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## GENERALLY BINDING ORDINANCES OF MUNICIPALITIES IN ENVIRONMENTAL PROTECTION FOCUSING ON A REVIEW ALGORITHM

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### Abstract

*Municipalities, as bodies of local public administration, play a key role in protecting the natural environment. With regards to the local and material correlation with environmental problems, the position of these territorial self-governing units is given by the fact that municipalities should be best capable of assessing the condition of individual components of the local environment thanks to territorial familiarity, and should be capable of taking optimally adequate and appropriate steps with regards to knowledge of local conditions. The authors contemplated selected aspects of the role of the municipality within the framework of its independent competence, i.e. the municipality as a rule-maker on the community level upon issuing generally binding environmental ordinances of the municipality. The greatest focus is on the importance of the oversight function and consequently relevance of case law or introduction and testing of four steps when reviewing generally binding ordinances. Nevertheless, also discussed in general are the basic prerequisites of rule-making by the municipality as an expression of the principle of local self-government and definition of the initial legal regulation of this area. This is demonstrated across the board in real examples of generally binding ordinances in practice (specifically those that were subjected to the mentioned review algorithm). Meanwhile, taking into account the robust scope of this question, it is appropriate to note the elaboration of the given issue in a general manner.*

Keywords: generally binding ordinances, environmental protection, review algorithm, municipal rule-making, oversight function, redevelopment, ultra vires behavior, proportionality

### 1. Introduction

The municipality, as a local public administration authority with strong local and material correlations to environmental problems, plays a key role in environmental protection. Municipalities are entrusted with a number of competencies with regards to the fact that they themselves should be best capable of assessing the condition of individual components of the environment thanks to territorial familiarity, and should be able to take optimally adequate and appropriate steps with regards to knowledge of local conditions. One of these competencies is the authority to issue generally binding ordinances on environmental protection (in the sense of regulating protection of its individual components). This paper aims to point out the basic prerequisites of the mentioned rule-making of municipalities in environmental questions (as an

expression of the principles of local self-government), definitions of basic legislation, a description of the importance of the oversight function and consequently the relevance of case law manifesting in the introduction of a research algorithm of these generally binding ordinances.<sup>1</sup>

## **2. Authority of the municipality to issue a generally binding environmental ordinance (excursion into municipal self-government).**

Municipalities are guaranteed the constitutional right to territorial self-government. Constitutional starting points of territorial self-government can be found both in the Constitutional Act No. 1/1993 Coll., Constitution of the Czech Republic (hereinafter the "Constitution") – mainly in Art. 8, Art. 99-105, as well in Constitutional Act No. 2/1993 Coll., Charter on Fundamental Rights and Basic Freedoms (hereinafter the "Charter") – especially in Art. 4(1), Art. 17 and Art 21(4). The territorial self-governing unit (the municipality) is guaranteed self-government derived from the autonomous position of the municipality, comprised *inter alia* of the municipality's authority to decide upon its own matters<sup>2</sup>. In the international treaty of the European Charter of Local Self-Government, the principle of local self-government is anchored as the right and ability of local communities, within limits given by law, at their responsibility, and in the interest of the local population, to regulate and manage a substantial part of public affairs. Starting points for issuing generally binding ordinances of the municipality regulating environmental questions represent the authority to issue generally binding ordinances within the framework of legally defined independent competence<sup>3</sup> (Art. 104(3) of Act No. 1/1993 Coll., Constitution of the Czech Republic<sup>4</sup>), and consequently definition of this independent competence (especially Act No. 128/2000 Coll., on Municipalities (the Municipal Order), as amended, hereinafter "the Municipal Order"). In Art. 104(3) of the Constitution, one can see the constitutional legal basis of local rule-making (this speaks of the

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<sup>1</sup> *This paper has been elaborated applying the outcome of Švarcová, K. Environmentální obecně závazné vyhlášky obcí. The paper has been accepted for publication in a monograph, which is an outcome of the conference on the topic "The role of municipalities in environmental protection from the legal aspect" held by the Faculty of Law of Charles University in Prague, in Pec pod Sněžkou on May 27–30, 2015.*

<sup>2</sup> "The Constitutional Court respects local self-government as an expression of the right and qualification of local authorities to administer public affairs within boundaries given by law, within the framework of its obligations and in the interest of the local population." *Source: Finding of the Constitutional Court of 05.08.2013, case no. Pl. ÚS. 6/08, with the popular name "Budyně nad Ohří" (hereinafter "Finding in the matter of Budyně nad Ohří"), the Constitutional Court of the Czech Republic [online]. [cit. 5/25/2015]. Available here: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=59739&pos=1&cnt=1&typ=result>.*

<sup>3</sup> *Competence of the municipality must be understood as the circle of community relationships, which may be regulated by the municipality, see ASPI, Wolters Kluwer. Municipalities 2008 -2009. The interpretation is elaborated towards the legal status as of 01 July.2008. Meritum, interpretative series, ASPI, a.s. Publishing house: ASPI, Wolters Kluwer. 2008. S. 31.*

<sup>4</sup> *Municipalities or the municipal council are (is) entrusted with authority on the constitutional level to issue generally binding ordinances within the limits of their (its) competence.*

legislative function of self-government<sup>5</sup>). The authority to issue generally binding ordinances of municipalities is an expression of the original rule-making authority, where autonomous municipal law is created by municipalities issuing generally binding ordinances. The actual competence shapes the administration of the municipality's own affairs, whereas it depends on the municipality itself whether or not it decides to regulate a certain matter. The legal definition of independent competence (or their limitation as stipulated by Art. 103(1) of the Constitution) is found in the wider context in Sec 7, 8, 10, 35, 84, 85 and 102 of the Municipal Order. In Sec 10(a) – (d) of the Municipal Order, three areas are defined in which the municipality may issue generally binding ordinances imposing obligations. One of these areas is also environmental protection, whereas special acts may determine further material areas in which the municipality may implement its rule-making authority<sup>6</sup>. In all of these, the criterion laid out in Sec 35 of the Municipal Order must be fulfilled, i.e. that it concerns a matter in the interest of the municipality and of its citizens. Territorial competence of the generally binding ordinance of the municipality is limited to the territory of that specific municipality (not possible to regulate the matter outside the municipal territory). Addressees of generally binding ordinances are all persons (legal entities or natural persons) found within the territory of the municipality (not bound by citizenship, permanent residence, registered seat, etc.)<sup>7</sup>. From this it is seen that it is only on the municipality as to whether or not it utilizes its constitutional empowerment to issue generally binding ordinances within the framework of independent competence as defined by the Municipal Order. Issuance of generally binding ordinances of the municipality is not obligatory if it is already occurring like this - in the form of resolutions of the municipal council. Of course it is always necessary to seriously consider whether the essence of municipal creation of law is truly legal regulation concerning independent competence and interests of the local community (then it is possible from the position of lawmakers only to define the legal space, if necessary, but the actual choice of implementing rule-making authority and its content is up the autonomous consideration of the municipality), or whether it now concerns performance of state administration (and in principle, issuance of a legal regulation should be the obligation of the municipality upon fulfilling legal conditions). From the diction of certain legal regulations (not only) in the environmental area however, this distinction is not always clear at first glance, and may even be misleading to a certain degree. An example of such a regulation can be found in the provisions of Sec 17(2) of Act No. 185/2001 Coll., on Waste, as amended. From these provisions it is seen that "the municipality in its independent competence determines by its generally binding ordinance a system of gathering, collection, transport, sorting, use and removal of communal waste created within its cadastral territory. The generally binding ordinance may also determine a system for handling waste produced within its cadastral territory by natural persons not commercially

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<sup>5</sup> Filipová, J. *Kap. 16: Normotvorba obcí a krajů na úseku životního prostředí a její kontrolní mechanismy. Within the publication of the Collective of Authors. Legal processes in environmental law. Brno Masaryk University 2010. S. 363.*

<sup>6</sup> *Finding of the Constitutional Court of 14 June 2011, case no. Pl. ÚS. 41/08, with the popular name "Chrastava" (hereinafter "finding in the case Chrastava"). The Constitutional Court of the Czech Republic [online]. [cit. 5/16/2015]. Available here: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=62584&pos=2&cnt=2&typ=result>.*

<sup>7</sup> Filipová, J. *Op. cit. Note 5. S. 365.*

active". From the formulation of the first sentence of the cited provisions (in relation to explicitly stated optional mode in the second sentence), it offered however a rather restrictive interpretation leading to the obligation of the municipality to issue such an ordinance (which of course runs directly contrary to the aforementioned autonomy of the municipality).

As stated below, generally binding ordinances as normative legal acts must fulfill the general features of these acts (such as abstractness, generality, absence of a relationship towards specific persons or things, binding nature for an indefinite numbers of addressees)<sup>8</sup>.

### 3. Demonstrative listing of environmental areas with potential municipal regulation

The possibility of regulation of individual components of the environment by generally binding ordinances is determined, in reaction e.g. to the provisions of Sec 10(d) of the Municipal Order (besides the aforementioned mode of the Waste Act), also by Act No. 133/1985 Coll., on Fire Protection, which in this wording regulates the fire code of the municipality, or by Act No. 201/2012 Coll., on Protection of the Air, which enables regulation of the determining of a zone with limited operation of motor vehicles (low-emission zones) and emission categories of vehicles allowed to drive into this zone, or conditions for burning dry plant materials in an open fire. The potential for regulation can also be found in Act No. 246/1992 Coll., on Protection of Animals against Cruelty, enabling regulation of determining permanent identification marking of dogs and records of their owners, determining rules for the movement of dogs in public places and determination of a space for dogs to run freely, or in Act No. 256/2001 Coll., on Undertaking, which affords room for regulation of the method and conditions of transport and temporary holding of the deceased. It is also possible to mention Act No. 258/2000 Coll., on Public Health Protection, governing the possibility of regulating the issue of special disinfection and rodent control to protect health against the origin and spread of infectious diseases<sup>9</sup>, or Act No. 274/2001 Coll., on Public Water Supply Systems and Sewers, regulating alternate supply of water and alternate removal of wastewater. Not the least of which, it also concerns Act No. 565/1990 Coll., on Local Fees, which regulates the issue of local fees (a local fee for dogs, for a spa or recreational stay, one for using public places, one for permission to enter selected places and parts of cities by motor vehicle, one for operating the system for gathering, collection, transport, sorting, use and removal of communal waste created within its cadastral territory, one for assessing grounds for construction by the possibility of its connection of water mains or sewers to the construction). The municipality is not obliged based on the mentioned acts to regulate the related matters of generally binding ordinances; it is only afforded the authority to enact such regulation. It completely depends on the will of the municipality as to whether or not it opts for regulation of the relevant areas through generally binding ordinances (of course it should not run contrary to the sense and purpose of the given regulation).

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<sup>8</sup> *Sládeček, V. Obecné správní právo. 1st edition Prague: ASPI, 2005, p. 50.*

<sup>9</sup> In the given area, rule-making of the municipality will often be closely tied to specialized performance of state administration in relation to professional assessment of the matter by public health agencies. This may be applied only in those cases when a legal regulation of the regional public health office does not already regulate the specific matter. That is because in the intentions of the provisions of Sec 96 of the Act on Public Health Protection, the municipality may adopt a generally binding ordinance for the territory of the municipality or part thereof to protect health against the origin and spread of infectious diseases by performing special disinfection and rodent control. Of course it is possible to enact exceptional measures during an epidemic and danger of its origin in the wording of the provisions of Sec 85 of the same act for the administrative circuit of the regional public health office or part thereof by legal regulation of the regional public health office. By this legal regulation of the regional public health office, it is also possible to impose performance of special disinfection, disinfection and rodent control over a wide area (territory of the municipality or its district(s)). For more on this see DUDOVÁ, J. *Vybrané právní aspekty ochranné dezinfekce, dezinfekce and deratizace*. Health Forum, 2012, yr. 2012, no. 3, p. 1618. ISSN 1804-9664.

#### 4. Review of generally binding environmental ordinances

Use of possibilities stated in legal provisions, or an issued generally binding ordinance of the municipality regulating these areas on the municipal level, are subjected to oversight activity of the Ministry of the Interior (hereinafter the "Ministry") under Sec 123 of the Municipal Order, and subsequently to review of the compliance of these generally binding ordinances with the law, with human rights and basic freedoms, or with the Constitutional Court of the Czech Republic. Through oversight activities, a series of generally binding ordinances has come before the Constitutional Court, having already been subjected to review of the legality and veracity. With regards to the fact that it concerns a legal regulation of the municipality, only the Constitutional Court itself may decide on abrogation of such an ordinance or part thereof. The Constitutional Court defines a so-called four step test, by means of which all further generally binding ordinances are reviewed for next time. The Ministry started using this test, or its criteria, itself when performing oversight (the difference between application of the test of the Constitutional Court and the Ministry is the fact that it suffices the Constitutional Court to assess the breach of one single step of the test, and it need not continue to the next ones); as it claimed itself, the Ministry tries to apply all four steps to the given situation with the aim of pointing out to municipalities the most frequent deficiencies)<sup>10</sup>. Before focusing on the four step test, a short excursion will be made into the procedure according to Sec 123 of the Municipal Order.

##### a) Excursion into oversight activity of the Ministry of the Interior, consequent review by the Constitutional Court

Constitutional comfort and legality of generally binding ordinances are a means for ascertaining proper and legitimate environmental protection<sup>11</sup>. The oversight function as laid out in Sec 123 of the Municipal Order serves to secure this quality of ordinances. According to Sec 123 of the Municipal Order, oversight is performed explicitly, including *inter alias* a review of generally binding ordinances, whereas it is ascertained as to whether they happen to run contrary to law, human rights or basic freedoms. It is possible to distinguish oversight over the content itself and oversight over the issuance of generally binding ordinances. The Ministry of the Interior performs oversight. If the Ministry finds that a generally binding ordinance runs contrary to the law, it calls upon the municipality *ex officio* to seek redress within a term of 60 days from the date of delivery of this appeal. If redress is not sought, the Ministry will decide on redevelopment on, i.e. the suspension of the generally binding ordinance along with determination of another term to seek redress. By such suspension, derogation (abrogation) of this generally binding ordinance does not occur; it only ceases to be in effect and cannot be applied, but it remains a part of the legal system. The purpose of redevelopment of generally binding ordinances is comprised of not applying the illegal ordinance and the absence of the origin of undesirable

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<sup>10</sup> Ministry of the Interior. Department of Oversight and Control. Methodical material of the Oversight and Control Department of Public Administration of the Ministry of the Interior No. 22/2008. Mvcr.cz [online] Available here: <http://www.mvcr.cz/soubor/22-2008-pdf.aspx>.

<sup>11</sup> Filipová, J. *Op. cit.* Note 5. S. 370.

consequence until the moment of seeking redress.<sup>12</sup> If the Ministry of the Interior concludes that the generally binding ordinance clearly runs contrary to human rights and basic freedoms, redevelopment may occur without previous appeal for remedy. If it does not agree with the conclusions of the Ministry, the municipality may file a remonstrance against them. If however the remonstrance was not filed and the municipality still has not sought redress, petitioning of the Constitutional Court follows for abrogation of the generally binding ordinance, in whole or in part. It will abrogate the generally binding ordinance or decide on its refusal, rejection or stoppage of proceedings. Before the Constitutional Court decides on the petition, the municipality may seek redress, and notify not only the Constitutional Court, but also the Ministry, of this fact. In the opposite case when the Constitutional Court assesses and decides on the nature of the redeveloped generally binding ordinance, case law determination of serious irregularity of a municipality when issuing binding ordinances will gradually ensue.

### **b) Review algorithm comprised of the four step test**

The Constitutional Court introduced the following four step test for review of challenged generally binding ordinances, in which it reviews four aspects of issuance of generally binding ordinances. To assess compliance of generally binding ordinances with the law, fulfillment of conditions prescribed by the law for their formal and content particulars is crucial. In the case of formal aspects of the issued generally binding ordinance, it assessed whether the generally binding ordinance was adopted and issued within the boundaries of a constitutionally guaranteed and legally specified competency of the municipality, whether this occurred in a manner predicted by the Constitution and the law (i.e. 1. if the municipality had the authority to issue the challenged provisions of the generally binding ordinance, 2. whether upon issuing the challenged provisions of the generally binding ordinance, the municipality moved outside its legally defined material competence [*ultra vires* behavior]<sup>13</sup>). In terms of content, compliance of the provisions of generally binding ordinances is assessed with constitutional laws and (other) laws (3. whether upon its issue it misused its legally entrusted authority and competence, and 4. whether by adopting the challenged provisions, the municipality clearly acted in an unreasonable manner<sup>14</sup>). The Constitutional Court furthermore always reviews whether the challenged generally binding ordinance fulfills general criteria placed on legal regulations, and whether, by using normal interpretive methods, their provisions are definite, understandable and mutually non-conflicting<sup>15</sup>. The text of the generally binding ordinance must be understandable, mutually non-conflicting, fulfilling conditions of at least the minimum level of expression in terms of language and content placed upon legal regulations<sup>16</sup>. This is key for limiting breach of the principle of legal certainty

<sup>12</sup> Finding of the Constitutional Court of 11 September 1997, case no. I ÚS 304/97, the Constitutional Court of the Czech Republic [online]. [cit. 6/10/2015]. Available here: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=29430&pos=1&cnt=1&typ=result>.

<sup>13</sup> Finding in the case of *Budyně nad Ohří*, op. cit. Note 2.

<sup>14</sup> Finding in the case of *Budyně nad Ohří*, op. cit. Note 2.

<sup>15</sup> *Ibid.*

<sup>16</sup> *Furková p., Matějová L., Rosová Š. Tvorba obecně závazných vyhlášek. Praktický průvodce pro obce. 1st edition Prague: C.H. Beck, 2013. p. 16, 17.*

and curtailing the threat of the risk of breach of the prohibition of arbitrariness on the part of public authorities. Also when issuing a binding ordinance, the municipality must uphold the rule of a generally binding nature of this ordinance (i.e. it is not possible for it to bind specific entities and impose specific obligations on them, because such regulation would run contrary to the purpose of the generally binding ordinance (i.e. impact on general matters concerning all cases of the same type)<sup>17</sup>.

If a generally binding ordinance stands up well to the four step test, there is no reason to abrogate it. The Constitutional Court substantially advanced its previous perception of scope of that which municipalities may regulate by means of their own ordinances, and accented with high relevance the right of the municipality to self-government and administration of local matters.

#### **5. First step of the test - reviewing the authority of the municipality to issue the generally binding ordinance**

Upon examining compliance of the method of implementing the authority of the municipality to issue generally binding ordinances with the legal system, the following are assessed: 1) issuance of generally binding ordinances by a body authorized to do so, by the municipal council, at its public meeting, which was duly announced (in accordance with Sec 93(1) of the Municipal Order); 2) whether it occurred in a legally prescribed manner (by a procedure in the sense of adopting a valid resolution of the municipal council, towards which it is necessary to have consent of an absolute majority of all of its members, where issuance of generally binding ordinances was a duly approved point of the program of the council meeting); 3) whether the generally binding ordinance was duly announced (i.e. by its displaying on the bulletin board of the municipal authority for 15 days), and assumed force. The conclusion that the municipality proceeded in accordance with the first point of the four step test is an essential prerequisite for the Constitutional Court when assessing the generally binding ordinance in order to proceed to the second step.<sup>18</sup>

#### **6. Second step of the test - reviewing the question of whether when issuing the binding ordinance, the municipality moved outside its legally defined material competence (*ultra vires* behavior)**

Furthermore, the Constitutional Court assesses whether or not the municipality has overstepped the established boundaries of its legally defined competence upon issuing the binding ordinance, i.e. whether it acted *ultra vires*. The Constitutional Court expressed itself regarding determination of material competence for regulation of the generally binding ordinances, with a diametrically opposed approach changing the existing case-law approach (sometimes called a Copernican reversal<sup>19</sup>), in *the Finding of 11 December 2007, Pl. ÚS 45/06*, with the popular name "Jirkov"<sup>20</sup>.

<sup>17</sup> Kočí, R. *Obecní samospráva v České republice, praktická příručka s judikaturou. Prague: Leges, 2012. S. 46.*

<sup>18</sup> *Ministry of the Interior. Department of Oversight and Control. Methodical material of the Oversight and Control Department of Public Administration of the Ministry of the Interior No. 22/2008. Op. cit. Note 10.*

<sup>19</sup> Filipová, J. *Op. cit. Note 5. S. 367.*

The Constitution left the defining of boundaries of independent competence to law, namely, *de lege lata*, the Municipal Order. It is necessary to point out that regarding the question of material competence, one must start in particular from Sec 10 and Sec 35 of the Municipal Order, whereas it must always concern a local affair. The term local must not be interpreted in a sense exceeding the boundaries of the municipality, but also, it should not concern a matter of regional or nationwide importance (thus situations will occur in reality where in one municipality, it is considered necessary to regulate a specific affair, but in another, it is not)<sup>21</sup>. According to Sec 35(3)(a) of the Municipal Order, the municipality must abide by laws when issuing a binding ordinance. The generally binding ordinance of the municipality must therefore not run contrary to a standard of higher force, i.e. with the law (the principle *lex superior derogat inferiori*). The municipality is limited by the boundaries of its competence as defined by law, and may not regulate questions that are reserved for statutory regulation alone. Whether it concerns a matter regulated by regulations in public or private law, the municipality may not regulate in a differing manner. When assessing whether or not the municipality exceeded the boundaries of its legal competence by regulating areas reserved for statutory regulation, it is necessary to examine "*identification of the subject and aim of regulation of the law*" on one hand and "*generally binding ordinances*" on the other. If they do not overlap, it can be said with certainty that the municipality may not regulate a certain matter simply because it is already regulated by law. After the Jirkov finding, it therefore suffices if the generally binding ordinance is issued within the boundaries of Art. 104(3) of the Constitution and the generally formulated Sec 10 of the Municipal Order.

The finding in the case of the city of Jirkov is also important because by it, the Constitutional Court abandons a restrictive interpretation, whereby for imposing an obligation in a generally binding regulation, the municipality must be explicitly empowered to do so, moreover duplicate to the definition of Sec 10 of the Municipal Order. Municipalities are directly empowered by the Constitution to create autonomous law in the form of generally binding ordinances. A logical conclusion then is that to issue generally binding ordinances within boundaries of material competence of the municipality and upon imposing obligations, the municipality needs no further empowerment (this applies with the exception of imposing taxes and fees in light of Art 11(5) of LZPS), because conceptually, a legal regulation is not without determination of legal obligations.

The generally binding ordinance however may not just reproduce the text of the law, but in fact independently administer its own affairs, which are in the interest of the municipality and its

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*20 This generally binding ordinance of the city of Jirkov, No. 4/2005, related to securing local matters of public order in public places. The challenged provisions impose an obligation upon owners or users of public greenery within the cadastre of the city of Jirkov to maintain greenery in the form of regular grass-cutting, at least twice per year, including the obligation to rake up cut grass within prescribed terms. The petitioner claimed that the ordinance regulates a problem already regulated, specifically by the provisions of Sec 3(1)(a) of Act No. 326/2004 Coll., on Phytosanitary Measures. Finding of 11 December 2007, Pl. 45/06, with the popular name "Jirkov" (hereinafter "finding in the case Jirkov").*

<sup>21</sup> *Ruling of the Supreme Administrative Court of 24 February 2005, case no. 4 As 35/2003-59. In: Beck-online [online legal information system]. Available here: <http://www.beck-online.cz/bo/document-view.seam?documentId=njptembqqvptmmzrl5zwex3oonzq&groupIndex=0&rowIndex=0>*



citizens, i.e. real local affairs (see the *Finding of the Constitutional Court of 22 May 2007, Pl. ÚS 30/06*<sup>22</sup> in the case of generally binding ordinances of the city of Ostrov regarding a local dog fee). As opposed to this, according to the finding in the case of Budyně nad Ohří, the Constitutional Court judged that in the text of a generally binding ordinance, the municipality may use the verbatim citation of the law while explicitly stating that it concerns a law, and furthermore stating the specific obligations prescribed in the given area, ... *"then bindingly with reference to the relevant empowering legal provisions, to state in what manner and scope the municipality uses these empowering provisions, and what specific actions or obligations are imposed by the relevant provisions of the ordinance above the framework of (but not in conflict with) the law. Such manner of application of legal empowerment is constitutionally compliant, and for the addressee of the legal standard, it is understandable and capable of regulating his (its) behavior."*<sup>23</sup>

A partial conclusion to this point is the need to review identification of the subject and aim of regulation of the law on one hand, and generally binding ordinances on the other, if it is to be ascertained whether or not the municipality exceeded the boundaries of its legal competence by regulating an area set aside for statutory regulation. If they do not overlap, it can be said with certainty that the municipality may not regulate a certain matter because it is already regulated by law. But this also means that although within its independent competence, the municipality may impose obligations to environmental protection by a generally binding ordinance according to Sec 10(c) of the Act on Municipalities, this authorization is not limitless, but is rather limited by its purpose - in the given manner by protection of air in the municipality.<sup>24</sup>

#### **7. Third step of the test - resolving the question of whether or not when issuing a binding ordinance, the municipality misused its legally entrusted competence**

Within the framework of the third point of the test, it is assessed whether or not the municipality misused its legally entrusted competence. The municipality may not pursue legally unsanctioned, illegitimate aims, and may not be led by irrelevant considerations. The Constitutional Court thus speaks of three fundamental forms of this misuse (1. pursuing a purpose not sanctioned by law, 2. omission of relevant considerations when adopting decisions, and 3. taking into account irrelevant considerations).

In this point, one often hears as well of the principle of proportionality, or adequacy, in all its aspects upon formulating excessive interferences into rights and freedoms through generally binding ordinances of the municipality (sometimes the Constitutional Court resolves them also in a different part of the test, especially in the second part). This applies whether it concerns the aspect of qualification to fulfill the pursued purpose by this regulation, the aspect of need while applying the most economical means, or the aspect of adequacy in its narrow meaning, comprised of limiting an indirect detriment in relation to basic rights and the achieved intended aim. The

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<sup>22</sup> *Finding of the Constitutional Court of 22 May 2007, Pl. ÚS 30/06, the Constitutional Court of the Czech Republic [online]. [cit. 6/13/2015]. Available here: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=55223&pos=1&cnt=1&typ=result>*

<sup>23</sup> *Finding in the case of Budyně nad Ohří. Op. cit. Note 2.*

<sup>24</sup> *Finding in the case of Budyně nad Ohří. Op. cit. Note 2.*

principle of proportionality is reflected in the measure of the selected regulation. The principle of proportionality is reflected e.g. in the fact that the municipality should not formulate prohibitions or prescribed conditions across the board (in terms of either time or space), but always only in the least limiting scope.<sup>25</sup>

An example of misusing legally entrusted competence may be cases of the uncertainty of a legal order ("*the term 'favorable weather conditions' is a legally indefinite term, which complicates the application of these provisions of the ordinance on the part of natural persons and legal entities, and may lead to misuse of competence legally entrusted to the municipality*"<sup>26</sup>), insufficiently specified public places for the purposes of prohibition or limitation of certain activities, etc. "*Here, when assessing generally binding ordinances, it is necessary to respect the fact that it is not possible in particular to expect from smaller municipalities that they will formulate their legal regulations in the same quality as formulation of legal standards should have, because municipalities generally do not have erudite legislators. But on the other hand, it is not possible to allow even in the case of legal regulations for their provisions to be formulated so indefinitely or unintelligibly that the addressee of these standards would not be capable of predicting their application and not have the possibly of regulation according to his (its) own behavior.*"<sup>27</sup>

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<sup>25</sup> Furková p., Matějová L., Rosová Š. *Tvorba obecně závazných vyhlášek. Praktický průvodce pro obce.* Op. cit. Note 16. p. 15.

<sup>26</sup> *Finding in the case of Budyně nad Ohří.* Op. cit. Note 2.

<sup>27</sup> *Finding in the case of Budyně nad Ohří. Or also the Finding of the Constitutional Court of 02 November 2010. Pl. ÚS. 28/09, with the popular name "Břeclav", the Constitutional Court of the Czech Republic [online]. [cit. 6/14/2015]. Available here: <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=68071&pos=1&cnt=1&typ=result>.*

## 8. Fourth step of the test - reviewing the content of the ordinance in terms of "irrationality"

The Constitutional Court in its *Finding of 13 September 2006, case no. Pl. ÚS. 57/05 in the case of the generally binding ordinance of the city of Nový Bor*<sup>28</sup> states that "application of the principle of "irrationality" on the part of the court must be very restrictive, and should be limited to cases when the decision of the municipality appears clearly absurd." It is possible to consider as clear absurdity the case where a court-performed review only leads to one conclusion (as opposed to a preferred or reasonable conclusion), which is that it is simply absurd. On the contrary however, this court-recognized conclusion remained unrecognized by municipalities. Irrationality however must not be used as an excuse to interfere in decisions adopted by a municipality just because the Constitutional Court disagrees materially with the decision of the municipality. Application of the principle of irrationality thus comes into consideration only under extreme circumstances. Assessing irrationality of the actions of the municipality is not simply a question of whether it acted in accordance with the authorization afforded to it by law. Rather, assessing irrationality requires one to consider the challenged ordinance in terms of its impacts measured by general rationality. "In the discussed case, the Constitutional Court in the heading found the cited provisions of the challenged ordinance<sup>29</sup> to be utterly rational, because the primary purpose of the challenged ordinance could in no way be considered irrational. As the Constitutional Court reminds us, it is not possible to consider a generally binding ordinance as running contrary to the principle of "irrationality" only because in the eyes of some, it could seem that way, because it regulates matters more than may be necessary. Ultimately, it is a matter concerning the municipality and its citizens themselves, who had the right to select their representatives, whom they believe will best represent them, and about whom they feel that they understand municipal affairs better than public authorities themselves." Sometimes proportionality of the generally binding ordinance is mentioned in this sense. Proportionality is understood besides the aforementioned by the fact that the anchored regulation leads to its purpose and aim by the least burdening and non-discriminating manner for citizens of this municipality (for more see above on proportionality). So in general, rationality may be considered as a review of whether prohibitions imposed by a generally binding ordinance lead to a reasonable manner of achieving an aim, i.e. whether they adequately lead to this aim and whether or not they are clearly absurd (unrealistic, incapable of being fulfilled)<sup>30</sup>. The rationality

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<sup>28</sup> *Finding of 13 September 2006, case no. Pl. ÚS. 57/05 in the case of generally binding ordinances of the city of Nový Bor, the Constitutional Court of the Czech Republic [online]. [cit. 6/13/2015]. Available here:*

<http://nalus.usoud.cz/Search/ResultDetail.aspx?id=104&pos=1&cnt=1&typ=result>.

<sup>29</sup> i.e. "An activity that could interfere with public order in the city or be in conflict with good morals, protection of safety, health and property, is: ... c) performance of pyrotechnical effects and fireworks" as well as "Activity stated in Art. 1(c), it is possible to perform only away from public places found in a monument zone of the city<sup>3</sup>). The municipal board is to provide an exception by resolution of the place of performance based on a request. ..."

<sup>30</sup> Furková p., Matějová L., Rosová Š. *Tvorba obecně závazných vyhlášek. Praktický průvodce pro obce.* Op. cit. Note 16. p. 15.

criterion itself bears features that are subjective (what is reasonable or rational for a municipality need not be reasonable for other entities, especially outside the municipality upon assessing this regulation). It is then a question of whether choosing such a step of the test is appropriate (when the review algorithm set for itself, it would seem, some kind of objective review of the legality and constitutionality of issued, generally binding ordinances).

## 9. Conclusion

With regard to the nature of this paper, elaboration of the chosen issue was approached selectively, because a detailed analysis of all aspects of generally binding ordinances that would come into consideration would form a separate, extensive publication.

Generally binding ordinances represent one of the most efficient tools through which the municipality engages in environmental protection within the framework of independent competence. This is an optional, volunteer instrument of environmental protection having the appearance of autonomous law. Though communal regulation in the plane of generally binding ordinances is not obligatory in municipal environmental protection departments, it is necessary, in light of the immanent essence of environmental protection, to conclude that in certain cases, the regulation in generally binding regulations is on the contrary, rather than optional, actually an obligatory matter for the municipality. After all, the municipality cares for multifaceted development of its territory while maintaining permanently sustainable development of local self-government. Within the framework of all these activities, it protects the public interest (one of which is environmental protection). The municipality should thus perceive its obligation to regulate specific environmental concerns, if the conditions of this specific locality so require.

In legislative terms, generally binding ordinances must be elaborated in quality in a manner that is understandable, easily interpreted, definite and clear. Generally binding ordinances contain a series of vague legal terms, just like other normative legal acts. Today, it is this legislatively solid level of elaborating generally binding ordinances that can be one of the most frequent problems.

It is also crucial to compare the purpose and subject of the regulation of the generally binding ordinance with a potentially competing statutory regulation. The authors identify with the opinion of the Constitutional Court when *"the Constitutional Court announced that it is not possible to expect, especially from smaller municipalities, that they will formulate their legal regulations in the same quality as formulation of legal standards should have, because municipalities generally do not have erudite legislators."*<sup>31</sup> The Constitutional Court thus named the fundamental problem of municipal rule-making i.e. a lack of qualitative, legislative erudite knowledge in order to create generally binding ordinances. For the municipality, it is very complicated to regulate generally binding ordinances so that they would capture the sense of legal provisions, which are widely scattered in environmental issues.

The most frequented modification of generally binding ordinances can be found in the area of communal waste policies. Generally binding ordinances differ with regard to component acts on the environment, known for certain specifics that are even reflected in the created case law.

Statutory regulation of the creation of generally binding environmental ordinances is very sporadic. It is therefore necessary to start strictly from partial component laws, to use current

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<sup>31</sup> Finding of the Constitutional Court of the CR of 11 December 2011, case no. Pl. ÚS 45/06. Available at: <http://nalus.usoud.cz>.

case law or general knowledge in legal theory. A review algorithm comprised of the four step test represents a certain guide for creating these generally binding ordinances. When considering the review algorithm of issued generally binding ordinances introduced by the Constitutional Court, there is no choice but to state that setting up a "recipe for creating a quality ordinance" is certainly a beneficial step (all the more so if the Ministry follows it while performing oversight). Nevertheless, practice is more complicated and more colorful. It is hard to assess the rationality of generally binding ordinances; it concerns a criterion containing a fair amount of subjective sub-text. Meanwhile, review of generally binding ordinances (their legality and constitutionality) places ambitions, it would seem, on definite objective assessment of reviewed, generally binding ordinances.

Even when issuing generally binding ordinances within the framework of independent competence, municipalities should take into consideration the relevance of environmental protection as a public interest, whereas this very interest in environmental protection is socially acceptable in today's world.

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