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Environment - Switzerland

Federal court decisions on traffic noise

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April 30 2012

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From 2009 to 2011 the Federal Administrative Court and the Federal Supreme Court ruled on several cases involving measures to reduce noise from traffic sources such as roads, railways and aircraft. In their decisions the courts confirmed a number of earlier rulings on the topic.

Key principles

According to Article 13 of the Ordinance on Noise Protection,⁽¹⁾ existing installations that significantly contribute to exceeding the maximum noise levels must be remediated. This provision reflects the precautionary principle, pursuant to which noise emissions should primarily be reduced at source. Even where a specific project complies with the relevant maximum noise levels, an assessment must be made on a case-by-case basis in order to determine whether the appropriate precautions require further noise-reducing measures.⁽²⁾ The precautionary principle also applies to traffic noise that is created by public infrastructure, but results from the appropriate use of a specific facility (eg, a gravel pit) and therefore must be attributed to such facility.⁽³⁾

The equally important principle of proportionality imposes limits on the precautionary principle. Pursuant to the former, remediation is required only if it is technically and operationally feasible and economically acceptable. Thus, an exception from the duty to remediate applies if the remediation would cause disproportionate costs or if there are opposing overriding interests.⁽⁴⁾ In addition, if a specific project complies with the relevant maximum emission values, further noise-reducing measures are considered to be proportionate only if relatively little additional effort will achieve a considerable additional noise reduction.⁽⁵⁾

Specific rules have been developed to assess whether specific remediation measures are proportionate. For instance, under the Ordinance on the Noise Remediation of Railroads,⁽⁶⁾ a cost-benefit index determines whether specific measures are proportionate. The index is calculated pursuant to a formula that looks at the remediation costs in relation to the achieved noise reduction and considers the number of persons profiting from such measures. As a general rule, a cost-benefit index of up to 80 is considered to be acceptable. Similarly, the Guidelines on Street Noise⁽⁷⁾ provide for an economic viability index, whereby a value of 1 is considered to be sufficient and values of above 4 are considered to be very good. In contrast to the ordinance, these guidelines are not directly legally binding on the courts. Nevertheless, such guidelines reflect the knowledge and experience of recognised specialists and the courts consider them as such.⁽⁸⁾

Motorway noise

With regard to the remediation of motorway noise, the Federal Supreme Court confirmed the decision of the Federal Administrative Court to dismiss a request for enlarged noise barriers because the overall benefit from the proposed enlargement was low and insufficient.⁽⁹⁾ Based on the Guidelines on Street Noise, the court considered an index value of below 1 to be insufficient. The court acknowledged that in principle, particular circumstances (eg, townscape, impact on landscape, living quality and road safety) may be considered in addition to the economic viability index. However, no such circumstances were presented in the case before the court.⁽¹⁰⁾

In the same decision, the court dismissed a request for the installation of a particular type of draining road surface that would further reduce noise by two decibels. Weighing up the relevant interests, the court considered several disadvantages of such a surface, in particular:

- the lower economic viability;
- the higher costs of installation and maintenance; and
- the reduced operating life.

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For these reasons, the court confirmed the decision of the Federal Administrative Court to deny the request for the draining surface.⁽¹¹⁾

In another case, the Federal Administrative Court dismissed a request for additional noise reduction measures even though the maximum noise levels were slightly exceeded. The main reasons for this decision were that the plot of land in question had not yet been built upon and there was no approved building project; therefore, it was impossible to assess where the noise-sensitive rooms would be situated. In addition, experience on the neighbouring plots had shown that minor planning, design and structural measures would allow the project to stay below the imposed noise limits.⁽¹²⁾

Railway noise

In a case relating to the remediation of noise from a railway line, the Federal Administrative Court confirmed that in principle, noise-reducing measures are required until the facility in question complies with the legal maximum noise levels, but that exceptions are possible if remediation would result in disproportionate costs, or if there are prevailing interests, such as townscape protection or nature and landscape conservation.⁽¹³⁾

Regarding the proportionality of costs, the court confirmed that a value of up to 80 on the cost-benefit index is usually acceptable, and that a higher index value indicates a lower proportionality of the noise reduction measures in question. Exceptions to the application of the cost-benefit index may be allowed if it is impossible to determine the relevant values correctly (eg, in the case of particular types of noise).⁽¹⁴⁾

In the same decision, the court confirmed that existing buildings are relevant for noise measurement and that possible future buildings are considered only once plans have been disclosed publicly or if a construction permit has been granted. Reserved use of developed land is not considered. In the case of undeveloped land, compliance with the applicable planning values is required for all positions and at all levels where future buildings with noise-sensitive rooms may be situated.⁽¹⁵⁾

Aircraft noise

In disputes relating to Zurich Airport, the Federal Supreme Court has held that from an environmental law perspective, the airport is an installation that must be remediated. This because the air traffic regularly exceeds the maximum noise levels, and to some extent even exceeds the noise alarm levels. As an installation in need of remediation, amendments or extensions of the airport are allowed only if remediation measures are taken. In its leading decision on the issue, the court further held that changes in the approach and departure routes of aircraft, which result in a material reallocation of noise, are amendments to the airport operations that trigger remediation measures.⁽¹⁶⁾

Regarding the actual remediation measures, the court confirmed that in certain circumstances, exemptions from the duty to remediate may be granted to facilities that are operated in the public interest. However, noise emission-limiting measures must be taken with regard to the airport and air traffic, and passive noise protection measures must be taken with regard to the buildings involved.⁽¹⁷⁾ In this context, the court confirmed that passive noise protection measures are not limited to soundproof windows, but may also include the sound insulation of walls and roofs.⁽¹⁸⁾ In addition, the court held that noise emission-based airport fees are an appropriate instrument for noise reduction, in line with the 'polluter pays' principle. Therefore, the court gave more weight to a timely introduction of incentivising airport fees than to the airport's concerns about the impact on its competitiveness.⁽¹⁹⁾

In the same decision, the court made significant statements about the Ordinance on Noise Protection. It held that certain noise levels defined therein do not fully comply with the relevant provisions of the Statute on the Protection of the Environment,⁽²⁰⁾ and should therefore be amended.⁽²¹⁾ This applies in particular to the early morning hours. As a consequence, the competent federal authorities must put forward a proposal for an amendment of the Ordinance on Noise Protection. The content of this amendment is not yet clear, but it is likely that it will affect construction development in the airport region. It is expected that the area in which maximum noise levels are exceeded, where no new buildings are allowed and where existing buildings require noise protection measures at the airport's cost, will be increased.

With regard to construction measures, the Federal Supreme Court held that the Minergie building standard and comfort ventilation systems are not sufficient structural measures to meet the legally required planning values. Accepting such measures would mean that the external areas of the buildings at issue remain exposed to noise above the legally allowed limits. With regard to noise reduction measures at the source, the court held that passive noise protection measures may not be taken into account. Finally, the court held that the precautionary principle justifies a prohibition on the construction of buildings in a noise-polluted area. This is justified by the public interest in avoiding a further increase in the number of persons who are exposed to aircraft noise.⁽²²⁾

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Endnotes

(1) *Lärmschutz-Verordnung* (December 15 1986), SR 814.41.

(2) BGer in 1C_10/2011 of September 28 2011, E4.1 with further references.

(3) BGer in 1C_10/2011 of September 28 2011, E4.1.

(4) BVGer in A-5306/2008 of June 26 2009, E2.2 with further references.

(5) BGer in 1C_10/2011 of September 28 2011, E4.1.

(6) *Verordnung über die Lärmsanierung der Eisenbahnen* (November 14 2001), SR 742.144.1.

(7) *Leitfaden Strassenlärm* (December 2006), issued by the Federal Office for the Environment and the Federal Roads Office.

(8) BVGer A-1619/2011 of December 20 2011, E6.3 with further references.

(9) BGer in 1C_480/2010 of February 23 2011, E4.4 and E4.5.

(10) *Id.*

(11) BGer in 1C_480/2010 of February 23 2011, E3.6.

(12) BVGer A-1619/2011 of December 20 2011, E9.3.6.

(13) BVGer A-5306/2008 of June 26 2009, E2.2 with further references.

(14) BVGer A-5306/2008 of June 26 2009, E3.3 with further references.

(15) BVGer A-5306/2008 of June 26 2009, E4.2 and 4.4 with further references.

(16) BGE 137 II 58 E5.1.

(17) BGE 137 II 58 E5.1 with further references.

(18) BGE 137 II 58 E7.2 with further references.

(19) BGE 137 II 58 E6.7.2 and 6.7.4.

(20) *Bundesgesetz über den Umweltschutz* (October 7 1983), SR 814.01.

(21) BGE 137 II 58 E5.3.5 and E. 7.4.

(22) BGer in 1C_331/2011 of November 30 2011, E7.2, E7.3 and E8.3.

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