Avosetta Annual Meeting 2014, Maribor

Environmental Law and Property Guarantee

THE QUESTIONNAIRE - CZECH REPUBLIC

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1) *What are, according to your country's legal system, potential objects of "property" (real things, private law rights, public law rights, a business, a market share etc)? To what extent is it possible to obtain property / ownership on natural resources? Has private property been used in defence of environmental protection?*

Introductory remark: In the Czech Republic, new Civil Code (NCC – Act No. 89/2012 Coll.) entered into force 1.1.2014. The conception of things in legal sense, resp. objects of property rights and many others is changed substantially, because the legislator established this law on discontinuation principle. Therefore, the answers to this questionnaire are not based on any experience with practical application and interpretation of NCC provisions and/or proper research which would exceed the frame of this questionnaire.

According to the NCC, both movable and immovable material things and non-material things including rights are defined as things in legal sense. The main character of a thing is its legal sense is its usefulness and possibility to exercise control over it. The NCC excludes directly some objects from the term "thing". These are human body and its parts, living animals and rights which are not objects of property rights, e.g. personal rights and expressions of a personal character (e.g. author´s works, inventions etc.).[1]

Immaterial things are rights with character enabling them to belong to somebody. It means that not all rights are things in legal sense. For the right to become an object of property rights, it has to have a property character. Therefore, public rights (permit to operate) are not supposed to be a thing in a legal sense. The NCC provisions related to material things are applicable accordingly to manageable natural forces which are object of commerce.

Most natural resources may be object of property rights, including public domain.[2] Therefore, the criterion to delimit public domain is not the property right (Constitutional Court I.ÚS 451/11). The right to use private property as a public domain is usually established by public laws (for example Forest Act No. 289/1995 Coll., as amended).

Based on environmental laws, an exception has to be made from the NCC rules in relation to specific natural resources. Surface and ground water resources and caves are not subject to property rights; they do not belong to anybody (according to special environmental laws) and their exploitation is based on public law licences.

Living animals are not considered to be a thing. On the other hand, wild living animals such as game may be kept in closed preserves and in this case (even that they are not a thing in a legal sense) they belong to the person who bought or raised them (Decision of the Supreme Court 22 Cdo 980/2005). Otherwise wild living animals do not belong to anybody until they were caught/taken based on the licence to hunt. Constitutional Court was dealing with this question in its findings (for example Pl. ÚS 34/03 of 13.12.200). The court took the view that wild game moves freely without regards to boundaries and

[1] Explanatory report to the Act No. 89/2012 Coll., Civil Code, http://www.psp.cz, (20.4.2014)

[2] Public commons are defined as a thing designated to the general use of public.

therefore it cannot be a part of the land (lot). Game is considered to be "*res nullius*" and state is entitled to regulate exertion of the right to hunt. Execution of this right is a legitimate restriction of the landlord (owner of the land).
According to the Mining Act No. 44/1988 Coll., the state is the exclusive owner of the exclusive deposits of minerals (listed as exclusive deposits by the Mining Act).

The private property can be used for environmental protection indirectly. The owners of real-estates are participants of administrative procedures related to use of different environmental parts. Moreover, if some activity requires the property rights to the land to be carried out, then the owner of the land can use his property right to prevent this activity to be carried out (for example he refuses to sell the land suitable for mining activities on the land surface).
The owner of the real-estate can also sue his neighbours in private nuisance in relation to activities of other property owners that are causing "unreasonable" interference with their individual rights to use land (for example excessive emissions of substances and/or noise/odour coming out of neighbouring property to their real-estate). Owners can also sue polluters in tort law for damages caused to their property (for example damage to the forest caused by emissions of polluting substances, damage to their right to use ground waters).

2) *How does your legal system construe expropriation (definition, preconditions, and legal effects) in particular in matters relating to the environment or of environmental friendly investments (like renewable energy infrastructure)?*

The legal regulation in this field is derived from the basic rule which is contained in the Charter of the basic human rights (Const. Act No. 2/1993 Coll., as amended, CBHR). Art. 11(3) of the CBHR reads as follows: "*The property is an obligation. It must not be used to harm rights of others or in breach of interests protected by the law. Realization of the property rights must not harm human health, nature and environment above the level set by the law*." Art. 11(4): "*Expropriation or limitation of the property is allowed only in the public interest, based on the law and in return for a fair compensation*".
This basic constitutional right is implemented in further legislation. Deprivation of property is possible only in cases laid down by the law and in the manner prescribed by the law. Special laws, including environmental laws, establish purposes for which the expropriation is allowed. Among those purposes, environmental friendly investments can be found (asanation/rehabilitation of the territory, establishment of the system of ecological stability, archaeological heritage protection, measures aimed at reduction and prevention of floods and other natural disasters etc.). Expropriation or limitation of the property for the sake of energy production of renewable sources of energy is not the reason for expropriation, on the other hand, expropriation is possible for the purposes of technical and transportation infrastructure. These are the reasons, resp. purposes of expropriation set by the law. The public interest in each individual case must be proved in a special administrative procedure. The legislature has authorized a special expropriation authority at a district level to decide on expropriation in each individual case.
According to the Act No. 184/2006 Coll. (Expropriation Act) expropriation means not only complete dispossession of the private owner, but also limitation of the property rights in the form of easements. The owner of the property is compensated in both cases. Based on the decision of the expropriation authority, the ownership of expropriated real-estate or the easement right is transferred to the proposer of expropriation (e.g. state and/or private person).

3) *Concerning regulatory restrictions to use property: does your legal system distinguish between allowable restrictions and allowable restrictions with*

compensation?[3] What are the criteria of distinction between the two kinds (weight of public interest, proportionality, etc)? Are these criteria sector-specific enriched, such as in nature protection from intensive agriculture, prevention of pollution from industrial installations, removal of water extraction rights, prevention of climate gas emissions etc?

In the Czech legal systems restrictions to use the property with or without compensation can be found. According to T. Kocourek, the difference is based on Art. 11.3 and Art. 11.4 of the CBHR (see above). The consequence of restrictions is, in sense of Art. 11.4, exclusion of realization of a certain part of property right and/or establishment of unevenness between different groups of owners of similar real-estates. Such intense restrictions of property rights are admissible only if they are substantiated by intensive public interest. On the other hand, restrictions to exertion of property rights in the sense of Art. 11.3 are not followed by any deprivation or limitation of realization of property right components or by unevenness between owners of similar real-estates, because they are related to all real-estates of the same character.[4] No compensation is paid to the owners of the forests who are restricted by the right of a "common use of the forest" according to which everybody has the right to enter forests, pick up berries, mushrooms and small branches. Moreover, owners and users (legal persons only) of the land in the open landscape are restricted by the right of anybody to open access.

Land use planning is restricting owners of the land in the future use of their property (each change in use of the land must be in compliance with adopted land use plan) against no compensation. However, in situation when the site formerly designated for development activity (building site) is according to new/changed land use plan devoted to other use disabling development there (for example city park), then the owner of the land is entitled to financial compensation, because the price of his property was lowered. (Art. 102 of Construction Code (Act No. 183/2006 Coll. , as amended)).

The Supreme Administrative Court took the view (decision NSS of 19.5.2011, 1 Ao 2/2011-16) that owners of the land are not restricted in their rights by the land use plan which is not supposed to change the current use of land. On the other hand, interests of the owner of the agricultural land which is supposed to be (according to the plan) used for development purposes against his will, are always concerned (thus he may go to administrative court and ask for annulment of the land use plan).

In other decision (decision NSS of 5.2.2009, 2 Ao 4/2008 – 88), the Supreme Administrative Court was applying principal of proportionality. The court ruled that the planned change in use of the land does not mean direct intervention to property rights; the indirect effect cannot be excluded in relation to limited use of his property. Even though owners must accept certain level of restrictions, the situation must be distinguished when those restrictions exceed the principal of equity between public interest and imperatives aimed at protection of basic human rights of individuals. In such situation, the owner must be compensated according to Art. 11.4 of CBHR. Based on the test of proportionality, the court is entitled to repeal such part of plan, in which the excessive restrictions are anticipated without adequate compensation.

Protocol No.1 to the ECHR guarantees the right to property to every natural or legal person and provides for adequate protection of this right. Constitutional Court (findings of CR CC of 26.4.2012 IV.ÚS 2005/09) stressed that the property right is not absolutely unlimited, which is consistent with ECHR. Legal restrictions of this right for the sake of protection of other persons´rights and for the sake of protection of public interests (protection of environment and human health) is legitimate. The property right, on the other hand, must not be restricted more than it is necessary. Therefore, restriction related to logging of forest trees in the National Nature Reserve without financial compensation

[3] *Sometimes called indirect or regulatory expropriation, or - such as in Germany - determination of property content requiring compensation.*

[4] Kocourek, T.: Disertační práce , http://www.law.muni.czp. 25

(equal to the value of potentially unlogged timber) is not excessive intervention to rights of individuals according to the Constitutional Court view.
Owners of the land situated in especially protected areas (including NATURA 2000) are facing many restrictions concerning to their land. Beside others, they are restricted to log the timber and to carry out intensive agriculture/forestry. Past judicial decisions indicate however, that the owner of the agricultural/forest land is entitled only to compensation for increased expenses related to protected forest areas management. Restrictions related to loss of profit in this regard do not represent any breach to constitutional rights, since the CBHR in Art. 35.3 establishes duty not to threaten or damage the environment, natural resources and cultural heritage above the limitations set by the law.[5]
The Czech Supreme Court, on the other hand, took the opposite view in its later decision (Case No. 25 Cdo 3837/2011) and ruled that the owners are entitled to compensation for limitation of their property right.

4) What public interests are considered legitimate to impose obligations (active & passive; to do or not to do something) regarding the use of property in cases:

- *to prevent environmental damage;*
- *to prevent traditional damage;*
- *to improve the appearance of the property (i.e. to remove own waste; or to renovate the building façade in the towns, or to isolate buildings for energy efficiency, etc.);*
- *to limit activities/property due to the special protected area, like Natura 2000*
- *of public health/safety reasons.*

To what extent can private individual invoke these sorts of powers – eg actio popularis)?
In which above cases compensation is foreseen by law?

To prevent and not to cause a harm to the environment is the general public interest – it is expressed in rules set by different laws. Therefore active and passive obligations and limitations aimed at environmental protection of private persons are encompassed in all environmental laws, setting thresholds for pollution and imposing duties and limitations on individuals in accordance with Art. 11.3. and Art. 35 of the CBHR (see above). Generally, all interests stated in 4) are in principle considered to be legitimate basis for property use restrictions. In this regard, limitations set by private law (Civil Code for example) and public laws should be distinguished.
The basic prevention requirement (e.g. not to cause damage to environment beside others) which was set by previous Civil Code (Act No. 40/1964 Coll., as amended) was not adopted by the new Civil Code. On the other hand, the NCC provides for protection of personal rights and the right to live in the favourable environment is protected as a natural personal right under § 81 of the NCC. The counterpart of this right is the obligation of others not to interfere with it. Therefore, limitation of exertion of property rights for the sake of environmental protection (based on Art. 11.3 and 35.3 CBHR) is considered to be legitimate.

One of the most disputable problems regarding to restriction of the use of private property is a land use planning. The land use plans do not restrict previous, resp. current mode of usage of the property, however, each projected (future) change in use of

[5] Wagnerová, E., Šimíček, V., Langášek, T., Pospíšil, I: Listina základních práv a svobod. Komentář. Wolters Kluwer, Praha, 2012, p. 312

the land must be in compliance with land use plans. State authorities are bound by those plans in their decision-making on the future use of a specific piece of land. Development consents inconsistent with land use plans are considered to be illegal decisions and as such they are easy to repeal in appellate procedure. Land use plans are also applicable to designate territory and buildings which are supposed to be used for public purposes and based on it, such land and/or buildings may be expropriated in expropriation procedure.

According to the Act No. 167/2008 Coll., on ecological damage liability (transposing Environmental Liability Directive 2004/35/EC) owners of the real-estates have a duty to tolerate preventive and/or remedial measures. Persons carrying out those measures have a right to enter the property which was damaged or is threatened by ecological damage and they are entitled to carry out preventive and remedial activities on the other person´s land. This restriction to property right should be minimized in its scope and time necessary to carry those activities out. According to the law, owners should be compensated for restriction in use of their property. Similar provision is contained in Water Act No. 254/2001 Coll. (§ 42.). Owners of contaminated land have a duty to tolerate limited use of their property in relation to corrective measures which were imposed on polluters or which were carried out by state to remedy contamination. Responsible persons, e.g. those who carry out remedial activities have a duty to restore the property; persons remedial measures were imposed on, must compensate those owners for possible damages and restriction in common use of their property.

Restriction of property rights are also related to mining activities. Provisions enabling to expropriate the private land for the sake of mining activities was abolished in 2012, however, the mining law (Act No. 61/1988 Coll, as amended) allows for the entrance to the private land and specific restrictions, for example to cut the trees, to place signal signs, etc. are set by the law. Similar restrictions are bound to the land designated to geological activity. (Act No. 62/1988 Coll., as amended). Owners of the land are compensated for restrictions in common use of their property.

One of the most pending problem area is cultural heritage protection. Owners of cultural heritage objects have a duty to take care about those monuments (to keep them in a good shape) and they are strictly limited regarding to their restoration and future use (for example they are required to use specific materials and products which are very expensive instead of cheaper ones). Owners of those historical monuments can apply for a state financial help, however, they cannot claim this subsidy. If they are unable to meet the duties set by the law, those cultural monuments can be expropriated against compensation.
To protect archaeological findings, owners of the land (with the exception of natural/physical persons) where some archaeological findings are anticipated (according to archaeological maps), have a duty to finance archaeological survey before the site can be used for development activity. Sites with archaeological findings which are not designated as sites with archaeological findings in archaeological maps in advance, are protected as well. Their owners have a duty to forbear the common use of his property for the sake of archaeological survey. Restriction in usual use of property is compensated; compensations are not related to restrictions in development activities.

Traditional damage prevention is based on "*neminem laedere*" principal. Prevention of the damage is closely related to duty to act with the aim to prevent the damage to the property which is contained both in civil and public laws (for example NCC, Act No. 17/1992 Coll., on environment, as amended).

Improvement of appearance of the property, construction or maintenance of the buildings are reasons for entrance to the neighbouring property. This right is incorporated in the NCC (§§ 1021-1022). According to NCC (§ 1037), it is also possible to use other person´s property (against compensation) in emergency situations or in urgent

public interest. This provision has rather public law character and it is followed by many public law requirements. Restriction of the property right is contained for example in § 60 of the Water Act (Act No. 254/2001 Coll., a s amended). Based on this provision, operators of a water works (hydroelectric power plant) are entitled to enter property near the water stream (river) to carry out operational activities. This provision does not provide for compensation related to this restriction of the land owner. Constitutional Court held (in case IV ÚS 652/06 of 21.11.2007) that this restriction is legitimate, however it does not mean that this restriction should not be compensated.

In the Czech law, there is a range of restrictions on use of property within areas protected for nature conservation purposes. Owners of the protected land (6 different categories of especially protected areas, including Natura 2000 protection) are restricted in use of their land substantially. Restrictions consist for example in prohibition to construct new buildings in especially protected areas, prohibition to use intensive agricultural and forestry technologies etc. Compensations, however, are related just to restrictions in agricultural and forestry activities. The prohibition to use the land in those areas for construction of buildings and other restrictions are not compensated.

Public health protection and safety are the other reasons for property restrictions. Limitations enabling entrance and usage of private property (movable and immovable things) are regulated under the Act No. 239/2000 Coll., on Integrated rescue system, as amended. The regulation is addressed either to entrepreneurs, or natural/physical persons. Basically, they all are obligated to material and personal help and they have to sustain preventive and rescue measures at their property, the entrance of rescuers and use of their land and other real-estates for the sake of rescue activities. Rescuers are entitled to construct protective constructions, to clear the site, to remove buildings and trees etc. The owners of the property and persons rendering help are compensated.

5) Is there a category of (possibly: gradual) dissolution of vested rights without requirement of compensation (example of stepping out of nuclear power)? Can for instance the economic (financial) difficulties of public finances be a reason for dissolution of compensation or vested rights (for instance, lowering or even abandoning wasted financial rights) like subsidizing green electricity)?

According to the Czech law, limitation or prohibition of operational activity is one of the basic public-law sanctions which is contained practically in all environmental laws. In the administrative law theory, they are called as “sanctions with renewable character” and they are usually imposed in case of breach of duties (excessive emissions of polluting substances) when other penalties (fine, corrective measures) were not effective. No compensation in this regard is the understandable consequence.
According to some environmental laws, permits (to do some activity) are issued only for limited period of time (for example permit to take surface or ground waters and to discharge waste waters). Moreover, according to § 12 of the Water Act (Act No. 254/201 Coll., as amended), the water protection authority is empowered to change or abolish the permit to use ground and surface waters based on conditions set by the Water Act. Cases in which this authority is entitled to change or abolish the permit (authority has a right to do that) should be distinguished from cases when the water protection authority has a duty to act.
Similar provision is contained in the Air Act (Act No. 201/2012 Coll.) Based on § 13 of this Act, air protection authority is entitled to decide on the change of permit to operate, which was issued previously, under conditions set by the law (for example the change would lead to air quality improvement in the region without need to exploit excessive financial resources of the polluter). In those cases, no compensation is anticipated by the

law. Similar regulation is contained in the Integrated Prevention and Pollution Control Act (IPPC Act No. 76/2002 Coll., as amended).
Unanticipated archaeological, cultural or natural findings that were discovered during development activities are regulated in § 176 of the Construction Code (Act No. 183/2006 Coll.) According to it, the developer has to stop construction works, to secure the object to prevent its damage and to report such findings to the Construction authority. Based on it, this authority may decide on the change of construction permit. Significant findings can be proclaimed as a part of cultural heritage. In such case, the construction permit may be changed or repealed. The developer is entitled to compensation.
Constitutional complaints were filed against taxes introduced by Act No. 402/2010Coll., amending the Act on the promotion of the use of energy from renewable sources. They were based on the ground of conflict with constitutional law and EU law[6], because the tax is related just to those photovoltaic power plants which started their operation within period of 1.1.2009 to 31.12.2010. Constitutional Court (Case Pl.ÚS 17/11 of 15.5.2012)[7] took the view that the legislation is in harmony with principle of legitimate expectation and principle of equity, since the subsidy of renewable sources of energy was preserved. According to the court, the different approach to different groups of persons/individuals is acceptable if it is based on reasonable grounds. (In the given period of time, the costs of individual components of photovoltaic power plants decreased dramatically by more than 40%. Therefore this group of operators took the biggest advantage of the subsidy which the state deemed necessary to reduce by additional tax[8].

6) How can a property holder defend his interests (through the ordinary courts/constitutional court)? What principles will the courts use when checking the compatibility with the property guarantee?

Property holder can defend his interest through ordinary courts and Constitutional Court, if his constitutional rights (for example right to the favourable environment or property right) are deemed to be interfered with. Property holders might bring a judicial review action before administrative courts in cases in which the administrative law is the ground of challenge, or before ordinary courts in civil matters. Courts would usually apply principle of proportionality and principle of "legitimate expectations".

7) Is secondary legal protection (i.e. the right to compensation) dependent on the exhaustion of primary legal protection (i.e. a motion to annul the action)?

The right to compensation is usually not dependent on exhaustion of primary legal action in civil law suits. In public (administrative) law matter, the compensation of damage caused by illegal administrative decision is dependent on prior annulment of the illegal decision.

8) Can one be responsible for the environmental damage only (solely) due to the fact of ownership of the property (i.e. for instance, the owner of the land where the waste is illegally deposited by the third (unknown) person)?

The owner is not responsible for illegal behaviour of a third (unknown) person; that is the general rule. Under specific circumstances (for example privatization process), the

[6] DIRECTIVE 2009/28/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC
[7] No. 220/2012 Coll.)
[8] Decision of the Supreme Administrative Court 1 Afs 80/2012-40 of 20.12.2012

owner of property may be required to take remedial measures to clean up contamination which was caused by previous property holder/s.

9) Does the state permit (like IPPC permit, operation permit etc) exclude the holder from the liability towards third persons (in case of damage cause by undertakings)?

No. Conditions of liability for damage are established by civil law (NCC). Since those permits are related to operational activities (which are governed by public law), non-compliance with permits gives rise to administrative law liability. Liability for damage is regulated by civil law and in general, it is a fault –based liability. Nevertheless, liability for damage caused by operational activities/hazardous activities is governed by specific provisions (§§ 2924 and 2925 NCC) and it has character of liability without regard to fault. According to those rules, sole compliance with public law requirements is usually not a direct reason for liberation from liability.

10) Are there cases (courts or administrative) that take into account Art. 8 of the ECHR (Right to private life) or Art. 1 of the first protocol of the ECHR? (For instance, where state intervention to limit the property without the compensation would be objected based on above article)?

The Constitutional Court referred to Art. 1 of the first protocol of the ECHR in many cases, for example :
IV ÚS 2005/09- related to prohibition to log timber in National Natural Reserve Ransko (see above)
Pl.ÚS 27/09 – Constitutional Court affirmed that the law can establish limits to property rights without the right to compensation for those restrictions. Such restrictions should be distinguished from forced restrictions as well as expropriation according to the Art. 11.4 (with compensation) which is related only to specific cases of restriction (the property rights of individual owner is restricted beyond the scope of general restrictions related to other owners).

11) How does your national legal system deal with situations where indirect or direct expropriation may be caused by EU legal acts or their implementation?

There seems to be no specific approach.

12) Are there cases where national courts have referred questions to the ECJ concerning property issues in environmental law?

Not to my knowledge.

Two cases:

1) *A factory, situated near a town, has been operating for decades. People are slowly realizing that statistically the inhabitants in the city and in the vicinity do not live average age and the cancer is more frequently present among them, also the frequent cause of the deaths. They have no direct proofs that the factory could be responsible, although it is rather clear that the soil around the factory is poisoned and that the heavy metals found in the vegetable could be linked to the factory. However, credible proofs are missing.*

   What could be the obligation of the state?
   Could the inhabitants rely on the public remedies procedure?

If the state wants to revoke the operation permit, could the factory claim any sort of property guarantee?

This case can be solved either at public law level or private law level. The solution will be dependent on the current state of the factory (if it is still operated or not).
The factory is still operating:
a) People can claim damages to their health at the civil law suit. In this case they need proves to establish *causal nexus* between operation of the factory and damage to their health.,
b) People can bring the problem with excessive pollution to the criminal or public authorities attention. These authorities have a duty to investigate such complaint. Illegal behaviour of the polluter could be probably penalized as a crime (both natural/physical persons and legal persons), or at least as an administrative offence. At the same time, corrective measures to clean the site could be imposed by administrative authority. This approach could be used only if the polluter does not comply with public law requirements.
c) People (owners of the contaminated land) can claim the "ecological damage". If the factory is on the list (Appendix 1 , Act No. 167/2008 Coll., on the ecological damage liability), the contamination of the land can have character of "ecological damage". If the contamination was caused by activity which was carried out after 18.8.2008 (the day the act came into effect), the operator has a duty to carry out preventive and remedial measures according to this law.
The permit may not be revoked unless conditions set by the law would be met (for example previous imposition of a fine and/or corrective measure was ineffective). No compensation or property guarantee can be claimed in this regard (prohibition of the operation represents some sort of punishment).
If the operator does not exist yet, remedial measures will be taken by the state. Different situations are anticipated by the law regarding to the duty of the state to carry out the remedy.

2) *How this case would be solved in your legal system: a waste disposal site is located not far away from a place with app. 150 individual houses. Inhabitants assert that they smell bad odour and they would like to sell their property, but, of course, there are no potential buyers. Their property is worth less. The waste disposal site is equipped with the necessary permits.*

Are the inhabitants in the surrounding entitled to compensation (perhaps to annual revenue)? Do they have to annul the operation permit first?

If the operation of the disposal site was authorized, the inhabitants can sue the waste disposal site in private nuisance for financial compensation. *Restitutio in integrum* is not possible because the operation was permitted. State authority is empowered to impose corrective measures if the disposal site does not comply with legal requirements.
Compensation that reflects the diminuition in the value of property was not awarded by Czech courts so far (as to my knowledge), according to the NCC it will be probably possible.