

HABILITATION THESIS REVIEWER'S REPORT

Masaryk University

Applicant

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Habilitation thesis

*LEGAL DISSONANCE OF STRENGTHENING
HARMONISATION IN EU PUBLIC CONSTRUCTION
LAW*

Reviewer

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The topic chosen by the Author is definitely worth pondering. Whereas there are no explicit competences of the European Union in the field of public construction law, miscellaneous other spheres of activity (and measures introduced within their framework by the EU legislator) unavoidably touch upon, affect and sometimes deeply interfere with the spatial planning and construction permitting. The varying scope and nature of such influence is the matter deserving scientific consideration, the more that there seems to be at least partial research lacuna as regards the subject matter of the thesis. I also think that the aim of the thesis, indicated as determination of the level of indirect harmonisation of spatial planning and construction permitting in EU law and the scope of corresponding requirements (p. 18) is well set.

The thesis consists of six chapters, four of which analyse separate spheres of interest within the framework of the subject matter, starting with introduction and finishing with conclusion. The manner of approaching the main topic seems to be mixed, i.e. to some extent it is based on sequence of events and to some extent on particular problems noticed by the Author. It is an interesting perspective, allowing the Author to draw well-founded conclusions both as regards the legislative trends changing as the time lapses, but also as regards the divergent issues. Each of the four main chapters is followed by partial conclusions, which is useful in terms of following the course of considerations.

The first chapter (after the introduction) describes and examines early harmonisation attempts of the public construction law. As the Author states, it illustrates the development of the important environmental requirements that appeared in public construction law and traces the origin of the public participation requirements. That chapter constitutes a good starting point for further analysis, which is generally focused more on problems than on chronology (this is positive as it allows for in-depth analysis).

The second (formally third) main chapter focuses on the Aarhus Convention and its implementation in the EU law, therefore, the major issues examined are public participation and access to justice in environmental matters. The topics of public participation and access to justice reappear also in further parts of the thesis and seem to be its leitmotifs. Considerations within the chapter in question are well led and include some interesting conclusions, in particular as to lacks and drawbacks of the present legal state as far as the implementation of the Aarhus Convention in the EU law is concerned.

The third chapter addresses current environmental requirements affecting the spatial planning and construction permitting. The Author examines in turn a wide array of instruments adopted

at the level of the European Union (i.e. environmental impact assessment, strategic environmental impact assessment, Natura 2000 directives, water protection and management, industrial emissions, prevention of industrial hazards, air quality protection, noise pollution and waste management). That chapter presents a diverse landscape of major environmental requirements influencing the spatial planning and construction permitting. Of course, the Author does not (fortunately) describe the entire content of different legal acts, but focuses on major elements which affect the spatial planning and construction permitting.

Afterwards, there follows the chapter discussing current requirements of other (i.e., other than environmental) policies of the European Union. That chapter deals with cohesion policy and territorial agenda, maritime spatial planning, trans-European transport and energy networks, promotion of renewable energy, building materials and energy efficiency of buildings. I find the choice of topics in that chapter – including the most important areas affecting the spatial planning and construction permitting – suitable. Obviously, as the Author admits, *identifying the most essential requirements that indirectly affect public construction law is inevitably subjective to some extent* (p. 29).

In my opinion, the plan is reasonable, which is reflected in quite convenient tracing of the sequence of considerations.

The thesis is rather concise as it encompasses 245 pages in total. However, this is only a technical remark.

As regards the choice and use of scientific sources, at present it is always hard to assess whether it is adequate due to the abundance of the literature nowadays, being – at least to some extent – out of control and non-exhaustible. However, it seems that in case of the habilitation thesis in question, the adequate number of representative research works (articles, chapters, monographs) is used. The Author invokes, *inter alia*, 122 journal articles, 38 monographs and 17 chapters in monographs.

The same assessment – as regards the adequate choice and number - may be expressed in terms of analysed legal acts and – with some exceptions mentioned below - also rulings of the European Court of Justice. The Author invokes 130 judgments of that court and 18 opinions of advocates general. Thus, there is an abundance of analysed rulings – however, I think that bearing in mind the subject matter of the thesis it would be worth considering a few additional ones.

I mean here, for instance, the ruling issued by the ECJ in case C-206/13, *Cruciano Siragusa v Regione Sicilia – Soprintendenza Beni Culturali e Ambientali di Palermo*, where the Court was faced with the task to determine whether the Charter of Fundamental Rights of the European Union (precisely, the right of ownership proclaimed thereby) precludes national provisions causing the lack of possibility to legalize some unauthorised construction works under the national landscape conservation rules. The Court has answered that the Charter is not applicable to obligations to protect the landscape, because *no specific obligations to protect the landscape, akin to those laid down by Italian law, are imposed on the Member States by the TEU and TFEU provisions referred to by the referring court; nor are such obligations imposed by the legislation relating to the Aarhus Convention, nor by Directives 2003/4 and 2011/92 (...)* *The objectives pursued by that EU legislation are not the same as those pursued by Legislative Decree No 42/04, even though the landscape is one of the factors to be taken into consideration in assessing the impact of a project on the environment in accordance with Directive 2011/92 and among the factors to be taken into consideration as part of the environmental information referred to in the Aarhus Convention, Regulation No 1367/2006 and Directive 2003/4.* The judgment clearly supports the conclusion of the thesis that the harmonisation of public construction law in the Member States is indirect in its nature – and definitely, not full. However, the thesis focuses on showing the most important examples of legal instruments influencing the spatial planning and construction permitting (so on positive instances) – it is not a reproach though – so it would be interesting to show contrasting examples, like the ruling where the Court denies harmonization as regards the matter related to public construction law.

Here I would also like to point out that when writing about small areas in terms of the SEA Directive, the Author invokes an opinion of the Advocate General that *small areas should be interpreted in accordance with their usual meaning in everyday language* (p. 128). However, according to the ruling in case C-444/15, *Associazione Italia Nostra Onlus v Comune di Venezia and others*, article 3(3) of Directive 2001/42, read in conjunction with recital 10 of that directive, must be interpreted to the effect that the term 'small areas at local level' in paragraph 3 must be defined with reference to the size of the area concerned where the following conditions are fulfilled:

- the plan or programme is prepared and/or adopted by a local authority, as opposed to a regional or national authority, and
- that area inside the territorial jurisdiction of the local authority is small in size relative to that territorial jurisdiction. Therefore, it is not enough to say that they should be understood as the language suggests - the Court of Justice clearly states that the size is relative and perception that an area is small depends on comparison with the entire area over which a given local authority has territorial jurisdiction.

However, in general the choice of rulings is adequate, and these minor critical remarks do not change definitely positive assessment of the thesis by JUDr. Vojtěch Vomáčka.

The language of the thesis is good, it allows for interesting reading and perception of the course of analysis. There are no grammar inaccuracies or unnecessarily complicated wording.

I perceive as particularly valuable the comparative perspective between the examined legal acts and resulting conclusions expressed by the Author - *inter alia*, concerning existence and character of requirements on spatial planning and construction permitting, merging and optimization processes relating to the aforementioned sphere, public participation (identification of authorized entities and individuals, access to information, participation in decision-making, access to justice). The comparative perspective results in an in-depth analysis and it definitely constitutes an added value of the thesis.

I agree with the conclusions drawn by the Author and find them justified in the context of the course of analysis and argumentation made in the thesis. It is true that the harmonisation of public construction law in the Member States has largely developed indirectly through EU environmental and energy requirements (*passim*, for instance p. 18) – so it is significant, but rather piecemeal, which is reflected in the conclusion that *the EU environmental legislation frequently supports the merging and optimisation of processes based on considerations of the feasibility of combining the obligations under different directives, which overlap in fundamental respects. However, it rarely actually attempts to synchronise requirements from different areas of regulation. The core work is left to the transposition by the Member States, which requires a considerable degree of inventiveness on the part of the national legislator to optimise national planning and permitting processes (...)* (p. 176). Moreover, as the Author demonstrates, there are overlaps between different EU directives, deepening the complexity, resulting also from the fact that the EU law does not require miscellaneous environmental instruments to be linked with each other.

In my opinion the work of Vojtěch Vomáčka definitely fulfils the requirements of a habilitation thesis. It is a valuable result of undoubtedly great effort, requiring in particular, without limitation, a thorough analysis of a wide array of legal acts and rulings of the European Court of Justice.

Reviewer's questions for the habilitation thesis defence (number of questions up to the reviewer)

1. Do you think that article 192(2)(c) TFEU you refer to in your thesis, requiring unanimous voting in the Council for adoption of measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply, should be applied as a legal basis in case of some of legal acts you analyse in your thesis, or maybe some other legal acts?

2. In general, which factors should be taken into account when a legal basis for issuing a given legal act is to be chosen?
3. In Poland, for a non-governmental organization to call into question a decision issued in the procedure of environmental impact assessment, the national legislator has introduced a requirement that it has to lead activity related to environmental protection for at least twelve months before launching the aforementioned procedure. Do you think such a requirement is in conformity with the provisions of the EIA Directive or not?
4. What is your opinion on extensive interpretation of provisions of environmental directives by the European Court of Justice, numerous examples of which appear in your thesis – such as in case C-567/10, *Inter-Environnement Bruxelles and Others*, where the Court stated that article 2(a) of the SEA Directive, referring to plans and programs required by law and administrative provisions, effectively refers to plans and programs the adoption of which is regulated by the law? Is it justified or not?

Conclusion

The habilitation thesis entitled “Legal dissonance of strengthening harmonisation in EU public construction law” by JUDr. Vojtěch Vomáčka **fulfils** requirements expected of a habilitation thesis in the field of Administrative Law and Environmental Law.

Date:

29.04.2024

Signature:

