administrative authorities to make copies of the file documents. An appropriate arrangement may be for courts to request the forwarding of files only at a point when the time when they will be able to deal with the given matter is coming near.

In our opinion, the whole system has a fundamental deficiency consisting in the fact that if, in the meantime between the filing of an action until the delivery of the court's judgment, the administrative authority ceases to be inactive and issues a decision, this automatically leads to a rejection, even though, in the given proceeding, the administrative authority may indeed have truly been inactive.

Such an unsuccessful plaintiff must seek the determination of the unlawfulness of the inactivity with the utilization of a so-called encroachment/intervention action (in order to be able, for example, to validly seek compensation of damage caused by the inactivity).

Finding one's way within the entire system of means against inactivity is relatively complicated and difficult for a non-lawyer.<sup>60</sup> One can only imagine whether the relatively low numbers of inactivity actions (Table no. 2) can possibly be due to the fact that public administration is regularly active in a timely manner, or whether potential plaintiffs are primarily dissuaded by the complexity of the system itself or by the duration of the whole procedure.

Going forward, it will be valuable to also examine the reasons for the relatively low success rate of inactivity actions (Table no. 2). Here we have two possible hypotheses, these being either that public administration is sufficiently active, or that the issuance of a decision oftentimes occurs in the meantime between the filing of an action and the issuance of a court decision.

In view of the above, it is difficult to view the so-called inactivity action as being a speedy and effective instrument of remediation of inactivity on the part of administrative authorities, primarily due to the relatively long duration of court proceedings.

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<sup>60</sup> Generally, in this context, it could be argued that the law as such is complicated and that, therefore, the addressee of public administration may use the services of attorneys. In general, if the applicant succeeds in court's proceedings, the administrative body will be ordered to pay the costs of court's proceedings and the applicant will not bear the cost of legal representation himself. However, it is problematic in this context that the whole process of protection against inactivity begins before the administrative body, when it is difficult for the applicant to orientate in the system of means of protection against inactivity and where even in the case of a justifiable application of means against inactivity it is not possible to award the costs to the applicant. The applicant may choose if he will use services of attorney and will bear the associated costs (which may lead him to discourage completely from applying all protection means because he does not want to bear the costs of representation and he is not enough oriented in the matter) or if he will try to orient himself in the system (with less or greater success).

Table 2: Number of matters and result of proceedings before regional courts and number of cassation complaints against decisions of regional courts in cases of inactivity actions in the years 2014 to 2017

Year	Number of Actions	Granted	Rejected	Number of Cassation complaints
2014	411	47	364	86
2015	259	57	202	93
2016	399	119	280	94
2017	401	83	318	122

Source: <https://cslav.justice.cz/InfoData/prehledy-statistickych-listu.html>

## 7 Protection against inactivity by the Constitutional Court

While the previous section dealt with protection against inactivity on the part of public administration through the administrative courts, here we would like to focus on the provision of protection against inactivity by the Constitutional Court, through a so-called constitutional complaint.<sup>61</sup> A constitutional complaint is a means of protection of constitutionally guaranteed rights and freedoms that may be infringed upon in connection with inactivity on the part of public administration. The significant thing is that a constitutional complaint to the Constitutional Court is, similarly to an action with an administrative court, a subsidiary means, and its utilization must, in principle, be preceded by the exhaustion of all procedural means that the law provides for protection against inactivity, i.e. the means of protection against inactivity provided by both public administration, as well as the administrative courts.

In connection with protection against inactivity, there is a possibility of seeking a special exception from the said subsidiarity rule. The Constitutional Court can also decide on a constitutional complaint prior to the exhaustion of the previous means of protection if, in proceedings on a submitted remedial measure, e.g. an appeal against an administrative decision, significant delays are occurring, due to which the affected person is incurring or may incur serious and unavoidable harm. In such an exceptional case, it would be possible to file a constitutional complaint directly. However, this is not a special means for protection against inactivity. Such protection is provided only indirectly through the application of the said exception, as a side-effect. The purpose of such an exception is for bodies of public authority to not be able, through their inactivity, to “block” the powers of the Constitutional Court, on an effective long-term basis (intentionally as well as unintentionally), in situations where an encroachment/intervention, or a violation of constitutionally guaranteed fundamental rights and freedoms of the complainant by way of a decision in legal force is already occurring and as a result of such delays the complainant is already incurring or may incur serious and unavoidable harm.

<sup>61</sup> Art. 87 (1) d) of the Constitution.

The exceptional nature of the utilization of the exception as stated above is also seen in the fact that no constitutional complaint has as of yet been allowed for review on the basis thereof.

As a rule, it should be such that sufficient protection against inactivity is already provided within the relevant procedure before the administrative authorities in the public administration sphere and within the subsequent review by the administrative courts. However, this only applies in full from 1 January 2003, when the Code of Administrative Procedure came into effect. From the 1990s, the Constitutional Court was an essential provider of judicial branch protection against inactivity and basically took the place of the activity that is currently within the powers of the administrative courts. Until the time when the Code of Administrative Justice came into effect, it was possible to defend oneself against inactivity directly by way of a constitutional complaint, which can be filed not only against a decision in legal force, but also against an "other encroachment/intervention" by bodies of public authority upon constitutionally guaranteed fundamental rights and freedoms.<sup>62</sup>

It is precisely the term "other encroachment/intervention" that, according to the case law of the Constitutional Court from such time period *"must therefore be understood to mean that, as a rule, this will predominantly be a one-time, unlawful, and simultaneously unconstitutional attack by such authorities against the fundamental constitutionally guaranteed rights (freedoms), which at the time of the attack constitutes a permanent threat to a rightfully existing situation, whereby such an attack in and of itself is not an expression (result) of the proper decision-making powers of such authorities and as such it defies the usual review or other proceeding"*.<sup>63</sup> Simultaneously, such "other encroachment/intervention" must be continuing in existence at the time of filing of the constitutional complaint. A constitutional complaint cannot be used to defend oneself against an "other encroachment/intervention" that has already ceased to exist<sup>64</sup>, or against an anticipated or future "other encroachment/intervention".<sup>65</sup> Such "other encroachment/intervention" can also consist in an act of omission, i.e. in inactivity on the part of a body of public authority in cases where it is supposed to be active. This shows that a constitutional com-

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62 Until the Code of Administrative Justice took effect, when it was possible to defend oneself against inactivity directly by way of a constitutional complaint under the conditions as set out above, the Constitutional Court made decisions (see the ruling of the Constitutional Court dated 4 July 2001, file no. II. ÚS 225/01) in matters of inactivity on the part of public administration, for example, in the case of inactivity on the part of the Czech Social Security Administration, within the scope of which it reached the conclusion that *"the fact that an administrative authority did not take any steps in the proceeding for a period of over 9 months clearly shows that it did not proceed in such a way so that the matter would be handled without undue delays, which shows a violation of Art. 38 (2) of the Charter"*. Another example was the constitutional complaint against inactivity on the part of a financial authority, within the scope of which the Constitutional Court reached the conclusion that *"if a body of public authority does not, in making decisions, respect its own internal regulations regarding deadlines for the handling of an appeal, such behavior must be assessed as a violation of a citizen's right to the handling of his/her matter within a reasonable period of time (Art. 38 (2) of the Charter)"* (see the ruling of the Constitutional Court dated 28 August 2001, file no. IV. ÚS 146/01).

63 See the ruling of the Constitutional Court dated 30 November 1995, file no. III. ÚS 62/95.

64 See the ruling of the Constitutional Court dated 22 May 1997, file no. III. ÚS 287/96.

65 See the ruling of the Constitutional Court dated 30 March 1999, file no. IV. ÚS 247/98.

plaint seeking the declaration of the existence of delays, or addressed against an “other encroachment/intervention” in the form of inactivity on the part of public administration is thus – in the case of proceedings that have already been completed at the time of its filing – inadmissible.<sup>66</sup>

Besides the above, a constitutional complaint against an “other encroachment/intervention” cannot be successful if the complainant were to not assert therein that an encroachment/intervention by a body of public authority has violated his/her fundamental right or freedom guaranteed by the constitutional order. Inactivity on the part of public administration can encroach/intervene primarily upon the right to the hearing of a matter without undue delays as guaranteed in Art. 38 (2) of the Charter of Fundamental Rights and Freedoms,<sup>67</sup> as well as the right to fair and equitable proceedings according to Art. 36 (1) of the Charter of Fundamental Rights and Freedoms, which also includes within it the right to the continuation of a proceeding until its completion in a manner as prescribed by law.<sup>68</sup>

If the Constitutional Court finds that such a constitutional complaint is justified, it issues a verdict forbidding the relevant body of administrative authority to continue violating the constitutionally guaranteed right (being inactive) and ordering it to act in the given matter without delay. However, it cannot set a deadline for the issuance of a decision or other act, unlike the courts in administrative justice.<sup>69</sup>

After the Code of Administrative Justice came into effect as mentioned, a constitutional complaint against inactivity on the part of public administration can, in principle, be filed only after the administrative courts have decided in the matter, i.e. the regional courts and the Supreme Administrative Court. The significance of a constitutional complaint as a means of protection against inactivity has been somewhat weakened in the said regard. In these cases, a constitutional complaint is filed not against inactivity as an “other encroachment/intervention”, but rather, against a decision of the administrative courts issued within the scope of the protection against inactivity (not) provided by them.

The statistics drawn up for the purposes of this text show that until the year 2017 (i.e. in the course of 14 years), the Constitutional Court issued a total of 54 decisions in matters of constitutional complaints filed against decisions of the administrative courts on actions against inactivity.

In terms of the material structure of matters coming before the Constitutional Court, where constitutional complaints in administrative matters comprise on average approximately 11% of the total number of constitutional complaints, we can see that decisions on constitutional complaints filed in matters of so-

66 See the ruling of the Constitutional Court dated 7 August 2007, file no. IV. ÚS 391/07.

67 For example, the ruling of the Constitutional Court dated 4 January 2006, file no. II. ÚS 507/05.

68 For example, the ruling of the Constitutional Court dated 25 September 1997, file no. IV. ÚS 114/96.

69 See § 82 (3) b) of Act No. 18/2/1993 Coll., on the Constitutional Court, as amended. In regard to that, compare the ruling file no. IV. ÚS 114/96 dated 25 September 1997.

called inactivity actions comprise approximately 12% of the decision-making activity of the Constitutional Court in administrative matters.

If we compare these statistics to the number of cases in which a cassation complaint was filed in matters of administrative actions against inactivity, we can see that only a small portion of these disputes continue to the Constitutional Court (ca. 6% on average).

Out of the said total of 54 matters, in four cases the Constitutional Court acknowledged the constitutional complaints, or repealed the decision of an administrative court on a so-called inactivity action on grounds of its unconstitutionality. The remainder was decisions by which the Constitutional Court rejected the complaints.

In these matters, the Constitutional Court issues a compliant decision, or declares a violation of the constitutional order by the administrative courts in approximately 7% of cases, on average. The said data corresponds to the overall statistics, whereby the Constitutional Court decides, on average, 4160 constitutional complaints per year, of which it complies with 206 constitutional complaints (at least in part), i.e. it issues a compliant decision in approximately 5% of cases. Data relating to the Constitutional Court decisions was obtained from the online database of the Constitutional Court and also from its yearbooks (see the links below).

Table 3: Overview of the Constitutional Court's decision-making activities on constitutional complaints against Supreme Administrative Court judgments in dealing with inactivity cases

Year	Number of Decisions on Constitutional Complaints	Non-Compliant Decisions	Compliant Decisions
2004	1	1	0
2005	2	2	0
2006	3	2	1
2007	0	0	0
2008	3	3	0
2009	5	5	0
2010	4	4	0
2011	3	3	0
2012	4	4	0
2013	8	8	0
2014	5	3	2
2015	10	9	1
2016	3	3	0
2017	3	3	0
<b>Total</b>	<b>54</b>	<b>50</b>	<b>4 (ca. 7%)</b>

Source: <https://nalus.usoud.cz>

Table 4: Overview of the number of cases dealt with by the Constitutional Court

Years	Number of Decisions on Constitutional Complaints on Average per Year	Material Structure of Submissions on Average per Year	Compliant Rulings (at Least Partially) per Year
2010 – 2017	4160	458 of Administrative Matters (ca. 11%)	206 (ca. 5%) from 4160

Source: <https://www.usoud.cz/en/yearbooks/>

In a recent and, in terms of the defendant entity, interesting case of a constitutional complaint against a decision of an administrative court on an action against inactivity, the constitutional complaint pertained to the matter of the non-appointment of a nominee as professor at a university in the field of physics.<sup>70</sup> The affected nominee was of the opinion that in the matter of his appointment as a professor, the president of the republic had remained inactive, and he filed an action against the inactivity of the president of the republic. He thereby referred to the previous conclusion of the administrative courts in the matter of the (non-)appointment of judges by the president of the republic, according to which if the decision-making of the president of the republic, through which he is dispensing the power to appoint judges, has the character of an administrative act, the president of the republic is obligated to decide on the proposal for the appointment of a judge and if he does not do so he is remaining inactive.<sup>71</sup> However, in the matter of the non-appointment of a professor, the administrative courts had reached the conclusion that the so-called inactivity action is unjustified, if the president of the republic issued a decision in the form of a letter to the minister of education by which he informed her of the intention to not appoint the nominee as a professor.<sup>72</sup>

The constitutional complaint submitted in the matter was rejected by the Constitutional Court. The subject matter of review in this matter was exclusively the question of whether the president made a negative decision in the matter, or whether he remained inactive. The Constitutional Court agreed

70 According to Art. 73 (1) of Act No. 111/1998 Coll., on Universities, as amended “*he/she who has been nominated for appointment as a professor by the scientific ... council of the university shall be appointed as a professor for a certain subject field by the president of the republic.*” The appointment of university professors is therefore not left entirely up to the autonomy of the university, but rather, within the entire system, there remains an anachronism or element, which to a certain extent is a monarchist feature, taking the form of the procedure being concluded with the delivery of appointment decrees by the president of the republic. Therefore, in the Czech Republic, the title of professor is not the designation of a functional position, but rather, it is a “personal and non-transferable” title that enables the person in question to hold the position of a professor at any other Czech university. The above indicates the importance of the appointment procedure on the part of the president of the republic.

71 See the judgment of the Municipal Court in Prague dated 15 June 2007, file no. 5 Ca 127/2006 – 122.

72 See the judgment of the Municipal Court in Prague dated 21 September 2016, file no. 10 A 186/2015-83 and the judgment of the Supreme Administrative Court dated 2 March 2017, file no. 7 As 242/2016-43. We intentionally leave aside the issue of whether the president of the republic is entitled to do so and whether this does not thereby negate the sovereign authority of universities to select the persons that can become professors.

with the administrative courts and reached the conclusion that the said letter constituted a decision by the president of the republic. The president was thus not inactive, although the letter was not delivered to the person that it directly pertained to, but rather “merely” to the minister of education, as stated above.<sup>73</sup>

The said decision of the Constitutional Court follows upon the previous case law of the administrative courts in the matter of the (non-)appointment of judges, within the scope of which the administrative courts dealt with the question of whether the president of the republic, who is included by the Constitution in the executive branch, can make decisions as an administrative authority, or whether his failure to act can be assessed as inactivity on the part of an administrative authority and thereby be subject to checks by the administrative judiciary.<sup>74</sup> On the basis of a positive response, the courts subsequently concluded that the president of the republic is obligated to make a decision on the proposal for appointment and if he does not do so he is remaining inactive. It must be noted that the said conclusion, which strengthens or broadens the checks of the administrative judiciary so as to extend to the exercise of the powers of the president of the republic, was not accepted by the relevant law profession public (its opinions contained in academic literature) without reservations.<sup>75</sup> And in terms of the affected candidate, we can only note that such inactivity continues to date, as the president of the republic quite intentionally ignored the said decision of the court.

## 8 Conclusion

In the article, we have addressed the issue of judicial protection against inactivity on the part of public administration which is dispensed by the administrative and constitutional judiciary.

As much as, at first glance, both systems fulfill the requirements that an individual has available means ensuring judicial protection against inactivity on the part of public administration, the actual practice of the application there-

<sup>73</sup> See the ruling of the Constitutional Court dated 7 November 2017, file no. Pl. ÚS 12/17.

<sup>74</sup> The Supreme Administrative Court (see the judgment dated 27 April 2006, file no. 4 Aps 3/2005-35) reached the conclusion that: *“in our circumstances, the president of the republic is a part of the executive branch, whereby, within the scope of the powers of the president of the republic as defined by the Constitution, it is possible, but also simultaneously necessary to differentiate those powers that have the character of and are exercised in the form of administrative acts (acts in the area of public administration) and correspond to the position of the president as an “administrative authority” sui generis, and those powers that have the character of and are exercised in the form of constitutional acts and correspond to the position of the president as a “constitutional official”... The president of the republic acts as an administrative authority in cases where two conditions are simultaneously fulfilled, specifically where the exercise of the given power is bound by law and, further, where the president’s decision in the dispensation of such power impacts upon the public individual rights of specific persons ... In the matter under review (the power to appoint judges), in the opinion of the Supreme Administrative Court, this is a power of the president of the republic the exercise of which has the character and form of administrative acts.”*

<sup>75</sup> In the academic literature, we can find, for example, the opinion that, in view of the fact that, in the given case, this is a power of the president of the republic expressly established by the Constitution (and not by “an ordinary law”), this is an act of a constitutional nature, which cannot be reviewed in administrative justice (see Sládeček, 2013, p. 278).



of is relatively critical, primarily in view of the duration of the proceedings before the administrative courts. In our opinion, there is nothing more absurd than when, within the scope of judicial protection against inactivity, there is further inactivity and such is in fact protracted. The state thereby indicates that it is not possible to battle inactivity effectively. It must be noted that this form of judicial inactivity is often caused by "objective factors", such as a large number of court proceedings and an overall overloading of the administrative judiciary. Nevertheless, this situation is ultimately disadvantageous for the affected persons.

A significant weak point of the system of judicial protection is also the fact that the courts within administrative justice cannot declare, on the basis of a so-called inactivity action, that (by then ceased) inactivity occurred and that such inactivity was unlawful. In order to do that, a so-called encroachment/intervention action must be separately utilized *ex post*, which, however, was not originally intended as a means of judicial protection against inactivity. Moreover, such a procedure leads to further burdens upon the administrative judiciary, as the whole matter must be dealt with in two related proceedings. In the case of the Constitutional Court, the said conclusions apply similarly, to a certain extent. However, we are not supporters of these issues being once again concentrated exclusively before the Constitutional Court. The Constitutional Court is and should be a means of protection against inactivity *ultima ratio*, coming into play only in the event of a failure by all others.

We have intentionally also noted two actual cases in the article of intentional (!) inactivity on the part of the president of the republic and the related conclusions by the courts. In these cases as well, we see that legal means of judicial protection against inactivity are not always the most effective, specifically in cases where there is a lack of will to proceed within the bounds of good administration. Understandably, such expressions of arbitrariness undoubtedly do not contribute to administrative authorities ceasing to be inactive and complying with obligations imposed upon them by the law and by the courts.

To conclude and answer our research questions, we can summarize that due to the long length of court proceedings and incomprehensible legal regulation it is very difficult to view the judicial protection against the administrative silence as a speedy and effective instrument of remediation of inactivity on the part of administrative authorities.

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