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Problematic Case Law of the Constitutional Court of the Czech Republic on the Legal Nature of the Pavement – Is It a Separate Immovable Thing or Part of the Land? Commentary on the Decision of the Constitutional Court of 25 June 2019 (no. III. ÚS 2280/18)

Problematyczne orzecznictwo Sądu Konstytucyjnego Republiki Czeskiej w sprawie charakteru prawnego chodnika – odrębna nieruchomość czy część składowa gruntu? Glosa do wyroku Sądu Konstytucyjnego z dnia 25 czerwca 2019 r. (III. ÚS 2280/18)

ABSTRACT

The legal nature of construction is a popular topic in Czech case law practice and legal literature. The basic problem of the whole concept of determining what is and is not a building is the prevalence of private law thinking and the disregard of building as a public concept, especially in the light of construction law. The legal nature of pavements has been highly debated. The legal nature of the pavement has already been the subject of some debate in the past, and it is not possible to decide whether it can be regarded as an immovable property under Czech law without knowing specific facts. According to the judgment of the Supreme Administrative Court of the Czech Republic of 24 January 2018 (no. 6 As 333/2017), the character of a pavement is determined by the factual situation on the ground. The Constitutional Court of the Czech Republic also raised the question of the legal

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nature of the pavement in the context of the dispute over ownership. The commentary rejects the legal opinion adopted in the commented judgment, according to which the pavement constitutes a separate thing, not a part of another thing, in this case, the land.

Keywords: pavement; construction law; immovable property; part of the land; building; ownership

SOURCE

On 25 June 2019, the Constitutional Court of the Czech Republic, composed of President Josef Fiala and Judges Radovan Suchánek and Jiří Zemánek (Judge-Rapporteur), decided on a constitutional complaint filed by the municipality of Staré Město under no. III. ÚS 2280/18, concerning the legal nature of pavements. By this judgment, the Constitutional Court upheld the constitutional complaint of the municipality of Staré Město ("the complainant") and annulled the resolution of the Supreme Court of the Czech Republic of 27 March 2018, no. 22 Cdo 4330/2017 (as well as the judgment of the Regional Court in Ostrava of 9 March 2018, no. 56 Co 65/2017-238) on the grounds of alleged violation of the complainant's fundamental rights to judicial protection and protection of property under Article 36 (1) and Article 11 (1) of the Constitutional Act No. 2/1993 Coll. – Charter of Fundamental Rights and Freedoms as components of the Czech Republic's constitutional order (hereinafter: CFRF).[1]

In the judgment the Constitutional Court reached a conclusion that completely "denied" the long-standing and constant case law of the Supreme Court of the Czech Republic regarding the legal nature of the sidewalk, thereby introducing fundamental legal uncertainty into legal practice.[2]

Equally cautionary is the fact that the conclusions of the Constitutional Court are, in contrast to the conclusions adopted on this issue by the Supreme Court, dogmatically incorrect, as they do not respect the premises of Act No. 89/2012 Coll. – Civil Code, as amended and its relationship to Act No. 13/1997 Coll. – On the Road Network as amended (hereinafter: the Road Act). From a formal point of view, the judgment in question can be criticised for being wholly inadequate in reasoning.[3]

[1] Header of the operative part of the decision of the Constitutional Court of 25 June 2019, no. III. ÚS 2280/18.

[2] On this, see the text below.

[3] The main part of the reasoning of the judgment is concentrated in part V "Assessment of the merits of the constitutional complaint", specifically in items 13–15.

DECISIONS OF THE GENERAL COURTS

The essence of the dispute was the determination of ownership rights to a pavement located on a plot of land in the cadastral area of Staré Město u Frýdku-Místku owned by the company LEKOS, spol. s r. o. ("the complainant"). The complainant disagreed with the appellant's intention to connect its land plot no. 1972/89 and others in the cadastral area of Staré Město u Frýdku-Místku by an exit to the regional road no. II/477 Ostrava–Frýdek–Baška. The establishment of the exit also includes the relocation of the pavement in question, for which the appellant has issued the relevant permit by the Frýdek-Místek Municipality.[4]

The judgment of the District Court in Frýdek-Místek of 11 November 2016 (no. 16 C 72/2016-16) established that the complainant is the exclusive owner of the pavement on plot no. 1972/89 registered on the ownership certificate no. 756 for the cadastral area of Staré Město u Frýdku-Místku, municipality of Staré Město, registered at the Cadastral Office for the Moravian-Silesian Region, Cadastral Workplace in Frýdek-Místku,[5] as it is an independent thing in the legal sense.[6]

An appeal against this decision was filed with the Regional Court in Ostrava, which found in favor of the complainant and overturned the judgment of the District Court in Frýdek-Místek. The District Court in Frýdek-Místek incorrectly assessed the established facts, according to the Regional Court in Ostrava. The Regional Court in Ostrava subsequently assessed the facts in such a way that the pavement in question is essentially a paved asphalt surface, the substrate of which originally consisted of slag, later gravel or other rubble, and the top layer was finished with a several-centimeter-thick asphalt surface. There is an exception to the rule that a construction consisting of only a certain type of land improvement is not, in principle, a separate matter, and the Regional Court in Ostrava does not consider that the pavement under consideration constitutes such an exception in the facts of the case. The Regional Court in Ostrava therefore automatically took the view that the pavement in question cannot be regarded as a building in the civil law sense and is therefore not a separate thing in the legal sense but is instead part of the land and belongs to the company as part of the land.[7]

The complainant sought to enforce its rights before the Supreme Court. Although the dispute was primarily about the determination of ownership, the reasoning of the Regional Court in Ostrava overlooked the fact that throughout the proceedings, the question of whether it was a separate case was completely resolved.

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[4] Decision of the Constitutional Court of 25 June 2019, no. III. ÚS 2280/18, item 9.

[5] Cf. *ibidem*, item 2.

[6] The case law on the definition of whether a road is a separate thing is inconsistent. Cf. resolution of the Constitutional Court of 20 May 2014, no. III. ÚS 2128/2013.

[7] Decision of the Constitutional Court of 25 June 2019, no. III. ÚS 2280/18, item 3.

The complainant also requested an expert report to assess the construction design of the pavement in question and determine its legal nature on that basis. However, the Supreme Court held that the appeal was inadmissible and further reasoned that the Regional Court in Ostrava had explained in a sufficient and logical manner what considerations had led it to not regard the pavement in question as a separate matter. The Supreme Court acknowledged that the case was, to a large extent, a borderline case and that, in general, in similar disputes, the courts use expert evidence, but in the present case, the decision was not conditional on the taking of such evidence, i.a., because there was no disagreement between the parties regarding the technological method of construction of the pavement.[8]

LEGAL ISSUE OF CONSTRUCTION

For many years, the prevailing principle has been that the assessment of a building is different from the point of view of public and civil law has been in force, where the legislator has not defined this concept and it is not even evident from the law that he wanted to define it at all; there is only a considerable amount of case law[9] and legal literature[10] that has explained this concept from the point of view of private law and at the same time has given this interpretation priority over the statutory concept. The legal definition of a building is regulated in Section 2 (3) of the Act No. 183/2006 Coll. – On Town and Country Planning and Building Code, as in force until 1 July 2023 (hereinafter: the Building Act): "As a structure, it is understood all the built structures, which are made by building or assembly technology, without respect to their building technical execution, applied structural products, materials and structures, for the purpose of utilization and duration period".[11]

It follows from the judgment of the Supreme Court of 28 January 1998 (no. 3 Cdon 1305/96), that "in cases where civil law operates with the term 'building', its content cannot be interpreted only in the context of building regulations. Building regulations understand the term 'construction' dynamically, that is, as an activity aimed at the realisation of a work (sometimes, of course, as the work itself), but for the purposes of civil law the term 'construction' must be interpreted statically, as a thing in the legal sense".[12] Relevant reasoning for the distinction between the

[8] *Ibidem*, item 4.

[9] For example, the judgment of the Supreme Court of 3 May 2011, no. 22 Cdo 2106/2009.

[10] P. Lavický a kol., *Občanský zákoník I. Obecná část (§ 1–654). Komentář*, Praha 2014, p. 2292.

[11] See P. Růžička, *Obrana rozhodnutí ÚS k právní povaze chodníku, zvláště sjednocení výkladu pojmu stavby*, 30.3.2021, https://advokatnidenik.cz/2021/03/30/obrana-rozhodnuti-us-k-pravni-povaze-chodniku-zvlaste-sjednoceni-vykladu-pojmu-stavby (access: 14.1.2024).

[12] Cf. H. Adamová, L. Brim, P. Coufalík, E. Dobrovolná, J. Hanák, A. Pekařová, *Pozemkové vlastnictví*, Praha 2019, p. 40 ff.

public law and civil law concept of construction can also be found in legal provisions such as the second sentence of Section 1 (1) of the Civil Code, which states "the application of private law is independent of the application of public law".[13]

The Constitutional Court has previously dealt with the concept of construction from the point of view of civil law and from the point of view of construction law in its decisions, e.g. in the resolution of 15 November 2011 (no. II ÚS 1351/10), it concluded that "if the result of construction activities does not meet the conceptual characteristics of a construction as an immovable thing, the owner of the road in question is the owner of the land on which the road is located". In the cited resolution, the Constitutional Court stated that for the special purpose road under consideration to constitute an immovable thing, namely a building connected to the ground by a solid foundation, it is first necessary that it is capable of being a thing within the meaning of Section 118 (1) of the Act No. 40/1964 Coll. – Civil Code as in force until 31 December 2013 (hereinafter: the Act No. 40/1964 Coll.), that is, to be a "definable piece of the external world",[14] which constitutes an independent thing, not a part of another thing, in this case land.[15] Similarly, in its decision of 17 April 2002 (no. IV ÚS 42/01), the Constitutional Court concluded that the paved asphalt surface – a parking lot does not have the character of a building from the civil law point of view. It is also worth mentioning the resolution of 20 May 2014 (no. III ÚS 2128/13), which shows that under certain conditions a local road may be a separate thing in the civil law sense. When assessing whether it is a separate thing or a part of the land, it is always necessary to consider whether the building can be a separate object of rights and obligations, taking into account all the circumstances of the case, in particular whether, according to legal practice, it is expedient for the building as a separate thing to be the subject of legal relations, and also considering its construction design.[16]

I believe, however, that there is no reasonable reason to perceive one phenomenon (social reality), that is building, *a priori* differently, through the prism of private and public law. In any event, I do not question the sensibility of the division of law into private and public or the reasons for the division into these parts. However, this division is always understood in terms of the interests that dominate the area in question, that is public law as the protection of the interests of society

[13] The conceptual delineation of private law has contemporary critics who deny its practical significance and the possibility of drawing precise boundaries, as well as the fact that the legislator took the dualism of law into account at all. For example, see I. Pelikánová, *Návrh občanskoprávní kodifikace*, "Právní fórum" 2006, vol. 10, p. 347.

[14] Decision of the Constitutional Court of 19 June 2007, no. II ÚS 529/05.

[15] Cf. resolution of the Constitutional Court of 27 September 2012, no. III ÚS 1947/12.

[16] Cf., e.g., decision of the Constitutional Court of 6 May 2003, no. I. ÚS 483/01; decision of the Constitutional Court of 24 May 1994, no. Pl. ÚS 16/93.

as a whole, whereas private law is understood as the protection of the rights and interests of individuals.[17]

Such a procedure would make sense if there was an obvious social need for it; in other words, if the definition of the Building Act in the civil law regime could not be reasonably applied.

CONSTITUTIONAL COMPLAINT – DECISION OF THE CONSTITUTIONAL COURT

The complainant turned to the Constitutional Court by means of a constitutional complaint pursuant to Article 87 (1) (d) of the Constitutional Act No. 1/1993 Coll. – Constitution of the Czech Republic, as amended (hereinafter: the Constitution of the Czech Republic). A constitutional complaint constitutes a specific and subsidiary means of protecting constitutionally guaranteed fundamental rights or freedoms, where a natural or legal person may be an actively legitimated subject if he or she claims that his or her subjective public fundamental rights or freedom have been violated by the intervention of a public authority (passively legitimated subject). The Constitutional Court assessed whether the procedural prerequisites for the proceedings have been met and concluded that the constitutional complaint had been lodged in due time by a person entitled to do so.

At the heart of the constitutional complaint was the allegation that the decision violated her right to a fair trial "when the Regional Court did not carry out the proposed expert opinion on the composition of the pavement and instead merely stated its individual layers without further analysis as allegedly undisputed between the parties. According to the complainant, the courts failed to recognise that throughout the proceedings, the issue of whether the pavement was a separate matter was considered to be settled; therefore, no special evidence was taken on that issue, which focused exclusively on the determination of the ownership right, that is, on the questions of how the pavement was constructed and under what circumstances it was transferred to the complainant. Therefore, if the court assessed the constructional and technical nature of the pavement on its own, without expert evidence, it committed a defect in the proceedings. The applicant also disagrees with the order of the Supreme Court, which, although it acknowledged that the case was borderline, deprived the applicant of the possibility of a fresh assessment of the case by the Regional Court".[18] It is apparent that the constitutional complaint primarily challenged the procedural procedure of the Supreme Court (or the Regional Court in Ostrava).

[17] Cf. closer to this K. Eliáš, *K justifikaci pravidla o nezávislosti uplatňování soukromého práva na uplatňování práva veřejného*, "Právník" 2014, vol. 153(11), pp. 1007–1033.

[18] Decision of the Constitutional Court of 25 June 2019, no. III. ÚS 2280/18, item 5.

Pursuant to Section 82 (1) and (2) (a) of the Act No. 182/1993 Coll. – On the Constitutional Court, as amended (hereinafter: the Constitutional Court Act), upheld the appeal, concluding that the pavement in question "is not a mere paving of the surface of the land by layering natural materials or a paved asphalt surface, but a separate (construction) object in the civil law sense, and as such is part of a local road pursuant to Section 12 (4) of Road Act the municipality on whose territory the local road lies is the owner pursuant to Section 9 (1) of that Act. This is a case provided for by law where a local road structure (of which the pavement is a part) is located on someone else's land [Section 17 (2)]".[19]

It is interesting that in its decision of 23 March 2015 (no. I. ÚS 3143/13), the Constitutional Court expressed the following opinion when assessing the legal regime of the airport runway: "The Constitutional Court is not part of the system of general courts and is therefore not in principle entitled to pronounce on the interpretation of the private-law nature of the construction of an airport runway. However, the deficiencies in the reasoning of the Supreme Court's judgment, which did not take sufficient account of the construction of the airport runway, even in the light of the existing case law on transport structures, entitle the Constitutional Court to interfere in the decision-making activities of the ordinary courts".[20] The Constitutional Court annulled the previous decision of the Supreme Court by this judgment, but only on the grounds that it was not properly reasoned (which meant interference with the right to a fair trial),[21] not perhaps on the grounds of its substantive incorrectness. However, this was not the case in the decision under review since the decisions of the Regional Court in Ostrava and the Supreme Court were properly reasoned.

THE ROLE OF THE CONSTITUTIONAL COURT AND ITS INTERPRETATION

The constitution, which is the legal expression of the existence of the state, along with the CFRF, which is part of the constitutional order (Article 3 of the Constitution of the Czech Republic), and ordinary laws are different sources of law. Vertically arranged, with a higher degree of legal force on the part of the Constitution and the CFRF. The task of the Constitutional Court is to protect constitutionality (Article 83 of the Constitution of the Czech Republic), fundamental rights and freedoms[22] arising from the Constitution, the CFRF and other constitutional laws of the Czech Republic,

[19] *Ibidem*, item 15.

[20] Decision of the Constitutional Court of 23 March 2015, no. I. ÚS 3143/13, item 32.

[21] Cf. *ibidem*, items 28–32.

[22] According to Article 4 of the Constitution of the Czech Republic, fundamental rights and freedoms are protected by the judiciary.

and to guarantee the constitutional character of the exercise of state power. The actual procedure in the proceedings, the establishment and assessment of facts, the interpretation of the law and its application are the responsibility of the general courts,[23] which are part of the judicial system under Article 91 (1) of the Constitution of the Czech Republic.[24] The Constitutional Court is called upon to review the principles of constitutional law, that is whether the legal conclusions of the general courts are not extremely inconsistent with the findings of fact and whether the interpretation of the law made by the general courts is constitutionally consistent, or whether it was not an act of "arbitrariness". In making his or her decision, the judge of the Constitutional Court is bound only by the constitutional order and law (Article 88 (2) of the Constitution of the Czech Republic), while it is necessary to understand beyond doubt, and above all, to be bound by its meaning and purpose (Article 1 (1) of the Constitution of the Czech Republic). However, pursuant to Section 81, the Constitutional Court Act is not bound by the findings of fact made in the previous proceedings when assessing the constitutional complaint. In particular, it may not be bound if it considers that the right to judicial protection under Article 36 CFRF or the right to a fair trial under Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms has been violated because of incomplete evidence and insufficient findings.[25]

The binding nature of the Constitutional Court's decisions is based on Article 89 (2) of the Constitution of the Czech Republic, according to which enforceable decisions of the Constitutional Court are binding on all institutions and individuals. This provision is interpreted by the Constitutional Court to imply that general courts are obliged to follow the *ratio decidendi*, that is the interpreted and applied supporting rule (decisional reason) on which the Constitutional Court's ruling is based.[26] In addition, it should be noted that if the Constitutional Court has already made such an interpretation, it should be reflected in the decision-making in factually similar cases or the court should present serious arguments that lead to the conclusion that, given the relevant factual differences, it is not appropriate to apply the already expressed principle in another case.[27] This is the only way to engage in

[23] According to Article 95 (1) of the Constitution of the Czech Republic, judges are independent in the performance of their duties and are bound only by the law and international treaties that are part of the legal order. However, it should be added that the specific case must also be assessed in the light of other principles and principles that apply in the application of law in a state governed by the rule of law, such as the principle of the predictability of judicial decisions and the principle of the protection of legitimate expectations, which are among the fundamental principles of a fair trial.

[24] Cf., e.g., decision of the Constitutional Court of 13 March 2013, on. IV. ÚS 512/12.

[25] Cf., e.g., decision of the Constitutional Court of 27 November 1996, no. I. ÚS 167/94.

[26] Cf., e.g., decision of the Constitutional Court of 25 January 2005, no. III. ÚS 252/04.

[27] The Constitutional Court, in its decision of 13 November 2007 (no. IV ÚS 301/05), speaks of the adoption of the doctrine of precedent into our legal culture. See also Z. Kühn, M. Bobek, R. Polčák

an informed "jurisprudential dialogue" and to present relevant arguments that may lead the Constitutional Court to change its case law. A change in case law, such as a change in the law, is generally undesirable, as it undermines the principle of the predictability of the law and is always a negative interference with the customary conditions of the users of the law and their legal certainty.

CRITICAL EVALUATION OF THE CONSTITUTIONAL COURT'S DECISIONS

The legal nature of pavements can be viewed in two ways. The first possibility is that a pavement is a building in the sense of civil law. The second possibility is that this is not such a structure.

Furthermore, the first option may have two variants. If the pavement is a building, it can be either a separate object[28] or part of the land.[29]

P. Tégl and F. Melzer state that the methodologically correct procedure is to first determine from a civil law perspective whether a certain result of a construction activity (a pavement) is a building. If we can answer the question affirmatively, then we can decide whether the construction is a separate thing or merely part of the land. However, if the answer to the first question is negative, that is the pavement is not a building, then the conclusion is automatically that the result of the construction activity is simply a representation of the surface of the land, which will always be part of it. However, the conclusion on the legal nature of the pavement must be drawn not only from private law (cf. in particular Sections 505,[30] 506[31] and 509 of the Civil Code)[32] but also from public law (in particular, the Road Act).[33]

According to Section 2 (1) of the Road Act, a road is defined as "a thoroughfare intended for use by roads and other vehicles and pedestrians, including fixed installations necessary to ensure such use and safety". However, this definition

(eds.), *Judikatura a právní argumentace*, Praha 2006, pp. 35–36. Even in this case, however, the Constitutional Court's decision does not become a source of law.

[28] Cf. Section 3 (4) of Decree of the Ministry of Transport and Communications No. 104/1997 Coll. implementing the law on road traffic.

[29] Cf. Section 12 (4) of the Road Act.

[30] Cf. Section 120 of the Act No. 40/1964 Coll.

[31] According to Section 506 (1) of the Civil Code, such buildings are considered to be "part of the land, with the exception of temporary buildings, including what is embedded in the land or fixed in the walls", taking into account the respected private law principle of *superficies solo cedit* (the surface gives way to the ground). See P. Tégl, F. Melzer, *Superedifikáty a nový občanský zákoník*, "Právní rozhledy" 2014, vol. 4, p. 132.

[32] Cf. e.g., F. Melzer, P. Tégl, *op. cit*.

[33] P. Tégl, F. Melzer, *Problematické rozhodnutí Ústavního soudu k právní povaze chodníku*, "Bulletin advokacie" 2020, vol. 27(11), p. 68.

does not mention the nature of private law on the road. It is notable that the Road Act divides roads into four categories, namely "motorways, roads, local roads and special purpose roads", in Section 2 (2). For motorways and roads (and, to a certain extent, local roads) the law provides for a clear regime (it can be inferred that these roads are distinct from land and have, or may have, an owner distinct from the owner of the land on which they are located); the situation is more complex for special purpose roads. The nature of special purpose roads can be inferred only under general rules.[34]

The clarity of the legal regulation, and hence of the Road Act, is not helped by the fact that "pavement" has no definition in Czech law[35] and is intertwined in the Road Act with the term "local road" in Class IV pursuant to Section 6 (2) (d) of the Road Act. From the point of view of traffic doctrine, it is a lane intended for non-motorised transport (pedestrians or, according to special traffic regulations, for the mixed movement of bicycles or other designated means).[36]

This conclusion follows indirectly from Section 12 (4) of the Road Act, according to which "if they are not separate local roads, adjacent sidewalks, sidewalks under arcades, public parking lots and turnarounds, underpasses and facilities for securing and protecting pedestrian crossings are also parts of local roads".

The adjacent pavement is generally a part of the road, both in terms of public and civil law. The problem with civil case law in understanding the pavement is that instead of logically subordinating it as part of the main thing (i.e. the road to which it functionally belongs), it first determines whether it is a building in the civil law sense and if it finds that it is, then it considers whether it is a thing in the legal sense. If not, then it considers that it is merely a representation of the surface of the land and therefore part of the land. This very complicated procedure (often using expert reports ascertaining the structural layers) leads to two possible solutions: either it is a separate building that does not share the fate of the adjacent road or it is just part of the land.[37]

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[34] It can be noted that special purpose roads represent one of the most controversial cases of the legal regime of a certain entity as a thing (or a building in the civil law sense). Cf., e.g., O. Motejl, M. Černínová, K. Černín, V. Gabrišová, *Veřejné cesty: místní a účelové pozemní komunikace*, Brno 2007, pp. 11–16; J. Spáčil, *Cesty a pozemní komunikace v praxi civilních soudů*, "Právní fórum" 2006, vol. 3(7), p. 225 ff.

[35] The absence of a legal definition of the term "pavement" is not a problem in case law. Cf., e.g., judgment of the Supreme Administrative Court of 11 September 2013, no. 1 As 76/2013-27; judgment of the Supreme Administrative Court of 31 July 2008, no. 2 As 48/2008-58.

[36] On the pavement from the point of view of traffic construction, see M. Černínová, K. Černín, M. Tichý, *Zákon o pozemních komunikacích. Komentář*, Praha 2015, p. 269.

[37] The case law of the Supreme Administrative Court has undergone a certain development, which the Court summarised in detail in its judgment of 11 September 2009 (no. 5 As 62/2008-59), in which it stated that "the decisive factor in determining whether a building is connected to the ground by a solid foundation or whether it is part of the land cannot therefore be merely whether the building

Section 9 (1) second sentence of the Road Act, as amended by the Act No. 268/2015 Coll. states that "the municipality in which the local roads are located is their owner". The fourth sentence of the same paragraph then states that "the construction of the motorway, road, and local road is not part of the land". It is therefore clear that motorways, roads and local roads will not form part of the land (and will therefore be a separate thing in the legal sense), but only if they are also a building in the civil law sense. While this assumption is almost always met for motorways and roads, this may not be the case for local roads (and even less so for dedicated roads).

In relation to the legal nature of local roads, it is first necessary to note the development of views on the legal nature of the Supreme Court case law. In its judgment of 31 January 2002 (no. 22 Cdo 52/2002), the Supreme Court stated that "local and special purpose roads represent a certain quality of land, are names for a type of land, and represent a certain representation or treatment of its surface. Therefore, they cannot be both land and building in the civil law sense as two different things that could have different legal regimes or fates; they cannot be separated from land, e.g., transferred separately (one from the other)". Thus, the Supreme Court inferred the nature of part of the land for both local and special purpose roads.

A certain modification of this view was brought about by the judgment of the Grand Chamber of the Civil Law Division of the Supreme Court of 11 October 2006 (no. 31 Cdo 691/2005), in which the Court, on the contrary, took the view that "a local road could be a separate thing distinct from the land on which it was located if it were a building within the meaning of civil law that is, a building within the meaning of Section 119 of Act No. 40/1964 Coll., which, as a separate object of ownership, can be the subject of civil law relations. It cannot be ruled out that a local road may be a building and therefore a separate object within the meaning of civil law, and that the legal relations in respect of it may not be identical to those in respect of the land on which it was built". The decision of the Grand Chamber thus relaxed the previously absolute view of the legal nature of a local road by accepting that that type of road may be a separate thing, provided that it is a building within the meaning of civil law. Therefore, that decision cannot be understood as taking a completely contrary view of the nature of a local road compared with the previous case law.

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can be the question of whether or not a structure can be separated from the ground, but also whether the first condition laid down in Section 120 (1) of the Civil Code is fulfilled, i.e. whether or not it is a part of the land which belongs to the land (as the main thing) by its nature. (…) If the doctrine concludes, when assessing whether a local road is a building or a piece of land developed in a certain way to serve as a road, that if the surface of the local road is so developed that its removal will not be possible without destroying it or at least substantially impairing its possibility or navigability, it can be qualified as a separate subject of civil law, then there is no reason not to apply those criteria to the case of special purpose roads".

This line of reasoning (as adopted in the Grand Chamber's decision) was also suggested by the subsequent case law of the Supreme Court. For example, the Supreme Court's judgment of 10 June 2014 (no. 28 Cdo 3895/2013) states as follows: "On the contrary, the Supreme Court has also emphasised in its subsequent decision-making practice that the Road Act only implies that a local road may be viewed as a separate matter (cf., e.g., the Supreme Court judgment of 17 October 2012, no. 22 Cdo 766/2011). Even if the car park in question was categorised as a local road, this does not necessarily mean that it could be regarded as a building representing a separate subject of civil law (in accordance with Section 12 of the Road Act, a car park may also fall within the category of special purpose roads). The conclusion that a car park, which is a plot of land the surface of which has been paved for the purpose of parking cars, is not a civil law building, which was already expressed and justified in the Supreme Court judgment of 26 October 1999, no. 2 Cdon 1414/97 (published in the journal 'Právní rozhledy' no. 1/2000, pp. 35), was also accepted by the Constitutional Court (cf., e.g., the Constitutional Court's decision of 17 April 2002, no. IV. ÚS 42/01), the case law does not deviate. It continues to emphasise that in the case of a car park it is extremely problematic that, as a paved area, it should meet the conditions of structural-technical and purposeful autonomy, which are necessary for it to be regarded as a building that does not share its legal regime as part of the land (cf., e.g., the Supreme Court Resolution of 23 July 2012, no. 22 Cdo 1928/2010). The Supreme Court has repeatedly held that the mere development and shaping of the land's surface in order to pave it, which is necessary for the intended use of the land, is not sufficient for such a structure to be regarded as an independent thing in the legal sense (e.g., Supreme Court judgments of 28 February 2006, no. 22 Cdo 1118/2005, or of 30 July 2013, no. 22 Cdo 2417/2011). The appellants do not point to any facts (apart from the fact that the car park is classified as a local road) for which it would be possible to accept their claim that the car park in question is a separate building owned by an entity that is different from the appellants as owners of the land on which it is located. A building constituting a separate aspect in the civil law sense is considered to be the result of a construction activity, as understood by the Construction Act and its implementing regulations, if the result of that activity is a thing in the legal sense, that is, an eligible object of civil law relations, including property rights, and not part of another thing (e.g. the judgments of the Supreme Court of 31 January 2002, no. 22 Cdo 52/2002, published in the Collection of Civil Decisions of the Supreme Court of Justice under C 2901, Book 30/2004, of 28 February 2006, no. 22 Cdo 1118/2005, or of 27 May 2010, no. 22 Cdo 2682/2008). To assess whether a building is separate, it is necessary to take into account all the circumstances of the case, in particular the legal practice, and to consider whether it is expedient to make the building a separate object of legal relations, including whether it is possible to define where the land ends and the building begins (cf., e.g., the Supreme

Court's judgments of 26 August 2003, no. 22 Cdo 1221/2002, and of 6 January 2004, no. 22 Cdo 1964/2003, as well as the Supreme Court's resolutions of 28 April 2011, no. 22 Cdo 2569/2009, and of 27 November 2008, no. 22 Cdo 3510/2007)".

It is worth noting that a local road will be a separate thing in the legal sense (distinct from land) only if it meets the nature of a building in the civil law sense. Thus, the assessment of whether the construction work on the land is a separate object of legal relations or part of the land in question depends on the individual assessment of the legal question.[38] However, to reach a correct legal conclusion in the case of pavements under consideration, it is necessary to have sufficient knowledge of their structural and technical design, or their functional interconnection with other components (buildings, other roads, etc.).

When it comes to defining the concept of a "building" in the civil law sense, legal theory[39] and case law[40] agree that this term includes five defining features. It must "be (1) the result of man's building activity, which has (2) material substance, is characterised by (3) relative compactness of material, is (4) definable in relation to the surrounding land and has (5) an independent economic function (purpose)".[41] The characters listed in subsections (1) and (2) will generally be satisfied for a pavement, the features listed in subsections (3), (4), and (5), this may not be the case.[42]

With regard to the condition of relative compactness of material (3), it may be noted that the pavement, or surface thereof, is most often composed of asphalt, paving stones, conventional, concrete, garden paving or other surface-enhancing materials. However, it should be noted that this concept has no support in civil engineering theory. To describe buildings in terms of their construction, civil engineering terminology should be used.[43] The case law states that the condition of compactness will generally be met by an asphalt surface covered by certain underlying layers, but not by a surface made up of any paving embedded in a dry subsoil.[44]

With regard to the condition that defines the concept of a pavement in relation to the surrounding land (4), that is, a clearly separable part of the outside

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[38] Cf. judgment of the Supreme Court of 16 May 2013, no. 22 Cdo 3851/2012; resolution of the Supreme Court of 25 September 2012, no. 22 Cdo 4378/2010; resolution of the Supreme Court of 26 November 2013, no. 22 Cdo 835/2012.

[39] F. Melzer, P. Tégl, *Občanský zákoník – velký komentář. Svazek III. § 419 – § 654*, Praha 2014, p. 262, commentary to Section 498, p. 49 ff.; M. Králík, *§ 1083 (Užití cizí věci pro stavbu na vlastním pozemku a nároky s tím spojené)*, [in:] J. Spáčil a kol., *Občanský zákoník III. Věcná práva (§ 976–1474). Komentář*, Praha 2021, p. 300 and the literature cited therein.

[40] The decision-making practice of the Supreme Court expressed, e.g., in the judgment of 27 October 2020, no. 22 Cdo 1238/2020.

[41] F. Melzer, P. Tégl, *op. cit.*, pp. 262–269.

[42] Cf. P. Tégl, F. Melzer, *Problematické rozhodnutí…*, pp. 69.

[43] H. Adamová, L. Brim, P. Coufalík, E. Dobrovolná, J. Hanák, A. Pekařová, *op. cit*.

[44] Cf. judgment of the Supreme Administrative Court of 11 September 2009, no. 5 As 62/2008-59; judgment of the Supreme Administrative Court of 29 May 2009, no. 4 Ao 1/2009-58.

world, in other words, the definiteness of the beginning and end of the pavement, it is necessary to assess each situation separately, since this concept is debatable from a structural engineering point of view. This condition is considered to be fulfilled if the pavement is clearly delimited on both longitudinal sides by a solid structural element such as concrete or stone kerbs. However, if it is just a layer of compacted gravel or other similar material, it will be difficult to determine where the pavement ends, and the surrounding land begins. Finally, with respect to the purpose of pavement (5), this is essentially the same as the purpose of the land (the surface portion).[45]

In the case at hand, the Constitutional Court does not argue whether, and if so, to what extent, it finds the above-mentioned features of a building in the civil law sense to be fulfilled. I draw your attention to the Constitutional Court's ruling in the case under no. I. ÚS 3143/13, in which the Court stated that it is "not entitled in principle to pronounce on the interpretation of the private law character of a building". On the contrary, in the case under review, the Constitutional Court had expressed its opinion on the private-law nature of the building, it should either have justified the exceptional nature of the case in which it departed from this principle, or it should not have respected this principle at all in which case, of course, it departed from the legal opinion of the Constitutional Court expressed in the previous ruling and should have left the question in question to be examined by the plenary of the Constitutional Court.[46]

The Constitutional Court concluded in its decision that the pavement under review "is not a mere paving of the surface of the land by layering natural materials or a paved asphalt surface, but an independent (building) thing in the civil law sense. As such, it is part of a local road pursuant to Section 12 (4) of the Road Act, the owner of which, pursuant to Section 9 (1) of this Act, is the municipality on which the local road lies. This is a case provided for by law where a local road structure (of which the pavement is a part) is located on someone else's land (Section 17 (2) of the Road Act)".[47] However, this conclusion cannot be made for the reasons outlined below.

The Constitutional Court presumably assumes that a local road[48] is thing in a legal sense, but it is not. It is always necessary for the results of a construction activity to meet the characteristics of a building in the civil law sense. If this is not the case, it cannot be a construction that can be legally independent, even

[45] P. Tégl, F. Melzer, *Problematické rozhodnutí…*, p. 69.

[46] Cf. Section 23 of the Constitutional Court Act.

[47] Decision of the Constitutional Court of 25 June 2019, no. III. ÚS 2280/18, item 15.

[48] A local road is made up of three features, including the administrative decision to classify it (a formal feature under Section 3 (1) of the Road Act), its traffic significance (a material feature under Section 6 (1) of the Road Act) and finally its ownership (a material feature under Section 9 (1) of the Road Act). See D. Slováček, *Místní komunikace*, "Právní rozhledy" 2014, vol. 20, p. 693.

in the form of a linear construction. Nor can the construction of the footpath be regarded as a building in the civil law sense because of the absence of certain defining features.[49]

In the reasoning of the decision, the Constitutional Court also impermissibly confused the term "part of a local road" in the regime of the Road Act with the civil law term "part of a thing". However, the term "part of a local road" has a completely different meaning and is constructed for completely different purposes than the definition of the term "part of a thing" under the Civil Code.[50] While the definition of "part of a thing" in the Civil Code is practically relevant mainly for the purposes of property dispositions of a thing,[51] the Road Act uses this term in completely different contexts, such as: in Section 18g (9) in the context of the assessment of the construction of a road and its effect on the surroundings, including the effect of its components and accessories on the surroundings;[52] in Section 19 (2) in the context of the definition of the general use of roads (here, i.a., the prohibition of polluting or damaging roads, including their components and accessories);[53] in Section 26 (3) in connection with the definition of the construction status of the road (the construction status includes, inter alia, the provision of the road with components and accessories),[54] and in connection with the formulation of the facts of certain offences.[55]

It follows from all the above provisions of the Road Act that this institute is important not in terms of property disposition, but for other reasons, which are primarily to ensure that, in addition to the roads themselves, their functionally related entities, specifically defined in the Road Act, meet specific criteria (technical, safety, quality, etc.). Similarly, there is a clear effort to take into account the components of the road when defining the "construction status of a road", etc. After all, already *prima vista*, some cases of "component parts of a land road" cannot be civil law "component parts of a thing". An example of this is Section 12 (1) (a) of the Road Act, which declares, i.a., all structural layers of the road to be part of

[49] P. Tégl, F. Melzer, *Problematické rozhodnutí…*, p. 70.

[50] This conclusion is undoubtedly valid despite the fact that the explanatory memorandum to the Road Act itself refers to the components of things and accessories of things under the Civil Code of 1964 in connection with the definition of this concept (as well as the concept of "accessories of the road"). However, a cursory glance at the individual examples of parts of the road and accessories of the road shows that these institutes are built on completely different foundations from those of the parts of the thing and accessories of the thing under the Civil Code (or earlier under the Act No. 40/1964 Coll.).

[51] Cf. H. Adamová, L. Brim, P. Coufalík, E. Dobrovolná, J. Hanák, A. Pekařová, *op. cit.*, p. 35 ff.

[52] See more B. Košinárová, *Zákon o pozemních komunikacích. Komentář*, Praha 2021, pp. 118–119.

[53] *Ibidem*, pp. 136–138.

[54] *Ibidem*, pp. 263–264.

[55] P. Tégl, F. Melzer, *Problematické rozhodnutí…*, p. 70.

the road; however, from a civil law point of view, it is not a "part of the road" as a thing, but the thing itself.[56]

It is therefore clear that the conclusion as to whether a certain entity has the nature of a "part of the road" within the meaning of the Road Act is in principle irrelevant to the civil nature of such an entity – that is, whether it is a building or not, or if it is a building, then whether it is a separate thing or just a part of the land.[57]

After all, even if the Road Act were to work with the concept of "part of the road" in the same spirit as the Civil Code works with the concept of "part of the thing" (which is probably what the Constitutional Court thinks), the reasoning of the commented judgment would suffer from another defect. If the Constitutional Court states that a pavement is "a separate (building) thing in the civil law sense", then at the same time it cannot be "as such a part of a local road (…), the owner of which is (…) the municipality on whose territory the local road lies. This is a case provided for by law where a local road structure (of which the pavement is a part) is located on someone else's land". It is evident that in these parts the Constitutional Court, when applying the institute of a part of a road, is based on the property (substantive) criterion and not on the criteria arising from the Road Act. However, the conclusion that the pavement is both a separate thing (a building) and part of the local road construction is obviously nonsensical. However, this result cannot occur; either the pavement is a separate thing or part of another thing, *tertium non datur*.[58]

CONCLUSIONS

The Constitutional Court has already dealt with the concept of construction in terms of civil and construction law in its previous decisions and concluded that if the result of a construction activity does not meet the conceptual characteristics of a construction as an immovable thing, the owner of the road in question is the owner of the land on which the road is located.

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[56] It always depends on the specific circumstances of the case in question to determine whether the road in question is a separate thing after 1 January 2014 or 31 December 2015. Two criteria are decisive. The first criterion is that the road must be a definable piece of the world, i.e. it is possible to clearly define where the land ends and the building begins. R. Kočí (*Účelové pozemní komunikace a jejich právní ochrana*, Praha 2011, p. 41 footnote 29) thus considers a road consisting of a bituminous surface and structural layers to be a definable piece of the world. On the contrary, one cannot speak of a definable piece of the world in the case of the layering of natural material on the road surface, e.g. chippings, gravel, clay.

[57] Cf. J. Švestka, J. Dvořák, J. Fiala a kol., *Občanský zákoník. Komentář. Svazek I (§ 1–654)*, Praha 2014.

[58] P. Tégl, F. Melzer, *Problematické rozhodnutí…*, p. 70.

In the case at hand, the Constitutional Court concluded that the sidewalk in question is not merely paving the surface of the land by layering natural materials or a paved asphalt surface, but an independent (building) thing in the civil law sense. As such it is part of a local road, the owner of which is the municipality on which the local road lies.

The departure of the Constitutional Court from the Supreme Court's established case law raises fundamental practical problems. In most cases, landowners treat pavements as a property. They rely on settled case law in confidence and invest considerable resources in repairs. In practice, the opinion of the Constitutional Court is already being enforced, which may lead to costs being incurred for the benefit of another person, which gives rise to a right of unjust enrichment against the owner of the "building", which, however, will in many cases already be time-barred. As these are buildings that are not registered in the Land Registry, it is almost always difficult to determine who built the pavement and is its "owner" and who should therefore carry out the building maintenance (Section 9 (3) of the Road Act). This uncertainty has a significant negative impact on the decisions of the Constitutional Court.

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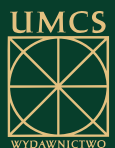
ABSTRAKT

Charakter prawny obiektu budowlanego jest częstym tematem w czeskiej praktyce orzeczniczej i piśmiennictwie. Podstawowym problemem całego zagadnienia dotyczącego ustalenia, co jest, a co nie jest budynkiem, jest przewaga myślenia prywatnoprawnego i brak podejścia do budynku jako pojęcia publicznoprawnego, zwłaszcza w świetle prawa budowlanego. Charakter prawny chodników jest przedmiotem żywej dyskusji. Charakter prawny chodnika był tematem dyskusji w przeszłości i nie sposób ocenić, czy może być traktowany jako nieruchomość w świetle prawa czeskiego bez poznania konkretnych faktów. Zgodnie z wyrokiem Naczelnego Sądu Administracyjnego Republiki Czeskiej z dnia 24 stycznia 2018 r. (nr 6 As 333/2017) o charakterze chodnika decyduje stan faktyczny występujący na danym gruncie. Sąd Konstytucyjny Republiki Czeskiej podniósł również kwestię charakteru prawnego chodnika w kontekście sporu o własność. W glosie odrzucono pogląd przyjęty w komentowanym orzeczeniu, zgodnie z którym chodnik stanowi odrębną rzecz, a nie część składową innej rzeczy, w tym przypadku gruntu.

Słowa kluczowe: chodnik; prawo budowlane; nieruchomość; część składowa gruntu; budynek; własność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