European Law on Zoning and on Project Approvals in the Czech Republic

Study of Early Application of Supranational Law in a New Member State

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1. Introduction

There is case law in Czech administrative courts regarding the participation of the public on zoning and project approvals based on the application of European Community law.[1]

Reading these judgments, however, reveals an uncertainty related to the application of this supranational law in the Czech Republic. This paper describes and analyses the grounds, consequences, and possible solutions of this situation.

2. Environmental policy and law of the European Community

The environmental law of the European Community has developed in the last decades into a specific branch of this supranational law.[2]

The reasons for the legislative engagement of the European Community[3] on environmental issues are manifold.

Firstly, there are global and continental risks to the environment. These need to be addressed by interna-

tional action. As a supranational structure established for the integration of European countries, the European Community can serve this task more effectively than other international organizations.

Another justification is the economic integration of member states. Producers in countries with lower requirements can beat with cheaper prices those producers that must comply with higher standards. Thus, competition would be unfair.

The European Community contributes to the development of social standards. Environmental protection improves the conditions of living. The right to an undamaged environment gradually becomes perceived as a fundamental right. Many Europeans are in favour of enhanced protection of the environment. A new ideology – environmentalism – emerged in Europe and enjoys a considerable influence in several member states.

Representatives of member states often criticize environmental standards of the European Community, perceiving it as a threat to economic development. Nevertheless, they have agreed with the establishment of a common environmental policy. They also mostly agree with such legislation in the Council. Therefore, I suspect that they transferred the competence for environmental issues to this supranational polity due to the unpopularity of inherently restrictive environmental law.

Certainly, the continent-wide level of government can avoid local pressures for reprieves from environmental standards. From this point of view, it can be more effective. Indeed, federal legislation is also the principal source of environmental standards in the United States.[4]

3. *Zoning and Project Approvals in European Community Law*

There is a large body of legislation of the European Community on environmental issues. Among them, two directives are important for zoning and project approvals that impact the environment.

The first is Directive 2001/42/EC on the assessment of the effects of certain plans and programmes on the environment.[5] The second is Directive 85/337/EEC on the assessment of the effects of certain public and private projects on the environment, as amended with Directive 2003/35/EC.[6]

Both directives specify standards outlined in the Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters (known as the Aarhus Convention) of the United Nations Economic Commission for Europe.[7] The European Community is a contracting party to it, together with most member states, including the Czech Republic.

The most demanding requirement of this legislation is the access to courts for the concerned public.[8] Traditional rules for standing are inapplicable, because numerous individuals and groups can be concerned.[9] Totally open access to courts, however, threatens to delay, unduly, any project. It is hard to balance this.

4. *Decentralization of the formulation and application of European Community law*

Formulation and enforcement of most laws within the European Community law is broadly decentralized.

Most standards are set with directives.[10] They are expected to be transposed with the laws of member states (national laws). Therefore, their application is mostly indirect and only covert. Only compliant national laws are expected to be applied.

This wide use of directives is related to the broad decentralization of enforcement. The law of the European Community is rarely applied by its own institutions and agencies. Most standards are to be enforced by administrations, or by the judiciaries of the member states. The activity of European institutions is usually limited to supervision and coordination of enforcement by authorities of the member states. The European Community can, thus, be described as “a head without a body.”

Directives are a prevalent tool of European environmental policy. Enforcement of shared environmental standards is left to member states. The role of the Commission (Directorate-General for the Environment) and of the European Environment Agency[11] are limited to support and coordination.

5. *Principles addressing consequences of decentralization*

This decentralization of both formulation and enforcement of European standards causes troubles unknown in states that formulate and apply their laws directly.

There are numerous examples of the failed transposition of directives in particular member states due to lack of will or capacity.

Therefore, the Court of Justice has gradually developed and refined its doctrine of direct effect. A directive that lacks appropriate and timely transposition can be claimed by affected individuals, against the various member states, to have failed.[12]

Furthermore, the Court of Justice has repeatedly required an indirect affect. Directives should be taken

into consideration if relevant national law is to be interpreted.[13]

Both effects can cause a departure from the usual interpretation and application of national law. Therefore, they create considerable complications for member states, their institutions, and the public. Law becomes more complicated than it ever was.

The Court of Justice has repeatedly underlined that the authorities of member states cannot deprive the standards of the European Community of their efficacy. According to the principle of equivalence, European standards should be at least protected comparably to similar standards established by national legislation.

On the other hand, there is a broad acceptance of procedural autonomy. The European Community takes into appropriate consideration different structures and procedures established by member states for application of national Europeanized and European law.

All these features resulting from legislative, executive, and judicial decentralizations are relevant for European environmental policy, in general, and for European standards for public participation and access to courts in environmental matters, in particular.

6. *Zone and Project Planning in member states in general*

Many member states have established standards and procedures for zoning and for approval of projects affecting the environment decades before the involvement of the European Community. They continue to use and to develop these according their political and administrative traditions. Albeit, European standards can introduce significant changes.

In other member states, however, zoning and public approval of projects that are risky for the environment are quite a new phenomenon. European law is often an important impetus for the creation of appropriate legislation. Legitimacy of these standards can be compromised with this introduction “from Brussels”.

It should also be mentioned that zoning and project approval is a competence which is vested to different levels and branches of government, including directly elected bodies on the one hand and specialized independent agencies on the other. The European Community can hardly intervene in the related distribution of competences if it relies on member states. Therefore, European standards for zoning and project approvals, including access to courts, are formulated vaguely.

7. *Zoning and Project Approval in the Czech Republic*

There is a long tradition of zoning and a developed legal framework for approval of environmentally sensitive projects in the Czech Republic. Its origins can be traced to the late Austrian-Hungarian Monarchy and to pre-war democratic Czechoslovakia. Nevertheless, the key features of these mechanisms were established during the period of socialism, under different economic, social, and political conditions.[14]

Czech zoning and construction law has recently been re-codified.[15] It is, however, hard to claim that this re-codification is sufficiently radical to meet all the requirements and expectations of the public.

8. *Modernization, Environmentalism, and Judicialisation*

After the collapse of socialism, Czechoslovakia and subsequently the Czech Republic quickly developed environmental law that included legislation on the environmental impact assessment of projects.

Nevertheless, the process of environmentalization stopped half way. New factories, highways, and other projects are promoted by politicians and usually backed by the population. Environmentalist groups have limited influence. They are successful mainly on the local level in ad-hoc coalitions with neighbourhood associations that fear the impact of projects on their living conditions. Using the political process, only a few projects were ever stopped or significantly curtailed and improved based on environmental considerations. There is also visible rejection of environmentalist ideas in the Czech Republic.

Czech environmental law, especially its standards for zoning and project approval, is gradually judicialized. Certainly, this tendency has been slowed by lengthy proceedings, unstable legislation, and weak mechanisms for the settling of case law.

The system of the administrative judiciary was reformed in 2003. *Nejvyšší správní soud* (the Supreme Administrative Court)[16] was created as the highest authority for administrative matters. Regional courts serve as inferior courts.

Even before this reform, the Czech judiciary was confronted with actions against decisions related to the environment. Most judgments show a reluctance to decide them. The standing of environmentalist groups and neighbourhood associations was denied entirely, or it was limited to actions against procedural shortcomings of previous administrative proceedings.

A Czech legislator is usually not keen to provide guarantees to the above-mentioned groups and associations. There are few provisions that explicitly grant

procedural rights for them.[17] Many legislators fear considerable delays and undue burdens to already overloaded courts.

9. *Entry of European Community law into the Czech Republic*

After a decade of economic, political, and administrative modernisation and stabilisation, the Czech Republic acceded to the European Community in 2004.

There are permanent troubles with the implementation of the law of the European Community in the Czech Republic. Directives are often transposed verbatim, instead of being properly understood as regards their requirements, including the margin of appreciation left to member states. Conciliation of their standards with the interests of the Czech Republic is often neglected. Regulations are also inappropriately accompanied with Czech legislation.

Since accession, there is only limited experience with the law of the European Community. Few authorities apply it routinely. For most judges and officials, this supranational law, which consists of hundreds of legal texts, is remote and obscure. Furthermore, legislation was not translated properly and timely. Judgments of the Court of Justice are rarely available in the Czech language even now. Therefore, everybody was and is forced to rely on texts in foreign languages that are often understood inappropriately.

10. *Judgments on Zoning and Approvals Based on European Community Law*

In recent years, Czech environmental activism has been aided by a non-governmental organisation that provides excellent legal services: *Ekologický právní servis*.[18]

It contributes to the continuous flow of actions and complaints against various decisions on projects affecting the environment. Argumentation starts to focus on standards set by the law of the European Community and international law, especially rights to information, to public participation, and to access to courts.

There are few judgments that have confirmed such access to a considerable extent. The most famous it that of *Nejvyšší správní soud – New Runway of Airport Praha-Ruzyně*.[19] Access to court was granted thanks to the perceived direct effect of the Aarhus convention. The zoning ordinance of the capital was labelled as a measure of a general nature and, thus, was reviewed by the court.

Nevertheless, this activist judgment was reversed quickly by a judgment of the extended chamber of the same court in the case *Motorway Pohořelice-Mikulov*.[20] It is based on the assumption that the Aarhus Convention sets the framework. Therefore, it should not be directly applied. This refusal of standing obviously disappointed Czech environmentalist groups and neighbourhood associations opposing particular projects with possible adverse effects on the environment.

Nevertheless, the previously mentioned, new legislation for zoning and construction already established access to the court to everybody who feels affected by zoning decisions categorized as measures of a general nature.[21]

The court also underlined the preliminary nature of the outcomes of environmental impact assessment in its decision on *Additional Motorway Lane around Brno*.[22] Resulting opinion serves only as a final decision. This final decision can be challenged before the court. The court claimed that the European standard for this environment impact assessment is formulated clearly in the directive. Therefore, it rejected the call for requests for a preliminary ruling.

11. *Analysis of the grounds of development and turbulences*

The above-mentioned judgments of the Supreme Administrative Court and several other judgments of it or of regional courts show considerable uncertainty related to the importance of the law of the European Community.

They show a wide range of approaches to this new supranational law: from entire ignorance to eager application of the law. Vaguely formulated standards and principles are difficult to apply alongside national law.

Nobody should expect quick homogenization of case-law. Cases are usually decided by small chambers comprised of three judges. Proceedings in Czech courts are lengthy. Czech legislation is complicated, messy, and subject of numerous changes. There are also reasonable doubts regarding the soundness of case-law. Judges often hesitate to respect it and try to bypass their views. The consequence is a messy application of law.

12. *Reluctance to Launch Preliminary Rulings*

There were reasons for references for preliminary ruling in the above-mentioned cases. Provisions on access to courts in both directives have not yet been interpreted by the Court of Justice. Interpretation of their relevant provisions is difficult, due to their general wording. Furthermore, the Supreme Administrative Court is generally perceived to be the court of last

resort in the Czech administrative judiciary.[23] Therefore, it requests it if there is no *acte éclaire* or *acte clair*.

There is, however, no such request among the several requests for preliminary rulings made by Czech courts. Probably, there are widespread fears of further delays.

Indeed, comparison shows the Europe-wide reluctance of courts in other member states to request preliminary rulings on these issues.[24] Most courts seem to strive for considerable procedural autonomy. Therefore, they hesitate to induce judicial activism of the Court of Justice in these issues related closely to their operations. There is widespread denial of direct applicability of the Aarhus Convention and a lack of will to apply or to take into consideration both directives.

After all, the transposition of both directives seems to be troublesome for many member states. Almost all elder member states face actions of the Commission before the Court of Justice. Coverage of new member states seems to follow.[25]

13. Impracticable Czech Legislation on Zoning and Approval of Projects

Zoning and approval of projects affecting the environment is complicated in the Czech Republic. Three levels of zone plans are adopted by various political bodies of state, regional, and local government. There are several types of subsequent decisions: a decision on localisation of building and several decisions related to construction. Other measures, including the results of environmental impact assessment, can be easily added to the list. These decisions, adopted in a broad span of time and often without any knowledge under which financial and technical conditions the project will be realized, if at all, can be theoretically brought to courts by disagreeing activist groups and neighbourhood associations. It should be underlined that projects clearly denied by the majority of the population of a government entity are usually not approved at all. Judicial challenges affect projects which are strongly rejected only by minorities.

Judges often perceive these judicial actions as obstacles for decision-making and tend to reject them. If it is necessary, due to the wording of supranational and international laws, they mention that subsequent decisions will be judiciable. Thus, no actual judicial control is necessary. Due to the length of planning and a usual shortage of public money, we often await these steps for years. Therefore, it remains unclear whether judicial control would be really available to activist groups and to neighbourhood associations in the late phases of project planning.

14. Comparison with Other Member States

Other member states of the European Union have adjusted their laws more to the requirement of conciliation of the different interests and the opinions of the public.[26]

For example, there are integrated proceedings for big projects that have significant impacts on the environment in Germany and Austria. In Germany, there is legislation that establishes a plan for building a motorway. Everybody knows, however, that this plan, adopted as an act of parliament, is not the final decision on the project. Nevertheless, political conflicts are often cleared already in this phase of decision-making. Subsequently, there is one integrated proceeding for the whole project (for example, for the indivisible section of motorway[27]), which includes an assessment of impacts. Approval of the project can be challenged before court only once. Certainly, such proceedings are extremely complicated and demanding. Nevertheless, they focus on substantive and important procedural issues more than in the recurring cases before Czech courts.

Special tribunals, or judicial panels together with specific procedures, are developed for judicial control of zoning and for approval of environmentally sensitive projects because traditional mechanisms are perceived to be unsuitable.[28]

15. Understanding of Environmental law including particular requirements

Environmental law related to the use of land and to environment-sensitive projects consists mainly of competing principles and requirements. Decisions include assessment. Therefore, the political aspect of these cannot be excluded, as it can be done, to a great extent, in criminal, civil, or other administrative law.

There are also many misunderstandings related to the requirements set by directives and the Aarhus Convention. I suggest that the requirements for public participation are often met with the decision-making of directly elected bodies, i.e., assemblies of municipalities, towns and regions. Judicial control, if it is required at all, should respect the inherent political nature of zoning and the approval of environmentally sensitive projects.

16. Conclusions on Zoning and Project Approvals

I am convinced that Czech zone planning should be profoundly reorganized to meet the requirements of the above-mentioned supranational and international law and – understandably – to remain functional. The pur-

pose of standards for zoning and the approval of projects is the conciliation of different economic, social, and political interests with compromises accepted by the general public and not threatening particular segments of the population in proceedings where politics and rights cannot be entirely separated within an appropriate time. It should not cause never-ending legal clashes. This outcome does not even serve the interests of the minority that is in favour of a more effective protection of the environment.

Czech legislators, who are expected to take appropriate consideration of international and supranational law, should study the solutions of other member states, especially countries that have successfully combined a high-level of protection of the environment with long-lasting economic prosperity and, finally, have similar traditions of law and government. These are, above all, close neighbours: Germany and Austria.[29]

17. Conclusions on interaction of Czech and European law

The cumulated application of Czech legislation and standards set by supranational and international laws has visible limits.

Principles of application of European Community law, which look nice in the judgments of the Court of Justice and in textbooks on European law, justify almost every solution with competing principles and with a direct and indirect effect of directives.

I am afraid that European law regarding access to courts in environmental disputes reveals an unbearable complexity of international, supranational, and national laws.

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1 I will write about the European Community in this paper. All law belongs to the first pillar of the European Union. Readers unfamiliar with it should take into consideration that the European Community forms the oldest and the most important component of the European Union. The law of the European Community only has supranational features. The Lisbon Treaty, however, expects a merger of these entities with same membership of 27 member states.

2 Several monographs have been written about this, for example Lee M., *Environmental Law – Challenges, Change and Decision-Making*, Hart Publishing, Oxford – Portland, 2005.

3 This policy has base in articles 174 – 176 of the Treaty establishing the European Community.

4 For an overview, see "Environmental Policy of the United States" in English Wikipedia. This engagement, however, does not exclude the more rigorous policy of several states.

5 OJ L 107, pp. 30-37. Deadline for transposition was 21st July 2004.

6 OJ L 156, pp. 17-25. Deadline for transposition of amending the directive was 25th June 2005.

7 For further information about the Convention, see http://www.unece.org/env/pp. The Convention was adopted in 1998. It came into force in 2001; for the European Community in 2005; for the Czech Republic in 2004.

8 Article 9 of the Aarhus Convention and article 10a inserted into directive 85/337/EEC with directive 2003/35/EC. On the other hand, directive 2001/42/EC does not require access to courts for the concerned public.

9 See Lee M. (cited above), p. 139-144.

10 See article 249 Treaty establishing the European Community.

11 See http://www.eea.europa.eu.

12 Landmark judgments of the Court of Justice; Ratti (148/78) and Marshall (152/84) described and analysed these in every textbook of the European Community / European Union law.

13 Judgment Marleasing (C-106/89) is also frequently invoked and analysed.

14 In the last three decades, *zákon č. 50/1976 Sb., o územním plánování a stavebním řádu* (Law on Zoning and Construction Rules) was applied and adjusted.

15 *Zákon č. 183/2006 Sb., o územním plánování a stavebním řádu* is applicable since 2007.

16 See web pages in English at http://www.nssoud.cz. In 2004 – 2008, I was adviser for European law at this court. This paper is based on my experience with its decisions. Nevertheless, the opinions expressed are my own.

17 *Zákon č. 100/2001 Sb., o posuzování vlivů na životní prostředí* (Law on Assessment of Impacts on the Environment) entitles (§ 23(9)) associations of citizens and non-profit companies that declare their engagement to participate in various proceedings related to environment impact assessment. A new tool for the engagement of the public is a repre-sentative commissioned by a certain number of citizens of a region or municipality that have objected.

18 (In English) Environmental legal service. See http://www.eps.cz.

19 Judgment 1 Ao 1/2006-74 (18th July 2006).

20 Order 3 Ao 1/2007-44 (13th March 2007).

21 According to the new legislation for zoning, various plans are labelled as measures of a general nature (*opatření obecné povahy)* which can be challenged directly before the Supreme Administrative Court. The Court clarifies the standing in these proceedings in the line of recent judgments.

22 Order 3 As 48/2006-52 (9th January 2008)

23 Article 234 (3) Treaty establishing the European Community.

24 Use the search form at http://curia.europa.eu for both adjudicated and pending cases relating to directives 2001/42/EC and 2003/35/EC for consultation of the actual situation. In September 2008, there are only the first few references for preliminary rulings.

25 The Czech Republic has already faced an inquiry by the Commission. Representatives of environmental activism are convinced that it does not comply with the requirements of directive 2003/35/EC. See web pages of the European Environmental Bureau (http://www.eeb.org), Černý P., *Czech Republic – The Aarhus Convention in Operation: Quick Scan*, pp. 1-15.

[26] Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (http://www.juradmin.eu) organized a colloquium (Leipzig, Germany, 2006) that analysed the impact of European environmental legislation on road planning. Country reports and a summarizing general report can be found there.

[27] German legislation for the construction of federal long-distance roads is provided with a special law (*Bundesfernstrassengesetz*). According to §§ 17–17d of this law, integrated procedure is necessary for the construction of a new motorway. This procedure finishes with a planning decision (*Planfeststellungsbeschluss*).

[28] The above-mentioned German legislation for the construction of federal roads provides for special rules relating to judicial review. For expedited approvals, projects in East Germany were limited to one instance (see article § 17e of *Bundesfernstrassengesetz*)

[29] Especially, the national policy of territorial development should be adopted as law by the Parliament of the Czech Republic, as it has been in Germany. On the other hand, ad hoc legislation for faster approval of particular sections of motorways should be avoided.