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The Admissibility of a Complaint against Inaction and Prolixity Despite the Ending of Administrative Proceedings

Dopuszczalność złożenia skargi na bezczynność i przewlekłość pomimo zakończenia postępowania administracyjnego

ABSTRACT

A discerning and quick handling of a case is the duty of an authority conducting administrative proceedings. If this duty is breached, a party has the right to present a call to action and a complaint to an administrative court against inaction or prolix proceedings. A doubt arises in connection with this regulation, however, if the submission of a complaint against inaction and prolixity at the end of proceedings and following the issue of an effective decision prevents an administrative court from considering such a complaint on its merits in the light of Article 149 § 1 (3) of the Law on Proceedings before Administrative Courts. The doubts have not been dispelled by the recent amendments to the Administrative Procedure Code and the Law on Proceedings before Administrative Courts in 2017 or a resolution of the panel of seven judges of the Supreme Administrative Court (II OPS 5/19), to which dissenting opinions were submitted. The Supreme Administrative Court has therefore made another resolution (II OPS 1/21) in order to clarify and reinforce the former. It is difficult to agree with the interpretation arising from these resolutions since they restrict a party's right to seek their rights in court. The universal binding force of the resolution must be borne in mind, though, as it binds administrative court judges until the interpretation of a given provision is varied by another resolution.

Keywords: inaction; prolixity; call to action; complaint to an administrative court

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INTRODUCTION

A discerning and quick consideration of a case by as simple means as possible is the duty of an authority conducting administrative proceedings under Article 12 of the Administrative Procedure Code.[1] Efficient proceedings also guarantee the right to good administration[2] arising from Article 41 of the Charter of Fundamental Rights of the European Union,[3] with the right to having a case considered in a reasonable time being its essential part. A public administrative authority's obedience to procedural standards helps to build public trust in authorities, too.[4] In spite of the above, the prolixity of administrative proceedings has long been a major issue in public administration and a violation of the principle of due administrative process, impairing the effective protection of legal interests of parties to administrative proceedings.

Taking note of the problem, the legislator continues introducing or amends the existing legal solutions supposed to prevent the silence and inaction (prolixity) of authorities.[5] Such solutions have recently been introduced to the Administrative Procedure Code and the Law on Proceedings before Administrative Courts[6] by force of the Act of 7 April 2017 amending the act – Administrative Procedure Code and certain other acts[7] while some have been amended. The modifications are driven by a desire to ensure an effective operation of public administration authorities.[8]

Unfortunately, the solutions in place since 2017 are ambiguous, as corroborated by plenty of administrative judicial decisions, including those of the Supreme Administrative Court and even a resolution by the panel of seven of its judges. These decisions exhibit a clear diversity of views, i.a., regarding the method of discontinuing proceedings initiated by a complaint against inaction (prolixity) of a public administrative authority submitted after a case is resolved. Some judges exclude the possibility of considering such a complaint on its merits, whereas others point out that this state of affairs does not rule out an *ad meritum* verdict.

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[1] Act of 14 June 1960 – Administrative Procedure Code (Journal of Laws 2021, item 735, as amended), hereinafter: CAP.

[2] P. Żuradzki, *Prawo do dobrej administracji w polskim porządku prawnym na tle Europejskiego kodeksu dobrej administracji*, [in:] *Duch praw w krajach Europy Środkowo-Wschodniej*, eds. M. Kępa, M. Marszał, Wrocław 2016, pp. 59–60.

[3] Charter of Fundamental Rights of the European Union of 7 December 2000 (OJ 2007, C 303/1).

[4] Z. Kmieciak, *Idea sprawiedliwości proceduralnej w prawie administracyjnym (założenia teoretyczne i doświadczenia praktyki)*, "Państwo i Prawo" 1994, no. 49(10), p. 57.

[5] P. Dobosz, *Milczenie i bezczynność w prawie administracyjnym*, Kraków 2011, pp. 17–31.

[6] Act of 30 August 2002 – Law on Proceedings before Administrative Courts (Journal of Laws 2019, item 2325, as amended), hereinafter: LPAC.

[7] Journal of Laws 2017, item 935.

[8] P. Daniel, *Skarga na przewlekłe prowadzenie postępowania administracyjnego*, "Ius Novum" 2012, no. 3; Ł. Sadkowski, *Zmiany w Kodeksie postępowania administracyjnego*, Legalis 2017.

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Meanwhile, an unequivocal clarification of this issue is important to effective disciplining of administrative authorities to keep legal deadlines in their handling of cases. This article, therefore, aims to answer the question whether a complaint against inaction or prolixity becomes objectless with the end of administrative proceedings. The problem of the title is discussed on the basis of the dogmatic method and a review of positions found in the doctrine and judicial decisions.

INACTION AND PROLIXITY IN THE LIGHT OF THE ADMINISTRATIVE PROCEDURE CODE

The terms inaction and prolixity had wrongly been used interchangeably until 2010[9] and the introduction of the complaint against prolix proceedings, which required a semantic discrimination of the two concepts.[10] In 2017, the legislator defined them in the Administrative Procedure Code as they are understood by the doctrine and judicial decisions.

Pursuant to Article 37 § 1 (1) CAP, inaction means a failure to settle a case by the date laid down in Article 35 or specific regulations or by the date designated in Article 36 § 1 CAP. In turn, prolixity means conducting a case for longer than necessary to settle it (Article 37 § 1 (2) CAP). As Article 35 CAP implies, public administrative authorities are bound to deal with cases without undue delay (§ 1), in particular with those that can be considered on the basis of evidence presented by a party together with a demand to institute proceedings or of universally known facts and evidence, or known ex officio to an authority hearing a case, or which can be established on the basis of data available to an authority (§ 2). A case requiring explanatory proceedings should be settled within a month and particularly complicated cases within two months of the date of their instigation, while cases in appeal proceedings, within a month of receiving an appeal (§ 3). An authority must notify parties of its failure to settle a case timely, identifying the causes of such delay and a new date for the case settlement (Article 36 § 1 CAP).[11]

Not every delayed settlement means an authority is inactive or conducts proceedings in a prolix manner, however. Essential circumstances of a given case

[9] By force of the Act of 3 December 2010 on amending the act – Administrative Procedure Code and the act – Law on Proceedings before Administrative Courts (Journal of Laws 2011, no. 6, item 18).

[10] M. Sieniuć, *Przewlekłość postępowania administracyjnego jako przedmiot skargi do sądu administracyjnego*, [in:] *Internacjonalizacja administracji publicznej*, eds. Z. Czarnik, J. Posłuszny, L. Żukowski, Warszawa 2015, pp. 353–354.

[11] Judgment of the Voivodeship Administrative Court in Gdańsk of 20 May 2021, III SAB/Gd 15/21, Legalis no. 2580779.

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must be assessed, therefore, including the degree of its complication, negligence or defective actions of an authority, as well as the parties' attitudes.[12]

In case of inaction and prolixity, a party has the right to file a call to action. In addition, pursuant to Article 53 § 2b LPAC, a complaint can be submitted to a competent authority against inaction or a prolix conduct of proceedings at any time after filing such a call.

These regulations appear clear and not require any comments. This is not the case, though.

INACTION

In spite of the definition of inaction in the Administrative Procedure Code, the earlier position taken by courts in their decisions has remained valid, which assumes inaction applies where an authority fails to take any steps in a case by a set date or it does conduct proceedings, yet without issuing a final act despite its statutory duty, or fails to take steps by a set date,[13] or fails to inform parties about causes of its failure to settle their case in a timely fashion and to specify a new date for a settlement.[14]

Thus, inaction is not solely connected with an authority's failure to take any actions and includes situations where an authority has taken some actions yet without ending proceedings with a decision in spite of its statutory obligation.[15] It should be stressed the charge of inaction applies where an authority, competent in a case and bound to take actions by law or other administrative acts, is in delay, no matter why a step or action has not been undertaken.[16]

Inaction results in a party's "suspension" as a case is not settled and the party may be prevented from exercising their right. This is undesirable from the view-

[12] Judgment of the Supreme Administrative Court of 24 July 2018, II OSK 3021/17, Legalis no. 1823359; judgment of the Voivodeship Administrative Court in Kraków of 26 February 2021, II SAB/Kr 8/21, Legalis no. 2553101.

[13] Judgment of the Supreme Administrative Court of 7 October 2020, II OSK 3466/19, Legalis no. 2498030.

[14] Judgment of the Voivodeship Administrative Court in Gorzów Wielkopolski of 22 June 2017, II SAB/Go 33/17, Legalis no. 1618387.

[15] Judgment of the Voivodeship Administrative Court in Warsaw of 16 February 2012, I SAB/Wa 429/11, Legalis no. 474303.

[16] Judgment of the Voivodeship Administrative Court in Olsztyn of 25 May 2021, II SAB/Ol 39/21, Legalis no. 2581809; judgment of the Supreme Administrative Court of 9 January 2020, I OSK 3483/18, Legalis no. 2288780; judgment of the Voivodeship Administrative Court in Wrocław of 22 April 2021, III SAB/Wr 1835/20, Legalis no. 2562906; decision of the Voivodeship Administrative Court in Gliwice of 25 October 2021, III SAB/Gl 110/21, Legalis no. 2625440.

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point of the function of public administration[17] and is therefore viewed critically as against the law and qualified as a failure to use competence an authority must exercise in circumstances required by law.[18]

PROLIXITY

Prolixity is now regarded as a separate premise that prevents a case from being considered. The concept means the conduct of proceedings longer than necessary for a case to be settled. This state can include a variety of an authority's behaviours that consist in a purposeful negligence of certain procedural acts or the taking and conduct of the same with the intention of protracting proceedings for longer than necessary.[19] Prolix proceedings will therefore involve dilatory, inefficient and ineffective action of an authority where a case could be settled faster, as well as objectively unreasonable postponement of a case settlement.[20] Some instances: taking actions at long time intervals; taking of apparent actions, so that an authority is not inactive formally; the collection of more and more evidence which is not required by the point of a case; the stagnation caused by an authority's inaction or defective action.[21]

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[17] A. Wiktorowska, [in:] *Postępowanie administracyjne*, ed. M. Wierzbowski, Warszawa 2007, p. 80.

[18] M. Miłosz, *Bezczynność organu administracji publicznej w postępowaniu administracyjnym*, Warszawa 2012, p. 92.

[19] Z. Kmieciak, *Przewlekłość postępowania administracyjnego*, "Państwo i Prawo" 2011, no. 6, p. 8; judgment of the Voivodeship Administrative Court in Wrocław of 19 April 2017, III SAB/Wr 25/17, Legalis no. 1673708; judgment of the Supreme Administrative Court of 12 April 2017, II OSK 2270/16, Legalis no. 1675235; judgment of the Supreme Administrative Court of 17 June 2021, I OSK 846/21, Legalis no. 2592631.

[20] Judgment of the Supreme Administrative Court of 31 May 2016, II OSK 1903/15, Legalis no. 1470652; judgment of the Supreme Administrative Court of 2 June 2016, II OSK 1156/16, Legalis no. 1470610; judgment of the Voivodeship Administrative Court in Białystok of 18 March 2021, II SAB/Bk 198/20, Legalis no. 2556370; P. Przybysz, *Kodeks postępowania administracyjnego. Komentarz*, LEX/el. 2021; *Kodeks postępowania administracyjnego. Komentarz*, eds. W. Chróścielewski, Z. Kmieciak, vol. 2, Warszawa 2019; P. Kornacki, *Skarga na przewlekłość postępowania administracyjnego*, LEX/el. 2014; judgment of the Supreme Administrative Court of 12 March 2020, I OSK 79/19, Legalis no. 2393360; judgment of the Supreme Administrative Court of 13 November 2020, I OSK 260/20, Legalis no. 2497481; judgment of the Supreme Administrative Court of 18 January 2021, I OSK 2256/20, Legalis no. 2532637.

[21] Judgment of the Voivodeship Administrative Court in Olsztyn of 20 May 2021, II SAB/Ol 30/21, Legalis no. 2580481; judgment of the Supreme Administrative Court of 24 May 2018, II OSK 349/18, Legalis no. 1792441; judgment of the Supreme Administrative Court of 1 February 2019, II OSK 2931/18, Legalis no. 1916966; J. Drachal, J. Jagielski, R. Stankiewicz, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, eds. R. Hauser, M. Wierzbowski, Warszawa 2019, p. 91.

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Prolixity may be therefore static (the absence of any actions by an authority), dynamic (an authority's aimless actions), and mixed, including some elements of both.[22]

Administrative proceedings will be prolix where an authority can be effectively charged with a failure of due diligence at organising proceedings in such a way that they end in a reasonable time or with taking steps without significance to a case.[23]

The prolixity of proceedings is a broader concept than inaction and a determination whether proceedings take longer than necessary must be based on both the nature of steps taken and the facts of the case.[24] Therefore, an authority's delay in dealing with a case cannot be abstracted from the latter's individual nature. A reasonable date set for proceedings must be evaluated in the light of all its circumstances and such criteria as: complication of a case, the attitudes of a complainant and relevant authorities, the meaning of the object of proceedings to the complainant. As a result, in cases involving complicated facts, where a range of evidence must be gathered, an authority must collect the evidence efficiently, which is not always the same as quickly, in order to establish facts and settle the case correctly. On the other hand, the complication of a case and parties with opposite interests cannot excuse a lack of a necessary focus of actions needed to settle a case.[25] The numbers of petitions filed with an authority,[26] the confusion related to the epidemic or staff shortages are not sufficient reasons, either. It's not important for grounds of a complaint against prolix proceedings why an act or step has not been undertaken.[27] An appropriate organisation of work and provision of adequate staff are public duties that cannot be discharged to the detriment of an individual.[28]

Importantly, prolixity and inaction are not mutually exclusive. It cannot be assumed, therefore, prolixity is possible only where an authority is not inactive,

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[22] Judgment of the Voivodeship Administrative Court in Wrocław of 22 April 2021, III SAB/Wr 1852/20, Legalis no. 2562907; judgment of the Supreme Administrative Court of 16 May 2018, II OSK 2768/17, Legalis no. 1799001; judgment of the Supreme Administrative Court of 24 May 2018, II OSK 349/18, Legalis no. 1792441.

[23] Judgment of the Supreme Administrative Court of 28 July 2021, III OSK 3297/21, Legalis no. 2600663.

[24] Judgment of the Voivodeship Administrative Court in Gdańsk of 11 May 2021, I SA/Gd 1550/19, Legalis no. 2585318; judgment of the Voivodeship Administrative Court in Gdańsk of 20 May 2021, III SAB/Gd 15/21, Legalis no. 2580779.

[25] Judgment of the Voivodeship Administrative Court in Lodz of 6 May 2021, II SAB/Łd 18/21, Legalis no. 2581999; judgment of the Supreme Administrative Court of 29 May 2019, I OSK 2635/18, Legalis no. 1951715.

[26] Judgment of the Voivodeship Administrative Court in Wrocław of 5 February 2020, III SAB/Wr 1287/19, Legalis no. 2286633.

[27] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, ed. M. Wierzbowski, Legalis 2021, commentary on Article 149; judgment of the Voivodeship Administrative Court in Poznań of 8 December 2016, II SAB/Po 71/16, Legalis no. 1545610.

[28] Judgment of the Voivodeship Administrative Court in Gdańsk of 5 May 2021, II SAB/Gd 19/21, Legalis no. 2569689.

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since inaction may arise from prolixity and an authority may be both prolix and inactive.[29] The concepts of inaction and prolixity partly overlap, because inaction may contain a prolix conduct of proceedings, including the lack of any actions.[30] Thus, an administrative authority's resolution ending a case does not make a complaint against the prolix conduct of proceedings groundless or unreasonable.[31]

THE SCOPE OF A CASE REVIEWED BY COURT IN THE CASE OF INACTION AND PROLIXITY

A party can complain to court against an inactive and prolix conduct of a case. This institution of complaint is expected to protect a party by leading to a case resolution. Finding a complaint against an authority's inaction reasonable, the court orders the authority to issue such an act by a specified date. The court cannot rule how the authority is to resolve or on the complainant's rights and obligations.[32] The court will not review an act or step, but will consider the facts and legal status of a case to resolve if an authority is inactive where it is bound to act in a specific form and by a legally set date.[33] The administrative court is limited to ascertaining whether an authority is bound by law to issue an act or take a step and whether it is done by a statutory date.[34]

If a complaint is presented about prolixity, in turn, the administrative court as a rule verifies the correct course of an authority's activities, their intensity, the concentration of evidence, correctness and rationality from the perspective of a resolution.[35] The court evaluates the application of procedural regulations in terms of effectiveness.[36]

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[29] Judgment of the Supreme Administrative Court of in Warsaw z dnia 24 November 2016, I OSK 3096/15, Legalis no. 1555455.

[30] Judgment of the Voivodeship Administrative Court in Białystok of 15 December 2020, II SAB/Bk 213/20, Legalis no. 2508942.

[31] Judgment of the Supreme Administrative Court of 28 February 2020, I OSK 2687/18, Legalis no. 2391572.

[32] Judgment of the Voivodeship Administrative Court in Wrocław of 22 April 2021, III SAB/Wr 1835/20, Legalis no. 2562906.

[33] Judgment of the Supreme Administrative Court of 15 July 2010, II OSK 2051/09, Legalis no. 298345; judgment of the Supreme Administrative Court of 29 September 2010, II GSK 827/09, Legalis no. 553866.

[34] Judgment of the Voivodeship Administrative Court in Gliwice of 21 May 2021, II SAB/Gl 34/21, Legalis no. 2588685.

[35] Judgment of the Supreme Administrative Court of 28 July 2021, III OSK 3297/21, Legalis no. 2600663.

[36] Judgment of the Supreme Administrative Court of 25 May 2021, III OSK 915/21, Legalis no. 2626268.

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It has already been noted prolixity and inaction are not mutually exclusive. Charging an authority with inaction and prolixity in a single complaint is an acceptable accumulation of two complaints where the timely and efficient operation in the same administrative case are questioned.[37] If, in a complaint against the inaction of an authority, the charge of a prolix conduct of proceedings is made as well, the court is obliged to determine if the case is settled without undue delay. The court should determine, therefore, whether a case is not withheld for no reason instead of being considered in due course and if an authority conducts the proceedings without unnecessary obstruction or prolixity.[38]

To sum up, a complaint against inaction concerns an illegal state of administrative proceedings where a resolution has not been issued in spite of the lapse of a date set by law for the individual case and the filing of a call to action. A complaint against prolixity concerns the state of proceedings where an authority's prolixity prevents a case from being dealt with promptly or faster than prescribed by regulations. Such a complaint is directed against a defective process which prevents a case from making progress.[39]

THE EFFECTIVENESS OF A COMPLAINT AGAINST INACTION AND PROLIXITY AFTER THE END OF PROCEEDINGS

In accordance with Article 53 § 2b the LPAC, a complaint against inaction or a prolix conduct of proceedings can be filed at any time after submitting a call to action with a competent authority. In spite of this provision, the practice of courts and authorities raises a doubt if the issue of a decision in a case precludes a ruling that an authority is inactive or conducts proceedings in a prolix manner.

The issue was controversial even before the Law on Proceedings before Administrative Courts was amended in 2015.[40] If an administrative authority issued an act or took a step after a complaint was filed with an administrative court, the court dismissed its proceedings as aimless even if an authority had breached a date set for the settlement of a case.[41] That pattern was taken advantage of by authorities

[37] Judgment of the Voivodeship Administrative Court in Białystok of 15 December 2020, II SAB/Bk 213/20, Legalis no. 2508942.

[38] R. Orzechowski, [in:] J. Borkowski, J. Jendrośka, R. Orzechowski, A. Zieliński, *Kodeks postępowania administracyjnego. Komentarz*, Warszawa 1989, p. 128.

[39] J.P. Tarno, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2012, p. 43.

[40] Act of 9 April 2015 amending the Law on Proceedings before Administrative Courts (Journal of Laws 2015, item 658).

[41] Judgment of the Supreme Administrative Court of 5 January 2007, II OSK 132/06, Legalis no. 450167.

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to prevent a complainant from being awarded a court decision stating an inactive or prolix conduct of proceedings was a gross violation of law.[42]

The modified Article 149 § 1 (3) LPAC was intended to counteract such developments and allow courts to resolve complaints against inaction where proceedings end at the time a case is heard by an administrative court and an authority need not be obliged to issue an act or take a step. This is corroborated by the statement of reasons in the draft amended act of 2015 and comments on the proposed amendments to Article 149 LPAC, which state, i.a., the legislator intends to prevent the cases of authorities "disciplined" with a complaint filed with an administrative court and issuing administrative acts, thereby preventing parties from being handed down decisions concerning the inaction.[43]

In spite of the amendment to Article 149 LPAC, the administrative courts' decisions vary in their responses to the question whether the submission of a complaint against inaction after the end of proceedings and issue of a final decision is an impediment to administrative court considering such complaints under Article 149 § 1 (3) LPAC.

The courts assume, on the one hand, the end of proceedings before the presentation of a complaint precludes admitting a complaint about inaction or prolixity.[44] On the other hand, parties adopt a different stance, stressing the need to protect complainants by allowing them the right to receive a declaratory judgment that would state an authority commits inaction as part of proceedings.[45]

In connection with these divergences, the resolution II OPS 5/19 of the panel of seven judges of the Supreme Administrative Court passed[46] to dispel the doubts described above on 22 June 2020. It rules the submission of a complaint against inaction (prolixity) after a public administrative authority ends its proceedings by issuing a final decision interferes with a consideration of such a complaint on its merits by an administrative court based on Article 149 § 1 (3) LPAC. The Supreme Administrative Court emphasises a state of affairs reviewed following on a complaint against inaction (prolixity) must hold at the date of the complaint, not be

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[42] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, eds. R. Hauser, M. Wierzbowski, Legalis 2021.

[43] Parliamentary print No. 1633, the 7th term of Parliament.

[44] Judgment of the Voivodeship Administrative Court in Kraków of 18 November 2018, II SAB/Kr 146/18, Legalis no. 1863757.

[45] Judgment of the Supreme Administrative Court of 4 November 2015, II OSK 591/15, Legalis no. 1395981; judgment of the Voivodeship Administrative Court in Poznań of 9 March 2016, IV SAB/Po 6/16, Legalis no. 1444133.

[46] Legalis no. 2389625; B. Wilk, *Ocena bezczynności organu w przedmiocie udostępnienia informacji publicznej na wniosek w świetle uchwały NSA*, "Informacja w Administracji Publicznej" 2020, no. 3.

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historical.[47] A court must not decide on merits of a case instigated by a complaint against inaction filed when proceedings in question had already ended. The Court believes this conclusion is founded on the normative contents of inaction and prolixity and upheld by the institution of the call to action. The Court drew attention to Article 53 § 2b LPAC, which institutes the right to complaint against an inactive or prolix conduct of proceedings and sets an acceptable date for filing it with court. It determined the expression "at any time" must be seen with reference to the state of administrative proceedings at the date of complaint submission that delays the time of case settlement, which suggests the option of presenting a complaint against inaction applies from the incipience of inaction "protested" by means of a call to action until the case affected by inaction is dealt with.[48] The court found the right to a complaint against inaction without any time limits is unacceptable for several reasons.[49] First, it's contrary to the essence of a complaint against inaction (prolixity) as a protest against the state of inaction or prolixity. Second, the admission of an open time frame for a complaint against inaction violates the system, prevailing in the administrative and administrative court procedure, of submitting means of challenge that are limited in time as a matter of principle. Third, the Court pointed out the practical dimension of accepting an open-ended period for complaining about inaction (prolixity), which would allow complaints to be filed a dozen or several dozen years after the end of proceedings and settlement of a case.

In the opinion of the Supreme Administrative Court, the argument for allowing decision about inaction (prolixity) without any time limits cannot be supported in view of the universal right to trial and the need for prejudication, guaranteed by Article 45 (1) of the Polish Constitution. Following the amendments to the Administrative Procedure Code and the Law on Proceedings before Administrative Courts, the right has been doubly secured by providing parties with means of protection against inaction (prolixity) in administrative and administrative court proceedings, with the court review not subject to any time limitations by the secondary administrative proceedings. Like the Court stressed, a party is now allowed two parallel means of controlling such a state (namely, a call to action and a complaint with administrative court), where each can bring a determination of inaction and a gross violation of law. They bring a case and proceedings to an end faster and then seek compensation in civil courts. The Court argued that if a complaint against inaction could also be submitted after the end of administrative proceedings, parties to these proceedings

[47] Similarly T. Woś, [in:] *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, ed. T. Woś, Warszawa 2016, p. 876; A. Kabat, [in:] B. Dauter, A. Kabat, M. Niezgódka-Medek, *Prawo o postępowaniu przed sądami administracyjnymi. Komentarz*, Warszawa 2018, p. 490.

[48] P. Dobosz, *op. cit.*, p. 326.

[49] Similarly decision of the Supreme Administrative Court of 4 August 2021, I GSK 671/21, Legalis no. 2606900.

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would be in better process positions than parties to penal or civil proceedings. In those legal proceedings, a firm time-frame is set for a prejudication, which allows an eligible party to seek compensation. The results of an external systemic interpretation, therefore, point against the possibility of an unlimited term for filing complaints against the inaction of a public administrative authority. The Supreme believes the view the necessity of obtaining prejudication to seek compensation as provided for by Article 4171 § 3 of the Civil Code supports the interpretation complaints against inaction can be submitted without any time limitations after the end of proceedings cannot be shared. As the Supreme Administrative Court argued, the principal aim of a complaint against inactive or prolix proceedings is to remove the state of inaction (prolixity). The issue of a prejudication in a compensation case is a secondary goal. Therefore, a complaint against inaction presented after the end of administrative proceedings must be found unacceptable.

Two Supreme Administrative Court judges disagreed with the contents of the resolution and the statement of its reasons and filed their dissenting opinions: judges Z. Zgierski and W. Mazur. The former was of the opinion that since an administrative court is only competent in ruling on whether inaction (prolixity) did take place and what its nature was, the state of an administrative case at the start of administrative court proceedings or at the date of judgment announcement are of a secondary importance. The determination an authority was inactive (prolix) should be reserved for situations where the inaction or prolixity do not apply at the closing date of a court case, though they applied before. If it's accepted that as a result of the issue of a final administrative decision a complaint against inaction cannot be heard on its merits, then an inactive authority would avoid penalties for the lack of legally required action, which would undermine the point of the remedy, that is, the complaint against an illegal silence of an authority. Meanwhile, the means applied under Article 149 LPAC to inaction cases are not only designed to discipline authorities. Following the 2015 amendment, the principal objective of administrative courts hearing complaints against inaction is to determine whether an authority committed inaction or prolixity and whether they did it in gross violation of law. Such a court decision is declaratory and thus cannot be limited to the situation prevailing at the date of complaint submission to the court. Such a decision becomes a necessary prejudication referred to in the regulations concerning the duty of recompensing losses in connection with actions of public administrative authorities that are against the law.[50]

As Judge Z. Zgierski underlines, Article 53 § 2b LPAC reaffirms a party can demand effective legal protection by requiring that an authority's inaction be determined after the same authority issues a decision the charge of inaction applies

[50] Judgment of the Supreme Administrative Court of 7 December 2018, I OSK 3420/18, Legalis no. 1974494.

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to. According to this provision, a complaint against an inactive or prolix conduct of proceedings can be filed at any time after a call to action is presented to a relevant authority. The presentation of a call is the condition of legal acceptability of a complaint. It cannot be accepted, therefore, finding by the court that an authority was inactive in its proceedings cannot be limited to open situations that apply at the time of complaint submission as a minimum. I believe Judge Z. Zgierski is right to point out the expression "at any time" used in the provision demonstrates the legislator has not introduced any time limitations to the option of initiating these proceedings. Since it is administrative courts' duty to protect citizens from illegal behaviour of the administration, it should be discharged in full in order to repair the consequences of law violations regardless of whether a complaint against inaction is triggered before or only after the issue of a final decision.[51]

The other judge dissenting from the resolution stresses its conclusion is wrong and unfounded on either the Administrative Procedure Code or the Law on Proceedings before Administrative Courts. In addition, it detracts from the constitutional right to a fair trial and to compensation for losses caused by an illegal action of a public authority. As W. Mazur argues, everyone has the right to a just and open hearing of their case without undue delay by a competent, independent, and impartial court (Article 45 (1) of the Polish Constitution) and law cannot prevent anyone from seeking their violated rights or liberties in court (Article 77 (2) of the Polish Constitution).[52] Those provisions are an autonomous foundation of the right to trial, which the established decisions of the Constitutional Tribunal define as comprising: the right of access to court, the right to a proper court procedure, the right to a binding resolution of a case, and the right to an appropriate membership of the court (in terms of the subject matter).[53] The negative aspect of the right to trial, meanwhile, is defined as a prohibition to block or excessively restrict access to the judiciary system.[54] Judge W. Mazur emphasises the contents of Article 45 (1) of the Polish Constitution imply the legislator intends to extend this right to the broadest possible range of cases. The principle of the democratic rule of law, adumbrated in Article 2 of the Polish Constitution, implies an interpretative directive prohibiting a restrictive interpretation of the right to trial. Where the right to trial clashes against another constitutional norm, therefore, protecting values of an equal or ever greater significance to the state or individual development, and both the norms must be addressed, the objective extent of the right to trial can be

[51] J. Wegner-Kowalska, *Nowy wymiar ochrony sądowej w sprawach bezczynności administracji lub przewlekłego prowadzenia postępowania?*, "Państwo i Prawo" 2018, no. 8, p. 67.

[52] M. Jaśkowska, *Konstytucyjnoprawne podstawy sądownictwa powszechnego i administracyjnego oraz delimitacja właściwości tych sądów*, [in:] *Aktualne problemy rozgraniczenia właściwości sądów administracyjnych i powszechnych*, ed. M. Błachucki, T. Górzyńska, Warszawa 2011, pp. 18–20.

[53] Judgment of the Constitutional Tribunal of 25 January 2011, P 8/08, Legalis no. 282878.

[54] Judgment of the Constitutional Tribunal of 2 June 2009, SK 31/08, Legalis no. 139316.

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restricted, allowed only "to the extent that is absolutely necessary to realise a constitutional value, which is impossible in any other way".[55] Such a restriction can only be instituted in law and only where it is necessary in a democratic state for its safety, public order, protection of the environment, public health and morals, freedoms and rights of others. In addition, it cannot impair the essence of the right to trial (Article 31 (3) of the Polish Constitution).

The doctrine is correct to stress the right to trial must result in a material and practicable possibility of seeking protection in a case, not only a formal accessibility of a court.[56] A dispute between an individual and a public administration authority relates to the way the authority deals with a case which an individual believes violates the law, hence they seek legal protection in court. The inaction of a public administrative authority may also breach individual rights and provide the basis for the initiation of court proceedings.[57]

W. Mazur underlines the principal objective of a call to action as worded in the 2017 draft amendment is to bring a case to a settlement as soon as practicable. The Law on Proceedings before Administrative Courts lacks a provision laying down a maximum date for a complaint against an inactive or prolix conduct of proceedings. By force of Article 53 § 2b LPAC, on the other hand, such a complaint may be presented "at any time" following a call to action submitted to a competent authority. Although the *ratio legis* of this provision was to dispel any doubts as to whether a complaint against an inactive or prolix conduct of proceedings is to follow a call to action which a competent administrative authority must dismiss, or whether the consideration of a call to action is not the condition of admitting a complaint,[58] it cannot be ignored the conclusion of the Supreme Administrative Court's resolution goes against the contents of this provision.

The foregoing shows the issue was not unambiguous and continued giving rise to doubts in spite of the panel of seven judges' resolution. This is corroborated not only by the dissenting opinions but also by the varied interpretations of the resolution in court decisions and its applicability to the prolixity of proceedings.[59]

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[55] Judgment of the Constitutional Tribunal of 9 June 1998, K 28/97, Legalis no. 10441.

[56] M. Jaśkowska, *op. cit.*, pp. 18–20.

[57] Decision of the Supreme Administrative Court of 8 October 2019, II OSK 1117/19, Legalis no. 2263369.

[58] The statement of reasons for the draft Act amending the Administrative Procedure Code and certain other acts dated 7 April 2017 (Journal of Laws, item 935), Parliamentary print of 28 December 2016 no. 1183.

[59] The Supreme Administrative Court supported this broad understanding of the resolution II OPS 5/19 in its decision of 8 February 2022 (I OSK 19/22, Legalis no. 2661343). Some courts have stated it's not applicable to complaints about prolix proceedings (e.g., see decision of the Supreme Administrative Court of 25 February 2021, I OSK 2893/20, Legalis no. 2540436; decision of the Supreme Administrative Court of 28 August 2020, II OSK 1479/20, Legalis no. 2477520), others have declared they are not bound by the so-called "universal binding force of the resolution" by force of

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The doubts were finally to be dispelled with another resolution of the Supreme Administrative Court (II OPS 1/21),[60] by the panel of seven judges nearly two years after II OPS 5/19. It assumes a complaint against prolix administrative proceedings presented after their end, following a call filed as part of the same proceedings, shall be rejected by force of Article 58 § 1 (6) LPAC, since the purpose of the complaint, i.e., the resolution of a case, cannot be attained in the circumstances as an authority has already made such a resolution.

The adjudicating panel also stresses in the resolution II OPS 1/21 complaints against both an authority's inaction and prolix proceedings are not, as a matter of principle, differentiated insofar as the conditions of either their presentation or consideration by the court are concerned. The adjudicating panel is correct in emphasising the placement of both these complaints in the same section and their joint regulation allow for the acceptance of their identical legal nature. The Supreme Administrative Court's adjudicating panel has found, therefore, the view on the complaint against the prolixity of an administrative authority, filed when such authority is no longer prolix, adopted in the resolution I OPS 5/19 remains relevant where such a complaint is submitted at the end of proceedings it relates to.

I believe these resolutions fail to deliver on their hopes, however, and may contribute to limiting a party's right to the protection of their subjective rights by preventing an assessment of an authority's prolixity and being awarded an associated compensation. It is true the Supreme Administrative Court has accepted in its resolution II OPS 1/21 the question of a possible prejudication finding the actions of a public administrative authority are against the law is not a problem of administrative judicial proceeding regulations, but of civil legal regulations. This is the legislator's duty to determine the conditions of realising the individual constitutional right to seek compensation claims due to the illegal action of a public authority.[61] In my opinion, the issue of admissibility of a complaint against the inaction of an administrative authority filed with a court after the authority has issued its decision is inextricably linked to the fundamental function of the administrative court, namely, to administer justice by controlling the actions of public administration.

Article 269 § 1 LPAC (e.g., see decision of the Supreme Administrative Court of 10 December 2020, II OSK 1004/19, Legalis no. 2569351; decision of the Supreme Administrative Court of 10 December 2020, II OSK 2968/19, Legalis no. 2569355), while still others assume the resolution is a "guide" to the assessment of admissibility of a complaint against the prolixity of administrative proceedings initiated after the issue of a decision by a public administrative authority (e.g., see decision of the Supreme Administrative Court of 23 February 2021, II OSK 1069/20, Legalis no. 2550056; decision of the Supreme Administrative Court of 26 November 2020, II OSK 3084/19, Legalis no. 2545441).

[60] Resolution of the panel of seven judges of the Supreme Administrative Court of 7 March 2022, II OPS 1/21, Legalis no. 2670962.

[61] M. Bogusz, *Glosa do uchwały NSA z 22 czerwca 2020 r. II OPS 5/19*, OSP 2021, no. 1, item 5, p. 144.

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The literature points out, too, the triggering of competences under Article 149 § 1 (3) LPAC should not depend on the time the inaction or prolixity of proceedings occurs or continues, but on whether they take place in a specific time range prior to a court decision.[62]

The Supreme Administrative Court is correct to note in one of its decisions[63] the admission of a complaint against inaction is not intended only to discipline authorities, guarantee complainants the right to having their administrative case resolved and a gross violation of law to be bindingly determined in order to seek their claims. A declaratory and retrospective determination of inaction and a negative assessment of the legality of an authority's actions, with a preventative effect on its operations, is another, equally important aim. In this sense, a declaratory judgment issued under Article 149 § 1 (3) LPAC gains a prospective dimension, too, becoming not only a prejudicial order for the purpose of seeking compensation claims in a civil court but also a decision including an assessment of the legality of the exercise of public administration by a given authority. The declaratory formula of such a judgment not only allows for a departure from the principle the time the court issues its decision is the reliable time for an assessment of reasons for a complaint, but it also can and should provide the grounds for recognising the time of complaint submission itself does not prevent a binding determination an authority had been guilty of inaction for a time prior to the submission of complaint. A dismissal of a complaint against inaction only because the inaction has discontinued at the time of complaint submission after the end of proceedings leads to hardly acceptable consequences in the light of the principles of legality and the rule of law in the operation of public administrative authorities.

In view of the above, I believe the end of an authority's inaction or a prolix conduct of proceedings in effect of a decision shouldn't release the court from the duty of assessing the nature of such inaction or prolix conduct of proceedings by determining if it constituted a gross violation of law. This will not cause the inaction (prolixity) itself to become objectless. In the event, it only becomes pointless to bind an authority to resolve a case as it has already been settled. The assessment whether the inaction was a gross breach of law remains to the point, on the other hand.[64]

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[62] J. Wegner-Kowalska, *op. cit.*, p. 65; Z. Kmieciak, *Przewlekłość postępowania administracyjnego w świetle ustaleń europejskiego case law*, [in:] *Analiza i ocena zmian Kodeksu postępowania administracyjnego w latach 2010–2011*, eds. M. Błachucki, T. Górzyńska, G. Sibiga, Warszawa 2012, pp. 124–125; M. Kotulski, *Zaskarżalność bezczynności i przewlekłości do sądu administracyjnego*, "Casus" 2014, no. 73; idem, *Ochrona przed bezczynnością i przewlekłością w postępowaniu administracyjnym*, "Samorząd Terytorialny" 2015, no. 6.

[63] Decision of the Supreme Administrative Court of 8 October 2019, II OSK 1117/19, Legalis no. 2263369.

[64] Judgment of the Voivodeship Administrative Court in Rzeszów of 11 May 2021, II SAB/Rz 42/21, Legalis no. 2577664; Resolution of the panel of seven judges of the Supreme Administrative Court of 22 June 2020, II OPS 5/19, Legalis no. 2389625.

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CONCLUSIONS

The above analysis implies the issue of the title has not been finally or unambiguously decided by the resolution of the panel of seven judges of the Supreme Administrative Court (II OPS 5/19), which was to be varied with another resolution of the panel of seven judges (II OPS 1/21). In my opinion, in spite of these resolutions, it cannot be unequivocally accepted that if a complaint is presented following the issue of a decision by an authority, a complaint against inaction (prolixity) becomes unacceptable. The court is authorised to assess due diligence of an authority and, if need be, to declare the authority is guilty of inaction or prolixity and whether they meet the conditions of a gross violation of law. Only this line of jurisprudence should be upheld as it realises the projected objective of the 2017 amendment, namely, to introduce a broad range of remedies, including preventive, to discipline public administrative authorities to handle administrative cases on time.

The prolix conduct of administrative cases and the inaction of public administrative authorities must be counteracted effectively, since they vitiate the very essence of the administrative process. They violate the individual right to fair administration and undermine the citizens' trust in public administrative authorities.

The legislators intended the complaint against inaction in (prolixity of) proceedings to become an effective instrument preventing and counteracting adverse developments in the administrative process in connection with a timely settlement of cases. Unfortunately, it has not quite come to pass, which should be disapproved, all the more so as the new legal solution was aimed at disciplining administrative authorities so that they keep the stipulated deadlines of case settlement. If the jurisprudence set out in the said resolutions of the panel seven Supreme Administrative Court judges is adopted, the amendment will fail to reach its goal in full. As a result, the protection of complainants will not be assured as they are refused the right to a declaratory relief, important to the seeking of liability for damages from an authority in breach of law.

It should be remembered, though, the Supreme Administrative Court's resolutions have a universal binding force on administrative court judges until another resolution possibly varies the interpretation of a given provision.

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Resolution of the panel of seven judges of the Supreme Administrative Court of 7 March 2022, II OPS 1/21, Legalis no. 2670962.

ABSTRAKT

Obowiązkiem organu prowadzącego postępowanie administracyjne jest wnikliwe i szybkie załatwienie sprawy. W przypadku naruszenia tego obowiązku stronie przysługuje prawo złożenia ponaglenia oraz skarga do sądu administracyjnego na bezczynność lub przewlekłe prowadzenie postępowania. Na tle powyższej regulacji powstaje jednak wątpliwość, czy wniesienie skargi na bezczynność (przewlekłość) po zakończeniu postępowania i wydaniu ostatecznej decyzji stanowi przeszkodę w merytorycznym rozpoznaniu takiej skargi przez sąd administracyjny w zakresie rozstrzygnięcia na podstawie art. 149 § 1 pkt 3 Prawa o postępowaniu przed sądami administracyjnymi. Wątpliwości tych nie rozwiały ostatnie zmiany prawne wprowadzone do Kodeksu postępowania administracyjnego i Prawa o postępowaniu przed sądami administracyjnymi w 2017 r. ani uchwała składu siedmiu sędziów Naczelnego Sądu Administracyjnego (II OPS 5/19), do której zgłoszono zdania odrębne. Dlatego też Naczelny Sąd Administracyjny podjął kolejną uchwałę (II OPS 1/21), mającą doprecyzować i wzmocnić poprzednią uchwałę. Trudno zgodzić się z interpretacją wynikającą z tych uchwał ponieważ ograniczają one stronie prawo dochodzenia swoich praw przed sądem. Należy pamiętać jednak o ogólnej mocy wiążącej uchwał, która wiąże składy sądów administracyjnych do momentu zmiany wykładni określonego przepisu przez inną uchwałę.

Słowa kluczowe: bezczynność; przewlekłość; ponaglenie; skarga do sądu administracyjnego