ANNEX IV.b)

4 As 157/2013 – 33

CZECH REPUBLIC

JUDGMENT

IN THE NAME OF THE REPUBLIC

The Supreme Administrative Court, sitting in a panel composed of Chairwoman JUDr. Dagmar Nygrínová and judges Mgr. Aleš Roztočil and JUDr. Jiří Palla, in the legal matter of the plaintiffs: a) the municipality of Dobřejovice, located at Na Návsi 26, Říčany near Prague, b) the municipality of Herink, located at Do Višňovky 28, Herink, c) the municipality of Modletice, located at Modletice 6, Říčany near Prague, d) the Association of Citizens Living Near SOKP Regarding Traffic Noise, located at Mladíkov 406, Jesenice, e) D. Z., all represented by JUDr. Michal Bernard, Ph.D., attorney-at-law, located at Příběnická 1908, Tábor, against the defendant: The Magistrate of the Capital City of Prague, located at Mariánské náměstí 2, Prague 1, in proceedings concerning the cassation complaint of the plaintiffs a) – e) against the resolution of the Municipal Court in Prague dated September 30, 2013, file no. 6 A 162/2013 – 41,

HEREBY RULES:

The resolution of the Municipal Court in Prague dated September 30, 2013, file no. 6 A 162/2013 – 41, is hereby annulled in the part concerning rulings I. and III., and the case is returned to this court for further proceedings.

REASONING:

I. **Course of the Proceedings**

[1] The defendant issued a decision on June 27, 2013, file no. MHMP 333704/2013/ODA-01/Za (hereinafter referred to as "the contested decision"), which permitted, at the request of the Czech Republic - Directorate of Roads and Highways of the Czech Republic (hereinafter referred to as "the applicant"), the trial operation of the construction titled "Road Ring around Prague – Southwest Segment, Section No. 512 D1 – Jesenice – Vestec" (hereinafter referred to as "the subject construction"), as specified in this decision. At the same time, it established the following conditions for the trial operation: 1) the duration of the trial operation from July 1, 2013, to December 31, 2015, 2) During the trial operation, noise barriers designated as PHS_01 to PHS_05 will be implemented according to the noise study from March 2013, file no. 3-0512-0008-69, prepared by PUDIS a. s. Furthermore, the defendant stated that according to § 124, paragraph 2 of the Building Act, the only participant in the proceedings is the applicant, who is also the builder and owner of the construction. In the instructions, the defendant stated that a participant may file an appeal against this decision within 15 days from the date of its notification.

[2] This decision of the defendant dated June 27, 2013, was challenged by the plaintiffs a) through e) by a lawsuit dated August 26, 2013, at the Municipal Court in Prague. The plaintiffs stated that the contested decision interfered with their rights, specifically their right to protection of life and health, property rights, the right to self-governance, the right to a favorable environment, and rights arising from the Convention on Access to Information, Public Participation in Decision-Making, and Access to Justice in Environmental Matters (published under No. 124/2004 Coll. m. s., hereinafter referred to as "the Aarhus Convention"). Specifically, they claim their rights have been curtailed as follows:

[3] Plaintiff a) is a municipality through which two significant road communications currently pass. The subject construction was newly built in the southern and southeastern part of the municipality and has been in operation since September 2010 based on a permit for the early use of the construction, which expired on June 30, 2013. The territory of the municipality is also traversed by road II/0101, which intersects with the subject construction within the municipality. Additionally, the D1 motorway borders the municipality. Since the commencement of operations, the load on the area, including residential zones, has significantly increased due to traffic noise, leading to a cumulative noise effect from all the mentioned communications. Citizens of plaintiff a) complain that the noise is unbearable, continuous, and so intense that it is impossible to sleep. Plaintiff a) participated in the previous phases of discussion regarding the subject construction and sought to implement measures to minimize noise emissions, specifically the construction of noise barriers on the bridge over the Sulín, which was rejected based on the noise study suggesting that the noise level in residential zones should not exceed 47.1 dB, a value lower than that permitted by standards. However, after the commencement of operations, actual noise level measurements were conducted on October 4 and 5, 2011, in the residential buildings in Dobřejovice [specifically, the building owned by plaintiff e)], proving that the actual average night noise level was 55 dB, which is significantly higher than that calculated based on the noise study used in previous permit proceedings and substantially exceeds the permitted hygiene limits. These data were confirmed in additional measurements conducted from August 6 to 9, 2013. The residents of plaintiff a) also sought a reduction in noise through a petition titled "For Reduction of Noise Load in Municipalities Around SOKP in Section 512," which was signed by 1,480 people and submitted to the Ministry of Health and the Ministry of Transport.

[4] Plaintiff b) is a municipality through which the subject construction also passes. The building of single-family homes is located approximately 800 m from the subject construction, and residents of plaintiff b) are disturbed year-round by noise from the operations of the subject construction. Noise mitigation measures (walls, embankments) on the subject construction in the section adjacent to the residential area of plaintiff b) were built illogically on the side facing away from the municipality towards the fields, while no noise mitigation measures were constructed on the side adjacent to the built-up area. Ninety-nine percent of the residents of plaintiff b) signed the petition "For Reduction of Noise Load in Municipalities Around SOKP in Section 512." According to measurements, the nighttime noise level in the built-up area of the municipality exceeded the permitted limits by 2.5 dB. The former Minister of Transport Dobeš's promise regarding the construction of noise mitigation measures was not fulfilled.

[5] Plaintiff c) is a municipality whose territory includes both the D1 motorway and now the subject construction. Noise pollution has increased after the commencement of operations of the subject construction to such an extent that it now involves continuous intolerable noise. Measurements have shown that the noise studies used in the permit proceedings, which stated that noise limits would not be exceeded, were incorrect, and that the noise limits established for nighttime hours are being exceeded. The properties owned by plaintiff c) (plots with sports fields, a children's playground, and a fire station) are also affected by noise emissions. Citizens of plaintiff b) are also among the signatories of the above-mentioned petition.

[6] Plaintiffs a) to c) jointly assert that the contested decision violates their right to self-governance guaranteed by Articles 8 and 100 to 104 of the Constitution of the Czech Republic, which includes, in accordance with § 2, paragraph 2 and § 35, paragraphs 1 and 2 of Act No. 128/2000 Coll., on Municipalities (Municipal Regulation), care for the comprehensive development of their territory and the needs of their citizens, and creating conditions to meet those needs, to protect the health of their citizens, to develop culture, and to maintain public order. According to § 10, letter c) of the

Municipalities Act, the plaintiffs deduce that municipalities are also obliged to ensure the protection of the environment within their territory. The permit for the trial operation of the subject construction has led to a serious threat to the aforementioned values, particularly the well-being of housing, life, and health of citizens, and has resulted in a deterioration of the environment in the affected municipalities.

[7] Plaintiff d) is a civic association (club) under § 70 of Act No. 114/1992 Coll., on Nature and Landscape Conservation. Its activities include protecting public health from traffic noise, primarily in the area around the road ring around Prague, as well as protecting nature and the landscape from the negative impacts of traffic. Plaintiff d) pursues these goals by participating in administrative proceedings, communicating with authorities, and conducting public campaigns. Plaintiff d) claims that the contested decision has primarily curtailed its right to a fair trial and the right to a favorable environment.

[8] Plaintiff e) is a co-owner and resident of the property located at D. č. p. X on plot no. st. 475 in the village and cadastral area of D. Plaintiff e) noted that the corridor of the subject construction is located approximately 415 m from the property she owns. Objectively, there is a year-round and all-day burden from the operations of the subject construction, particularly noise and air pollution. Noise measurements conducted at plaintiff e)'s property on October 4 and 5, 2011, demonstrated significant exceeding of noise limits. The contested decision therefore violates plaintiff e)'s right to protect her property and also her right to health protection.

[9] Plaintiffs a) to e) unanimously assert that the contested decision is a decision of an administrative body under § 65, paragraph 1 of Act No. 150/2002 Coll., the Administrative Court Code (hereinafter referred to as "A.C.C."), which imposes on them to tolerate excessive noise levels for a specified period (and possibly longer). The plaintiffs also based their standing to sue on Article 11 of Directive 2011/92/EU and on Article 9, paragraph 3 of the Aarhus Convention. To support their view that they are entitled to seek judicial review of the contested decision, they also cited the judgment of the Court of Justice of the EU in Case C-240/09, Lesoochranárske zoskupenie VLK.

[10] The plaintiffs further presented a number of illegalities in the contested decision, which they believe justify its annulment [contradiction with regulations on public health protection, violation of § 11 of Act No. 17/1992 Coll., on Environmental Protection, violation of § 119, paragraphs 2 and 3, and § 124, paragraph 1 of Act No. 183/2006 Coll., on Territorial Planning and the Building Code (Building Act), non-fulfillment of conditions No. 34, 53, and 54 specified in the EIA opinion, failure to comply with conditions stated in the final building permit]. The defendant acted improperly, among other things, by allowing long-term use of the subject construction based on exceptional provisions (early use, trial operation), thereby circumventing the necessity of completion required by the Building Act. The condition required by the Building Act for imposing a trial operation has not been met, namely the need to verify the functionality and execution of the construction, as the properties of the subject construction have been verified already through three years of practically unlimited operation, without any changes or adjustments having been made that would change or limit these (harmful) properties of the construction. The contested decision also lacks adequate reasoning and was therefore issued contrary to § 2, 3, and 68, paragraph 3 of Act No. 500/2004 Coll., the Administrative Procedure Code.

[11] Alternatively, in the event that the administrative courts conclude that the contested decision is not a decision under § 65, paragraph 1 of the A.C.C., the plaintiffs proposed that the contested decision be assessed as an unlawful intervention and that the court declare it an unlawful intervention and order the defendant to cease such intervention.

[12] Additionally, the plaintiffs proposed that the municipal court issue a preliminary measure prohibiting the trial operation of the subject construction, or alternatively, that it order the Ministry of Transport to temporarily impose a speed limit on the subject construction, capping the speed of passenger vehicles at no more than 100 km/h and for trucks at no more than 60 km/h.

[13] The Municipal Court in Prague, by resolution dated September 30, 2013, file no. 6 A 162/2013 – 41, rejected the lawsuit (ruling I.), denied the request for a preliminary injunction (ruling II.), further decided that none of the participants is entitled to reimbursement of litigation costs (ruling III.), and that the plaintiffs will have refunded the court fee paid in the amount of CZK 11,000 (ruling IV.). In its reasoning, the Municipal Court stated that the contested decision is a decision of an administrative body in the sense of § 67 of the Administrative Procedure Code and § 65, paragraph 1 of the A.C.C. According to § 5 of the A.C.C., protection of rights in administrative judiciary can only be sought after exhausting the remedies allowed by special law. According to § 68, letter a) of the A.C.C., a lawsuit is inadmissible if the plaintiff has not exhausted the ordinary remedies in the proceedings before the administrative body. An appeal is permissible against the contested decision of the administrative body, and it even includes relevant instructions on the possibility of filing an appeal. The Municipal Court concluded that plaintiffs a) to d) did not exercise their right to appeal the contested decision; therefore, their lawsuit is inadmissible and must be rejected under § 46, paragraph 1, letter d) of the A.C.C. Regarding the alternative proposal to assess the contested decision as an unlawful intervention, the Municipal Court stated that if a certain act of the administrative body can be reviewed in proceedings concerning a lawsuit against that administrative decision, one cannot seek its review through a lawsuit for protection against an unlawful intervention under § 82 of the A.C.C.

[14] Plaintiffs a) to e) [hereinafter also referred to as "the petitioners a) to e)"] filed a cassation complaint against the resolution of the Municipal Court dated September 30, 2013, file no. 6 A 162/2013 – 41, strictly concerning the rulings I. and III. The Municipal Court unlawfully rejected their lawsuit, according to the petitioners, since it is not true that they did not exhaust the remedies in the proceedings before the administrative authorities that the legal regulations allowed them to file. According to § 81, paragraph 1 of the Administrative Procedure Code, only a participant in the proceedings can file an appeal. In the case of the permit for trial operation, the only participant according to § 124, paragraph 2 of the Administrative Procedure Code is the owner of the construction and the builder (in this case, solely the applicant). Therefore, the petitioners a) to e), who were not participants in the administrative proceedings, could not file an appeal against the contested decision since the special law (Administrative Procedure Code and Building Act) did not grant them such a right. The petitioners also referred to the judgment of the Supreme Administrative Court dated May 12, 2005, file no. 2 Afs 98/2004 - 65, which indicates that the requirement to exhaust remedies in the proceedings before the administrative body applies only to the participant in the proceedings. The general regulation of participation in the proceedings cannot be applied in the present case, according to the petitioners, as it is excluded by the special law, namely § 124, paragraph 2 of the Building Act. The Municipal Court also did not address the question of what basis the petitioners could claim the right to appeal against the contested decision, making the contested resolution unreviewable due to a lack of reasons.

[15] Regarding the active legitimacy of petitioners a) to c), they further pointed to the decision of the Supreme Court dated August 25, 1999, file no. 2 Cdon 330/97, which indicates that a municipality is entitled to seek judicial protection for its citizens against emissions. The petitioners also referred to the case law of the Constitutional Court (III. ÚS 542/09 and III. ÚS 224/98), according to which courts are obligated to provide effective protection of the rights of participants. If, due to procedural formalism, a decision in this matter were to be delayed to a time when there would be nothing left to decide, the

rights of the petitioners to effective and timely judicial protection would be violated. In light of this, the petitioners proposed the annulment of the contested resolution and the return of the case to the municipal court for further proceedings.

[16] The defendant, in its response to the cassation complaint dated December 27, 2013, stated that the relevant authority in the area of public health protection, namely the Regional Hygiene Station of the Central Bohemia Region, issued a favorable opinion regarding the trial operation on the condition that during the trial operation, noise barriers PHS_01 to PHS_05 would be implemented according to the noise study from March 2012, prepared by PUDIS a.s., along with an evaluation of their effectiveness. These noise barriers are to be built by spring 2015. The applicant will also conduct noise measurements to demonstrate that the implemented noise mitigation measures are sufficient and that the hygiene limits for noise are not being exceeded. The defendant further stated that the petitioners could file an appeal against the contested decision even though they were not participants in the proceedings. In such a case, the appellate authority would proceed according to § 92, paragraph 1 of the Administrative Procedure Code and simultaneously assess whether there are grounds for initiating review proceedings or reopening the proceedings. Therefore, the defendant agreed with the conclusion of the Municipal Court that the petitioners did not exhaust the remedies in the administrative proceedings and their lawsuit was thus inadmissible.

[17] In their reply dated February 3, 2014, the petitioners stated that the applicant has already had three years to implement noise mitigation measures and verify their effectiveness, as the subject construction has been in operation since September 2010. Furthermore, the petitioners stated that any means considered a proper remedy under the special law pursuant to § 68, letter a) of the A.C.C. cannot include any means, including an inadmissible appeal or a motion for initiating review proceedings, or even a complaint or a criminal report. The petitioners noted that they are also seeking remedies for the unlawful status through all conceivable legal and extra-legal means, including a petition, a motion to the Public Defender of Rights, and submissions to various authorities. They consider a lawsuit to be a last resort, which they resorted to only after having failed to achieve any remedy through other means even after three years.

[22] According to § 81, paragraph 1 of the Administrative Procedure Code, a participant may file an appeal against a decision unless otherwise provided by law. The Building Act in § 124, paragraph 1 states that the trial operation of a construction is to verify the functionality and properties of the completed construction according to the documentation or project documentation. The trial operation will be permitted by the building authority upon a justified request from the builder or ordered based on a request from the affected authority or in other justified cases. The decision will specify, in particular, the duration of the trial operation, and if necessary, set conditions for it, or conditions for the smooth transition from trial operation to usage of the construction. The builder will attach the evaluation of the results of the trial operation to the application for a building permit. The trial operation can only be authorized based on a favorable binding opinion or decision from the affected authority. The building authority may also, if necessary for the implementation of the trial operation ordered under § 115, paragraph 2, establish additional conditions by a new decision. During the trial operation, a new decision to extend the duration of the trial operation can be issued without prior proceedings. Paragraph 2 adds: The participant in the proceedings under paragraph 1 is the builder and the owner of the construction.

[23] In assessing the grounds for the cassation complaint, the Supreme Administrative Court first addressed the question of whether the petitioners were participants in the administrative proceedings in which the contested decision was issued and whether they were thus entitled to file an appeal against the contested decision in the sense of § 81, paragraph 1 of the Administrative Procedure Code.

The Supreme Administrative Court states that for the assessment of this question, it is irrelevant whether the defendant has actually treated the petitioners as participants in the proceedings, as participation in proceedings cannot be based solely on the fact that a public authority has negotiated with a certain person, nor can a person entitled to participation under the law lose that status simply because they were not treated as a participant in the reality (see the judgment of December 7, 2005, file no. 3 As 8/2005 - 118, No. 825/2006 Coll. NSS, or the judgment of December 16, 2010, file no. 1 As 61/2010 – 98, para. 13; all decisions of the Supreme Administrative Court cited here are available at www.nssoud.cz).

[24] It is necessary to determine whether the legal regulation of participation in the proceedings for the approval of trial operation contained in § 124, paragraph 2 of the Building Act excludes the general legal regulation of participation in proceedings contained in § 27, paragraphs 1 and 2 of the Administrative Procedure Code. The Supreme Administrative Court believes that the list of participants in the proceedings in § 124, paragraph 2 of the Building Act is a comprehensive list that excludes the general legal regulation of participation in the Administrative Procedure Code. This conclusion is supported both by the literal interpretation of § 124, paragraph 2 of the Building Act (which does not indicate that it would be a demonstrative list, e.g., by using terms such as "also," "primarily," "always," etc.). Any other interpretation would lead to the redundancy of this provision, as even if the provisions of § 27 of the Administrative Procedure Code were applied, the builder and the owner of the construction (usually in one person) would always be participants in the proceedings (and thus according to § 27, paragraph 1 of the Administrative Procedure Code). Furthermore, it can be argued that a similar conclusion has been reached in relation to the analogous provision of § 109 of the Building Act, which regulates participation in building proceedings. Here, it was also adjudicated that the list of participants in building proceedings in § 109 of the Building Act is a closed list that excludes the application of § 27 of the Administrative Procedure Code (see the judgment of the Supreme Administrative Court dated June 1, 2011, file no. 1 As 6/2011 - 347, No. 2368/2011 Coll. NSS). Additionally, it can also be argued (based on historical case law) regarding participation in proceedings related to the usage of constructions, which pertains to the Building Act of 1976. The list of participants in these proceedings was always considered closed (see, for example, the judgment of the Supreme Administrative Court dated December 9, 2004, file no. 7 As 29/2003 - 78, No. 943/2006 Coll. NSS, the judgment of the Supreme Administrative Court dated May 13, 2009, file no. 6 As 49/2008 - 96, and the finding of the Constitutional Court dated March 22, 2000, file no. Pl. ÚS 2/99). This interpretation is also in line with the purpose of the legal regulation, which is to ensure quick and effective decision-making regarding trial operations, and to eliminate potential procedural obstructions by third parties, who generally had sufficient opportunity to express their opinions on the proposed plan already in previous phases of its approval and in the process of spatial planning. The legislator also proceeded from the correct assumption that situations where a trial operation permit affects the rights of third parties are likely to be exceptional. It can thus be concluded that the petitioners were not participants in the administrative proceedings concerning the approval of the trial operation, as they were neither builders nor owners of the subject construction.

[25] Furthermore, the Supreme Administrative Court adds that it did not address the potential participation of petitioner d) in the administrative proceedings based on § 70 of the Act on Nature and Landscape Protection. This is because petitioner d) did not assert any facts that would make consideration of his possible participation in the administrative proceedings necessary. In particular, petitioner d) did not claim or document that he had, in accordance with § 70, paragraph 3 of the Act on Nature and Landscape Protection, notified the defendant in writing within 8 days of being informed about the commencement of the proceedings that he intended to participate in the administrative proceedings. Under these circumstances, considerations regarding the hypothetical participation of

petitioner d) in the proceedings on the approval of the trial operation, including the issue of whether such participation in the proceedings according to § 124 of the Building Act is even possible, would be merely theoretical and would have no bearing on the resolution of the matter.

[26] It was also necessary to assess whether the ordinary remedy permitted by special law, which plaintiffs must exhaust before filing a lawsuit, is an appeal in the case of a plaintiff who was not a participant in the proceedings. This question must also be answered negatively. The Supreme Administrative Court considers the principle of subsidiarity of judicial review expressed in § 5 and § 68, letter a) of the A.C.C. as one of the fundamental principles of administrative judiciary. In the resolution of November 16, 2004, file no. 1 As 28/2004 - 106, No. 454/2005 Coll. NSS, the Supreme Administrative Court stated the following: "Primarily, the protection of rights before an administrative court is original protection in matters of violated or threatened subjective rights and duties of a public law character; its aim is to determine whether the activity of public administration did or did not violate a right. This approach is logically reflected in the proceedings concerning a lawsuit against the decision of an administrative body; general standing thus grants the right to sue to anyone who claims to have been compromised in their rights by a decision of the administrative body. The assertion that an administrative decision improperly affected the legal sphere of the plaintiff includes the presumption that such a decision is final, whether after exhausting all ordinary remedies or without their use if they are not permitted by the legal order. In addition, in accordance with the principle of "vigilantibus iura scripta sunt," everyone should actively and diligently care for their rights already in the proceedings before the administrative body and only turn to the court when their efforts are unsuccessful. This emphasizes not only the respect for the need for procedural economy, as if there is a legal remedy available at a higher administrative authority for the illegality, there is no substantive or legal reason to present the matter in court, but also highlights the necessity for the subjects of public law relations to be active in protecting their subjective rights. Ordinary remedies are institutions of procedural law that – if filed properly and in time – give participants in the proceedings the possibility of a procedural right ("right") to initiate a review of the administrative decision issued before it becomes final. An ordinary, i.e., permissible appeal filed in a timely manner with the relevant administrative authority generally carries a suspensive effect. The effects of the legal force, and consequently even enforceability, are postponed until the remedy (here: the appeal) is resolved." (Emphasized by the Fourth Senate.)

[27] However, the principle of subsidiarity of judicial review cannot be interpreted so broadly that judicial protection in proceedings concerning a lawsuit against the decision of an administrative body is conditioned on the submission of an (extraordinary) remedy that is inadmissible or lacking in claim. If the law stipulates the condition of exhausting an ordinary legal remedy permissible according to a special regulation (here the Administrative Procedure Code), it means in administrative proceedings an appeal in cases where the law does not exclude the filing of an appeal, and only in relation to persons whom the law allows to submit an appeal, i.e., participants in the administrative proceedings. From the fact that the Administrative Procedure Code provides for the procedure of the appellate authority in the event of an inadmissible appeal (§ 92 of the Administrative Procedure Code), it cannot be inferred that access to the court should be conditioned on such an inadmissible appeal (or a decision regarding it). In cases where the law does not provide for such an admissible ordinary remedy, it must be allowed to submit a lawsuit directly against the first-instance decision of the administrative body (see the judgment of the Supreme Administrative Court dated April 17, 2013, file no. 6 Ans 16/2012 - 62, No. 2959/2014 Coll. NSS). In any case, a lawsuit against a decision regarding an inadmissible appeal under § 92 of the Administrative Procedure Code is indeed reviewable, but the administrative courts only assess whether the conclusion of the defendant administrative body regarding the inadmissibility or lateness of the submitted appeal stands. Thus, the petitioners could not achieve a substantive judicial review of the contested decision through this route.

[28] It should also not be forgotten that the legal regulation on the admissibility of a lawsuit is a statutory implementation of the constitutional right to a fair trial and judicial review of administrative decisions according to Article 36, paragraph 2 of the Charter of Fundamental Rights and Freedoms, which includes the right of access to court. Legal restrictions on this right of access to court, including limitations arising from § 5 and § 68, letter a) of the Administrative Court Code, must be interpreted and applied restrictively, as evidenced by extensive case law of the Constitutional Court. This principle can briefly be referenced, for example, in the finding of the Constitutional Court dated March 16, 2006, file no. IV. ÚS 49/2004, the ruling of the extended Senate of the Supreme Administrative Court dated October 26, 2005, file no. 1 Afs 86/2004 - 54, No. 792/2006 Coll. NSS, the judgment of the Supreme Administrative Court dated March 29, 2006, file no. 2 Afs 183/2005 - 64, No. 886/2006 Coll. NSS, or most recently the resolution of the extended Senate of the Supreme Administrative Court dated June 11, 2013, file no. 3 Ao 9/2011 - 219, No. 2887/2013 Coll. NSS. In no case should the interpretation of the provisions of the Charter of Fundamental Rights and Freedoms and the legal provisions implementing them lead to conclusions that would amount to a de facto denial of the essence and purpose of fundamental rights (see Article 4, paragraph 4 of the Charter of Fundamental Rights and Freedoms). Such a de facto denial of the essence and purpose of the right of access to court would result in accepting the view of the municipal court that the condition for filing a lawsuit against the decision of the administrative body is the filing of an appeal, even if such an appeal is not permissible.

[29] This question is also related to whether there can be cases where an administrative decision infringes the rights of someone who is not a participant in the administrative proceedings. In this regard, the Supreme Administrative Court states that although such situations are highly undesirable, they cannot be a priori excluded and may, exceptionally, arise. This is particularly conceivable in cases where participation in the proceedings before the administrative body is not governed by § 27, paragraphs 1 and 2 of the Administrative Procedure Code, which associates the right to participate with potential infringement of rights (see the judgment of the Supreme Administrative Court dated December 17, 2008, file no. 1 As 80/2008 - 68, No. 1787/2009 Coll. NSS), but where the participants in the proceedings are exhaustively listed in a special law regarding the Administrative Procedure Code, as is the case in the matter currently being examined. Unlike the legal regulation of administrative judiciary contained in Part Five of the Civil Procedure Code, as effective until the end of 2002, the Administrative Court Code no longer associates active legitimacy to file a lawsuit against the decision of an administrative body with participation in the administrative proceedings (see § 250, paragraph 2 of the Civil Procedure Code, effective until December 31, 2002, and § 65, paragraph 1 of the A.C.C.). In the judgment dated February 6, 2014, file no. 4 Ads 107/2013 - 29, the Supreme Administrative Court noted that "[n]othing can change this conclusion [i.e., that the petitioner was entitled to file a lawsuit], not even the fact that the petitioner was not a participant in the proceedings in which her son's care allowance was reduced. The structure of § 65, paragraph 1 of the A.C.C. does not necessarily require the previous participation of the plaintiff in the administrative proceedings, and concerning active legitimacy to file a lawsuit, it is not decisive whether the affected entity was treated as a participant in the administrative proceedings, but whether the issued decision negatively affected its legal sphere in the sense described above." The Supreme Administrative Court reached this conclusion in its judgment dated February 22, 2011, file no. 2 Afs 4/2011 - 64, which was based on the resolution of the extended Senate dated March 23, 2005, file no. 6 A 25/2002 - 42. This new case law has subsequently overcome the opposite conclusion made in the resolution of the Supreme Administrative Court dated September 15, 2004, file no. 5 A 45/2001 - 65, which was referenced by the regional court in the contested resolution.

[30] The Supreme Administrative Court thus concludes that it is conceivable (in general terms) that the contested decision interferes with the legal sphere of the petitioners (or some of them) even though

they were not participants in the proceedings before the administrative body. In such a situation, their entitlement to file a lawsuit cannot be made conditional on filing an appeal against the contested decision of the defendant, to which they were evidently not entitled and which would have to be rejected as inadmissible. In such a case, a lawsuit against the final decision of the first-instance administrative body may, conversely, exceptionally be permissible. Similarly, a lawsuit may also be permissible, for example, by the highest state attorney or the Public Defender of Rights against the final decision of the first-instance body under the conditions set out in § 66, paragraphs 2 and 3 of the A.C.C.

[31] If the contested decision of the defendant had indeed violated the rights of the petitioners, applying the legal opinion expressed in the contested resolution of the municipal court could lead to a denial of justice, especially in a situation where, due to the finding of the Constitutional Court dated January 11, 2012, file no. I. ÚS 451/11, the possibility for the petitioners to obtain a remedy for the alleged adverse condition in proceedings before civil courts has been significantly restricted, if not excluded altogether.

[32] The Supreme Administrative Court also considered whether the provision of § 124, paragraph 2 of the Building Act, which practically excludes any persons other than the owner of the construction and the builder from participating in the proceedings for the approval of trial operation, is in conflict with the constitutional order of the Czech Republic and whether there is grounds for proceeding under Article 95, paragraph 2 of the Constitution of the Czech Republic, i.e., submitting the matter to the Constitutional Court along with a proposal to annul this provision of the law. For a similar reason, the Constitutional Court has previously annulled § 78, paragraph 1 of the Building Act of 1976 by a finding dated March 22, 2000, file no. Pl. ÚS 2/99 [see also the finding of the same day in the matter of file no. Pl. ÚS 19/99, annulling the provision of § 139, letter c) of the Building Act of 1976]. However, the Supreme Administrative Court concluded that the reason for the annulment finding by the Constitutional Court in the cited matters was the then-valid procedural regulation of the entitlement to file a lawsuit against the decision of an administrative body, which linked that entitlement with participation in the administrative proceedings. The exclusion of persons whose rights the decision of the administrative body could affect from proceedings before that administrative body thus also resulted in denying judicial protection to those affected persons. The currently applicable legal regulation of active legitimacy, however, is different and does not directly link the right of access to court with participation in administrative proceedings. Therefore, the Supreme Administrative Court found no inconsistency between the legal regulation contained in § 124, paragraph 2 of the Building Act and the constitutional order.

[33] In light of the above, the Supreme Administrative Court states that the legal opinion expressed by the municipal court, according to which the lawsuit filed by the petitioners must be rejected due to the non-exhaustion of remedies, is unlawful, and thus the contested resolution must be annulled and the matter returned to the municipal court for further proceedings.

[34] In the further proceedings, the municipal court will need to carefully evaluate the lawsuit regarding whether the petitioners (or some of them) are not evidently unauthorized persons to file a lawsuit under § 46, paragraph 1, letter c) of the A.C.C. In doing so, the municipal court will rely on the case law of the Supreme Administrative Court, which establishes a "presumption of review" and allows the lawsuit to be rejected only if judicial review, or, respectively, active legitimacy, is plainly excluded by law (see the judgment of the Supreme Administrative Court dated February 22, 2011, file no. 2 Afs 4/2011 - 64, No. 2260/2011 Coll. NSS). As also suggested earlier, in these considerations, it is necessary to take into account that the case law concerning active legitimacy has evolved over time, and it is necessary to rely on the legal opinion of the extended senate concerning the interpretation of § 65, paragraph 1 of the A.C.C., expressed, among other things, in the resolution of the extended senate of

the Supreme Administrative Court dated March 23, 2005, file no. 6 A 25/2002 – 42, No. 906/2006 Coll. NSS: "Standing under this provision must be given in all cases where the legal sphere of the plaintiff is affected, i.e., when a unilateral act of the administrative body relating to a specific matter and specific addressees binds and authoritatively affects their legal sphere. It is not about whether the act of the administrative body established, changed, revoked, or definitively determined the rights and obligations of the plaintiff, but whether – according to the plaintiff's assertions in the lawsuit – it negatively manifested in their legal sphere."

[35] In this context, the Supreme Administrative Court further states, without prejudging the assessment of the issue of the active legitimacy of the petitioners by the municipal court, that the conclusions stated in the judgment of the Supreme Administrative Court dated August 31, 2008, file no. 8 As 8/2008 - 33, are not directly applicable to the current case. In that judgment, the Supreme Administrative Court found that the plaintiff, the owner of the adjacent property, did not have standing to file a lawsuit against the occupancy decision issued under §§ 81 and 82 of the Building Act of 1976. The Supreme Administrative Court finds significant differences compared to the cited judgment in the current matter, particularly in that this case concerns a permit for trial operation, not an occupancy permit, as well as the fact that it involves procedures under a different law (the current Building Act vs. the Building Act of 1976) and especially in the nature and scope of the project in question (here a heavily trafficked highway, there a gas pipeline transfer station).

[36] When considering the standing of petitioners a) to c), the municipal court will also take into account the resolution of the extended senate of the Supreme Administrative Court dated June 11, 2013, file no. 3 Ao 9/2011 - 219, No. 2887/2013, in which the extended senate assessed the active legitimacy of a municipal district in the capital city of Prague. While it involved the interpretation of § 101a of the A.C.C. defining active legitimacy for filing a motion to annul measures of general nature, in both cases, active legitimacy is based on claims of infringement of rights by the contested act of the administrative body (the extended senate did not specify that the active legitimacy it derived applied to entitlement under § 101a, paragraph 2 of the A.C.C.; rather, it derived the entitlement to file a lawsuit based on claims of infringement of the applicant's right to self-governance). The municipal court will also consider the case law cited by the petitioners, which grants municipalities the right to file a negative declaratory action under § 127 of the Civil Code of 1964 to protect their residents and their properties from emissions. The Supreme Court stated in its judgment dated August 25, 1999, file no. 2 Cdon 330/97, that: "[t]hese provisions imply that a municipality is a public law corporation whose factual basis is composed of its citizens (the personal substrate of this legal entity in terms of § 18, paragraph 2, letter c/ of the Civil Code). Citizens are capable of perceiving the mentioned emissions, and if they are disturbed in their legitimate use of properties owned by the municipality, the municipality is also disturbed in the exercise of its property rights. Therefore, if the conditions listed in § 127, paragraph 1 of the Civil Code are met, the municipality may rightfully seek from the owner of the property, the use of which causes noise or vibrations, to refrain from such emissions. In this case, the claimant is a municipality whose citizens are disturbed at least by noise caused by the aviation activities of the defendant. Therefore, the claimant is entitled to assert in court its right to protection from noise disturbances (possibly also vibrations) in the sense of § 127, paragraph 1 of the Civil Code."

[37] Last but not least, the municipal court, in assessing the standing of the petitioners, must also consider that this is a project subject to an Environmental Impact Assessment (EIA), and as a result, it is necessary to take into account the Aarhus Convention and the European Parliament and Council Directive 2011/92/EU of December 13, 2011, on the assessment of the effects of certain public and private projects on the environment when interpreting procedural regulations concerning the admissibility of lawsuits. According to paragraph 21 of the rationale of the aforementioned Directive,

one of the objectives of the Directive is the implementation of the provisions of the Aarhus Convention, which establishes access to judicial or other proceedings to challenge the substantive or procedural legality of decisions, acts, or omissions subject to the provisions on public participation in Article 6 of that Convention. The Court of Justice of the European Union further stated in its judgment dated March 8, 2011, in Case C-240/09, Lesoochranárske zoskupenie VLK, paragraph 45 and following: "It should be noted that the provisions of Article 9, paragraph 3 of the Aarhus Convention do not contain any clear and precise obligation that could directly govern the legal situation of individuals. Since only 'public members who meet the criteria, if any are established by national law' have the rights set out in that Article 9, paragraph 3, the implementation and effects of that provision depend on the issuance of a subsequent act. However, it must be noted that the aim of these provisions, even though they are framed generally, is to ensure effective protection of the environment. In the absence of Union legislation in this area, it is for the national law of each member state to lay down the procedural conditions for actions aimed at ensuring the protection of rights which individuals derive from Union law, in the case at hand from the Habitats Directive, with member states being responsible for ensuring effective protection of these rights in any case (see, in particular, the judgment of April 15, 2008, Impact, C-268/06, Rec. I-2483, paragraphs 44 and 45). (...) It is therefore for the referring court to interpret the procedural law governing the conditions to be met for the purposes of filing an administrative remedy or lawsuit in such a way as to take into account as much as possible the objectives of Article 9, paragraph 3 of the Aarhus Convention, as well as the objective of effective judicial protection of rights granted by Union law (...)." These interpretative guidelines will also need to be respected when interpreting § 65, paragraph 1 and § 46, paragraph 1, letter c) of the A.C.C. in the matter currently under examination. This is also because the petitioners in their submitted lawsuit explicitly asserted their rights arising from Directive 2011/92/EU and from the Aarhus Convention. The obligation to interpret Czech law regulations so that their application is not inconsistent with EU law has been repeatedly emphasized by the Supreme Administrative Court in its case law. For example, reference can be made to the judgment of the Supreme Administrative Court dated November 16, 2010, file no. 5 As 69/2009 - 86, No. 2245/2011 Coll. NSS, which states: "It should be noted that all authorities of the member state, including the courts, are required, according to the established case law of the Court of Justice, when applying national law, to interpret this law to the greatest extent possible in the light of the wording and purpose of the directive or other Union legal instruments intended for its implementation (see, for example, the Court's judgments dated April 10, 1984, von Colson and Kamann, 14/83, Rec. 1891, paragraph 26, and November 13, 1990, Marleasing, C-106/89, Rec. I-4135, paragraph 8; see also, for example, the judgment of the Supreme Administrative Court dated August 29, 2007, file no. 1 As 3/2007 - 83, published under No. 1401/2007 Coll. NSS)."

[38] If it is not possible to interpret § 65, paragraph 1 of the A.C.C. as granting standing to the petitioners, it will be necessary to further examine whether the petitioners (or at least some of them) might have the right to file a lawsuit against the contested decision according to § 23, paragraph 10 of Act No. 100/2001 Coll., on Environmental Impact Assessment and on Amendments to Certain Related Laws (the Environmental Impact Assessment Act), in conjunction with § 66, paragraph 4 of the A.C.C. According to this provision of the Environmental Impact Assessment Act, an association of citizens or a public benefit corporation whose activities include environmental protection, public health, or the protection of cultural heritage, or a municipality affected by a project, may file a lawsuit due to violations of this Act to seek the annulment of the consequential decision issued in proceedings under special legal regulations, by means of the administrative judiciary.

[39] In relation to the specific issue of a lawsuit filed by a person who is not a participant in the proceedings before the administrative body, the Supreme Administrative Court further emphasizes that it is also necessary to evaluate the timeliness of the filed lawsuit. If the petitioners were not

normally notified of the contested decision by the defendant, it will be necessary to apply the opinion expressed by the Supreme Administrative Court in, for example, the judgment of September 6, 2011, file no. 9 As 92/2011 - 186: “In assessing the timeliness of the lawsuit, it is appropriate to take into account the legal opinion contained in the judgment of the extended Senate of the Supreme Administrative Court dated February 17, 2009, file no. 2 As 25/2007 - 118 (No. 1838/2009 Coll. NSS), according to which ‘even an administrative authority’s decision, which has not been formally delivered (notified) to a participant in the proceedings, may acquire legal force (§ 52, paragraph 1 of the Administrative Procedure Code of 1967, § 73, paragraph 1 of the Administrative Procedure Code of 2004), when the fiction of notification of a decision occurs. ... If a participant in the proceedings, whose rights, legally protected interests, or obligations have been affected by the decision, is omitted in the notification of the decision, the fiction of notification of the decision occurs at the moment when it is reliably and beyond reasonable doubt determined that the omitted participant has been made aware of the complete content of the decision regarding its identifying features and subject matter, essentially the same as if the decision had been duly notified to them.’”

[40] Finally, the Supreme Administrative Court adds that in the case of the permit for trial operation, it is clearly not one of the approvals granted by the building authority outside the administrative proceedings, against which the extended Senate of the Supreme Administrative Court deduced that these are acts under Part Four of the Administrative Procedure Code, against which one can seek protection through a lawsuit for unlawful intervention under § 82 and following of the A.C.C. (see the resolution of the extended Senate of the Supreme Administrative Court dated September 18, 2012, file no. 2 As 86/2010 - 76, No. 2725/2013 Coll. NSS). This is because the Building Act in § 124 explicitly (see terms such as "permit," "order," "decision," "participants in the proceedings," etc.) anticipates that a permit for trial operation is issued in an administrative procedure by a decision, in which the conditions for the trial operation can be set, among other things. Hence, it constitutes a decision in the sense of § 67 of the Administrative Procedure Code, or § 65 of the A.C.C. Consequently, the petitioners chose the correct procedural regime by filing a lawsuit against the contested decision of the administrative body. In contrast, a lawsuit for protection against unlawful intervention, order, or compulsion by the administrative authority would be inadmissible under § 85 of the A.C.C.

III. Conclusion

[41] As the Supreme Administrative Court found the opinion of the municipal court, on which it based its decision to reject the petitioners' lawsuit, unlawful, it had no choice but to annul the contested resolution and return the matter to the municipal court for further proceedings (§ 110, paragraph 1 of the A.C.C.).

[42] If the Supreme Administrative Court annuls the decision of the regional court and returns the matter to it for further proceedings, the regional court is bound by the legal opinion expressed by the Supreme Administrative Court in the annulment decision (§ 110, paragraph 4 of the A.C.C.).

[43] The municipal court will decide on the costs of the proceedings regarding the cassation complaint in a new decision on the matter (§ 110, paragraph 3 of the A.C.C.).

Instructions: No appeal against this judgment is admissible.

In Brno, on April 18, 2014

JUDr. Dagmar Nygrínová
Chairwoman of the Senate