LIABILITY FOR DAMAGE CAUSED BY OPERATIONAL ACTIVITIES AND ENVIRONMENT

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Abstract: This contribution is focused on legal liability for damage caused by operational activities. The author deals especially with position of such a liability within the system of liability for damages. The author examines how such legal liability may be employed if damages environment caused by operational activities occur. Moreover, the author analyzes relationship of liability for damage caused by operational activities to liability for environmental damage.

Keywords: environment, damage, environmental damage, operational activities, extraordinarily dangerous operations, liability for damage, liability for environmental damage, proposal of the new Czech Civil Code.

1 General Grounds

Legal liability is one of the most difficult legal concepts and it is a persisting subject of scientific discussions which are important not only for theory, but also for application. This fact also applies to liability for damage, especially liability for damage caused by operational activities, which is *de lege lata* provided in the Sec. 420a of the Czech Civil Code. It is important to mention that this particular provision has been implemented into the Civil Code by the Act No 509/1991 Coll., which altered, amended and modified the Civil Code. The purpose of implementing this provision into the Civil Code may be found in the efforts to create, aside from "subjective" liability, also strict liability for damage caused by operational activities. It is important to emphasize that even before this amendment, strict liability for damage caused by operation was already laid down in the Sec. 432. Nonetheless it applies only to extraordinarily dangerous operational activities. This provision has remained in force and has not been affected by the said amendment. Moreover it should be mentioned that before the amendatory Act No 509/1991 Coll. was passed, the issue of liability for damage caused by operational activities was being dealt with in "economic-legal" laws which regulated relationships between organizations. Last time that this issue was regulated was in the Sec. 145a of the Act No 109/1964 Coll., Economic Code, in which the liability for damage caused by operation of organizations was implemented by the amendatory Act No 103/1990 Coll., having entered into force as of May, 1, 1990.[1]

It is important to pinpoint this development also because of the fact that the then provision of the Sec. 145a of the Economic Code is more or less identical with the actual wording of the Sec. 420a of the Civil Code. Nevertheless, the said Sec. 145a of the Economic Code applied only to organizations. Other feature that should be brought up in respect to the topic of this contribution is that under the Sec. 145a, para 3 of the Economic Code, the liability for damage caused by operation expressly applied also to damage to environment, especially air pollution, water loss, degradation of water, agricultural land or forests including plant stand and damage to or destruction of protected areas and protected species and plants. Aside from stating that it is needed to implement liability for damage caused by operations into the system of legal liability for damage, the explanatory memorandums to any of the abovementioned amendments (the Act No 103/1990 Coll. and the Act No 509/1991 Coll.) do not deal with features of the new provisions.

Today, the issue of strict liability for damage caused by operational activities is becoming more and more important because of the development of the concept of liability for damage to environment which is taking place on both the international and community level and that needs to be considered by the Czech legal order. It is also important with regard to the proposal of the new Civil Code,[2] which will have to deal with liability for damage caused by operational activities.

2 Liability for damage caused by operational activities in the system of liability for damage – status quo and perspectives

Liability for damage caused by operational activities is *de lege lata* provided systematically in part two, chapter six, division two, entitled "general liability". In both the scientific literature[3] and the commentaries to the Civil Code,[4] one may find an idea which I agree with that the position of the essence of this liability within the system of liability for damage is not very clear. Some authors ask whether the lawgivers' objective was to create general concept of strict liability and some authors point out that "given the today's wording of the Sec. 420a, one can hardly regard the Sec. 420a as general in respect to the other cases of operational activities (the Sec. 427 et seq. of the Civil Code – liability for damage caused by operation of means of transportation; the Sec. 432 of the Civil Code – liability for damage caused by extraordinarily dangerous operations)".[5] There is presented in some commentaries to the Civil Code[6] that the Sec. 420a of the Civil Code is of special nature in relation to the general provision of the Sec. 420 of the Civil Code and, further, that the Sec. 427 and 432 of the Civil Code and some other provisions of, for instance, mining or water legislation, etc, are of special nature in relation to the Sec. 420a of the Civil Code.

I do not think that it is important today to analyze in detail the abovementioned issue of the relationship between the Sec. 420a (any operational activity) and the Sec. 432 of the Civil Code (extraordinarily dangerous operations), because as it is known even from practical application, since the Act 509/1991 Coll., by means of which the provision of the Sec. 420a was implemented into the Civil Code, entered into force, the Section 420a of the Civil Code has been followed when raising claims concerning liability for damage caused by operation activities and the provision of liability for damage caused by extraordinarily dangerous operation under the Sec. 432 of the Civil Code is no longer used. This approach is based on rational fundamentals, because one cannot expect that in a situation where liability caused by mere "operational activities" is strict, the injured parties would use the provision of extraordinarily dangerous operation under which they would have to prove that the damage was caused by such an extraordinarily dangerous operation. I think that by using historical-legal interpretation of such provision of the Czech legislation, which concern damage caused by "operational activities", we can get to a conclusion that as a result of the development of sources causing bigger danger, even the regulations had to consider whether one of the presumption of liability for damage would have to be a special feature of dangerousness of the operation or operational activities or not. I incline to the idea that *de lege ferenda* it is more appropriate to consider creating a concept of strict liability

[1] This amendment to the Economic code repealed the governmental ordinance No 40/1963 Coll. on compensation for damage caused by exhalations by socialist agricultural and forest organizations and the governmental decree No 46/1967 Coll. on settlement of damage caused by operational economic activities of socialist organizations to substantial property of other socialist organizations and on remuneration in investment construction and thus liability for damage caused by operational activities was included in statute. For more on the issues of liability under these regulations see: PRUCHOVÁ, I.: *Prevence škod a odpovědnost za škodu způsobenou provozní hospodářskou činností*, UJEP v Brně, spisy právnické fakulty Univerzity J.E.Purkyně, Vol 80, 1988, 116 p.,ISBN 55-989-88 and other works cited in therein.

[2] See especially the Sec. 2866 and 2867 of the proposal of the new Civil Code. Available at: <http://obcanskyzakonik.justice.cz/tinymce-storage/files/Navrh%20obcanskeho%20zakoniku_ver_2010.pdf>.

[3] See: FIALA, J. et al: *Občanské právo hmotné*, Masarykova univerzita a nakladatelství Doplněk, Edice učebnice Právnické fakulty MU v Brně, Vol 191, second edition, 1998 p. 342, ISBN 1081-113-1998(2838- 11/98-17/22).

[4] See: FIALA, J., KINDL, M,. et. al. *Občanský zákoník.Komentář.1. díl., first edition Praha: Wolters Kluwer ČR, a.s., 2009, p. 684 et seq, ISBN 978-80-7357-395-9.*

[5] Compare the work cited in the footnote four.

[6] See: ELIÁŠ, K. et al: *Občanský zákoník – velký akademický komentář, úplný text zákona s komentářem, judikaturou a literaturou podle stavu k 1.4.2008,Vol 1,* Linde Praha a.s., 2008, p. 811, ISBN 978-80-7201-678-7.

for damage caused by operational activities without a need to have a special provision on "extraordinarily dangerous operation". If we compared the today's nature of liability for damage caused by operational activities with the provision on liability for damage caused by extraordinarily dangerous operation, we would have to get to a conclusion that their structure is very similar. Thus, in my opinion, we can agree with the idea that *"in regard to the concept of liability for damage caused by operational activities under the Sec. 420a, the Sec. 432 is no longer needed."*[7]

Therefore it is important to ask whether and how the concept of liability for damage caused by "regular" operations and the concept of liability for damage caused by "extraordinarily dangerous operations" should be structured *de lege ferenda* and whether the eventual features of damage to substantially appropriative environmental components should be expressed directly or in the Civil Code. In this respect it is significant to emphasize that the proposal of the new Civil Code considers two provisions of "compensation for damage" based on strict (objective) principle. To be exact, the Sec. 2866 of the proposal of the new Civil Code,[8] entitled "damage caused by operational activities" says: *"the one who operates an enterprise or other establishment whose purpose is to make profit, shall compensate damage caused by operation, whether it was caused by own operational activity, by a thing thereof or by effects of such activities on surroundings. One can exempt from this obligation, if they prove that they have exerted all care that can be reasonably requested to prevent such damage."* Aside from that there is the Sec. 2867, entitled "damage caused by operation extraordinarily dangerous", which states: *"the one who operates an enterprise or other extraordinarily dangerous establishment shall compensate damage caused by such a source of increased dangerousness; an operation is extraordinarily dangerous if one cannot reasonably and in advance eliminate it. One can exempt from this obligation if they prove that the damage was caused by force majeure, behavior of the injured party or unavoidable behavior of a third party."* Further, the Sec. 2867, para 3 should help us to define what the extraordinarily dangerous operations are: *"it is understood that operations are extraordinarily dangerous it is rendered by factory production or if it involves similarly dangerous substance or if it trades such a substance."* Moreover, in the Sec. 2868, the proposal of the new Civil Code regulates compensation for damage to a real property by stating that: *"the one who even justifiably carries out or provides works, by which damage to real property of other person is caused, or by which possession of a real property is either excluded or made difficult, shall compensate the damage arisen therefrom."* It is important to emphasize that *de lege lata* this issue is essentially regulated by the Sec. 420a, para 2, letter C of the Civil Code, under which the concept of damage caused by operational activities applies if damage is caused by duly justified rendering or providing works, by which a damage to a real property is caused to a third party or if using of such a property is substantially aggravated or eliminated.

In connection with the abovementioned proposal of the new Civil Code and in regard to the need of the Czech legislation to response to the actual problems and trends concerning strict liability for damage in general and in connection to liability for damage to environmental components, I would like to state that a discussion on the proposed wording of the provisions concerning compensation for damage should be still led and the consequences of the new concept should be still considered. In this contribution, I would like to discuss the issue of "damage to environment" caused by operational activities. It has been traditionally and for a long time stated in both the commentaries to the Civil Code[9] and especially in scientific publications focused on the issue of environment law[10] that although the Sec. 420a does not expressly uses the concept of "environment", it is very important in connection with possible negative consequences of operational activities to environment. Especially, the Sec. 420a, para 2, letter B, under which: *"damage is caused by operational activities if it is caused by physical, chemical and biological effects of operation on surroundings."* One can imagine that instead of the term "surroundings", the term "environment" could be used. Because I have concentrated on the issues of environment and the concept of the term environment, I have to emphasize that even from the practical view, the term of "environment" is preferable to completely inexplicit term of "surroundings". Thus I do not regard as unnecessarily needed that there be *de lege ferenda* in the provisions of the Civil Code expressly used the term "environment" in connection with compensation for damage caused by operational activities; this applies to both the general level and any potential amendments to the exemplary list of its components. In particular situations, this could prevent from successful claiming for compensation for damage on the grounds that it was not damage to "environment". This assertion may be supported by the fact that the most frequented cases in which the Sec. 420a is applied, are situations concerning compensation for damage to forest stands caused by immission having its origin in operational activities,[11] which is such a damage that relates to forest as a significant component of environment.

Both *de lege lata* and *de lege ferenda*, it is important to keep in mind that certain features of operating activities and their consequences may be so critical or specific that it will be suitable for them to be provided out of the Civil Code. Ideally of course, in laws concerning the issue in question.

Just for illustration of this thesis, it could be mentioned that one of the traditional examples of such a specific provision is the concept of compensation for damage caused by loss of underground water or substantial reduction of its take-off. Today, we have it regulated by the Sec. 29 of the Act No 254/2001 on Water, as amended.[12] These are the situations in which loss of underground water or substantial reduction of the possibility to take-off such water is in causal connection with operational activities. As for the concept of operational activities, the Act on Water expressly refers to the Sec. 420a of the Civil Code. One of the features of the Act on Water, as compared with the Civil Code, is especially the manner in which damage shall be compensated, as it is based primarily on natural compensation. It should be mentioned that the proposal of the new Civil Code returns back to the priority of natural compensation for damage, which can be assessed as positive, especially in respect to damage to environment.

Mining damage is another special type of damage caused by operational activities. *De lege lata*, it is regulated in the Sec. 36 and 37 of the Act No 44/1988 Coll. on Using Mineral Deposits, as amended. This Act specifies the activities that may cause damage and it also lays down rules for dealing with such damage placing an emphasis on manner and the extend of compensation for damage, for instance, rational costs of preventive measure. The Civil Code shall be used as secondary. One can expect that it would be effectual and convenient to have the features of mining damage regulated by special laws.

[7] See: ŠVESTKA,J., SPÁČIL, J., ŠKÁROVÁ, M., HLMÁK, M. et al. *Občanský zákoník I.,* § 1-459. Komentář. First edition Praha: C.H.Beck, 2008, p. 1111, ISBN 978-80-7400-004-1.

[8] Confer: http://obcanskyzakonik.justice.cz/tinymcestorage/files/Navrh%20obcanskeho%20zakoniku_ver_2010.pdf

[9] See, for instance, the work cited in the footnote No 4, p. 686 and in the footnote 6, p. 811

[10] See: DAMOHORSKÝ, M. *Právní odpovědnost za ztráty na životním prostředí*, Univerzita Karlova v Praze, Nakladatelství Karolinum, 1999, p. 51 et seq., ISBN 80-7841-827-1, KINDL, M., DAVID, O: *Úvod do práva životního prostředí, Vydavatelství a nakladatelství Aleš Čeněk, s.r.o., Plzeň, 2005, p. 200 et seq., ISBN 80-86898-11-3,* STEJSKAL, V.: *Prosazování právní odpovědnosti v ochraně biodiverzity* , nakladatelství Eva Rozkotává-IFEC, Beroun, 2006, p. 187 et seq., ISBN 80-903409-5-4, PEKÁREK, M., PRUCHOVÁ,I., DUDVÁ,J., JANČÁŘOVÁ, I., TKÁČIKOVÁ, J.: *Právo životního prostředí,* I. díl. , second revised edition ,p. 290 et seq., ISBN 978-80-210- 4926-0.

[11] Compare for instance the decision of the Supreme Court of the Czech Republic No 25 Cdo 1016/2004 of February 23, 2005, or the decision of the Supreme Court of the Czech Republic of September 25, 2008 No 25 Cdo 582/2007, or the decision of the Supreme Court of the Czech Republic of February 24, 2005 No 25 Cdo 623/2004.

[12] Similar provisions were already in the previous Water Act No 138/1973 Coll. in the Sec. 29.

Special provisions on liability for damage are further included in the Act No 18/1997 Coll. on Peaceful Usage of Nuclear Energy and Ionizing Radiation (Nuclear Act), as amended and it applies to liability for nuclear damage. The abovementioned provisions of the Civil Code shall only be used if either the Nuclear Act or the Vienna Convention on Civil Liability for Nuclear Damage does not apply. There is no doubt that the features of liability for nuclear damage will be regulated out of the Civil Code and the Civil Code will apply only as a subsidiary law.

The abovementioned facts may be summarized that even as for the future – regardless of which direction the discussion about the new Civil Code will take – strict (objective) liability for damage caused by operational activities will be a part of the Czech legislation. However the question is whether there will be provisions in the Civil Code regulating liability for damage caused by extraordinarily dangerous operations. The proposal of bringing back priority of natural compensation for damage should be appreciated. It is still important to keep in mind that the provisions on liability for damage caused by operational activities included in the Civil Code would allow that special laws could regulate certain issues regarding negative consequences of operational activities differently either with regard to the nature of the harmed subject (water) or with respect to the features of operational activities (mining operations, operating nuclear facility) including implementation of obligations arising out of international treaties or union law by which the Czech Republic is bound.

3 The relationship between liability for damage and liability for liability for environmental damage

One of the most complicated problems is determination of the mutual relationship between liability for damage (proprietary damage to environmental components; the injured party is the entitled one and it may claim its rights through civil litigation) and liability for environmental damage (immaterial reduction of functional qualities of ecosystem or other values of environment; a State is the entitled party; and measures are issued by an administrative body). The goal of this contribution is not to analyze issues regarding environmental damage itself.[13] Nonetheless it can be emphasized that in many cases, certain operational activities may be in causal connection with both damage to property and environmental damage. In other words these two may overlap each other without having to be – and in most cases they will not be – identical. While pondering over effectiveness of liability for damage caused by operational activities, we cannot miss outlining of their mutual relationship.

In the Czech Republic, the situation is even more complicated, for liability for environmental damage is laid down in both the Sec. 27 of the Act No 17/1992 Coll. on Environment, as amended and the Act No 167/2008 Coll. on Preventing Environmental Damage and its Correction, by which the Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage was transposed into the legislation of the Czech Republic. Even the relationship between liability for environmental damage and liability for damage is dealt with differently in the abovementioned laws.

As for liability for environmental damage under the Sec. 27 of the Act 17/1992 Coll. on Environment, as amended, its relationship to liability for damage is that in light of the Sec. 27, para 5, no laws of general nature on liability for damage and on compensation for damage are affected by the provisions on environmental damage. In other words, their relationship is based on the principle of "concurrence". Both the liability for damage and the liability for environmental damage may take place and the fees paid do not count towards. As opposed to this principle, the Sec. 21, para 6 of the Act No 167/2008 Coll. On Prevention of Environmental Damage and Its Correction provides that if a person entitled from somebody else's liability for damage claims its right to be compensated under the general provisions on compensation for damage, the relevant provision on liability for damage will not be used if the damage to property has already been compensated while taking care of the environmental damage under the Act No 167/2008 Coll. Thus "count in" principle, which is considered to be more appropriate, is used.

4 Conclusions

With respect to the abovementioned discussion, it may be asserted that the concept of liability for damage caused by operational activities, as it is laid down in the Sec. 420a of the Civil Code, allows *de lege lata* effective compensation (if we do not consider some problems with figuring out the amount of damage) for the negative consequences caused by operational activities for the property of the injured persons. In light of damage to property that is also by its nature a component of environment, it is problematic that as for the manner of compensating damage, our current legislation is based on priority of monetary compensation. In this respect it, the proposal of the new Civil Code shall be appreciated for its expected return to priority of natural compensation. As regards the character of the operational activities, as a result of which damage may occur, it shall be considered very carefully whether, aside from "general" liability for damage caused by operational activities, it is needed *de lege ferenda* to establish a concept of damage caused by extraordinarily dangerous operations. Even in the future, we should keep in mind that special laws will regulate eventual features of compensation for damage caused by operational activities differently from the Civil Code, especially with respect to the character of the object to which damage is caused or with regard to specificity of certain operations by which they would be caused. These specific regimes will typically (similarly to as it has been done until now) apply even to situations concerning damage to environment.

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