

## **EXPROPRIATION FROM THE ADMINISTRATIVE LAW AND FINANCIAL LAW POINT OF VIEW IN THE CZECH REPUBLIC**

Expropriation is a legal institute which uses the power to make changes in property rights. The aim of this institute is the facilitation of the desirable fixed **transition, or restriction, of the property rights** in situations where it would not be possible without this institute.

The basic legal act which regulates the expropriation is the Declaration of Fundamental Rights and Freedoms. It states that the expropriation or the restriction of the property rights is admissible only in the public interest, on the basis of acts and by compensation<sup>1</sup>. In the legal regulation of ownership this constitutional presumption is specified in the Civil Code<sup>2</sup>.

The expropriation procedure is regulated by administrative law regulations, among which the meritorious position has the Expropriation Act<sup>3</sup>. On the one hand there are supplemented civil conditions, which are necessary to be satisfied for acceding to the expropriation, and on the other hand the main **principles** of the expropriation procedure are set in this act. The expropriation procedure is the execution of public administration.

The **purposes** of expropriation are defined in several acts. The most considerable from this point of view is the Building Act<sup>4</sup>.

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1 Section 11(4) of the Declaration of Fundamental Rights, published as a resolution of the presidium of the Czech National Council as No. 2/1993.

2 Section 128(2) of the Civil Code (Act No. 40/1964 Sb.) states that the expropriation or restriction of property rights is allowed only in the public interest, if it is not possible to reach the purpose another way, on the basis of the act, only for the purpose and by compensation.

3 Expropriation Act (Act No. 183/2006 Sb.).

4 Building Act (Act No. 184/2006 Sb.) specifies the purposes of the expropriation (for itself): The property rights to the plots and building structures, which are necessary for reaching the constructions or other public welfare arrangements under this act, may be restricted or withdrawn, if they are specified in the published version of the town-planning documentation and if it is a public welfare construction of the transport or technical infrastructure, including the area, which is necessary for the building-up, and regular usage for the purpose of expropriation, public welfare arrangements, concerning the hazard control in the floodplains and other natural disaster areas, the raising of the retentive ability of the area and the protection of the archeological heritage, building structure or arrangement for the defense and security of the state, landscape sanitation. It is possible to take away or restrict the property right to the plot for the creation of the conditions required for necessary access, proper usage of

The **Expropriation Act** defines expropriation as a deprivation or restriction of the property right or of real burden to a plot or to a building structure and a transition of the property right or acquisition of the real burden to that plot or to a building structure for reaching the purpose of the expropriation, which is defined in several acts. The expropriation is admissible solely for the purpose defined in several acts and if the public interest for reaching this purpose predominates over maintenance of rights of the present owner and if it is not possible to acquire rights to the plot or to a building structure necessary for reaching the purpose of the expropriation by agreement of some other way.

The public interest for the expropriation has to be proved in the expropriation procedure.

The lien and the sub-lien right to the plot or to the building structure, the custodial transfer of the right concerning the plot or the building structure, generally the lease of the plot, building structure or its parts and the real burden to that plot or to a building structure are dissolved in the expropriation. On the other hand the rent of a flat is never dissolved.

The **compensation** of the expropriation is regulated by the Expropriation Act. This act states the statutory duty that the compensation is provided in principle in money. On the other hand, if the object of the expropriation is a property right of a plot or a building structure, the present owner has a possibility to get another real estate (plot or a building structure) by an agreement. Possible differences in value of the real estate will be the object of the settlement.

The compensation is provided by the **common price**<sup>5</sup> if the object of the expropriation is a plot or a building structure. If the object is a real burden then the compensation is provided by the value of the property right according to the real burden. Except this, the present owner has a title to obtain the compensation of the removal, compensation concerning the change of the place of business, and other purposeful compensation expended concerning the expropriation and its consequences from the expropriator.

The competence for expropriation procedure belongs to the **expropriation authority**<sup>6</sup>. The territorial jurisdiction is influenced by the territory of the authority where the real estate, which is the object of the procedure, is situated. In case of

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the building structure or for the approach road to the plot or to the building structure. Other acts which enable expropriation for some purposes are, for example: Water Act, Mining Act, Road Act, Rail Act, etc.

5 The common price is a price which would be set as a selling price in case of selling the same, respectively the similar property, or it is a price of providing the same or similar services in the commercial relation in the date of evaluation.

6 The expropriation authorities are the municipal offices with a widespread competence (the number of these offices is 205) in their district of administration, plus the town-councils of the corporate towns (23) and the Town-Council of the Capital Prague.

situations when the real estate is inherited in two or more territories of expropriation authorities, the final decision as to which authority has the competence and will carry out the expropriation procedure is taken by the immediate common superior governing body.

The **parties to an action** are defined by the Expropriation Act. For the procedure the parties to an action are: the expropriator, the present owner, attaching creditor, sub-attaching creditor, the authorized person of the real burden to a plot or to a building structure (which is the object of the expropriation procedure) and the tenant of the plot or a building structure. However, the tenant of a flat is never a party to an action.

The procedure has a character of a **proposal procedure** and it is commenced by the request of the expropriator. The expropriator could be a natural person, an artificial person or a municipality, which demands:

- the transition of the property right to a plot or to a building structure,
- the constitution of the real burden to a plot or to a building structure, or
- the abolition or the restriction of the real burden to a plot or to a building structure.

The **requirement of the proposal**, or more precisely of the **application** for the initialization of the expropriation procedure, has to contain (except for general requirements for the administrative procedure):

- the identification of the plot or a building structure which is the object of the expropriation procedure and the identification of the rights of third parties,
- documents that the conditions for the expropriation were completed,
- specification of the kind of the expropriation, which is proposed,
- specification of the time period when and how the expropriator will begin to accomplish the aim of the expropriation.

To the application for the initialization of the expropriation procedure it is necessary to add the papers requested by law, including the expert's report, which is needed for setting the compensation. The expert's report is made out on the present owner's proposal or, with his agreement, on the expropriator's proposal.

If the application does not contain the formal requirements requested by law, the expropriator authority will assist with the elimination of the deficiencies, or will call upon the expropriator to eliminate the deficiencies in the appointed time. At the same time it is the duty of the expropriator authority to instruct what the consequences for the next procedure are if the deficiencies will not be eliminated.

The oral principle is governed for the expropriation procedure. The oral proceeding has to be set up for the hearing of the proposal. It has to be announced at least 30 days in advance to the parties of the procedure. In the announcement of the oral proceeding the expropriation authority has to draw parties' attention to the fact that their objections should be raised at the latest in the oral proceeding, or they will not be sustained (the concentration of the procedure principle).

The time for decision is regulated by the general regulation, which is stated in the Administration Procedure Act. In the sense of the act, the decision should be taken without delay, in 60 days at the latest. This time for decision can be extended for working out the expert's report.

At the end of the expropriation procedure the decision is taken, which has to have as an administrative decision the contentual and formal requirements. If it is not proved that the conditions for expropriation are completed, the expropriation authority will reject the request. If it is proved, then the authority will grant the request and concurrently will set up the compensation of the expropriation as well as the deadline for the payment of the compensation.

There are the terms and the ways how the expropriator has to begin the pursuance of the aim of the expropriation in the decision. The term cannot be longer than 2 years from the legal validity of the decision. The decision has to be justified of course. In the appeal instruction the expropriation authority has to instruct about the conditions of the abolition of the decision.

The appeal against the decision is possible to the governing administrative body. In this situation it is necessary to draw attention to the fact that the deferring effect is not suspended.

The rights which were taken or restricted from the present owner are transferred to the expropriator at the moment of the legal validity of the decision. The final order of the expropriation procedure can be, in the conditions set by the law, the object of judicial review.

The rights which were transferred consequently with the expropriation procedure have to be used only for the aims for which they were expropriated. The realization of the aims has to start in the term which was stated in the decision.

If the compensation is not paid in the term which was stated in the decision of the expropriation authority, or if the realization of the aims of the expropriation is not started within the term stated in the decision, the expropriation authority will take a decision, on the basis of a request of the original owner, that the expropriation

is dissolved<sup>7</sup>. In this situation, the original owner acquires the rights which were transferred to the expropriator or which were restricted at the moment of legal validity of the decision of the abolition of the expropriation. The original owner is obliged to return the paid compensation in 1 month at the latest.

## Transfer of Taxation Rights

The expropriator is mostly the state due to the public interest on the transfer of rights. The expropriation is the ultima ratio of the restriction of the property rights; therefore the first step is the attempt to enter to an agreement between the state, which is in this negotiation represented by the state body, and the present owner. The type of the agreement is not determined by the law – it can be a contract of sale, barter contract or any other types of agreements.

If the present owner agrees with the sale or with a barter of the plot or a building structure, he is the taxpayer himself<sup>8</sup>. In case of the transfer of rights to the State of the Czech Republic the transfer is exempted from the real estate transfer tax and the present owner does not have the tax liability. But he is obliged to present his exemption in the Declaration of Real Estate Transfer Tax in 3 months at the latest from the month when the decisive facts<sup>9</sup> were fulfilled. If the property is transferred to any other subject apart from the State, the tax liability of the present owner is 3% from the selling price, which cannot be lower than the estimated price<sup>10</sup>.

In case of the sale or any other agreement, when the transfer is paid, the exemption from the income tax is very interesting for the present owner in the case when the objects of the transfer are real estates, flats or non-residential premises if the present owner had the place of residence there for at least 2 years prior to the transfer or if the compensation is used for buying a new residence<sup>11</sup>. This exemption also applies in case of selling the property which is owned by the present owner for more than 5 years, but some restrictions are applied<sup>12</sup>.

This 5-year-restriction period was stated due to the prevention of speculations in real estate. If the owner of the property which is the object of the negotiation and will be the object of the expropriation, in case of unsuccessful negotiation, possesses the plot or a building structure for less than 5 years, and therefore he is not able

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7 The possibility and conditions for the dissolution of the expropriation, as it was underlined, has to be stated in the expropriation decision.

8 Section 8(1/a) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).

9 Decisive facts are defined in the Section 21(2) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).

10 Section 10(1/a) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).

11 Section 4(1/a) of the Income Tax Act (Act No. 586/1992 Sb.).

12 Section 4(1/b) of the Income Tax Act (Act No. 586/1992 Sb.).

to exempt the transfer from the real estate transfer tax, it is very often that at the beginning of the negotiation he announces the disagreement with selling the plot or the building structure and calls for expropriation.

If the negotiation is really unsuccessful and is not entered to the agreement, the expropriation procedure is the only way to transfer rights from the present owner. As it was underlined, the expropriation is a transfer independent of the will of the owner. In this situation the acquirer of the property is the tax payer<sup>13</sup> and it is his obligation to declare the Declaration of Real Estate Transfer Tax. The present owner is acquitted of any duty concerning the administration of the real estate transfer tax. Only one situation is stated when the taxpayer need not declare the Declaration of Real Estate Transfer Tax – when the property is transferred from the property of the Czech Republic and only in case of exemption of this transfer from the real estate transfer tax<sup>14</sup>. In all other situations the Declaration of Real Estate Transfer Tax is required.

In the situation when the expropriator acquires the property to the property of the Czech Republic, it is his obligation to declare the Declaration of Real Estate Transfer Tax and therein set up a claim to the exemption from the tax. Practically this is not done because of the increasing, and, due to exemption from the tax, useless costs. The routine is that only if the tax administrator calls upon the expropriator to declare the Declaration of Real Estate Transfer Tax, then it is declared. In many situations the tax administrator settles with a presentation of the documents or with a decision that the property is transferred to the property of the Czech Republic.

In comparison, which transfer – selling or the expropriation – is preferable to the present owner, it is clear that the expropriation is more advantageous for the present owner. First of all, the present owner is not obliged to declare the Declaration of Real Estate Transfer Tax because it is the expropriator's obligation. The second advantage of the expropriation is the exemption from the income tax without reference to the period for which the object of the expropriation is the property of the present owner<sup>15</sup>.

In consequences of the above, the expropriation saves time and a lot of money for the present owner in comparison to his obligation in the situation when the transfer of the property is done by an agreement.

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13 Section 8(1/b) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).

14 Section 21(6) of the Inheritance Tax, Gift Tax and Real Estate Transfer Tax Act (Act No. 357/1992 Sb.).

15 Section 4(1/zd) of the Income Tax Act (Act No. 586/1992 Sb.).

## **Streszczenie**

Niniejsze opracowanie dotyczy instytucji wywłaszczenia nieruchomości: teoretycznych podstaw wywłaszczenia, prawnych uwarunkowań stosowania tej instytucji. Autorzy przedstawiają procedurę wywłaszczania (w tym – organy prowadzące postępowanie i strony tego postępowania), poruszają również zagadnienie sposobu definiowania interesu publicznego (cel wywłaszczenia), metod wyceny nieruchomości oraz orzekania o należnym odszkodowaniu. Zwrócono również uwagę na aspekt podatkowy wywłaszczenia, tj. obowiązki podatkowe po stronie wywłaszczonego i wywłaszczającego.