DEALING WITH PUBLIC INTEREST IN THE FRAMEWORK REGULATIONS AND IN THE TAILOR-MADE LAWS

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Abstract: *This article focuses on features and facets of the qualified public interest as it is relevant to enable the realisation of many infrastructural and other significant projects of the state or carried out in favour of the state by private businessmen or private persons while distinguishing them from purely private interests. Secondly, it aims at the description of a balanced interrelation between legislative and executive powers in seeking for provision of support to some concrete infrastructural projects when simultaneously preserving the constitutionally stipulated division of powers and a proper function of law in a society.*

Keywords: *public interest, projects of common interest, administrative bodies, planning proceedings, energy law, Czech Republic*

1. SEEKING FOR THE PUBLIC INTEREST

1.1 Public Interest as a Reversed Individual Interest (a Horizontal View)

From the general point of view, the public interest is a real philosophical concept that has its core meaning and potential to be determined in each and every case when an administrative body weighs which interest could be seen as the public one. So that its grounds lie in philosophy, asides of law and the more complicated is then to correctly acknowledge the specific interest to be in favour of common wealth of a whole society rather than of an individual. As of the same reason it is not easy, for instance, for the administrative court to discover properly the real roots of a due legal consideration and, therefore to duly justify its ruling while seeking for the public interest as a final product of a material review. Public interest issue depends very much on the fact that it does not occur primarily on the side of a state but of a political society that is established by people in order to legitimate common life underneath a single roof and to provide a legacy to a state as a means for achieving its goals. Directly each political society is creating a set of public interests quite dynamically with the solely aim to assure the common existence of people and its welfare. Sometimes, it is focusing on a human being as such and his or her life space and life conditions and is covered by the incomplete range of human rights that, on the other side, could be limited in favour of the respective community by law. But from the most part they are derived from the interest of the entirety of society as material prosperity and intellectual richness, dignity, justice and felicity could be enumerated. Any state is predetermined to represent the interests of a whole society, though being of former or latter characteristics as mentioned above. In the end, functions executed by any state should be deemed as those serving to the corresponding political society and not vice versa.[1]

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[1] MARITAIN, J. *Člověk a stát*. Prague: Triáda, 2007, p. 16.

The public interest consists in common wealth and, correspondingly, in care of a whole society when improving social conditions of people and the most significant role of a state is to represent this common wealth in the name of the political society and through the both just statutes and laws on the base legislative level and the proper execution of discretionary competence while deciding on rights and duties of the concrete subjects on the application level. Any state shall specialise to defend the interest of a society and to protect commonly perceived rights in order to ensure its development and not to encourage an ill-minded and divergent egoism and particularism of only a part of a society, not even of an individual, against its own substance. In terms of ethics, a simple struggle to personal enrichment that is typical of any human being could be perceived as something unjust and therefore, a sort of real evil destructing any society by its substantial material denial. The selfish power of evil destroys any effort to keep a unity of a society together by sacrificing common needs and values or, respectively, public interests resulting in preference of an individual to a society.

To this end, public interest is construed by law in form of an undefined legal term that is essential to fill in with the concrete content by the respective public authority in relation to relevant circumstances of the case. Public interest proves its social influence contrary to the private interests primarily consisting in the specific interests of an individual also protected by law. Not in each case those interests are contradictory but often they are. To enforce law properly public authorities are forced to balance the both ones and to find the corresponding administrative and justified resolution, being in line with law. In fact, that could be defined as a competing interrelation *stricto sensu* between the interest of entire society against the interest of a concrete human being or a private company. But also such a complementary case could be inevitably introduced where a resulting public interest corresponds to a different private interest, for example of a developer who intends to place some housing project and therefore is seeking for a planning permission.

Just the aforesaid relative contradictory feature between both public and private interests, or to be more precise, between two private interests from which only one could be chosen as a public interest, is permanently viewed as the most significant one, even being in real on the secondary, or better to say vertical level as the following section shows in turn. The aforesaid interrelation is, however, very significant for an essential reflection and debate enabling the duly process of public interest test weighing which of the interests considered override and which ones will be then involved in the relevant administrative decision.

For instance, in terms of planning and construction law, it is mentionable that the both competing principles involving on one side the private property ownership interests in the granting of planning or building resolutions and, on the other side, the ideology of public interest that is much about the decision-making power concerning the publicly recognisable use of land within the same resolutions issued and simultaneously not harming protectable interests of a community involved as from the environmental, cultural, economic or any other relevant perspective. A sort of tensions between both above mentioned interests could arise during such planning proceedings that are vivid for a higher quality, justice and democracy of a decision making in the planning proceedings. Therefore, these proceedings are widely open to public as the information is properly provided

or its direct participation is ensured by legal provisions concerning the constitutionally protected freedom of information. Thanks to this system interface the open competition of the both private and public interests could be developed in favour of a better and more proper discussion and also a prevention of any later disputes.[2]

1.2 Public Interest as a Framework for Individual Interests (a Vertical View)

On the other side, the formally acknowledged public interest in comparison to the sole private one creates the real framework for the exercise and enforcement of any private rights as the society is composed by the individuals who share the same values. If the private interest is formally confessed as the prevailing one over the public (in the meaning of common) interest based on social interactions and basically coming from the social environment, then the former is considered to transform itself into the qualified public interest and overrides the latter, related to a society as a whole. Consequently, concerning the mutual position between private and public (common) interest it speaks from this perspective vertically in favour of public interest that covers regularly also the formally adopted private interests or rights based on the successfully realised public interest test. The necessary precondition for a success of such a public interest test is, however, that the originally private interest of a concrete individual does not undermine the function of society and its values as they are preserved within the legal order.

To stay on the vertical level, a very useful view was also introduced by Jiří Hoetzel, one of the undisputable scholars of the administrative law, during the time of the First Czechoslovak Republic that differed among the public interests while thinking of more levels of importance.[3] He referred in his work to the interests of collective alliances or, better to say, political societies of public nature but respecting the priority of such alliances as from the topical interests of the state following by the interests of the local regional communities, then by interests of municipalities and, finally by those of private alliances. In terms of material assessment, he stressed as an example a case of military bunkers built against potential enemies or railways when simultaneously pointing out that any other interests in the respective territory had to retreat military buildings and public roads of transportation had to retreat railway transport infrastructure. These prioritisation rules were stipulated directly by law taking into consideration the criterion of the integrity and security of the state when facing the German military danger on the western borders. Bearing that in mind, the state interest on the security provoked the corresponding prioritisation of military usable railway transport. To this end, let us mention the case from that time that consisted in the assessment if the respective lot should be used for a cemetery rather than for a railway. As the ruling showed, the cemetery was expropriated in order to vacate for the planned railway route.

[2] Also see ADSHEAD, J. Revisiting the Ideologies of Planning Law: Private Property, Public Interest and Public Participation in the Legal Framework of England and Wales. In: *Manchester Metropolitan University* [online]. [2020-01-20]. Available at: <https://e-space.mmu.ac.uk/619378/1/Adshead_Article.pdf>.

[3] See HOETZEL, J., WEYR, F. *Slovník veřejného práva československého*. Vol. V., 1. Part. Brno: Nakladatelství Rovnost, 1948, pp. 492–494.

Considering this case, one could also perceive the vast dynamics of definition potential, which public interest among the other ones has to be seen as the most significant one and, therefore shall be prioritised before any other public interests depending on the extra – legal factual circumstances like security reasons are.

As from the other point of view, it seems to be very essential to mention more levels of "overnational" public interests depending on the authority that decided if such interests shall be deemed as the utmost ones. Sometimes, this could be chiefly a case of supranational law passed by the relevant authorities of the European Union representing the interest of much wider community of people or/and territories.[4] As from this reasons and accepting the supremacy and direct effects doctrines, the drawn public interests involved in the European pieces of legislation either principally overweighs the contradictory national public interest that must be suppressed or, if such an interpretation is possible, modifies the seeking qualified public interest in a European direction while not to circumvent it at the same moment. Therefore, relatively concrete factual matters of a case could determine the final implication that should be tested and balanced also through the European law system in order to attain a pure result in form of the acknowledged and justifiable public interest to be then properly protected by the public authority concerned.

Having regard to the existence of public interest of the "European nature" one could point out that the European law addresses the projects of common interest (PCI) status to some cross border European projects when mainly aiming at the construction of the future key energy infrastructure involving gas high pressure and oil pipelines as well as the electricity high voltage lines. The PCI projects shall have a significant (positive) impact on, or better to say an improvement of the energy market integration otherwise they do not fall under the scope of the PCI Regulation.[5] For that purpose, there is a specific procedure presumed in the PCI Regulation that is set down reversely in the sense of not admitting the discretion of a public authority in its traditional form of a decision – making but expressly stipulating a specific procedure of *a priori* balancing the European public interest. Unfortunately, this procedure results in the delegated regulation though as from the material point of view, such piece of legislation should be substituted by a more suitable individual decision. Such a conclusion could be evidenced by the procedural precondition that it generates every two years an upgraded list of European projects of common interest published by the European Commission as the supranational body of the mostly executive nature. As a negative consequence, domestic public authorities that make the corresponding decisions concerning the same projects are necessarily excluded from supplementary testing the existence of public interest in the respective case of any PCI project.

By contrast, all the projects that are not labelled with a PCI status enable to the domestic public bodies to be decided relatively freely on the (non-)existence of the public interest. Nevertheless, the aforesaid example of PCI status projects inherently implies public in-

[4] ANTHONY, G. Public Interest and Three Dimensions of Judicial Review. Northern Ireland Legal Quarterly. 2013, Vol. 64, No. 2, pp. 125–127.

[5] EU Regulation No. 347/2013 of the European Parliament and of the Council on guidelines for trans-European energy infrastructure and repealing Decision No. 1364/2006/EC and amending Regulations No. 713/2009, No. 714/2009 and No. 715/2009.

terest for concrete infrastructural projects but, at the same time, it forms a kind of primarily legislative (when taking into account that passed as a Commission delegated regulation) hurdle for executive authorities, even causing formal obstructions on the side of them while balancing the relevant interests as the respective energy infrastructure project concerned. Based on that, the both executive powers as well as judicial review are limited in their own statements and judgements in favour of the delegated legislative body – the European Commission, even when one could argue that its legal facets and features are primarily executive ones.[6] Consequently, some contra – implications in comparison to the Czech judicial practice could arise because the Czech Constitutional Court ruled *inter alia* that "the term *public interest* is by theory confessed to be an amorphous concept whose interpretation principally belongs to the administrative bodies with regard to the circumstances of a case".[7]

Last but not least, the international law sources of an existing relevant public interest also could be taken into account in some situations where e.g. international agreements or conventions are to be applied.

2. ACTS WITH A CONCRETE OBJECT – A (IL)LEGITIMATE LEGISLATIVE WAY HOW TO ASSIST TO PUBLIC AUTHORITIES

While seeking for the qualified public interest to be followed in the respective case, legislative bodies often try to find an ideal legal solution that safely enables to public authorities to duly identify it with no discretion used and not much administrative effort invested. It is a range of fast track varieties or means offered relatively lawfully to the public bodies that are determined to simplify the process of identifying the qualified public interest and, at least to some extent, to define concrete projects or activities as projects or activities of public interest. However, these fast track improvements (as e.g. the PCI projects on the European Union law level) are at the same time limiting the participation of public in proceedings and obstructing it by prescribed written procedure but only for specific projects of transportation or energy infrastructure. Thus, the authorities with executive powers are then disadvantaged while not having the sufficient discretion to distil such a public interest on the case by case basis. The public interest issue seems to be settled directly by the law, with no essential participation of executive administrative bodies. However, the less participation of executive bodies the more absent is a court reviewing issued administrative resolutions afterwards.

The goal seems to be evident as each political representation is trying to gratify the public when using legal framework to enhance the probability of political success through the completion of various projects of general transportation, road construction or deficient energy infrastructure taking into account relatively very short period between elections.[8]

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[6] For more, please see the article by HANDRLICA, J. Expropriační tituly subjektů soukromého práva. *Právník*. 2016, Vol. 10, pp. 818–828.

[7] Pl. ÚS 24/04.

[8] This was also a problem of the period of the Third Czechoslovak Republic when the Act No. 251/1946 Coll. was passed with the sole intention to expropriate the Prague sanatorium in Prague – Podolí. For more, see HOETZEL, J., WEYR, F. *Slovník veřejného práva československého*, p. 493.

The pressure on the legislative process is then developed by politicians mostly being members of Parliament at the same moment, so logically putting stress on the omnipotent legislative authority (i.e. Parliament) when simultaneously eliminating the hardship caused by "useless" and time-wasting balancing of the public interest by executive bodies. In that sense, this simplification leads to a misuse of the legal system that is perceived solely as a political means for policy – making and that is undermined by torpedoing significant principles of division of powers and legal certainty. These constitutionally presumed principles are intentionally suppressed in a corresponding unlawful manner.

To find a reasonable solution that considers the necessity to speed up the functioning of the administrative system with no excessing harms to both the system of law and the principle of division of powers is a rather complicated issue that deserves a more detailed explanation as follows.

2.1 Struggling Competence – Executive Power First

Following the ruling of the Czech Constitutional Court, some conclusions should be pointed out in order to understand the position of the only Czech extraordinary court aiming at protection of constitution. From the perspective of its judicial practise one could stress that the Czech Constitutional Court refused that executive authorities would not been capable to balance the public interest for instance in relation to the concrete project of a hydraulic structure as the fundamental role of the administrative bodies would have been excluded or unlawfully diminished by the legislative body. Moreover, the potential following judicial review would also have been limited only to other legal matters than to assess if the public body duly had been considered correctly as the presence of the public interest concerned. By this decision, the Czech Constitutional Court encouraged the position of executive bodies but indirectly, through the impossibility of the following effective judicial review made by courts.

If the Parliament as the sole legislative authority on the territory of the Czech Republic passes such a legal act that specifies the concrete works or building considered to expressly imply the public interest then the executive power is adversely reduced in meeting its constitutional competence as well as it is in case of a following judicial review of the issued administrative individual, often very sensitive, acts chiefly aiming at the expropriation of land or a building or the limitation of property by constituting real burdens to them. To this end, the legislative abstract acts are not allowed to intervene so intensively in disfavour of executive bodies taking into consideration the terms of the aforesaid judgements.[9]

2.2 Struggling Competence – Legislative Power First

Why does the legislative body actually represent and introduce fast track solutions with the current reduction of discretion in assessment of a public interest? Is it really necessary and suitable to minimise a branch of executive bodies to favour some projects that are

[9] See e.g. the decision of the Constitutional Court Pl. ÚS 24/04.

pre-determined to having an exclusive and expressly prioritised status inherently assuming their existing qualified public interest? The grounds lie on the site of the same public authorities that unfortunately have vast problems with their effective and convincing ruling based on the identified public interest, and also with their own weakness vis-à-vis some pressure groups or individuals. It seems to be much more comfortable for them not to slowly test all the circumstances and facets of all interests in question, not to defend their statements and procedural positions in progressing judicial review but rather to solely declare the given public interest as it has been introduced directly in the legal wording by the legislative body. The same restrictions are vis-à-vis the courts that must respect the legal wording too.

One could argue rightfully that the principle of division of powers is breached but only in terms of concretely or namely appointed projects. The same has not been yet applied by courts as concerned the generically specified projects or building to be constructed. To partially conclude, this opens a possible solution for legislative bodies to pre-regulate by law the situations where the executive bodies shall not be empowered to balance the public interest in each case and, instead of it, be restricted to evaluate if the assessed project has the factual and legal parameters of a building or an activity that enjoys a preference treatment implying the public interest as prescribed by the legislator.

2.3 A Possible Compromised Ceasefire – Being Concretely General

It could be potentially dangerous to prior declare that the public interest is present as this or that concrete infrastructural project concerned. In turn, the Supreme Administrative Court has ruled and pointed out that there should be acceptable to enable the legislative bodies to determine the public interest as present in such cases where the projects of public support are set down concretely general, i.e. by stating which kind of project or buildings is worth to be qualified as being of public interest.[10] Not being in juxtaposition when taking into consideration the ruling of the Czech Constitutional Court, this could be a right and effective wording used by legislator in order to assist the executive authorities in their complicated tasks on their way to seek for the public interest in the specific balancing tests. Such conclusions are also supported by some scholars.[11]

3. CONCLUSION – ON THE WAY FROM GENERALITY TO BEING CONCRETE CONSIDERING THE CZECH ENERGY ACT

As the example of the Czech Energy Act shows, the feasible way how to interpret the public interest seems to be a combination of the legislative wording that refers to a kind of legally regulated human activity meant in general on one side and the duly discretion of executive public authorities when assessing real consequences of the same legally regulated human activities under concrete circumstances on the other side. Then, however one could point out that there should be a sort of a rebuttable presumption in law as-

[10] See e.g. the decision No. 6As 231/2016-43, points 30 and 32.
[11] HANDRLICA, J. Vyvlastňovací tituly podnikatelů všeužitečných děl. *Právní rozhledy*. 2018, Vol. 2, pp. 44 et seq.

sumed by the legislative body in order to provide some interpretation space for situations when there are substantial doubts concerning the public features arisen following the respective notice of objection of a relevant participant in administrative proceedings. As a good illustration, one could specifically mention the § 3/2 of the Energy Act that calls upon the public authorities stipulating that some licenced activities as the electricity or gas transmission shall be executed in public interest. Some interpretation space remains for a public body in such a case under some authors[12] because it should activate the public interest test based on the notice of objection lodged by the entitled person. Even albeit the aforesaid opinion could be perceived as not being so offensive to private rights of individuals, a possible harm to public interest side of this clash between public and private interests could occur to the debit of general welfare what should not have been the real intention of the publicly determined law.

But this is only one of the three possible ways of interpretation of the same wording in the Czech Energy Act. Opinions of the other distinguished scholars[13] tend to read the same text as being a sort of a binding legislative instruction, not allowing a public body for use its discretion to impede the intended purpose of law consisting in the fact that e.g. the electricity transmission is unconditionally deemed as the activity inherently having the public interest overriding any individual rights. This could be seen as a formal legislative assistance to the public authorities with the apparent aim to more effectively oppose any individuals while exercising their rights, from time to time quite aggressively, to support the social coherence.

The last expert view as mentioned above and initially refused by the aforesaid authors is that the legislative assistance is obsolete or not normative, i.e. it shall be omitted as a sole declaration of legislators with no impact on the prior presumed public interest. Public bodies enforcing the law should then use their corresponding discretion to initiate the public interest test and find out on the case by case basis if public interest prevails or not. Equally, such an interpretation could result in the adverse consequences evidently unintended by the legislative bodies due to the disregard to the both ones – a legal wording as such and its purpose, too.

In fact, while simplifying it a little bit the last of all three interpretations solely represents an extreme position in comparison to the first one. Therefore, it is also worth to prefer the interpretation mentioned on the second place referring to the clear intention of a legislator to presume public interest in each and every case of the specific regulated activity or building in form of a sort of an indisputable pre-condition.

To sum up, the public bodies executing legislative power reflected in the last energy legislation the reluctance of a social environment to accept a prevalence of the principally substantial public interest in the functioning of essential energy facilities over private rights of concrete persons and a corresponding weakness of executive public authorities that are exposed to the legal as well as outlaw mechanisms. The current ruling of the Czech

[12] EICHLEROVÁ, K. Komentář k § 3. In: K. Eichlerová – J. Handrlica – M. Jasenský et al. *Energetický zákon, komentář*. Prague: Wolters Kluwer ČR, 2016, p. 67.

[13] As e.g. the opinion of Jakub Handrlica as introduced by EICHLEROVÁ, K. *Komentář k § 3*, pp. 66–67.

supreme courts upholds this interpretation position, so that the determination of the specific buildings especially under the Czech Energy Act could lawfully contribute to the simplicity of the corresponding administrative decision on expropriation that limits itself only to consideration if the building in question is a building of transmission or distribution systems.[14]

[14] See also HANDRLICA, J. *Vyvlastňovací tituly podnikatelů všeužitečných děl,* pp. 44–46