

INTERPRETATION AND APPLICATION OF THE EU LAW BY THE CZECH COURTS

I. Introduction

In my article I would like to focus on application of the EC/EU law by the Czech courts. I would like to mention some interesting Czech cases where the community law was applied and add my own commentary on them. I will focus on decisions of Czech highest courts (in particular the Supreme Administrative Court and the Constitutional Court) as they have special role in the Czech judiciary. Their judgments, even though that they are not formally precedents as judgments of common law courts, have great impact on decision making of Czech lower courts. As such they are carefully monitored and often used as arguments in order to justify their decisions.

It is necessary to emphasize in the very beginning of this article that the Czech Republic has not experienced any major problems with the community law application. There were done mistakes in some decisions and the EC law was not applied correctly. However, these mistakes were not extraordinary and their character can was in fact equal to mistakes in application of the Czech law.¹

In the practice of the Czech highest courts the community law seems to be applied the most often in asylum related cases and in the field of international private law. Both these areas are nevertheless so specialized that I will not deal with them in my article.

II. Cases concerning supremacy principle

I would like to start with the cases concerning the principle of supremacy² of the EC law over the national law.³ The Czech Constitutional Court dealt with this issue in several decisions and on different occasions. All these decisions can be divided into two main areas. The first area concerns cases where the question of supremacy of the EC law over Czech “ordinary statutes” was raised. The second area concerns cases where possible conflict of the EC law with the Czech Constitution and Charter of Fundamental Rights and Freedoms (hereinafter referred to as the “Charter”) had to be solved.

The first group does not seem to be problematic at all. The Constitutional Court in general fully respects the principle of supremacy of the community law. However, the second group seems to cause problems as the Constitutional Court does not seem to be willing to lose its extra-ordinary position in the Czech judiciary and therefore does not want to fully acknowledge the absolute supremacy of the EC law over the Czech law including the Czech sources of law of the highest legal force. As this issue is of high importance we will have a closer look at it.

¹ Court often do not fully understand the principles of direct and indirect effect of directives. For an example see Sehnálek, D: *The review of one Czech court's decision: are we more European than the European union itself?* In Dny práva 2008 Days of Law. I. vydání. Brno : Tribun EU s.r.o., 2008. pp. 743-750, 8 s. ISBN 978-80-210-4733-4.

² Terms primacy and supremacy are being used interchangeable in this Article. For more see Svoboda, P: *K povaze práva Evropské unie*. Právník, 1994, No 11, p. 9951

³ The principle of supremacy solves the relationship between provisions of the EC law and national law. in case of their discrepancy the EC law renders automatically inapplicable any conflicting provision of current national law. For further reading see Sehnálek, D: *The Primacy of Community Law*. EU Watch, 2008, 11, pp. 25-32 or Tichý, L, Arnold, R., Svoboda, P., Zemánek, J., Král, R. *Evropské právo*. 3. vydání, Praha : C. H. Beck, 2006 since p. 285; Týč. V. *Působení práva Evropské unie ve sféře českého právního řádu – Úvodní studie* in Sborník z workshopu konaného na Právnické fakultě MU v Brně dne 26.9.2006 Evropský kontext vývoje českého práva po roce 2004, Brno, Masarykova univerzita, 2006, pp. 10 – 28.; Svoboda, P. *K povaze práva Evropské unie*. Právník, 1994, č. 11, p. 940.

III. Refusal of absolute supremacy

There have been issued several decision of the Czech Constitutional Court concerning the supremacy of the EC law over the Czech Constitution and Charter. The most well known are its rulings “Sugar quotas”⁴ “European warrant”⁵ and the latest is the “Lisbon Treaty ruling”⁶.

In the Lisbon Treaty ruling “the Constitutional Court was to examine the conformity of the Lisbon Treaty with the Czech Constitution. In this decision the Constitutional Court expressed the opinion that, even after ratification of the Accession Treaty, the normatively supreme position of the constitutional order was not rendered meaningless, and that, in exceptional cases, one can conclude that a treaty is inconsistent with the constitutional order even *ex post*, subsequently, after it has been ratified, via individual constitutional complaint proceeding.”⁷

The Czech Constitutional Court also pointed out that there is a certain reasonable way which leads in case of discrepancy between Czech and community law to a result positive from the viewpoint of the European Union. It is because the aims of the EC can be achieved via the Euro-conforming interpretation of the Czech Constitution everywhere where such an interpretation is possible under the Czech methods of interpretation of law.

This above-mentioned statement is nevertheless only a little concession as the Constitutional Court also held that “in the event of a clear conflict between the domestic Constitution, especially its material core and European law that cannot be healed by a reasonable (Euro-conforming) interpretation, the constitutional order of the Czech Republic, especially its material core, must take precedence.”⁸

In the Lisbon Treaty ruling the Constitutional Court also made some comments on the issue of transfer of competences to the EC. The Constitutional Court stated that it generally recognizes the functionality of the EU institutional framework for ensuring review of the scope of the exercise of the transferred powers, although it acknowledges that its position can change in the future, if it appears that this framework is demonstrably non-functional.⁹ In addition, the Constitutional Court can review whether an act by bodies of the Union exceed the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution, although only in wholly exceptional cases.¹⁰

IV. Other European highest courts and principle of supremacy

This argumentation means that the approach of the Constitutional Court to the EC law is similar to those which are recognized by other EU Member states constitutional courts. The list of similar decisions with the same approach of other European constitutional courts is contained in Sugar quotas decision of the Czech Constitutional Court. In this ruling it is emphasized that constitutional or supreme courts of Italy, Germany, Ireland and Denmark have never fully accepted the absolute supremacy of the EC law over national law.¹¹ And finally, French Conseil d'Etat is not in this respect, an exception as well.¹²

⁴ Constitutional Court decision No. Pl. ÚS 50/04.

⁵ Constitutional Court decision No. Pl. ÚS 66/04.

⁶ Constitutional Court decision No. Pl.ÚS 19/08

⁷ the Lisbon Treaty ruling No. Pl.ÚS 19/08 of November 26, 2008.

⁸ Ibidem.

⁹ Ibidem.

¹⁰ Ibidem.

¹¹ See decision No. Pl. ÚS 50/04 of the Czech Constitutional Court where this institution mentioned decision of the Italian Constitutional Court of December 27m 1973 No. 183/73 *Frontini v. Ministero delle Finanze*, Constitutional Court; and decision of April 21, 1989 No. 232/1989 *Fragd v. Amministrazione delle Finanze dello Stato*; Germany as well (decision of October 22, 1986 No. 2 BvR 197/83 *Wuensche Handelsgesellschaft, Solange II*; decision of October 12, 1993 No. 2 BvR 2134 a 2159/92

V. Supremacy of the EC law in case law of the ECJ

It is also interesting to compare the reasoning of the Lisbon Treaty ruling with some former judgments of the European Court of Justice concerning the issue of supremacy of community law. The question which has the precedence, whether the constitution of a Member state or the EC law, has been solved in several decisions of the European Court of Justice.¹³

The European Court of Justice held in case *Internationale Handelsgesellschaft* that “recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law. The validity of such measures can only be judged in the light of community law. In fact, the law stemming from the Treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure.”¹⁴

The simple comparison of these two decisions shows that both institutions offer a different answer on question: “who is the supreme judicial authority in the European Union?”. The truth is most probably on ECJ’s side. Otherwise the system may not be functional. However, should a Member state the EC law, the EU has no efficient measure which would be capable to force it to comply to EC law if such Member state decides to be ingrain in this matter.¹⁵

The situation of the European Union is in this respect completely different for example from the USA. The first difference is that the US constitution clearly states that the federal law has supremacy over the law of US states¹⁶ whereas the EC Treaty does not say anything about this issue. The second difference is that the US federation has its own federal forces (both military and police). These forces can be used in order to enforce the federal law directly against US citizens and eventually against US states as well whereas the European Union is in this respect fully dependent on Member states and their forces or political willingness to comply.

VI. The Czech and Slovak pensions

The principle of supremacy of the EC law can be also examined in decisions of the Czech Constitutional Court¹⁷ and Czech Supreme Administrative Court¹⁸ concerning Czech and Slovak pensions. Both these courts were trying to judge the following situation.

zum Vertrag über die Europäische Union; Irish decisions (decision of the Supreme court of December 19, 1989 *Society for the Protection of Unborn Children (Ireland) Ltd. v. Grogan* and of March 5, 1992 *Attorney General v. X*), and Danish decision (decision of the Supreme Court of April 6, 1998 No. I-361/1997 *Carlsen and Others v. Rasmussen*).

¹² For further information on this topic see Matli, W., Slaughter, A. *Constructing the European Community Legal System from the Ground Up: The Role of Individual Litigants and National Courts* <http://www.jeanmonnetprogram.org/papers/96/9606ind.html> (2009.07.05) or Bobek, M. *Hledání modu vivendi ESD a německého Spolkového ústavního soudu* http://www.europeum.org/dispatch_article.php?aid=541&cid=0&nolang=1&page=44&type=0 (2009.07.05).

¹³ The first case expressly stating that the EC law has primacy over national law was the well known case 6/64, *Flaminio Costa v. E.N.E.L.* This principle was further interpreted in case 106/77, *Amministrazione delle Finanze dello Stato v. Simmenthal SpA.*

¹⁴ Judgment of the Court of 17 December 1970., *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*. Verwaltungsgericht Frankfurt am Main - Germany. Case II-70.

¹⁵ I am of that opinion that in such serious breaches of EC law even the infringement procedure according to the Art. 226 and 228 of the EC Treaty might not be enough to force the Member state to comply to the EU law.

¹⁶ Art. VI. of the US Constitution states: “This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.”

¹⁷Constitutional Court decision I.ÚS 1375/07.

The complainant in these cases was a woman of Czech nationality which used to be employed in Slovakia in the times of Czechoslovak federation. After the breakup of the federation she has worked for some time in the Czech Republic. When she reached retirement age, she was entitled to both Slovak and Czech pensions (or more precisely proportional parts of them).

The Czech part of her pension was figured out according to the regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community (hereinafter referred to as the "Regulation"). This Regulation replaced existing bilateral treaties concerning pensions negotiated by Member states save for those cases where such treaty provides a higher standard for the beneficiary..

However, the pension could have been alternatively figured out under the Czech law, in particular according to the bilateral Treaty which was negotiated by the Czech and Slovak Republics (hereinafter referred to as the "Treaty"). The purpose of this Treaty was to settle cases where a citizen of one of the successional states used to work in the other state for some time in the times of former federation.

It is important to mention that the system given by the Treaty would lead to a higher pension for the complainant as the Czech Constitutional Court in its several decisions¹⁹ held that any Czech citizen cannot be discriminated (compared to other Czech citizens) solely due to such exceptional fact as is the breakup of the federation.

In other words, despite the fact that the Treaty and the Regulation were using technically same criteria in order to determine the final amount of the complainant's pension, there was a difference in results. This difference was caused by the fact that they were interpreted differently. Thus, only because of prohibition of discrimination among Czech citizens adopted by the Czech Constitutional Court, the pension figured out according to the Czech law (in particular the Treaty) was more favorable for the complainant.

The Czech Supreme Administrative Court in its decision in this case ruled that the Regulation has to be applied as the system is technically same and therefore EC law shall take precedence. This decision was not correct thought. Therefore the Constitutional Court ruled that the Treaty must be interpreted and applied in light of its former decisions in order to protect fundamental rights. Thus, the EC regulation could not have been applied in this case and the Treaty took precedence. However, this precedence of national law (or better to say international treaty binding on the particular state) was possible only because the EC law itself provided so.

The abovementioned decision of the Constitutional Court was long awaited. It was important for many Czech citizens who in times of federation used to work in Slovakia. Their pensions were lower than pensions of their fellow Czech citizens working in the Czech part of the former federation. This decision opens a way to set right this unusual problem. It is a pity that none of the Czech courts raised a reference for a preliminary ruling on this case to the European Court of Justice. However, the adopted solution seems to be fair and in accordance with the EC law as well. I therefore personally agree with the Constitutional Court that the precedence of the EC law is not possible in this case.

VII. Conclusion

It seems that Czech courts have not experienced any serious difficulties with interpretation and application of the EC law so far. There can be found some mistakes, however these mistakes seem to be of an "ordinary nature" and they are usually set right by courts of higher instance.

The principle of supremacy on the other hand seems to be a potential source of future problems. The supremacy of the EC law over the Czech statutes is not being disputed. However, the Constitutional Court does not fully acknowledge current absolute supremacy of the EC law even over the Czech

¹⁸ Supreme Administrative Court 3 Ads 21/2006 – 44.

¹⁹ For example following cases were mentioned: case No. IV. ÚS 228/06 or case Pl. ÚS 4/06.

Constitution and Charter of Fundamental Rights and Freedoms. This approach is similar to the approach adopted by some other European constitutional courts nevertheless it is contrary to the settled case law of the European Court of Justice. As such it has a potential to be a source of future problem.