
ASSOCIATION OF THE COUNCILS OF STATE AND SUPREME ADMINISTRATIVE
JURISDICTIONS OF THE EUROPEAN UNION

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QUESTIONNAIRE – CASE STUDY

REPORT ON THE CZECH REPUBLIC

submitted by

THE SUPREME ADMINISTRATIVE COURT OF THE CZECH REPUBLIC

1) ADMINISTRATIVE CONSENT PROCEDURE

Please give a short outline (no specific details) of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

The intention to build a new motorway must be specified in the **planning documentation** (cf. § 17 – § 31a of the Town and Country Planning and Building Regulations Act (hereinafter the „Building Act 1976“), No 50/1976 Coll., as amended). The motorway is supposed to run through the territories of several municipalities. This means that the relevant planning documentation must be carried out on the level of a **regional plan** (as opposed to a simple local or regulatory plan). The competent authority will be the Regional Office.

The town and country planning (hereinafter “the planning”) procedure consists of several **steps**:

- (i) First, there is the proposal to elaborate the planning documentation, issued by the Regional Office after the approval of the Regional Assembly.
- (ii) What follows is the planning documentation conception draft, which is discussed by the Regional Assembly. Following the discussion, the Regional Office works out an assessment report. The planning documentation conception draft is publicly displayed.
- (iii) After the conception draft has been finalised, discussed and approved by the Ministry for Regional Development, the Region endorses the regional plan.

The endorsed regional plan (or any planning documentation generally) consists of **two parts**: the binding and the guiding one. The **binding part** of the regional plan is set by the Regional Assembly and it is promulgated in the form of a generally binding ordinance. The binding part of the planning documentation is compulsory basis for elaboration and approval of any ensuing planning documentation and further decision-making in the area (planning permissions).

In the course of the planning procedure, following **entities** are entitled to **submit**, within the time-limits stipulated, their **objections**:

- (i) Competent state authorities (determined for instance by the Nature and Landscape Protection Act, Law No 114/1992 Coll., as amended, or on the basis of Protection of Agricultural Land Resources Act, Law No 334/1992 Coll., as amended);
- (ii) the Ministry for Regional Development;
- (iii) neighbouring regions;
- (iv) affected municipalities;

(v) affected land and structure owners.

Anybody may submit objections concerning the planning documentation conception draft at the public meeting.

The Regional Office is obliged, in respect of those municipalities and land and construction owners, who raised objections, either to allow their objections or give reasons for their dismissal.

The difference in opinion between the Regional Office and the affected state authorities, which have raised their objections, will be settled by the Ministry for Regional Development.

Should the difference concern a Natura 2000 area, the Ministry for Regional Development shall decide after having reached an agreement with the Ministry for Environment on the contentious matter. If no agreement can be reached between the two Ministries, the final decision lies with the Government.

The planning documentation conception draft is furthermore subject to the **environmental impact assessment (EIA)** in accordance with the Environmental Impact Assessment Act (Law No 100/2001 Coll., as amended, which implements the Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by the Directive 2001/42/EC of 27 June 2001). Within the framework of the EIA and within the time-limits provided for therein, anybody may submit their objections. Another independent EIA is also carried out: in the case of a new motorway, the environmental impact assessment is undertaken by the Ministry for Environment. The opinion of the Ministry for Environment, issued for the purpose of the EIA, is an integral part of its opinion on the planning documentation conception draft.

Planning permission, necessary for the execution of the intended motorway construction, cannot be issued without the environmental impact assessment having been carried out, in accordance with EIA Act (Law No 100/2001 Coll.). Anybody may express their opinion in the course of the EIA procedure. The competent authority, in the present case the Ministry for Environment, elaborates a final assessment.

Once the planning documentation has been approved, a decision on the structure location can be adopted on the basis of a **planning permission** (cf. § 32 - § 42 of the Building Act 1976). The competent authority for the planning permission procedure is the Building Authority. The **participants** in the planning permission procedure are:

- (i) the petitioner;
- (ii) persons, whose property rights or other rights to the land or structures on it, including neighbouring property and neighbouring structures, may be directly affected by such decision;
- (iii) municipalities;
- (iv) persons, whose standing is provided for by specific laws (e.g. the Nature and Landscape Protection Act, Law No 114/1992 Coll., as amended);
- (v) a civic association, which took part in the previous EIA procedure.

For locating or permitting structures, which may deteriorate or alter the landscape pattern, the consent of the **Environmental Protection Authority** is required. The decision to locate structures in the area of e.g. national parks or preserved areas or to dispose of water resources or hydraulic engineering works cannot be made without the consent of the Environmental Protection Authority. Should agricultural land resources be involved, the regional plan can only be approved with the prior consent of the Agricultural Land Resources Protection Authority, which must approve of the withdrawal of the land from the agricultural land resources fund.

The petition initiating the **planning permission procedure** shall contain the proper documentation, prescribed by the executive regulations to the Building Act 1976 or documentation required by special laws. The petition shall also contain a list of persons, who might become participants in the procedure and who are known to the petitioner. The petition must finally contain sufficient basis for assessing the location of the projected structure (motorway) in the area, especially the environmental impact assessment.

The Building Authority shall notify the opening of the planning permission procedure to the affected state authorities and to all known participants. The opening of the planning permission procedure for the location of a line structure of a very large structure with many participants, such as a motorway, shall be announced to the participants by a public notice, issued by the Building Authority.

The participants may submit their objections and amendments at the oral hearing at the latest. Later submissions will be disregarded. Provided that there is a planning documentation procedure under way, which forms a sufficient basis for the assessment of a petition for a planning permission, the Building Authority might waive the oral hearing, as the planning documentation is the basis for issue of a planning permission.

The Building Authority **assesses the petition** as regards, *inter alia*, the environmental protection requirements and the impact of the proposed measure on the location in question. It further judges the conformity of the petition with legal requirements concerning environmental protection, protection of agricultural land resources, forest land resources, etc., as far as the assessment does not fall within the competence of other authorities. The Building Authority in the planning permission procedure furthermore ensures the conformity between all the opinions submitted by the various affected state authorities, required by special laws (e.g. the Ministry for Environment, Ministry for Health, National Parks Administration etc.). It also assesses the objections raised by other participants in the procedure.

In case the petitioner is not the owner or has no other right to the piece of land in question, the planning permission concerning the location of a structure of the use of land cannot be issued without the permission of the owner. The permission of the owner would not be necessary only if it were possible to expropriate the piece of land for the same purpose or if the petitioner is to become the owner of the piece of land according to other special legal provision.

In the planning permission, the Building Authority shall demarcate the ground to be used for the proposed purpose. It shall also set the conditions for the protection of public interests within the area; in this way, the Building Authority ensures, *inter alia*, that requirements related to health and environment protection are observed. It also decides on objections raised by the participants to the procedure.

The decision on structure location and the decision on land use remain valid for 2 years following its entry into legal force, unless the Building Authority has not provided, in justified cases, for a longer validity period. The validity period may be extended by the Building Authority upon the request made by the petitioner, provided this request has been submitted before the period has expired.

The decision on the location of a line structure shall be communicated by public notice.

The construction of the motorway itself can only be carried out on the basis of a **building permit**. The building permit itself is, however, beyond the scope of the present question – the permit concerns the construction stage, not the planning one.

2) PUBLIC INVOLVEMENT:

- a) *Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure?*
- b) *If yes, at which stage(s) of the procedure and in which form?*
- c) *Do affected parties lose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement?*

Public involvement as well as respective stages of the administrative procedure, at which the involvement comes into question, is covered by the answer to question 1.

As far as the possibility of **judicial review of the planning permission** is concerned, it is to be stressed that the binding part of the planning documentation is promulgated in the form of a generally binding ordinance. Such ordinance cannot be subject to judicial review before administrative courts. It may, however, be examined by the Constitutional Court. (Further see below, answer to question 8).

The possibility of a judicial challenge to planning permissions for **civic associations** is quite limited. According to the up-to-date case-law of administrative courts, civic associations may only attack violation of their procedural rights in the course of the previous administrative procedure. They are, however, due to insufficient *locus standi*, not allowed to question the substance of the decision. What follows is that if a civic association has not participated in the prior administrative procedure at all, it cannot challenge later administrative decision before administrative courts (on standing for civic associations, see below, answer to question 4).

3) JUDICIAL PROCESS:

Please give a short outline (no specific details) of the judicial process applying to project planning decisions (pre-trial proceedings, time-limits competent courts, appeal, interlocutory injunctions).

Judicial review of planning permissions (decisions on the structure location) falls within the **jurisdiction of administrative courts**, as planning permissions are issued by an administrative authority in the area of public administration. Administration authority is any body within the executive branch of the government, local government body, or any moral as well as legal person or other body that has been entrusted with authoritative decision-making on the rights and duties of individuals in the area of public administration.

Judicial review of a planning permission follows the general review pattern within the administrative judiciary; there are no specific provisions relating to planning permissions review. Any person claiming that their rights have been prejudiced by a planning permission may lodge an action against such decision. The time limit is 2 months following the moment the decision has been notified to the applicant.

Competent courts in administrative judicial review cases are **regional courts**. Their territorial jurisdiction is determined by the place where the seat of the administrative authority, which decided in the last instance, is located.

The remedy against the regional court judgment (i.e. the judgment in the first instance) is the cassation complaint. The cassation complaint can be lodged by a party to the proceedings before the regional court on listed grounds within 2 weeks following the notification of the decision to the applicant. The competent court in cassation proceedings is the **Supreme Administrative Court**.

There are no time limits for rendering a judgment in planning permission judicial review cases. No oral hearings are normally held. Judicial review of planning permissions cases are awarded no special priority, as no preferential treatment is provided for these in law. Application for an interlocutory injunction in this type of cases is inadmissible, because the application for judicial review itself may be, under the given circumstances, awarded dilatory effect. However, as follows from the established case-law of administrative courts, the nature of a structure location decision excludes the possibility of causing irreparable harm to the applicant, the danger of irreparable harm being the precondition for dilatory effect.

Similar principles apply to the cassation complaint proceedings before the Supreme Administrative Court.

4) STANDING:

- a) *Do all of the above-listed plaintiffs have standing before your national courts?*
- b) *If not, which are the reasons for their exclusion?*

Standing (*locus standi*) is regulated by § 65 sec. 1 and 2 of Code of Administrative Justice 2002 (CAJ 2002). According to this provision, an application may be filed by:

- a) **Anyone** who claims that their rights have been **prejudiced directly** or due to the violation of their rights in prior proceedings by an act of an administrative authority (§ 65, section 1 CAJ 2002),
- b) Any **other party to the administrative procedure**, which is not entitled to submit an application under § 65 section 1 CAJ 2002, because the subject of the prior proceedings were not their rights or duties, but the rights and duties of others. Such persons may also file an application against a decision of an administrative authority if they claim that their rights have been prejudiced by the administrative authority's acts in a manner that could have resulted in an illegal decision in the matter in question.

§ 66 CAJ 2002 provides for *locus standi* of other individuals or bodies (specified administrative authorities, the Supreme Prosecutor or other bodies provided for in specific laws or international treaties) in the protection of public interest. This provision is, however, of little real consequence in judicial practice; on the one hand, "specific laws" which would bestow special standing to administrative authorities or other bodies beyond the § 65 CAJ 2002 itself have never been adopted. The Supreme Prosecutor, on the other hand, does not use her privileged standing in practice.

As far as the standing of the persons listed in the questionnaire is concerned, the following can be observed:

- 1) **The inhabitant of the residential area** who is afraid of unbearable traffic noise and air pollution is not entitled to a judicial challenge of the planning permission. The decision on motorway structure location does not yet present any prejudice to inhabitant's rights. The inhabitant is solely expressing his/her concerns that there might be future prejudice to his/her rights. Such claims might be well-founded sometime in the future, but are unfounded at present. Such claims are, due to their uncertain nature, outside the scope of judicial protection.
- 2) The situation described under point 2), i.e. that **one of the municipalities would have divergent project plans** for its territory, should not occur at all. As was described supra, in question 1), the planning documentation conception

draft is submitted, before its final approval, to the superior planning authority. The superior planning authority reviews the conception draft as to its conformity with the laws and other regulations, which includes the review of conformity of the local plan with the regional plan and the regulatory plan with the local plan and the regional plan. This means that the “lower” plan should always conform to the “higher” one.

- 3) The Czech **national environmental agency** is the Agency for Nature Conservation and Landscape Protection of the Czech Republic. The Agency is a constituent unit of the Czech state. It acts on behalf of the Czech Republic. As such, it cannot be at the same time entitled to the constitutional right to favourable environment, and it cannot thus be prejudiced in its rights in the sense of § 65 sec. 1 CAJ 2002. Taking into account there are no other special legal provisions granting standing to the Agency, it must be concluded that it has no *locus standi* to bring similar claim.
- 4) A **farmer who will lose parts of his farmland** would surely be entitled to file an application, as his rights (ownership) would be directly concerned.
- 5) A **national environmental association** would be entitled to file an application for judicial review under the conditions stipulated in § 65 sec. 2 CAJ 2002, i.e. if it had been party to administrative procedure concerning the motorway location decision and it would furthermore claim that it has been prejudiced in its procedural rights in such a manner as to influence the legality of the contested planning permission. The conditions for the environmental association to become a party to the administrative procedure are laid down in § 70 of the Nature and Landscape Protection Act, Law No 114/1992 Coll., as amended.
- 6) An **association** for the protection of the environment **from a neighbouring state** could file an application for judicial review under the same conditions as a national environmental association: it must have been party to the prior administrative procedure and it must furthermore claim that it had been prejudiced in its procedural rights in such a manner as to influence the legality of the contested planning permission (§ 65 sec. 2 CAJ 2002).

5) SCOPE OF CLAIMS:

Are the above-listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interest (e.g. adverse effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well?

Applicants are entitled to claim only violation of their rights, not violation of the rights of others. There is a distinction to be made between **two types of applicants**: Applicants falling under the provision of § 65 sec. 1 CAJ 2002 may claim the violation of their substantive as well as procedural rights. Applicants under § 65 sec. 2 CAJ 2002, on the other hand, may only argue the violation of their procedural rights. In other words:

1) **Applicants** having *locus standi* under § 65 sec. 1 CAJ 2002 may be **prejudiced in their subjective**¹ substantive as well as procedural **rights**. They are accordingly entitled to argue both types of violation before administrative courts.

2) **Persons** having *locus standi* under § 65 sec. 2 CAJ 2002 (e.g. environmental or ecological associations) may **only** argue violation of their subjective **procedural rights**, but not violation of substantive rights. The present case-law is of the opinion that such associations do not have any own vested substantive rights. If they participated in the prior administrative procedure, they did not assert their subjective rights, they just defended certain public interest (e.g. the public interest in the protection of the environment and landscape). In such case, their subjective rights could not have been violated, as none had ever been present. Equally, as was already mentioned above, environmental associations cannot defend substantive and/or procedural rights of others.

The outlined case-law of the administrative courts, limiting the access of environmental or ecological associations to judicial protection, might undergo some change in the near future. The impetus for change might come from the Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment (the **Aarhus Convention Directive**). This directive has yet to be transposed into Czech law (especially as far as the access to justice for the “public”, as defined in Art. 2 of the Directive, is concerned). The transposition period has, however, already expired. It is conceivable that this transposition deficiency might be overcome by some sort of direct effect or indirect effect of the Directive within the current legislative framework, which would allow for greater access of environmental associations to administrative courts in the planning documentation/planning permission making area.

As already mentioned above (point 4), the Supreme Prosecutor is entitled, by virtue of § 66 sec. 2 CAJ 2002, to submit an application for judicial review in “the public interest”. Such case has, however, not yet occurred.

6) SCOPE OF JUDICIAL REVIEW:

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community law)?

Administrative courts review planning permissions in **full jurisdiction**, i.e. the administrative court is entitled to review questions of law as well as questions of fact. They are furthermore allowed to collect evidence. When reviewing the decision of an administrative authority, the administrative court always considers the legal and factual background that was present before the administrative authority at the moment of the adoption of the contested decision.

¹ Czech legal and administrative law theory makes the sometimes problematic distinction between objective and subjective legal rights. Objective right(s) are conceived as the conglomerate of abstract legal provisions. Objective right (law) gives the answer to “what the law is” in any given moment; it is the totality of valid legal norms. Subjective rights (claims or privileges), on the other hand, are legal entitlements belonging to a given person (the property right of X relating to the estate Z). They follow from the objective rights; they are objective laws applied to a concrete case.

7) EU ENVIRONMENTAL LAW:

Which decision will your court take, if:

- a) *the environmental impact assessment prescribed by Community law has not or not duly been carried out in connection with the project in question?*

Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment, as amended by Council Directive 2001/42/EC, has been transposed into Czech law by the **Environmental Impact Assessment Act 2001** (EIAA 2001), Law No. 100/2001 Coll., as amended. By virtue of § 4 sec. 1 of the EIAA 2001 and point 9.3 (or 9.4) of the first attachment, category I thereof, environmental impact assessment (EIA) in the case of a motorway construction conception is **compulsory**. The competent body for carrying out the assessment would be the respective administrative authority, in the given case either Ministry for Environment or the regional office.

According to the case-law of the Czech courts, the final output of the EIA procedure, the assessment itself, is not an administrative act, but just legal basis for another administrative act. For this reason, the assessment itself **cannot be subject to judicial review** (cf. decision of the Constitutional Court of 25 May 1999, IV. ÚS 158/99 or decision of the High Court in Prague of 31 March 2000, 7 A 32/99-19, 677/2000). On the other hand, what may be subject to judicial review is the final administrative act (e.g. the planning permission), for which the assessment served as the basis. Within the judicial review of the final act, review of the assessment is possible.

In case where, within the administrative procedure before the administrative authority, the EIA has **not been carried out at all**, the defect in the administrative procedure would result in illegality of the contested decision and its cancellation.

In case where the EIA has **not been carried out duly**, it would be necessary to assess, within the circumstances of the particular case, whether or not the defect of the administrative procedure was of such magnitude as to cause illegality of the decision (further see below, question 8).

b) *the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of EU "Habitats Directive", but has not yet been transmitted to the Commission?*

c) *the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list?*

(Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora – Official Journal L 206, 22/07/1992, p. 7 - 50)

The answer to and the distinction between the scenarios described in letters b) and c) is **currently pending before the Court of Justice** of the European Communities as a request for preliminary ruling raised by the Bavarian *Verwaltungsgerichtshof* in the Case C-244/05, *Bund Naturschutz in Bayern e.a* (notification published in O.J. 2005, C 205 of 20 August 2005, at p. 8). With regard to this fact, the course of action the Supreme Administrative Court might take would be to stay the proceedings and wait for the decision of the Court of Justice. Alternatively, the Supreme Administrative Court could also submit its own request for preliminary ruling concerning the issue, which would most likely be joined with the already pending case before the Court of Justice.

Generally speaking, it could be argued that principle enshrined in Art. 10 Treaty establishing the European Community (TEC), namely the **duty of loyal cooperation**, is applicable in both scenarios: even before the transposition period duty has expired, the Member States are obliged to behave in such a manner as not to compromise the later full implementation

of the directive in question (cf. in context of environmental protection, Case C-129/96, *Inter-Environnement Wallonie ASBL* [1997] ECR I-7411, paras 44 and 45).

As far as the application of the Directive 92/43/EEC is concerned, this would mean the **duty** of the Member States **to afford preliminary protection** to areas, which fulfil the conditions for becoming a site of Community importance, their application has been transmitted to the Commission, but the declaration process is on the way, i.e. the area has yet to be placed on the Commission's list (cf. judgment of the Court of Justice in Case C-117/03, *Società Italiana Dragaggi SpA* [2005] ECR I-167, paras 25 – 29).

Nonetheless, it remains unclear whether or not the same level of protection should be afforded to areas, which also fulfil the conditions, but have not yet been transmitted to the Commission.

It appears, however, that the protection of sites of Community importance by the fiat of generous judicial interpretation might not be necessary in Czech law. The preliminary protection of sites of Community importance is expressly provided for in § 45 of the Nature and Landscape Protection Act, Law No 114/1992 Coll., as amended. This provision implements Art. 5 sec. 4 of the Directive 92/43/EEC and provides for **statutory preliminary protection of sites of Community importance**. The preliminary protection extends to all sites, which have been put on the national list, i.e. even before the transmission of the selected site to the European Commission for evaluation. What follows is that the statutory preliminary protection extends to both scenarios described above, i.e. sub letter b) as well as c).

To protect sites of Community importance is the primary duty of administrative authorities in their decision-making. Should, however, the administrative authorities fail to do so, administrative courts would be entitled to take this fact into consideration when assessing the contemplated motorway construction.

d) the project adversely affects a birds sanctuary in the sense of the EU – “Birds Directive”?
(Council Directive 74/409/EEC of 2 April 1979 on the conservation of wild birds – Official Journal L 103, 25/04/1979, p. 1-18)

Should the project adversely affect a **birds sanctuary** in the sense of EC Birds Directive, the legal process would be quite similar to that of the Habitat Directive. Nature and Landscape Protection Act (Law No 114/1992 Coll., as amended), which implements the relevant provisions of the Directive 74/409/EEC, provides in § 45h for **compulsory** environmental impact assessment for all planning documentation conception drafts that might considerably influence a site of Community importance or a birds sanctuary. The administrative authority is thus obliged to evaluate the project of the motorway also with respect to any possible collision with a birds sanctuary. The statutory preliminary protection, provided for in § 45b of the Nature and Landscape Protection Act, extends also to birds sanctuaries.

The only real tangible difference between the situations outlined in letters b) and c) on the one hand, and situation sub d) on the other, would be the application of a different set of substantive criteria in evaluating the impact of the motorway location within the environmental impact assessment exercise. These differences follow, however, directly from Community legislation – cf. the different wording of Art. 5 and 6 of the Birds Directive on the one side with Art. 12 of the Habitat Directive on the other, implemented in Czech law by § 5, § 5a and § 5b of the Nature and Landscape Protection Act respectively.

e) the project is likely to exceed the limit values of the EU – “Ambient Air Directive”
(especially those for PM10/particulate matter)?
(Council Directive 1999/30/EC of 22 April 1999 relating to limit values for sulphur dioxide, nitrogen dioxide and oxides of nitrogen, particulate matter and lead in ambient air – Official Journal L 163, 29/06/1999, p. 41 - 60).

The Ambient Air Directive has been partially transposed into the Czech legal order by **Ambient Air Act 2002** (Law No. 86/2002 Coll., as amended). Assessment of the ambient air quality, as set out by the Directive and the Act, will form part of the environmental impact assessment under the EIAA 2001, similarly to habitats and birds sanctuaries.

Should it become apparent, in the course of the environmental impact assessment exercise, that the motorway project would **exceed the limit values** laid down in the Directive 1999/30/EC, the decision-making administrative authority is obliged to consider that.

On the other hand, the assessment given within the EIA framework is not binding upon the administrative authority (cf. § 10 sec. 4 EIAA 2001). Should the decision-making administrative authority nonetheless diverge from the opinion expressed in the assessment, it remains bound to give reasons why it considered necessary to depart from the assessment opinion. The reason justifying departure from an opinion expressed by an environmental protection authority in the EIA process by the planning permission-making building authority might be other public interests at stake, such as economic development, regional cohesion, traffic planning etc. To sum up, it may happen that despite of a negative environmental impact in the given case, caused for instance by exceeding the limit values of the Ambient Air Directive, the motorway construction would be allowed.

A different situation would occur if the fact that the motorway project were to exceed the limit values were **found out only after completing** the motorway construction and not during the EIA. The disregard of the limit values were to become known only once the motorway has been already functional. Similar situation is contemplated neither by the Directive 85/337/EEC (EIA Directive), nor by the Directive 1999/30/EC (Ambient Air Directive).

A possible course of action in similar situations might be to complain to the European Commission, alleging violation of EC law and urging the Commission to launch infringement proceedings against the Czech Republic, pursuant to Art. 226 TEC.

An alternate way might be an action for damages before the Czech courts, claiming for instance deterioration of the quality of environment or violation of the right to favourable environment. Similar course of action is, however, highly speculative – no such cases have so far been heard in Czech courts and their chances of success are marginal. Some of the major hurdles a similar action for damages would have to overcome would be to substantiate, in the form of a pecuniary claim, the harm done to the environment and to prove the standing to bring such claim.

The **lack of full and proper implementation** of the Ambient Air Directive could enrich the case scenario in letter e) with one additional interesting procedural angle. As already mentioned, the value limits of the Directive were transposed into Czech law partially by the Ambient Air Act 2002 (Law No. 86/2002 Coll., as amended), which provides for the general regulatory framework, and partially by the Government Regulation No. 350/2002 Coll., which sets the value limits themselves. As far as the particulate matters PM10 are concerned, the Act and the Regulation lack full transposition of the Directive, especially of Art. 5 of the Directive. Taking into account the fact of incomplete transposition of the Directive, it remains to be seen whether or not a Czech court, when assessing the Community requirement concerning the value limits for particulate matters PM10, could rely on this provision of the Directive as being **directly effective** (cf. e.g. Case 152/84, *Marshall* [1986] ECR 723). Alternatively, should the provision of the Directive appear not to be sufficiently clear, precise and unconditional, the court could use the Directive as an interpretative tool for the correct “euro-conform” interpretation of Czech legislation (i.e. **indirect effect**, cf. e.g. Case C-106/89, *Marleasing* [1990] ECR I-4135).

8) CONSEQUENCES OF PROCEDURAL AND SUBSTANTIVE DEFICIENCIES OF THE PLANNING DECISION:

a) Are there – in your national legal order – any procedural and/or substantive deficiencies which regularly render a planning decision completely void?

The binding parts of the regional plan as well as the local plan (**planning documentation**) are promulgated in the form of a generally binding ordinance. The ordinance is a measure of general application (normative act). Only the **Constitutional Court** is entitled to annul measures of general application. What follows is that any application claiming the cancellation of binding parts of a planning documentation must be made to the Constitutional Court.

The number of claimants being entitled to submit similar application is limited to state authorities (e.g. the Government, the competent ministry or a court) or to a person who attacks the application of the planning documentation in his/her individual case by the way of a constitutional complaint (cf. § 64 of the Constitutional Court Act, Law No 182/1993 Coll., as amended).

Challenges to the validity of an ordinance promulgating the binding parts of a planning documentation are not a frequent type of proceedings before the Constitutional Court. It is therefore difficult to infer any procedural and/or substantive deficiencies, which would regularly render planning documentations void.

The **review of a planning permission**, on the other hand, falls within the jurisdiction of **administrative courts**. A frequent deficiency which causes the cancellation of planning permissions is the fact that a participant, who was entitled to participate in the original administrative procedure, has been omitted. This often applies to environmental/ecological associations, which have applied for participation in administrative procedure and fulfilled the conditions for participation laid down in § 70 of the Nature and Landscape Protection Act, Law No 114/1992 Coll., as amended, but which were unlawfully excluded from the participation in the administrative procedure by the administrative authority. A contentious issue often arising in similar type of litigation is to whether or not the environmental association has duly notified (normally within 8 days of the commencement of the procedure) its intention to participate in the procedure to the administrative authority.

b) For what kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity)?

When **Constitutional Court** decides on the first type of cases, i.e. when it examines binding parts of planning documentation enshrined in generally binding ordinances, the Court is entitled to annul the ordinance in its entirety or to annul just parts of it.

When reviewing planning permissions in administrative jurisdiction, **administrative courts** are only allowed, once they found the application well-founded, to quash the administrative decision in its entirety. The case is then remitted to the administrative authority, which is obliged to decide the case anew in conformity with the judgment of the court.

c) For which kinds of rulings does your national legal order provide if the planning decision has only minor deficiencies/ is not completely void (e.g. modifications of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation)?

The **grounds for annulling** a planning permission are:

- (i) illegality, i.e. the fact that the administrative authority erred in a question of substantive law, or
- (ii) the fact that the administrative procedure leading to the issue of the planning permission suffers from deficiency (irregularity), which might have led to the illegality of the contested decision itself.

Provided that there were **only minor deficiencies** in the course of the administrative procedure, i.e. deficiencies which do not reach the intensity as to render the decision illegal, the application would be rejected. Modification of the planning permission by imposing additional requirements is out of question, as the judicial review of administrative acts in the Czech Republic is essentially based on the cassation principle.²

d) Which rulings are likely to be given in the cases of the above-listed plaintiffs?

As already mentioned above (question 8, letter a), number of potential claimants before the **Constitutional Court**, who would be entitled to challenge a generally binding ordinance, which promulgated the binding parts of a regional plan contemplating the construction of a motorway, is limited by § 64 of the Constitutional Court Act, Law No 182/1993 Coll., as amended.

From the persons discussed above in question 4, **only the municipality** would be entitled to challenge the ordinance before the Constitutional Court **directly**. **Other** persons could do so **only in connection with a constitutional complaint**. The object of the constitutional complaint would have to be the individual application of the regional plan to the situation of the individual claimant. The claimant would have to demonstrate the unconstitutionality or illegality of the regional plan or its individual provisions.

What follows is that if an inhabitant of the residential area, who is afraid of unbearable traffic noise and air pollution, a farmer, who will lose parts of his farmland, a domestic or a foreign environmental association were to file an annulment application to the Constitutional Court directly, i.e. without filing a constitutional complaint at the same time, their applications would be dismissed.

The chances of the discussed persons in **judicial review of planning permissions** on motorway structure location before administrative courts have already been discussed supra, question 4.

9) REMEDY OF DEFICIENCIES:

*May procedural of substantive deficiencies of the planning decision be remedied during the judicial process?
If yes, on which conditions?*

As has already been mentioned, the **Constitutional Court** is called to review the conformity of regional plan and local plan, both issued in the form of a generally binding ordinance (normative act), with generally binding laws. The municipality or the regional office, which issued the generally binding ordinance, are even in the course of the litigation before the Constitutional Court free to remedy the contentious provisions; they may replace the contentious provisions or

² Meaning that the administrative courts in the Czech Republic can only confirm or annul the administrative decision, but they cannot modify it (similarly to the French concept of the “*recours en cassation*”)

they may repeal the ordinance altogether. Should they decide to do so, the proceedings will be discontinued.

As far as the remedy of deficiencies before **administrative courts** is concerned, the Code of Administrative Justice provides for the possibility of discontinuance of proceedings due to satisfaction of the applicant (§ 62 CAJ 2002). What this means is that until the court has decided, the defendant may make a new decision or measure, or take another action whereby the defendant may satisfy the applicant, providing the rights and duties of third parties are not affected.

The **steps** to be taken in a similar case are the following ones:

- (i) The administrative authority informs the court of its intention to satisfy the complainant.
- (ii) The court sets the time limit within which it is necessary for the defendant to take a decision, measure or action and to inform both the applicant and the court of them.
- (iii) Once the defendant notified the court of the decision made or other measure taken, the court calls on the applicant to state whether he or she is satisfied with the action of the administrative authority.
- (iv) The court shall discontinue the proceedings by a resolution once the applicant states that he or she is satisfied with the new administrative decision of the defendant. The court shall discontinue the proceedings even though the applicant does not say so within the period prescribed if all the circumstances of the case make it clear that satisfaction has been achieved.
- (v) The new decision, measure or action come into force or have similar legal effects upon the day the court's decision to discontinue the proceedings comes into force.

It is obvious that remedy of deficiencies in the course of judicial proceedings may happen only at the instigation of the defendant administrative authority. The only function performed by the administrative court in similar cases is to give the defendant the opportunity to remedy acknowledged and recognised deficiencies of the administrative decision. The function of the court is surely not to remedy the deficiencies itself or to alter the contents of the administrative decision.

The up-to-date case-law of administrative courts implies that the practical use of the discontinuance of proceedings due to satisfaction of the applicant is limited to easy and evident cases. On the other hand, nothing in law precludes the application of this procedural tool to judicial review of planning permissions.