



Evidence in administrative proceedings – proof by audio-visual record, proof by the content of the website and other means of proof lacking explicit regulation in the Code of Administrative Procedure

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Abstract

Evidence is one of the most important parts of any administrative procedure. The Czech Code of Administrative Procedure (hereinafter “Code”) contains the basic legal regulation of evidence in administrative proceedings and a demonstrative list of evidence. The administrative authorities are therefore not limited in the proceedings to the explicitly stated means of proof. However, the fundamental problem is that the Code regulates the implementation of only those means of proof which it expressly mentions. The Code is completely silent in relation to other means of proof and the course of their implementation. Nevertheless, in many cases, administrative authorities also need to take other means of proof (not regulated by the Code), in particular proof by means of audio-visual recording or proving the content of websites. The author will therefore focus on answering the questions that cause the greatest problems in this context in practice: “What rules must be followed in obtaining this evidence for it to be legal evidence? Under what conditions and by what procedure should the administrative authorities take this evidence? To what extent can analogy be followed in the implementation of this evidence?” The answers to these questions will be demonstrated mainly in relation to audio-visual evidence and the evidence of the content of the website. This is because of the evidence that is gaining in frequency and importance with regard to the development of modern society and information technology. Based on the analysis of the current administrative practice and case law, *de lege ferenda* proposals will also be formulated in relation to the current (non)regulation of this evidence in the Code.

Keywords

administrative proceedings, Code of Administrative Procedure, evidence, proof by audio-visual record, proof by website content.

Introduction

It is important for any legal process that the matter is decided in a lawful and factually correct manner. It is therefore essential for the competent public authority conducting the proceedings to have sufficient information to issue a decision (Průcha, 2019, 178). Probably the most voluminous group of documents for issuing decisions by administrative bodies is evidence. Evidence is therefore one of the most important parts of any administrative procedure. However, the Code,¹ as a general and basic legal regulation governing administrative proceedings, does not characterise the concept of evidence. However, with the help of administrative doctrine and case law, the institution of evidence can be defined. It is a set of acts by the administrative body performed *ex officio*, the aim of which is to ensure that the decision corresponds to the circumstances of a particular case and is in accordance with laws and other regulations.²

The evidentiary process has several stages. The administrative authority must first consider which facts must be proved and by what means. Furthermore, the administrative body must deal with the proposals by the participants in the proceedings to introduce evidence. The administrative authority then needs to obtain and adduce evidence. At the final stage, the administrative body must evaluate the evidence presented and draw appropriate conclusions from it for a decision based on its merits (Fiala et al., 2020, 275–276). In this respect, the administrative body is bound in particular by the principle of legality³ as well as the principle of material truth, as expressed in § 3 of the Code. This means that the administrative body must proceed in such a way as to find out the state of affairs about which there are no reasonable doubts, to the extent necessary for the compliance of its action with the requirements set out in § 2 of the Administrative Procedure Code.⁴

The documents for administrative decisions including the evidence are always primarily provided by the administrative body. It is a manifestation of the investigative principle, which is typical of Czech administrative proceedings. Thus, traditionally, the general regulation of administrative proceedings establishes the responsibility of an administrative body for the appropriate discovery of the factual basis for issuing a decision on the merits. However, this construction is partially modified, respectively supplemented by the obligation of the parties to provide all co-operation in obtaining the documents, as well as the burden of proof in connection with the stated allegations.⁵ Proposing evidence is an important procedural right of the parties and, due to the dominant principle of the unity of proceedings, the parties are entitled to adduce evidence throughout the proceedings until a decision is issued. At the same time, however, it is also an

¹ Zákon č. 500/2004 Sb., správní řád. [Act No. 500/2004 Coll., Code of Administrative Procedure], Sbirka zákonů [Czech Official Gazette].

² Rozsudek Krajského soudu v Hradci Králové [Judgment of the Regional Court in Hradec Králové], 15 February 2007, 51 Ca 9/2006.

³ Čl. 2 Ústavy ČR a čl. 2 Listiny základních práv a svobod [Art. 2 of the Constitution of the Czech Republic and Article 2 of the Charter of Fundamental Rights and Freedoms].

⁴ “As the Supreme Administrative Court reiterates, in relation to the facts, the law establishes an obligation for administrative authorities to proceed in such a way as to establish the state of affairs of which there is no reasonable doubt ... It is a rationalized version of the principle of material truth.” Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 26 March 2008, 9 As 64/2007.

⁵ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 14 March 2019, 1 As 367/2018.

obligation, because, according to the Code, the participants are obliged to indicate the evidence in support of their claims (§ 52). Thus, even in administrative proceedings, the procedural activity of the participants is reflected in the duty of assertion and in the duty of evidence (Skulová et al., 2020, 158). Typically, the procedural activity of the participants in the proceedings will primarily be manifested in proceedings where the participant applies for a certain authorization to be issued (e.g. a permit or concession.). On the contrary, in proceedings where an obligation is to be imposed, the evidence will mainly relate to the exercise of the rights of the defence (e.g. misdemeanour proceedings).

Although the administrative body is not bound by requests by the participants to submit their evidence, it must always ensure there is the evidence necessary to establish the state of affairs. In that regard, it must be emphasized that the administrative authority does not have unlimited discretion of how to deal with the participants' proposals for the introduction of evidence. Although it is not obliged to introduce all the evidence proposed by the participants, if it fails to do so, it must then state, in the reasons for each administrative decision, why this has happened. The administrative body is therefore not only entitled, but also obliged to weigh which evidence needs to be provided with due care, considering what basis for the decision must be provided in order to give a lawful and factually correct decision on the merits.⁶

The Code stipulates that, as part of the introduction of evidence, the administrative body may use all means that are capable of ascertaining the state of affairs and which are not obtained or performed in contravention of the legal regulations.⁷ The Administrative Procedure Code explicitly lists documents, searches, witness testimony and expert opinions as examples of evidence.⁸ However, this list is only demonstrative, so it is possible to use other means of evidence other than those explicitly mentioned here. The administrative authorities are therefore not limited in the proceedings to those four explicitly stated types of evidence. However, the fundamental problem is that the Code regulates the implementation of only those means of evidence that it explicitly mentions. It is completely silent in relation to the other means of proof and the method of introducing other evidence.

Nevertheless, in many cases, administrative authorities also need to provide evidence that is not regulated at all by the Code. Such means of evidence may include, in particular, evidence by means of an audio-visual recording, proving the content of the website. We cannot omit evidence by questioning the party to the proceedings or carrying out a formal identification of an object or person (although it is not very common). However, with these means of proof and their assessment, problems often arise in practice. In particular, there is no legal basis for answering the following key issues: *“What rules must be followed in order for evidence to be obtained in accordance with the law? Under what conditions and using what procedure should the administrative authorities introduce this evidence? To what extent can an analogy be followed in the process of the introduction of evidence?”* The answers to these questions will be demonstrated mainly in relation to the audio-visual evidence and the evidence of the content of the website. These are the means of evidence which, with regard to the development of modern society and information technology, are gaining in frequency and importance. However, other means of evidence not regulated by the Code will not be left out either. Based on the analysis

⁶ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 13 November 2009, 5 As 29/2009.

⁷ For more details see Vedral (2012, 519 et seq).

⁸ More details on these means of proof see Jemelka et al. (2016, 288–308).

of the current administrative practice and case law, *de lege ferenda* proposals will also be formulated in relation to the current (non)regulation of this type of evidence in the Administrative Procedure Code.

Evidence through audio-visual recording

Given that companies are experiencing a period of rapid technological growth, audio-visual recording has become one of the important means of proof. Although the frequency of its use in administrative proceedings is increasing, it is unfortunately not included in the demonstrative list of evidence in the Code. Therefore, there is no legal regulation for its implementation in administrative proceedings. The initial question that was addressed in this regard was whether or not it was a separate type of evidence. The case-law concludes in that regard that the screening of an audio-visual recording may be regarded as a specific case of search, since it is closest in nature to it.⁹ However, the question is whether it should not be considered as a separate type of evidence. After all, evidence by audio-visual recording shows certain differences and specifics compared to proof by search, both in terms of the method of its acquisition and subsequent realization. I therefore personally tend to conclude that it would be appropriate to include the evidence by audio-visual recording as a separate type of proof in the list of evidence in the Code and at the same time to enshrine its implementation, at least in its basic features.

However, the main problem that arises in connection with this means of evidence in Czech administrative practice is a situation where such audio-visual recordings (e.g. camera system recordings, recordings made on a mobile phone, etc.) are made without the consent of the persons concerned. The point is that, in such cases, the right of these persons to privacy (Wagnerová et al., 2012, 186 et seq) may be endangered or even violated. These means of evidence most often occur in administrative tort proceedings, especially in misdemeanour proceedings. As there is no legal regulation of the procedure in such cases, the solution is derived from the case law (of Czech courts and the European Court of Human Rights).

When assessing the admissibility of audio-visual recordings made without the consent of those persons intercepted as evidence in administrative proceedings, it is always necessary to assess first whether there is a conflict between the right to privacy on the one hand and another public interest on the other.¹⁰ Therefore, the administrative body must primarily examine whether the record is at all capable of interfering with the protected private sphere of a natural person. Above all, it will be necessary to find out whether the record could interfere with the privacy of the person in any way. There is certainly a fundamental difference in the perception of privacy, for example in residential areas on the one hand and in public areas marked with a warning of camera surveillance on the other.¹¹

Unless any interference with the personal rights in question is ruled out, the next step to be taken in assessing the applicability of the audio-visual recording must be to find out who pro-

⁹ The Supreme Administrative Court states that “*there is no reason why the projection of a video should be constituted as a separate type of evidence if the legislator themselves, knowing that the video will certainly be a frequent means of proving the facts, has not done so.*” Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 26 November 2008, sp. zn. 2 As 59/2008.

¹⁰ For example, the interest in punishing the perpetrator of the offense, the interest in nature conservation, and more.

¹¹ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 18 November 2011, 2 As 45/2010.

vided it. There is a fundamental difference between whether the recording was made by a public authority or whether the author is a private person. If there was a vertical relationship between the author of the record and the person concerned (whose personal rights were affected by the record), such a procedure must be expressly envisaged by law and all conditions required by law must strictly be met.

If there is a horizontal relationship between these subjects, such a record and its use as evidence in administrative proceedings cannot be ruled out *a priori*, even if not all the legal requirements associated with making such a record have been met. In such a case, however, it will be necessary to consider whether, for example, the interest in clarifying the infringement in a particular case outweighs the interest in preserving the privacy of the recorded person.¹² For example, the Czech Supreme Administrative Court has accepted the possibility of using a video recording taken by a journalist as evidence in the matter of an administrative offence by a taxi service operator.¹³ Furthermore, the court did not rule out the possibility of using a recording of a telephone conversation between the supplier's sales manager and the customer's employee in order to determine whether prohibited agreements were concluded and complied with, which could lead to distortions of fair competition and thus to tortious conduct.¹⁴ As in proceedings on administrative offences, it is necessary to proceed in other administrative proceedings as well. It is always necessary to assess whether the protection of a particular public interest prevails in a given procedure over the protection of the privacy of the person in the audio-visual recording.

In the case where the audio-visual recording was made by a public authority without the consent of the person concerned, it is necessary to assess, from the point of view of its applicability in the proceedings, whether such a procedure was expressly envisaged by law and whether all conditions required by law were strictly met. Within this assessment, the classic three-stage test is applied: a legal basis – a legitimate aim – a necessity / proportionality.

The first condition examined is therefore the existence of a legal basis for the acquisition of an audio-visual recording (and thus essentially for a certain interference with the right to privacy) by a public authority. In addition to the basic requirement for the very existence of binding legislation, such legislation must also provide protection against arbitrary interference with the rights of the individual and be clear enough to provide individuals with adequate information on the circumstances and conditions under which public authorities may resort to a recording.¹⁵ Another condition for finding “compliance with the law” is the availability of the legislation. If the legislation then gives the state authorities a certain discretion in this respect, it must also determine its scope, or conditions that must be met. From this point of view, the key decision of the Supreme Administrative Court stated: “*There is no legal basis in the Czech legal system for*

¹² Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 2 August 2013, 4 As 28/2013.

¹³ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 28 November 2007, 7 As 7/2007.

¹⁴ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 31 October 2013, 8 Afs 40/2012. See also Rozsudek Nejvyššího soudu [Judgment of the Supreme Court], 11. 5. 2005, 30 Cdo 64/2004, where the court stated that “the calls of natural persons, which take place in the exercise of a profession, business or public activity, are generally not in the nature of personal expressions. Evidence by audio recording of such a call is therefore admissible in civil proceedings.”

¹⁵ Judgment of ECHR in Case of Khan v. the United Kingdom, 12 May 2000, no. 35394/97; or Judgment of ECHR in Case of Bykov v. Russia, 10 March 2009, no. 4378/02.

*the secret making of audio-visual recordings by public authorities for administrative purposes if they interfere with the “private life” of natural persons. Section 51 of the Administrative Procedure Code is not such a basis, according to which all means of evidence which are suitable for ascertaining the state of affairs and which are not obtained or performed in contravention of legal regulations may be used to introduce evidence.”*¹⁶

The second condition is that the interference – in our case, the use of an audio-visual recording and the resulting interference with the right to privacy – leads to a legitimate aim. These goals are defined in the Charter of Fundamental Rights and Freedoms and in the Convention for the Protection of Human Rights and Freedoms in so-called “legally vague terms” – such as state security, national security, public order, public security, crime prevention, protection of health or morals, protection of the rights and freedoms of others, nature protection and more. Some of these terms are then defined by law; some of them, although widely used (e.g. the term “public order”), are not clearly defined by the legal system, and are therefore interpreted by the case law of the courts. From a constitutional point of view, it is irrelevant whether these terms are delineated by the legislator or interpreted by case law; it is decisive that they must not be expanded further.¹⁷

The third condition stipulates that an interference with rights must be inevitable, or necessary in a democratic society. Even these concepts are not further defined in the Charter of Fundamental Rights and Freedoms or in the Convention, but it is clear that they entail a certain urgent social need, the concretisation of which represents room for discretion and justification by the legislator. In connection with the assessment of the necessity of intervention by a public authority in the rights and freedoms of the individual, the Czech Constitutional Court ruled that “*if the constitutional order of the Czech Republic allows a breakthrough in the protection of rights, this is done solely and exclusively in the interest of the protection of a democratic society, or in the interest of the constitutionally guaranteed fundamental rights and freedoms of others. In order not to exceed the limits of necessity, there must be a system of adequate and sufficient safeguards, consisting of appropriate legislation and the effective monitoring of compliance.*”¹⁸

If an audio-visual recording made by a public authority without the consent of the defendant is to be used as evidence then all the above criteria must be met cumulatively. Thus, if the first of them is not already met, there is no need to examine the existence of other criteria. If these criteria are not met, it is an illegal means of evidence and it cannot be used in administrative proceedings.

From a European point of view, it can be stated that the ECtHR is quite benevolent in its decision-making practice as regards the assessment of the admissibility of evidence (Kmec et al., 2012, 762). The question of the admissibility of evidence falls primarily within the scope of national law and therefore the fact that the evidence was taken in breach of national law or other rights or freedoms guaranteed by the Convention (other than the right to a fair trial) does not necessarily constitute a violation of Article 6 of the Convention.¹⁹ In *Heglas v. The Czech Republic*,

¹⁶ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 5 November 2009, 1 Afs 60/2009.

¹⁷ Nález pléna Ústavního soudu ČR [Judgment of the Constitutional Court of the Czech Republic], 20 May 2008, no. 355/2008 Sb.

¹⁸ Nález pléna Ústavního soudu ČR [Judgment of the Constitutional Court of the Czech Republic], 20 May 2008, no. 355/2008 Sb.

¹⁹ Judgment of ECHR, in *Case of Schenk v. Switzerland*, 12 July 1988, no. 10862/84.

the ECtHR concluded: “*The court (i.e. the ECtHR) therefore does not, in principle, rule on the admissibility of certain types of evidence, such as evidence obtained illegally under national law, or due to the complainant’s fault. It must assess whether the proceedings, including the manner in which the evidence was obtained, were fair as a whole.*”²⁰ At the same time, the ECtHR does not in itself consider that a person has been found guilty on the basis of evidence obtained in breach of the law as a violation of the principle of the presumption of innocence guaranteed by Article 6 of the Convention.²¹

The Czech Supreme Administrative Court also assumes that the mere use of evidence obtained in violation of the law (incl. audio-visual recording) and thus a violation of the relevant procedural regulations may not in itself result in the illegality of the decision in the case.²² The relevance and seriousness of the evidence used for the conclusions reached by the competent authority, which will be reflected in the decision on the substance, must always be assessed. For example, in a situation where the offence is proved by evidence other than an illegal audio-visual recording, this is not a defect which would render the decision illegal. Reversing such a decision would be “*mere formalism*”. On the other hand, this does not preclude a situation where an illegal audio-visual recording will be the main or even the only item of probative value and the decision will have to be annulled.

Proving website content

The content of websites is increasingly becoming the subject of evidence in administrative (and judicial) proceedings in the Czech Republic. Unfortunately, the Code does not regulate this form or how to process it. The procedure is therefore so far only inferred by the case law of administrative courts. The case law generally acknowledges that there are several ways to prove the content of a website. Both the screenshot and the printed page are acceptable. Particular attention must be paid to the credibility and sufficient capture of the real content of the website.²³

A credible way of capturing website content depends on what aspect of the website content needs to be proved in administrative proceedings. If it is necessary to prove the existence of a statement in the text published on the website, it is sufficient to print a part of the page with text without graphic elements.²⁴ However, if it is not only the text, but also the graphic elements accompanying it (e.g. pictures of goods, illustrations, etc.), capturing the content of the page must be done so that the relevant graphic elements are not distorted or eliminated. The method of capturing website content also determines whether the question is if specific information with a specific content was published on the website (e.g. whether a defamatory article was published on the Internet) or whether the absence of certain information on the website was proved (for example, failure to specify mandatory advertising requirements). While in the first case the printing of a website documenting only the existence of a proven fact would suffice, in the second case it is necessary to capture the appearance of the website more comprehensively.

²⁰ Judgment of ECHR, in Case of Heglas v. the Czech Republic, 1 March 2007, no. 5935/02.

²¹ Judgment of ECHR, in Case of Schenk v. Switzerland, 12 July 1988, no. 10862/84.

²² Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 2 August 2013, 4 As 28/2013.

²³ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 24 August 2016, 1 As 80/2016.

²⁴ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 4 March 2009, Pst 1/2008.

It is necessary to document all elements of the website that would actually be able to carry a certain message that is to be absent from the site.

The “time fixation” of this means of evidence is also important. The point is that “*the content of the same website, given the nature of the internet, can be – and usually is – changing over time*”.²⁵ It is therefore important for the administrative body to record the status of the website on which it relied at the time of its decision (either by printing or by storing it on an electronic data carrier). This capture is particularly important for the subsequent judicial review of an administrative decision. Indeed, there is no guarantee that the information on the website at the time of the judicial review will be the same as that at the time of the administrative authority’s decision.²⁶

For the sake of completeness, it should be added that evidence in the form of a notary record certifying the existence of “electronic” evidence (the existence of a website with a certain content on a certain date) is also admissible.

Other means of evidence not expressly regulated by the Administrative Procedure Code

Evidence in the form of an audio-visual recording or a website is not the only means of proof not provided for in the Code, and yet it is or may be used in administrative proceedings.

An example is hearing of a party to the proceedings, which is not explicitly mentioned in the list of evidence in the Administrative Procedure Code and the Code does not contain any regulation of its implementation. However, the Code envisages it in relation to contentious proceedings, when it stipulates in § 141 that a participant in the disputed proceedings may be heard if the facts of the case cannot be proved otherwise. However, it does not specify anything else, especially not the method of implementation.

The hearing of a party to the proceedings is also mentioned in the Act on Liability for Misdemeanours and Proceedings Concerning Them (Section 82). Specifically, it is an interrogation of the accused. In contrast to the Code, there is at least a minimal adjustment of the procedure for the implementation of this means of evidence. In particular, it sets out some important principles, namely that the accused has the right not to testify. The administrative body must also not force the accused to resign or confess. The ban on self-incrimination is therefore strongly respected. The administrative body shall inform the accused, before the interrogation, of their right not to testify and of the prohibition to conduct the interrogation.

Evidence can also be taken by questioning a party to the proceedings in such those administrative proceedings for which it is not expressly regulated by law, but its applicability is considerably limited. Hearing a party is not intended to enable them to state their claims on decisive facts, nor to comment on other evidence adduced in that form. In administrative proceedings, the submissions, proposals and other procedural acts of the party to the proceedings primarily serve this purpose.²⁷

²⁵ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 15 March 2009, 1 As 30/2009.

²⁶ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 12 April 2011, 1 As 33/2011. The Supreme Administrative Court also commented on the possibility of proving the content of the Wikipedia online encyclopaedia. The court stated that the administrative authorities are not restricted in the choice of evidence under the Administrative Procedure Code. Although the evidence provided by an open web encyclopaedia may be less credible, it is certainly not *a priori* inadmissible. Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 20 May 2015, 4 As 58/2015.

²⁷ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 6 February 2014, 6 A 147/2013.

Given that the Code, as a general regulation on administrative proceedings, does not specify the procedure for questioning the participant, the situation has to be resolved by analogy. It can therefore be considered that, if the hearing of a party to the proceedings is carried out, the administrative body shall proceed by analogy according to the legal regulation of the examination of a witness. This is contained in Code in Section 55. However, the procedure must be applied appropriately; it is necessary to distinguish between the position of a witness on the one hand and the position of a party in the case on the other. In particular, the extent to which the duty of a witness, to testify truthfully at all times and not to conceal any facts is open to question, especially in proceedings where a participant has an obligation imposed. Even in view of this fact, it would again be appropriate to regulate this evidence and the procedure for its implementation, at least with the basic features in the Code. Its regulation in the Code is all the more important because, in cases where a participant is a legal entity and a person in the position of the statutory body of that legal entity is to be heard then, according to the case-law, it is necessary to proceed in the same way as when questioning a participant.²⁸ Where a person acts in a dual position, as a party to the proceedings and as a witness, it is necessary to distinguish carefully when such a person acts as a witness giving their testimony and when they testify as a party to the proceedings.

Another means of proof that is not regulated in the Administrative Procedure Code is identification. It is a means of proof used in criminal law and regulated in the Code of Criminal Procedure (Section 104b), being a procedural act consisting of the identification of an object – namely persons or things – and the aim is to determine their identity beyond doubt. I agree with the case-law that, although the Code does not regulate the conditions for the introduction of evidence by its identification, it can be used as evidence in administrative proceedings.²⁹ By analogy, the regulation in the Code of Criminal Procedure would have to be followed.

Conclusion

Undoubtedly, it can be argued that, as society changes and evolves, as does the means and technologies it uses, so does the structure and nature of the evidence used in administrative proceedings. We can state that new means of evidence are increasing and that they often play a crucial role in proving certain facts in the proceedings. A typical example might be audio-visual evidence or evidence of website content. However, although these means of evidence are increasingly used in administrative proceedings, their explicit legal regulation is lacking. The most important legal regulation in the area of Czech administrative procedural law is not applicable to their regulation. This shortcoming is all the more noticeable because it is these types of evidence that are widely used in administrative tort proceedings. These are serious cases affecting the rights and legitimate interests of the addressees of public administration and ensuring their protection, and at the same time concerning the basic attributes of a democratic society and the rule of law. On the one hand, there is the right to a proper and fair trial and the right to privacy; on the other hand, the legitimate interest of society and the state in the proper and objective finding of an infringement and its just punishment.

²⁸ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 31 March 2010, 1 Afs 58/2009.

²⁹ Rozsudek Nejvyššího správního soudu [Judgment of the Supreme Administrative Court], 15 January 2009, 7 Azs 22/2008.

The problem is not that there are doubts about the use of these forms of evidence in administrative proceedings. The Code contains only an indicative list of means of evidence, so it is not a “*numerus clausus*” in this respect. However, there are fundamental doubts; first, under what conditions to regard such evidence (in particular audio-visual recordings) as evidence obtained in a lawful manner. This is a crucial issue, as the introduction of illegal evidence in the proceedings has an impact on the legality of the decision on the merits. Second, a significant problem caused by the absence of legislation is also the fact that at least the basic rules for the procedure for introducing such evidence are completely missing. This can also have a number of consequences, such as limiting the possibility of a subsequent judicial review of the issued decision (in cases when the administrative body did not properly capture and fix the website and its content in the file). The advantage of the current situation is that these shortcomings of legislation are currently being replaced by the Czech administrative courts (often based on the case law of the ECtHR). It is the case law of the Czech courts that defines the conditions for the applicability of these “non-regulated” means of evidence in administrative proceedings, as well as the basic rules for their implementation in proceedings. Courts often base their conclusions on the analogy of legis.

In view of all the above, I therefore think that the Administrative Code should reflect social development and its reflection in the field of communications and information technologies. Therefore, it would be appropriate for the Code not only to regulate the traditional and historically older means of proof, but also to regulate the modern ones, in particular evidence via audio-visual recordings and the proof by the content of websites. Given the frequency of use of the interrogation, it would be appropriate to pay attention to this means of proof as well.

In relation to all such means of evidence, in particular the rules governing the legality of the introduction of the evidence, its credibility and preservation should be added to the Code. At the same time, the procedure for their implementation within the evidence in the proceedings should be outlined. Of course, this amendment to the Code would not preclude the need to assess such evidence and its admissibility in each specific case, but it would at least set out the basic conditions and procedures that would facilitate such an assessment by the administrative authorities. This would also contribute to greater legal certainty for the addressees of public administration.

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