

THE INFLUENCE OF ENVIRONMENT AND HUMAN RIGHTS IN THE BUSINESS – THE CONCEPT OF PUBLIC HEALTH – CASE STUDY ON NOISE POLLUTION

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Abstract

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With the competitive global environment raises the question of responsibility in business and maintaining certain legal standards and responsibilities of corporations. Especially discussed is the question of human rights and business impacts on the environment. These factors are surprisingly closely related. They meet in an area, which is referred as “public health”. This concept is widely reflected both in the UN and in the legislation of many countries, but Czech legal arrangement is still not conceptually solved. However, in the debate about increasing corporate responsibility for their actions, we must take into account the protection of the health risk factors, respectively negative environmental effects. This right to public health is enforceable in a certain number of cases. It is therefore necessary to strictly distinguish some of the issues relating to liability for personal injury in the context of human rights. Problem is always to prove a causal nexus between the injury to health and adverse environmental impacts arising in connection with the business or operating a business.

public health, human rights, liability for noise in the environment, excessive noise pollution, public and private methods of regulation, legal enforceability

With regard to some issues related to the overall strengthening of the concept of human rights, we discuss a case study addressing the conflict to protect public health with a focus on protection of property rights. In particular, conflicts of interest will be analyzed in the operation of the noise source. This paper will demonstrate concept of public health on case study on noise pollution in terms of Czech Republic. First of all, we may briefly say what public health means. As defined by the United Nations World Health Organization “The dimensions of health can encompass a state of complete physical,

mental and social well-being and not merely the absence of disease or infirmity.” Public health as a term is widely reflected in many foreign legislations as well as in UN bodies or EU policy². For instance UK decision makers define Public health as a “helping people to stay healthy and avoid getting ill, so this includes work on a whole range of policy areas such as immunisation, nutrition, tobacco and alcohol, drugs recovery, sexual health, pregnancy and children’s health.” Public health is therefore accepted as a single term, concept. This concept is concerns more science disciplines as a medicine,

1 Frequently asked questions from the “Preamble to the Constitution of the World Health Organization” as adopted by the International Health Conference 1946.

2 e.g.: European Commission web for Public Health, see: http://ec.europa.eu/health/index_en.htm quoted at 21.2.2013.

3 Department of Health, United Kingdom, official webpage, see: <http://www.dh.gov.uk/health/category/policy-areas/public-health/> quoted at 22. 2. 2013.

law, environment protection, land planning etc. Main aim is to prevent illness and state of disease by prevention and pre-emption actions. Unfortunately, this term in such condition is not understood in our local terms. Legal arrangement in Czech environment is at least sketchy and incomplete. We have several public health coherent chapters legally solved as health protection in medicine, protection of health in a workplace or EIA or SEA processes in land planning. These areas are separate, not assessed as influencing our "public health" together. In order to show legal arrangement in Czech terms we shall demonstrate this "sketchy" approach in case of noise pollution. Application of torts in the event of negative environmental impact caused by motor traffic – as it relates to human health protection – is still very problematic in the Czech Republic. This can be clearly demonstrated in the specific case of judging the noise burden in decision-making practice of the courts. Yet unresolved are questions of enforceability of rights and responsibilities in terms of both public and private regulation methods.

I. Legal background

Legal liability relates to adverse legal consequences against the one who has breached legal liability. This concerns a secondary obligation in consequence of violation of a primary legal norm. Tort liability can be understood generally as the obligation of each entity to bear consequences for illegal actions or breach of general obligations stipulated by a legal norm. This comes from the principle of *general duty of care*. In relation to the effects of a wide range of negative environmental influences on human health, it is possible for illustration and clarity of certain fundamental problems of current legislation to select just a certain part of it, and point out selected torts regarding noise pollution. Today, in these very questions of noise pollution liability, in the decision-making practice of the courts, one may encounter surprising conclusions with regard to legitimate expectations of participants of the relevant court cases. One such ruling is that of the Constitutional Court of 11. 1. 2012, case No. I. ÚS 451/11. In this case presented rather frequently in the media, the Constitutional Court decided on a nuisance by noise emissions by motor traffic on the Prague Expressway at the street 5. května in Prague. In the given matter, the court decided to limit the right of ownership in relation to noise emissions in correlation to noise pollution exceeding established limits. By this decision, the Constitutional Court overturned the decisions of the Municipal Court

in Prague and the Supreme Court of the Czech Republic. By these general court decisions, pursuant to Sec 127(1) of Act No. 40/1964 Coll., Civil Code, as amended (hereinafter "CC"), the City of Prague was ordered to refrain from noise disturbances caused by motor traffic on the Prague Expressway.⁴ The Constitutional Court decided that these decisions violated the fundamental right of the City of Prague (as operator of the noise source exceeding limits) to protection of its property guaranteed by Art. 11(2) Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter CPHRFF).

II. Public interest in health protection?

Regarding the adjudged case, it is appropriate first to state that it concerns a lengthy conflict with the problematic application and interpretation of private and certain public aspects of valid legislation. On the part of plaintiffs, the owners of adjacent property, a motion was made for the defendant, the City of Prague, as the operator of noise on the road, to refrain from the excessive effects of noise within the framework of so-called neighbor law. Meanwhile, the right was not exercised to compensation for damage to health in causal relation to the effects of noise pollution, apparently with regard to the nearly nonexistent chance of a successful result to the litigation. Compensation for damage to health has thus far been regulated by provisions of Secs 444–450 CC. This mainly concerns compensation for pain suffered, aggravation of social position, loss of earnings after sick leave or upon disability, incurred expenses relating to treatment, costs for sustenance of survivors and funeral costs. Compensation for pain suffered and compensation for aggravation of social position are further regulated by Decree No. 440/2001 Coll., on Compensation for Pain and Suffering and for Aggravation of Social Position, as amended⁵. The fundamental problem can be seen in failure to establish the causal nexus between impaired health and quantifying a specific injury (which could already have been incurred as a result of other influences, or is impaired in conjunction with other causes as well). If the injured party claims that health complications occurred as a result of further specified negative environmental influences, he should provide proof of this fact himself. He must then bear the difficult burden of proof, and valid law in no way (even in the public interest) facilitates fulfillment of this obligation. For damage to health caused by other influences and events not explicitly determined by Decree No. 440/2001 Coll., its quantification will be a bit more problematic. This for example

4 This concerned the decision of the Municipal Court in Prague, case No. 54 Co 390/2007 and the decision of the Supreme Court, case No. 22 Cdo 3281/2008.

5 Compensation is determined according to rate scoring established in appendices to this decree, based on a physician's assessment (for pain pursuant to appendices No. 1 and 3, for compensation of aggravation of social position pursuant to appendices No. 2 and 4).

could concern a situation where the injured party is seeking compensation for damage to his health by hazardous substances released from a specific operation (and does not concern an employment relationship with this operator of the pollution source). In these cases, it is highly problematic to prove the causal nexus between the release of hazardous substances and health impairment. So, therefore public interest (on protection of life and health) gets into a conflict with the private interest (typically the operation of a pollution source – in this case the noise source). In accordance with the valid legislation can be concluded that with regard to exemptions from the noise limits as listed above public interest is not sufficiently supported.

III. Criteria of the term “measure proportional to circumstances”

Specifics of general use of roads and walkways, or their consequences and the criterion of the measure “proportional to circumstances” are questions whose resolution in the ruling of the Constitutional Court case No. I. ÚS 451/11 has seen a reversal of established court practice and opinions widely supported in technical literature.⁶ So far in such cases, the public could exercise its rights at least within the framework of private remedies, mainly in the form of an action to deny in the intentions of provisions of Sec 127 CC. In the wording of this provision, *the owner of a thing must refrain from all that in a measure disproportionate to conditions bothers another person or that seriously jeopardizes the exercise of his rights* Meanwhile, the plaintiff can be anybody bothered by use of the thing in a manner stated in the provisions of Sec 127(1), or one whose rights are seriously threatened by such use. Protection is afforded to everyone regardless of whether or not he is bothered as the owner of the thing. It was generally valid that if the plaintiff based performance of right of ownership on official permission, and the defendant did not exceed the limits of such permission, it was necessary to consider performance of right of ownership as justified (R 65/1972). It is necessary to point out however that this always concerned entitlement solely from the viewpoint of public law. If a nuisance comes from

activity for which official permission was granted, this does not exclude protection against a nuisance caused by this activity according to the provisions of Sec 127 I. CC.

Permission, e.g. to perform a certain trade or activity does not automatically mean that the neighbour would be forced to endure all negative consequences of activity.⁷ In all such cases, it has also been generally possible as of yet to infer civil liability relationships.⁸ Upon the decision of the Constitutional Court in the matter in question however, these interpretation rules have yet to be applied.

IV. Public regulation remedies?

As indicated above, in the given case this concerned on the part of the public essentially the only legally conforming procedure, i.e. private remedies of regulation, because in terms of public law, the valid legislation does not contain adequate legal remedies that could support the enforceability of the right to health protection from excessive noise pollution in consequence of road traffic.

Administrative liability is derived primarily from EU administrative law, which is applied in most Member States. The main liability for preparing implementation rulings falls to the level of the European Union, generally the European Commission. In the area of protection from noise pollution, it is necessary to start mainly from the Directive of the European Parliament and the Council of Europe 2002/49/EC of 25 June 2002 relating to the assessment and management of environmental noise. The European Court of Justice (or EU Court of Justice) then in the case of a conflict gives a binding interpretation of the law of the EC/EU.⁹ Also holding great influence on European administrative law is the case law of the European Court of Human Rights.¹⁰ In the issue of noise pollution, basing itself on the institute of the exception, the utterly fundamental and decisive factor in the CR is the circumstance that the relationship of administrative liability is hardly applicable, and criminal liability is not even considered.¹¹

6 For more see ex. ŠVESTKA, J., SPÁČIL, J., KÁROVÁ, M., HULMÁK, M. and coll. Civil Code I, Sec 1–459, comment, 2nd publication, C.: H. BECK, 2009, pages 719–720.

7 Compare the decision of the Supreme Court, case No. 22 Cdo 1733/2004.

8 Further see ŠVESTKA, J., SPÁČIL, J., ŠKÁROVÁ, M., HULMÁK, M. and coll. *Civil Code I. Sec 1 to 459*. Commentary. 2. publication: Prague: C. H. Beck, 2009, page 1187.

9 Compare with this ex. the ruling of the European Court of Justice (Grand Chamber) of 15. November 2005, C-320/03, the Commission vs. Austria in the matter of limiting freight vehicle transport in the region of Tyrol on the D12 motorway in regards to decreasing harmful air pollution.

10 Compare with this ex. case Deés vs. Hungary, which concerned breach of the right to housing as a consequence of excessive road traffic (complaint No. 2345/06). The European Court of Human Rights in its ruling of 09 11. 2010 stated that by excessive road traffic, violation occurred of Art. 8 of the European Convention on Human Rights (right to respect for private and family life) and Art. 6 (right to due process).

11 For criminal liability relating to threat or damage to health by adverse environmental influences, practically the most frequently applied provisions are those of Sec 273 of the Criminal Code for the criminal offense of general threat

The vague legislation and nearly “limitless” institute of exceptions from maximum permitted limits enable the operator of the source of noise to rightfully operate even such sources where it is demonstrable that regarding potential health risks, they may be dangerous to the health of persons (as well as to other organisms). Legislators have basically resigned to this legal mode in the declared purpose of Act No. 258/2000 Coll., on Public Health Protection, as amended (hereinafter PHPA), which should be protection and support of public health.¹²

In the wording of PHPA, the administrative code should be used for proceedings for permission of operating an excessive source of noise¹³, if this act does not stipulate otherwise¹⁴. The PHPA regulates this process mode in a special way, where a participant in the proceedings held in accordance with Sec 31(1) PHPA in correlation to provisions of Sec 94(2) PHPA, is only the applicant, i.e. the operator of the source of noise. Third parties are not a participant in administrative proceedings for permission to operate an excessive source of noise or vibration. In relation to public participation in protection of public health from noise (or vibration) burden, it is problematic to define the term in an understandable enough measure¹⁵.

The public is not a participant in administrative proceedings for a permit for excessive noise or operation, and thus does not have the rights recognized in administrative procedures only to its participants (such as the right to express oneself

on motions for commencement of administrative proceedings, on materials submitted by participants of the proceedings, to make motions for additional proof, to submit standard and exceptional remedies, etc.). According to Article 11 (1) CPHRFF, the right of ownership of all owners (if it concerns in a specific case a alleged interference in the right of ownership) has the same legal content and protection. Thus if the modification of participation in proceedings according to provisions of Sec 31(1) PHPA prefers protection of rights of one group of owners (operators of source of noise and vibration) over the rights of other owners, it is a question of whether it concerns a constitutionally conforming modification. The affected public may attempt to interfere in administrative proceedings only indirectly, ex. in the form of complaints and material objections, which the administrative body deciding on the matter is obliged to resolve.¹⁶ Regarding the aforementioned, it becomes very problematic to protect affected persons (the public), by which fundamental rights to and freedoms for health protection and a positive environment are limited by noise pollution. If valid legislation does not enable such affected persons to become an equal partner in administrative proceedings¹⁷, it is appropriate to examine whether violation of the right to due process is not occurring in such case. Main problematic in the given context is application of Art. 36(2) CPHRFF, according to which the one claiming that he was not afforded his rights by

11 through negligence. The injured party may make a motion by no later than the start of presentation of legal evidence for the court to decide on the liability of the defendant to compensate it for damage it has incurred. A condition of success of such a motion however would need to be a circumstance where the damage caused would be quantifiable in money (for such specific health effects, this concerns a stipulation not always satisfyingly fulfilled), and furthermore for the motion for compensation for such damage to be exercised in time, and for the defendant to be found guilty of the crime, in whose consequence the damage occurred. If the court does not recognize entitlement to compensation for damage in criminal proceedings, it will refer the injured party to civil proceedings.

12 Compare provisions of Sec 1 PHPA.

13 The excessive noise must be understood not in relation to emissions, ex. a certain machine or equipment as such, but as an assessment of the relationship between such a source and protected building-structure, interior and exterior spaces of constructions. Thus, this concerns a situation where the source of noise or vibrations in specific conditions burdens certain protected buildings in its surroundings above the established limit.

14 See provisions of Sec 94 PHPA in relation to Act No. 500/2004 Coll., Administrative Procedure Code.

15 PHPA defines this term as the ratio between costs for anti-noise (or anti-vibration) measures and their benefit to decreasing noise or vibration burdens of legal entities. The ratio of costs and effectiveness of potential measures is determined also with regard to the number of natural persons of the exposed excessive noise (or vibration). Limit values on noise were determined based on technical materials taking into account the health consequence of noise pollution. In this context, the implicit consequence of considerations on the “number of exposed persons” is not only immoral, but is also incompatible with the constitutional principle of equality and the constitutional anchoring of the right of every person to health protection.

16 If for defining the circle of participants of these proceedings, Section 27 of Act no. 500/2004 Coll., Administrative Procedure Code, were applied, the owner of the property near the source of noise could e.g. successfully claim his case, since his rights and responsibilities could certainly be affected by (issuance of) a permit for operating an excessive source of noise or vibration. It is also possible to refer to the provisions of Sec 15 of Act No. 17/1992 Coll. on the Environment, according to which he may demand his rights arising from regulations regulating environmental matters. In the given case however, it is necessary to interpret the circle of participants in narrow terms (while applying special legal regulations having precedence over the aforementioned legal regulations) in the wording of the provisions of Sec 94 PHPA.

17 The public does have the right to view strategic noise maps (under the stipulation that they were elaborated duly and in time), as well as action plans, but only from the position of an entity to whom valid legislation does not recognize the position of a participant in legal proceedings.

decision of a public administration body, he can turn to the court for it to review the legality of such a decision, if the law does not establish otherwise. Meanwhile, review of decisions concerning fundamental rights and freedoms according to the Charter may not be eliminated from the authority of the court. Torts are thus significantly reduced and eliminated.¹⁸

If it concerns damage caused by operation on roads and walkways, or their replacement, then torts according to special legislation coming into consideration are also relatively complicated.

In the given context, the Constitutional Court analogically referred to the ruling out of liability of the municipality for damages arising from road traffic, by referring to the provisions of Sec 27(4) of Act No. 13/1997 Coll on Roads, as amended. According to this provision it applies that *the owner of a motorway, state road, local road or walkway is liable according to general legal regulations to owners of neighboring property for damage that they incur in consequence of a state of construction or the technical condition of such roads and walkways; the owner is not liable however for damage incurred by owners of neighboring property in consequence of operation of such roads and walkways*. The Constitutional Court thus arrived at the conclusion that *this concept of exclusion of liability for damage caused by operation of roads and walkways apparently arises from the fact that - as opposed to the technical or structural condition of roads and walkways - the traffic on them is something that the owner of the road or walkway cannot influence*. Meanwhile, in the author's opinion the question remains, how much is it possible in a legally relevant manner to separate from each other the issue of the technical and structural condition of the road or walkway on one hand, and the actual traffic on the road or walkway on the other.

In relation to the aforementioned, it can be stated that the standards of public law in the CR do not sufficiently protect the public from noise pollution (including the expected guarantee of rights arising from torts). Thus, the public until now has been able to use at least general private means of protection under the Code of Civil Procedure. The legal opinion of the Constitutional Court expressed in its finding of 11. 1. 2012, case No. I. ÚS 451/11, however does not even allow for this possibility. The circle is hereby closed. By this interpretation of the law, the public ceases to have legally relevant means of protection against interference in the basic human rights of every individual. The author believes that this procedure is in absolute conflict with the Aarhus Convention. It can thus be summarized in accordance with the statement of the Supreme Court that satisfying a constitutional complaint results in the fact that protection of public rights from noise (in the given dispute of secondary participants)

is postponed for an indefinite time period, thus leading to factual exclusion of their protection from noise pollution.

V. Comments on the process of exercising the right to due process

Regarding the circumstance that the right to due process was not granted by the given decision to secondary participants, in essence no other realistic option remains for them in order to implement the given requirements than to turn to the European Court of Human Rights.

In relation to the case in question, it is possible to outline the legal remedies according to Act No. 89/2012 Coll., the new Civil Code (hereinafter the "NCC"). Effective 1. 1. 2014, the NCC should be the basic platform for settling legal relationships in both the private and public sphere.

In the intentions of the provisions of Sec § 2900 et seq. of the NCC, every person is obliged to act preventively in his actions to prevent unjustified harm to the freedom, life, health or property of another. If a party causes damage to the injured party by breach of legal liability, the assumption of negligence occurs, meaning that it is considered that the party causing damage caused such damage out of neglect (compare the provisions of Sec 2911 et seq. of the NCC). In the given context it is necessary to emphasize that in the wording of the provisions of Sec 2925 et seq. of the NCC, every entity operating an especially dangerous operation (such operation could undoubtedly also be an environmental polluter), will compensate for damage caused by the source of increased danger. Operation is especially dangerous if it is not possible to first rule out the possibility of the origin of serious damage even by the exercise of due diligence. The operator is released from liability if it proves that external Force Majeure caused the damage or it was caused by the own actions of the injured party or irreversible actions of a third party (if other reasons for release are arranged, they are not taken into account). If it is clear from circumstances that operation has significantly increased the danger of origin of damage, though it is possible to demonstrably refer to other potential causes, the court orders the operator to compensate for damage in a scope corresponding to the probability of cause of damage by the operator.

Under the provisions of Sec 2951 of the NCC, damage is compensated by restoring the original condition. Only if this is not possible or the injured party thus requires, the damage is compensated by cash payment. Especially in the case of damage to health, the non-material damage should be undone by reasonable satisfaction, which should be given a priori in cash (compensating for factual damage

18 For more on this see DUDOVÁ, J.: *The Right to Public Health Protection*. Public health protection against risk factors of the external environment. LINDE Prague 2011, pages 131–135.

and lost profit). If the amount of compensation of the damage cannot be accurately determined, the court will determine it according to just consideration of individual circumstances of the case (compare Sec 2955 of the NCC). It is necessary to point out that in disputes, fault in the form of negligence is presumed and it is on the party allegedly inflicting damage in each specific case to prove that its actions did not cause damage.

VI. Conclusion

Due to the utterly new concept and terminology of the NCC, it will greatly depend on application and interpretation of its individual provisions. Requirements for transparency of unified

application and interpretation of newly defined terms will be especially current in the just-developing area of compensation for health damage in relation to environmental influences. If in the Czech Republic, the grandly conceived concept of compensation mentioned above were truly implemented, it would lead to a significant qualitative shift with regard to the legal status of injured parties. Also, by the indicated approach upon compensating within the framework of this specific health and legal issue, our application practice would strongly approach the model of the most advanced countries, closest to countries with legal systems founded upon common law.¹⁹

SUMMARY

With regard to some issues related to the overall strengthening of the concept of human rights, paper deals with a case study addressing the conflict to protect public health with a focus on protection of property rights. In particular, analyses the conflict of interest in the operation of the noise source. In previous decisions of the courts is difficult to find a single line of argument proving the responsibility for "noise pollution". One of these problematic cases is Constitutional Court decision dated November 1, 2012, sp. I. U.S. 451/11. Above mentioned decision, demonstrates the conflict between the problematic application and interpretation of private and public aspects of current legislation. The problem has been solved both in terms of neighborly rights, and on the level of damages. According to remedies, we may say, that administrative liability is solved only in European level by ECHR and in terms of CR legislative power resigns on effects declared in PHPA. PHPA is therefore not yet linked to administrative code. Proper implementation of ECHR case law helps. Basic platform to anchor the legal relations on this shall be NCC effective since 1. January 2014. Due to an entirely new terminology and concepts of NCC it will very much depend on the application and interpretation of its provisions.

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¹⁹ Compare with this ex. HINTEREGGER, M. *Environmental Liability and Ecological Damage in European Law*. Increase in leukemia rate. Cambridge. 2008, p. 372–394.

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