The Emerging Czech Constitutional Doctrine of European Law

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Influence of the Czech accession to the European Union on the judicial ideology of Czech courts – Questions regarding the constitutional status of European Union law in the Czech Republic – Czech Constitutional Court: no testing of so-called necessitated implementing provisions, except when core constitutional values and principles are at stake – Extension of this doctrine to non-Community Union law – An act contrary to Union law is not as such also contrary to the Czech Constitution

Innovative authority of European law

As new 'European judges' the Czech courts were expected to depart from a passive reception of the European Union's legal order, binding on them since the date of the accession,[1] and to provide all persons concerned with the guarantee of its full and immediate application. The novelty of this task regarded not primarily the substance of European legal norms, which were already incorporated into the Czech legal system during the process of legal approximation preceding the accession. It was largely a matter of *judicial ideology*. A tradition of mechanical jurisprudence and statutory positivism had previously discouraged judges from using abstract legal principles, teleological interpretation and comparative, cross fertilizing legal arguments. Their type of reasoning traditionally relied on legal force, not on more subtle forms of persuasive authority like convincingness or acceptability of their judgments.[2] They mostly practiced an authoritarian approach to law, based on the maxim *iura novit curia*, where an all-knowing judge is respon-

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[1] Art. 2 of the Act Concerning the Conditions of Accession of the Czech Republic … and the Adjustments to the Treaties on Which the European Union is Founded, *OJ* [2003] C 227.

[2] For an excellent analysis of that path dependence see: Zdenek Kühn, 'The Application of European Law in the New Member States: Several (Early) Predictions', *German Law Journal* (2005), p. 565 et seq., as well as: Zdenek Kühn, 'Worlds Apart: Western and Central European Judicial Culture at the Onset of the European Enlargement', *American Journal of Comparative Law* (2004), p. 531.

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sible for resolving the dispute, applying relevant law under all circumstances *ex officio* and raising – in an inquisitorial way – points of the breach of law of his or her own motion, without the discursive interaction with the parties to the dispute that is desirable in modern, rather complex legal systems.[3]

To be fair, this judicial mindset cannot be attributed to intentional inertia or prejudice *vis-à-vis* European law. It has at least three major causes specific for a post-communist judiciary. First, strict legal formalism and textual interpretation were the only defence against the use of open-ended political clauses and the required purpose-oriented law application in the communist era. Secondly, it was a reaction to the great legislative instability which was caused by a flood of ever-complemented legislation during the transformation years after 1990, in other words against the 'legislative optimism' of the Czech law-maker.[4] A third cause was the lack of accessibility of secondary European law in official translations in the Czech language after accession (which led the Regional Court in Ostrava to submit one of the first Czech requests for a preliminary ruling).[5]

In spite of this, the Czech Constitutional Court from early on started to play a ground-breaking role in the promotion of newly established democratic values, the rule of law and fundamental rights, followed by the Czech Supreme Administrative Court and by some other high ranking courts. Already before accession, the Constitutional Court did not hesitate to refer to the *acquis communautaire* as a subsidiary guideline of interpretation of approximated Czech laws, to adhere to the common European legal culture, arguing that primary Community law is 'not […] irrelevant when assessing the constitutionality' of national acts and stating that the use of Community law is 'not foreign to the Constitutional Court, but it irradiates – especially in the form of the common European principles of law – to a great extent its decisional practice.'[6] The Constitutional Court always stressed the continuity of its own case-law, which was deduced from the attributes of a democratic law-based state as identified in the Copenhagen accession criteria.[7] In contrast, in 2000 the Czech Supreme Court, identifying itself as a court of a non-

[3] Michal Bobek, 'A New or a Non-Existent Legal Order? Some (Early) Experience in the Application of EU Law in Central Europe', *Croatian Yearbook of European Law and Policy* (2006), p. 289.

[4] Jiri Zemanek, 'The Constitutional Courts in the New Member States and the Uniform Application of European Law', in Ingolf Pernice, Juliane Kokott, Cheryl Saunders (eds.), *The Future of the European Judicial System in Comparative Perspective* (Baden-Baden, Nomos 2006), p. 257.

[5] Case No. 22 Ca 69/2005 (pending); Michal Bobek, 'The Binding Force of Babel. The Enforcement of EC Law Unpublished in the Languages of the New Member States', *EUI Working Papers Law 2007/06*.

[6] Decision of 16 Oct. 2001, case No. Pl. US 5/01 *Milk Quota* (published as No. 410/2001 Coll.); cf. also decision of 6 March 2002, case No. Pl. US 11/01 *Czech Railway Act* (published as No. 144/2002 Coll.); decision of 20 June 2001, case No. Pl. US 59/00 *Czech National Bank Act* (published as No. 278/2001 Coll.); decision of 29 May 1997, case No. III US 31/97 *Skoda Auto.*

[7] Case No. Pl. US 11/02 (published as No. 198/2003 Coll.).

member state, refused to interpret the provision of the Civil Code on consumer contracts concluded outside business premises in a way consistent with Community law.[8]

Since accession, in a number of cases Community directives were used to interpret (implementing) legislation,[9] including acts which originated in pre-accession times. To determine the place of a transaction taxable under the 1992 Czech VAT Act (Slovakia, where the business performance occurred, or the Czech Republic, where both parties resided), the Supreme Administrative Court had recourse to the Sixth Council Directive 77/388/EEC on the harmonisation of VAT to interpret the Act, reminding the parties that the Directive had acted as role model when the Act was drafted. Therefore, the Czech Parliament was presumed to have drafted the Act in a way compatible with the Directive, absent clear textual deviation from the Directive.[10]

In several other cases the direct applicability of Community law was at stake. A well-known example is a case concerning the *Protocol on asylum for nationals of member states of the European Union*, annexed to the Treaty on European Union. Referring to this Protocol, the Czech Ministry of the Interior refused to grant political asylum to a Slovak woman as she was a citizen of a member state and thus a 'secure State of origin', without examining the merits of the case. This deprived the person of an examination whether in the case at hand evidence contrary to this presumption could be collected and whether the status of Slovakia as a 'secure State of origin' under the Community law could be questioned. The Act on Asylum allowed such an examination and the Protocol was interpreted in the same vein. The Supreme Administrative Court therefore did not find it necessary to apply the Protocol directly,[11] in contrast to the lower court which took the Protocol for *lex specialis* to the Act as *lex generalis*.[12]

There are also a couple of pending cases, originating still in the times of the Czech association to the EU and potentially involving primacy of Community law. For example, the *national wine tax* redistributing the revenues solely in favour of Czech wine producers and not importers of wine from other member states,

[8] Case No. 25 Cdo 314/99.

[9] Cf. decision of the Municipal Court in Prague of 4 Jan. 2005, case No. 8 CA 6/04-24 on financial leasing; decision of the SAdminC of 27 Sept. 2005, case No. 1 Ao 1/2005-98 on transferability of mobile numbers; decision of the SAdminC of 17 Jan. 2006, case No. 6 As 52/2004-67 *Czech Airport Administration Agency*, where the notion of 'public undertaking' under the Act on free access to information, was interpreted with regard to the Commission 'transparency' Directive No. 80/723 and to the case-law of the ECJ.

[10] Decision of 29 Sept. 2005, case No. 2 Afs 92/2005-43.

[11] Decision of 19 July 2006, case No. 3 Azs 259/2005-42.

[12] Decision of the Municipal Court in Prague of 20 June 2005, case No. 7 A 7/2005, where the Protocol was qualified as *lex specialis* to the general provision of the Act, avoiding the direct conflict between both.

has been contested as a measure having equivalent effect to quantitative restrictions on imports; this could lead to disapplication of national legislation.[13] Another, very sensitive example: pensions and social entitlements of the Czech citizens who before the division of the former Czechoslovakia worked for Czech companies in Slovakia. After the division these pensions and entitlements have been paid by the successor state on the territory of which the persons had worked, even if upon retirement they moved back to the country of their origin, i.e., to the Czech republic. Before accession to the European Union, a considerable divergence in pensions between the both new states encouraged the Czech Constitutional Court[14] to quash this rule as in breach of the constitutional principle of equality and to replace it by a calculation of pensions on the basis of nationality. After accession the Supreme Administrative Court[15] rejected this approach and accepted the application of the rule of the actual place of work by reference to Community legislation in this field, which bases these claims on territoriality, not citizenship.[16] On the one hand, the approach of the Constitutional Court might be regarded as discrimination based on nationality. On the other hand, such an indirect retroactive force of Community legislation is questionable as the case may be regarded as falling outside the scope of Community law.[17]

Hereafter, three fundamental judgments of the Czech Constitutional Court on the post-accession relationship between Union law and Czech constitutional law will be analysed. The first concerns the status of Community law in the Czech legal order, the second the status of other Union law, i.e., third pillar law, and the third deals with the question whether the Czech Constitutional Court can test the conformity of national law with European law. We start with an introduction to the issues involved.

National constitutional predisposition towards European law

Unlike the highest or supreme judicial authorities in some other new member states,[18] the Czech Constitutional Court waited two years following the accession

[13] For the commentary *see* Michal Bobek, *supra* n. 3, note 40.

[14] Decision of 3 June 2003, case No. II. US 405/02; decision of 25 Jan. 2005, case No. III. US 252/04; decision of 4 April 2005, case No. IV. US 158/04.

[15] Decision of 19 Feb. 2004, case No. 3 Ads 2/2003-60; decision of 23 Feb. 2005, case No. 6 Ads 62/2003-31.

[16] Council Regulation (EEC) No. 1408/71 on the application of social security schemes to employed persons and their families moving within the Community, *OJ* [1971] L 149/2, as amended.

[17] ECJ case C-302/04 *Ynos*.

[18] For the detailed analysis of the first experiences of the courts *see* Alfred E. Kellermann, Jenö Czuczai, Steven Blockmans, Aneli Albi, Wybe Th. Douma (eds.), *The Impact of EU Accession on the Legal Orders of New Member States and (Pre-)Candidate Countries. Hopes and Fears* (The Hague, T.M.C. Asser Press 2006), in particular Part III.

to present its general stance on the basic doctrines of European law and their adoption by the Czech constitutional order. When it finally did so in the spring of 2006, the Court could exploit a lively academic debate on the operation of Community law within the Czech legal order,[19] which had started immediately after the adoption of the 'integration' clause of the Czech Constitution on the accession to the EU,[20] as well as its own experiences.[21] Several unprecedented and important questions called for a resolution.

The first concerned the constitutional basis for the operation of Community law in the Czech constitutional order. Does the 'integration clause' of Article 10a Constitution, which allows for the transfer of some powers of Czech authorities by way of an international treaty to an international institution, and thus for the accession to the European Union, institute also, in the inverse direction, the opening up of the domestic legal order for the operation of the EC/EU Treaties and their derived law under the conditions determined by these Treaties and by the Treaty of Accession? Does it matter that Article 10a does not state that Community law can be directly applicable and has priority over Czech (statutory) law, like the constitutional clauses on membership of the European Union in some other new member states do?[22] Or is the *monistic clause* of Article 10 Constitution, which

[19] For the most recent critical analysis of the debate *see* Jiri Malenovsky, 'K nove doktrine Ustavniho soudu CR v otazce vztahu ceskeho, komunitarniho a mezinarodniho prava' [About the new doctrine of the Czech Constitutional Court on the relationship between the Czech, Community and international law], *Pravni rozhledy* [Legal Horizon] No. 21/2006, p. 774-783. This was another feature of the years following 'the velvet revolution' of 1989, persisting from the past in the lawyers' community across the scene: not to discuss the current business of the law-/constitution-maker. Participants to the debate exploited their own sources of information about the relevant legal provisions of the former member states, without being familiar enough with their local legal and jurisdictional contexts. One of the few positive exceptions in this respect was the conference volume '*Ustava a mezinarodni pravo*' [Constitution and International Law] (Brno, Masarykova univerzita 1999) and in particular an impetus for a constitutional change, brought by Jiri Malenovsky, 'Komentovany navrh clanku Ustavy České republiky upravujici jeji vztah k mezinarodnimu pravu' [Commented draft articles of the Constitution of the Czech Republic on its relationship to international law] *Pravnik* [The Lawyer] (1999), p. 385-404, who was inspired by the new Polish Constitution 1997 (Arts. 89-91).

[20] Prior to this amendment, Art. 10 of the Constitution stipulated only a limited precedence of international treaties concerning human rights and fundamental freedoms over statutes. This effect has been extended by Constitutional Act No. 395/2001 Coll. on all (self-executing) international treaties and accompanied by the new Art. 10a, which reads as follows: '(1) *Certain powers of Czech republic authorities may be transferred by a treaty to an international organization or institution. (2) The ratification of the treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in referendum.*' For the explanation *see* Jiří Zemánek, 'Czech Republic' (national report) in Alfred E. Kellermann a. o. (eds.), *supra* n. 18, p. 313-330.

[21] Cf. conference volume '*Rizeni o predbezne otazce a narodni soudy/Das Vorabentscheidungsverfahren und die netionalen Gerichte*' (Praha, Linde 2005).

[22] For instance, Art. 91(3) Polish Constitution (direct application, precedence), Art. 7(2) Slovak Constitution (precedence).

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stipulates the priority of ratified international treaties (as a part of the legal order, keeping their authenticity of genuine self-executing international instruments) over statutes, but not over the Constitution, the respective constitutional medium of the national operation of Community law? A third possibility is to consider both Articles relevant, which implies their *lex specialis* (integration clause) – *lex generalis* (monistic clause) alliance.

Another question to be answered was on the duty of the Czech authorities to observe obligations resulting from international law, contained in Article 1(2) Constitution. Does it also cover the obligations under the Treaty of Accession and the *acquis?* Can this duty – as a national counterpart of the principle *pacta sunt servanda* of the law of international treaties – be a pendant of the principle of loyal co-operation in the EC Treaty, supporting the obligation of due implementation of Community legal acts by legislative bodies as well as the *harmonious interpretation* of national legal provisions with Community law by administrative and judicial bodies? And if so, what are the inherent limits to the application of this rule? And to what extent does the Constitutional Court have the power to review the constitutionality of statutes implementing Community acts? Should this power be restricted to measures adopted within the discretion allowed by the relevant Community act, while other implementing measures which leave the member states no discretion (in recent Czech legal literature called 'necessitated' measures), can (or must?) escape constitutional review? Moreover, should the Constitutional Court leave the duty to disapply national provisions contrary to Community law and thus give priority to Community law to the general courts, if necessary after a preliminary ruling of the Court of Justice? Or, instead, should the Constitutional Court itself become a genuine 'European court' and, in a 'dialogue' with the Court of Justice, decide to annul the national legal provision contrary to Community law as also being contrary to the Czech constitutional order? That brings us to another question. Should the Constitutional Court comprehend the operation of Community law in the Czech legal order as conditioned not only by compliance of the Community with the powers conferred on it by the Treaties, but also with fundamental rights and rule of law principles, equivalent to those 'essential requirements for a democratic state governed by the rule of law' which may not be amended according to the Czech Constitution (Article 9.2 Constitution)?

Another topic to be decided was to what extent the differences between the first and the third pillar law justify the different treatment of third pillar law from the perspective of the national law? Should constitutional review of (acts implementing) secondary third pillar law not only involve the 'essential requirements for a democratic state governed by the rule of law', but the whole constitutional order?

The benefit of lessons learnt by other member states?

The Constitutional Court's position was influenced by two circumstances: the Czech judicial authorities could not participate in the course of formation of this doctrine prior to accession and had to accept it as it stood at the moment of accession; and secondly, the Constitutional Court has only recently acquired the position of a promoter of democratic values within Czech society. How should it deal with the experience collected by the constitutional practices of the older member states?

Should the Constitutional Court learn from the Irish[23] or German[24] lesson and consider national acts implementing Community acts which leave national authorities no discretion (so called 'necessitated' implementation) to be immune from constitutional review, because the national authorities have been deprived of the competence to question Community acts, even indirectly, by the transfer of powers to the European Union? Or should it follow the Austrian[25] or Polish[26] practice of full constitutional review of implementing legislation, regardless of whether it was necessitated or not? Or could it feel inspired by the French *Conseil constitutionnel*,[27] which denounces review of 'necessitated' implementation measures unless they are contrary to an express provision of the Constitution, relying otherwise on the competence of the Court of Justice to rule on the compliance of Community acts with the Treaties and fundamental rights and principles? Of course, the positions of these constitutional courts must be considered in their proper context and against the background of the legal environment of their member state, but it was to be expected that the case-law of other constitutional courts could influence the Czech Constitutional Court.

The birth of the doctrine

In a decision of 8 March 2006, the Czech Constitutional Court seized the opportunity to explain its approach to Community law when it was confronted with an inconspicuous application for constitutional review of a Government Order[28] implementing the Commission regulation on *sugar quotas*.[29] The applicants

[23] Art. 29.4.10 Constitution of Ireland; case *Greene* v. *Minister for Agriculture*, [1990] 2 IR 17, for commentary *see Common Market Law Review* (1999), p. 830.

[24] Case *Bananenmarktordnung*, decision of 7 June 2000, BverfGE 102, 147.

[25] Karl Korinek, 'Die doppelte Bedingtheit von Gemeinschaftsrecht-ausführenden innerstaatlichen Rechtsvorschriften', in S. Hammer, A. Slomek, M. Stelzer, B. Weichselbaum, *Demokratie und sozialer Rechtsstaat in Europa. FS Theo Öhlinger* (Wien 2004), p. 131.

[26] Cf. decision of the Trybunal Konstytucyjny of 11 May 2005, case No. K 18/04, reported on 17 May 2005 in Dz.U. (Polish collection of laws) No. 86, p. 744.

[27] Decision of 10 June 2004, case No. 2004-496 DC.

[28] Nos. 364/2004 Coll. and 548/2005 Coll.

[29] Nos. 1260/2001/EC and 1609/2005/EC.

claimed that the principles of equality among producers, their freedom to conduct business and their right to undisturbed use of property had been infringed.[30]

In an *obiter dictum* the Constitutional Court stated that the validity of directly applicable secondary Community law cannot be tested against the Czech Constitution, as the adoption of the act by Community institutions was authorised through the conferral of specified sovereign powers of the state on the Community by the Treaty of Accession concluded under Article 10a Constitution. This provision is a *two-way* medium: it enables the transfer of powers and opens up the Czech constitutional order for the direct effect of such acts-determined solely by Community law itself, without being subject to national constitutional review. The Constitutional Court thus in principle accepted the competence of the Court of Justice as the sole arbiter of the validity of Community acts.

But at the same time, the Constitutional Court, by means of a reference to the earlier case-law of the German *Bundesverfassungsgericht* (the famous *Solange II* and *Maastricht* cases), refused the absolute and unconditional supremacy of Community law. The Court reasoned that since the transfer of powers by the Treaty of Accession (implicitly) had not been unconditional, the exercise of the transferred powers must not threaten '*the fundamentals of state sovereignty and the essential attributes of a democratic state governed by the substantive rule of law*'. An infringement of these core constitutional values and principles, which are even beyond the reach of the *pouvoir constituant* as they cannot be amended (Article 9(2) and (3) Constitution), would surpass the powers conferred on the Community by the Treaty of Accession. In the highly unlikely case that this situation would materialise, it would entail – in the opinion of the Czech Constitutional Court – a suspension of the conferred powers, depriving the respective Community act of its priority position within the Czech legal order and allowing national authorities to disregard it.[31]

The Constitutional Court subsequently made a distinction between 'necessitated' and 'non-necessitated' implementing provisions. Those in the first category can only be tested against the said core constitutional values and principles. In the hypothetical case that a Community act transgresses the scope of powers transferred by the Czech Republic on the Union and infringes the core constitutional values and principles on which also the Union is founded and which it has to respect (Article 6 TEU), the act in question would not be binding in the Czech

[30] Decision of 8 March 2006, case No. Pl. ÚS 50/04 *Sugar Quotas* (published as No. 156/2006 Coll., the English translation is available under <http://test.concourt.cz/angl_verze/cases.html>.

[31] The ConstC did not refer expressly to more recent cases *Bananenmarktordnung* and *Alcan* (2000) or *Görgülü* (2004), where the BVerfG defined more restrictive conditions of admissibility for a constitutional review of Community acts, departing from the need of an individual violation of fundamental rights ('ausbrechender Rechtsakt') to a general decline ('Fehlentwicklung'). Nevertheless, it shared, without any doubt, this position.

legal order, and acts implementing it would be invalid *per se*. Presumably, this invalidity will not be enforceable before annulment of the implementing provision by the Constitutional Court.[32]

In contrast, non-necessitated implementation measures will not only be subjected to review concerning their compliance with the constitutional core, but also with other constitutional provisions. In other words, if a Community act leaves the implementing authorities discretion, they have to respect the constitutional order as a whole.[33] Nevertheless, although national measures implementing Community law which leaves or explicitly delegates scope for legislative discretion to the member state[34] may be tested against the whole constitutional order, the test should reflect the obligations of Union membership. The member states' discretion is limited[35] by the overarching general principles of primary Community law. Accordingly, the affected provisions of the Czech Charter of Fundamental Rights and Basic Freedoms are to be interpreted in a way consistent with fundamental rights of Community law ('taking them into account'), that 'irradiates' the whole Czech constitutional order. The Constitutional Court bases this position on Article 1(2) Constitution stipulating 'the observance of obligations of the Czech Republic resulting from international law', which implies also obligations resulting from the Treaty of Accession, including the principle of sincere co-operation laid down in Article 10 EC.

Against this doctrinal background, the Constitutional Court analysed the case-law of the Court of Justice on the freedom to conduct a business, the principles of non-discrimination, proportionality, legal certainty and the prohibition of retroactivity, entailing the limits of legislative discretion of the Czech implementing authority. It also considered the level of protection of fundamental rights: the observance of the national constitutional (Czech Charter of Fundamental Rights) or international standard (European Convention on Human Rights) will be justified only if they guarantee a higher level of protection of individuals than the

[32] In contrast to some other member states, the decision of the Czech Constitutional Court has constitutive effect in this respect, which protects the legal certainty of those who *bona fide* relied on the legality of the implementing provision before annulment; an ordinary court, faced with a question on the constitutionality of any Czech statute (incl. a statute implementing a Community act) shall submit the matter to the Constitutional Court (Art. 95(2) Const).

[33] Under Art. 112 Const the constitutional order is made up of the Constitution itself, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to the Constitution and several constitutional acts from the period immediately preceding the division of Czechoslovakia.

[34] The ConstC referred to the case 34/73 *Variola* [1973] *ECR* 981, restricting the implementation of Community regulations to the specific circumstances.

[35] ECJ cases 5/88 *Wachauf* [1989] *ECR* 2609, C-260/89 *ERT* [1991] *ECR* I/2925, C-309/96 *Annibaldi* [1997] *ECR* I-7493 and C-292/*97 Karlsson* [2000] *ECR* 2737, *see* Declaration No. 12 concerning the explanations relating to the EU Charter, Final Act to the Treaty establishing a Constitution for Europe (Art. 51).

European law does, in particular through the case-law of the Court of Justice.[36] Without qualifying the implementing act under review as necessitated or not, the Constitutional Court concluded that

> the current standard for the protection in the Community does not […] give rise to any presumption, that this standard is of a lesser quality than […] the level of protection provided in the Czech Republic.[37]

We may conclude that as long as the protection given by the Community legal order will be at least equivalent, the Constitutional Court will not test implementing provisions against Czech fundamental rights.

Following Court of Justice judgments on the review of decisions on economic policy, the Constitutional Court demonstrated judicial self-restraint and departed from its own earlier (pre-accession) case-law, without questioning the substance of the Government Order, i.e., the key it contained for the distribution of the production quotas on sugar. It found itself not in a position to assess the fairness of the key within the procedure on general review of legality, assuming that an adequate assessment reflecting the interests of all individuals concerned (farmers, producers) would be provided by the competent court in the specific case.

The Constitutional Court also considered the competence of the Court of Justice as the final interpreter of Community law 'in co-operation' with national courts under Article 234 EC on references for a preliminary ruling. However, it did tackle the question whether it itself was under a duty to refer, and it did not have to as *in casu* it could rely on clarifications of the Community regulation on sugar quotas provided in the case-law of the Community Court (*acte éclairé*).

Finally, the Constitutional Court annulled one provision of the Government Order for lack of competence (Article 78 Constitution), because it was adopted in the domain of the Community competence.

The extension of the doctrine to non-community union law

In a decision of 3 May 2006, the Constitutional Court reviewed legislation[38] implementing the Council framework decision on the *European Arrest Warrant* and the surrender procedures between member states.[39] Two grounds for incompatibility were alleged before the Court. First, the framework decision deprives

[36] Presumably, the Constitutional Court paid attention to the rule on co-existence of these three standards as set out in Art. 53 Charter of Fundamental Rights EU.

[37] Point VI.A-3 of the decision.

[38] Amendment acts to the Criminal Code (No. 537/2004 Coll.) and to the Code on Criminal Procedure (No. 539/2004 Coll.).

[39] No. 2002/584/JHA, *OJ* L 190 of 18 July 2002.

the member states of the option not to arrest and extradite its own citizens in case of surrender request of another member state (although it allows for the execution of the arrest warrant conditional upon a guarantee of return). According to the applicants, the legislation implementing this obligation was incompatible with the constitutional clause which prohibits 'forcing the citizen to leave his homeland'.[40] Second, the applicants claimed infringement of the principle of *nullum crimen sine lege*,[41] because for 32 offences listed (not defined) by the framework decision, an arrest warrant must be executed without verification of the double criminality requirement, i.e., without verification of those offences under Czech criminal law.

The Constitutional Court refused to assimilate the implementation of the framework decision in the Czech legal order to the reception of 'normal' international treaty obligations. Instead, it extended its legal reasoning developed in the *Sugar quotas* decision regarding Community law to Third Pillar law, when it held that the legal nature of the obligations under Union law indicate a narrower referential framework for constitutional review than for international law. The judgment provoked two dissenting opinions, both asserting the international law nature of the framework decision and calling for extensive constitutional review.

The Constitutional Court, however, based its position on the following considerations. The duty of the member states to implement framework decisions is governed by the principle of loyal co-operation, which is nearly identical with the duty to implement Community directives, irrespective of the lack of direct effect in case of non-implementation (Article 34(2)b EU). The member states must implement framework decisions in a way most suitable to the result pursued, to help to establish the Area of freedom, security and justice within the Union. This duty includes, as the Court of Justice decided in the *Maria Pupino* case to which the Constitutional Court referred,[42] a Union law-consistent interpretation of the whole of national law, which however cannot lead to a *contra legem* interpretation.

The Constitutional Court shared in its *ratio decidendi*[43] the opinion that the constitutional clause prohibiting the forced exclusion of a Czech citizen from his or her national community was not applicable to surrender under the European Arrest Warrant Framework decision.[44] The clause was introduced into the

[40] Art. 14.4 CzCharter.

[41] Art. 39 CzCharter.

[42] ECJ decision of 16 June 2005, case No. C-105/03 *Maria Pupino* [2005] *ECR* I/5285.

[43] Decision of 3 May 2006, case no. Pl. ÚS 66/04 *European Arrest Warrant* (published as No. 434/2006 Coll., the English translation is available under <http://test.concourt.cz/angl_verze/cases.html>.

[44] Jiří Zemánek, 'Evropskopravni meze prezkumu ustavnosti implementace ramcoveho rozhodnuti o eurozatykaci' [The European law limits of constitutional review of the implementation of the Framework Decision on the European Arrest Warrant], *Pravni rozhledy* [Legal Horizon] (2006), p. 90 et seq.

Czechoslovak Charter in 1992 as a *memento of the unlawful practice* of the former communist regime which expelled its political opponents ('dissidents') from the country (historical interpretation). The Court also referred to the fact that the Slovak Constitutional Court had not invalidated the legislation implementing the framework decision as being incompatible with the equivalent clause in the Slovak Constitution (Article 23(4); comparative interpretation). Moreover, an interpretation of the clause as instituting a general ban on the extradition or surrender of Czech citizens would not only be contrary to the framework decision of Union law, but also to the principle of equality of Union citizens before the law.[45] Czech citizens should not be treated more favourably than other Union citizens beyond the scope allowed for by the framework decision.

The Constitutional Court was not discouraged in its 'pro-Union interpretative drive' by the European Arrest Warrant decision of the Polish constitutional court,[46] which 'discovered' in a similar clause in the Polish Constitution – but in a different constitutional context – a general ban of extradition of nationals, including not only compulsory exile, repudiation or any other involuntary exclusion on arbitrary grounds for unlimited period of time, but also the surrender on the basis of an European Arrest Warrant.

No national legislative discretion – no constitutional review of the implementation act

The Constitutional Court considered that its competence of constitutional review also has been restricted in the domain of Third Pillar Union law, in spite of the narrower scope of transferred powers as compared to Community law. There is no competence of review when a framework decision does not leave the member states any discretion (necessitated implementation), with a reservation of a review against the core constitutional values and principles (*see* above). This was exactly the case with the direct horizontal enforceability of foreign criminal decisions listed in Article 2(2) of the European Arrest Warrant framework decision. This provision excludes a double check of criminality of the alleged offence, because the framework decision does not aim for any harmonisation of substantive criminal law of member states, but only imposes on them a procedural obligation of mutual assistance in enforcement of their criminal laws (the principle of territoriality). In the same vein, nationals of a member state executing a European Arrest Warrant may not be exempted from surrender (the principle of personality will no longer be applied). The execution may only be subjected to a guarantee of

[45] Art. 80 EU Charter.
[46] Decision of 27 April 2005, case No. P 1/05.

the issuing member state assuring that the person, after being heard, will be returned to the executing State to serve the custodial sentence there; otherwise an exemption may be granted in the case of a threat of violation of fundamental rights and legal principles as enshrined in Article 6 EU.[47] Both provisions left the national legislature no leeway. Therefore, the Constitutional Court could have spared itself the intellectual trouble of explaining its reasoning on these issues – the simple notice would have sufficed that no core values or principles were at stake. However, the topic of the extradition of nationals was so politically sensitive, not to mention that it was an issue being followed by Czech mass-media, that the Court simply did not dare to avoid it.

The equal guarantees of fundamental rights

The free movement of persons within the Union requires, on the one hand, enhanced direct co-operation between the judicial authorities of member states. This is based on grounds of mutual confidence in the guarantees of fair trial and legal remedies offered by national systems of criminal procedure to persons, even if a member state could reach a different judgment on criminality and punishment on substantive law issues of the respective offence.[48] On the other hand, the rights of Union citizens to move and reside freely are accompanied by the duty to respect the criminal laws of the host country and to accept criminal responsibility for their infringement.

The Constitutional Court thus accepted the horizontal dimension of European law: the surrender may be allowed, as long as the rule of law is upheld. The Czech Constitution has been opened to the European values common to the legal culture and constitutional traditions of the member states.[49] The legitimate concern of the Czech state about equal protection of its citizens in criminal proceedings abroad is, according to the Court, implied in the guarantees maintained by the framework decision, which refers in its Preamble to the Union standard of fundamental rights (Article 6(2) EU) as well as to the system of their enforcement towards member states (Article 7 EU):

> The contemporary standard for the protection of fundamental rights within the European Union does not, in the Constitutional Court's view, give rise to any presumption that this standard … , through invoking the principles arising there-

[47] The Court stated with reference to *H.Ch. Biron, K.E. Chalmers and C. Stanbrook* (without any more specific sourcing), that the countries, adhering unambiguously to the principle of territoriality in extradition affaires, like UK, Ireland or Malta, do not need to settle such a problem.

[48] The Court referred to the ECJ joint cases No. C-187/01and C-385/01*Gözütok and Brügge* [2003] *ECR* I/1345.

[49] Cases No. Pl. ÚS 31/03 and No. Pl. ÚS 5/01.

from, is of a lesser quality than the level of protection provided in the Czech Republic.[50]

The Constitutional Court, in contrast to the German Federal Constitutional Court,[51] does not require that in every individual case a concrete review should be made of whether the rights of prosecuted person are respected. Although the level of safeguards in the implementation legislation guaranteeing the protection of Czech citizens was not challenged by the applicants in the case in general, i.e., beyond the above-mentioned two issues,[52] the Constitutional Court nevertheless reviewed the issue, taking into account the whole Czech constitutional order.

Such a safeguard was found in the general provision of the Code on Criminal Procedure,[53] which forbids the Czech judicial authorities to extradite persons (in the classical meaning of the term as well as in terms of surrender under the framework decision) if this would entail a violation of the Constitution or of a provision of the Czech legal order which must be adhered to without exception, or if it would damage some other significant protected interest of the state. The Constitutional Court *expressly* deduced that this provision primarily concerns Czech citizens' fundamental rights as enshrined in the Czech Charter, since they constitute the essentials of citizenship and therefore must be guaranteed as 'other significant protected interest of the state'. We may criticize this reasoning, because the special provision in the implementing act, which exhaustively lists the reasons for a rejection of arrest warrants,[54] does not refer to the general provision of the Code on Criminal Procedure (*lex specialis derogat legi generali*). Such a reference would have undermined the unlimited duty to extradite nationals under the framework decision – and would have rendered the implementation legislation deficient from the perspective of Union law (of course, it was not a task of the Constitutional Court to deal with this question): the Czech judicial authorities should not test individual cases against fundamental rights and should only rely on the procedure for remedy of 'a clear risk of a serious breach by a Member State [issuing the EAW] of principles mentioned in Article 6(1)' EU, foreseen in Article 7 EU.

This most controversial part of the legal reasoning of the Constitutional Court certainly cannot be understood as excluding other resident persons (Union citizens, non-Czechs) from the respective state guarantees, indeed. Persons to be surrendered, regardless of their nationality, also retain the remedial right to submit

[50] Case *EAW* (*see* n. 43), para. 71; an identical statement was made in *Sugar Quotas* case (*see* n. 30).

[51] Decision of 18 July 2005, 2 BvR 2236/04, para. 119.

[52] Prohibition to force citizens to leave the country and *nullum crimen sine lege* (Arts. 14(4) and 39 CzCharter).

[53] § 377.

[54] § 411(6).

within the respective proceedings a complaint against the relevant measures of Czech judicial authorities with suspensive effect (§ 411(5)), as well as a constitutional complaint afterwards (Article 87(1)(d) Constitution). In their complaint they can indicate the reasons which could justify starting the procedure under Article 7 TEU.

Then, the Constitutional Court dismissed the action, without directing an amendment to the Czech Charter.[55] But it also declared that the constitutional principle that Czech law shall be interpreted in conformity with the Czech Republic's obligations resulting from Union membership (Article 1(2) Constitution) was

> … limited by the possible significance of the constitutional text … If the national.methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European law, it is solely within the lawmaker's prerogative to amend the Constitution.[56]

By this declaration the Constitutional Court certified – in the European law context – the relevance of the prohibition on supplementing or amending the Constitution in any other way than by constitutional acts (Article 9(1)). This understanding of the limits of consistent interpretation of the Constitution calls for a further elaboration of the Constitutional Court's position – which is not settled yet – in the months and years to come.[57]

Taking community law seriously by an alternative resolution

The most recent 'European' case[58] of the Constitutional Court dating from 16 January 2007 follows the general line of the previous cases. Contrary to a Council directive,[59] maximum prices of medications had been fixed by regulations of the Ministry of Public Health, instead of by individual decisions taken in the administrative procedure. The applicants referred their claim to the Constitutional Court,

[55] The political, not the legal motivation of the claimants (the group of MPs) was obvious. They were well aware of the impossibility to reach an amendment to the Czech Constitution (by the qualified three-fifths majority in both Chambers of Parliament) soon. They simply wished to torpedo one of the elements of the Area of freedom, security and justice, as an important part of the emerging political union.

[56] Case *EAW* (*see* n. 43), para. 82.

[57] Cf. Jan Komarek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of Contrapunctual Principles', *Common Market Law Review* (2007), p. 39.

[58] Decision of 16 Jan. 2007, case No. Pl. ÚS 36/05.

[59] No. 89/105/EEC relating to the transparency of measures regulating the prices of medical products for human use and their inclusion in the scope of national health insurance systems (*OJ* L 40, 11.2.1989, p. 8-11).

which they regarded as 'a guardian of implementation duties of the State under European law', empowered by the Constitution to review the compliance of Czech acts with Community law and to strike down its provisions when incompatible with Community law. They obviously understood the implementation duties and the right of legal remedy required by the Community directive to be among the essentials of the rule of law as a matter of constitutional principle.

The Constitutional Court refused to take Community law as a direct criterion of constitutional review, since the Constitution does not grant it this competence. The Court took the infringement of implementation duties into account only insofar as it also amounted to a breach of the constitutional order. It left aside the necessitated Czech implementation of Community law, which escapes any constitutional review (as long as it does not infringe the core values and principles).

Referring again to the *Sugar Quotas* case, the Constitutional Court detected equivalence between the Community law and the Czech constitutional order as concerns fundamental rights protecting fair trial and good administration. From the relevant Court of Justice case-law[60] it deduced the necessity for public authorities to balance the distortion of competition resulting from the fixing of maximum prices with proper guarantees of the rights of all affected persons, especially through introduction of an effective judicial remedy. Since the ministerial regulation affecting specified individuals was in reality a bunch of individual decisions depriving the individuals of the required transparency, access to justice and acceptability of the public authority's decision, it infringed the constitutional principle of rule of law. On this basis of a Community law-consistent interpretation of the Czech law, the Constitutional Court annulled the contested provision of the regulation. In order to allow for the enactment of a new system of maximum prices, the Constitutional Court postponed the execution of its judgment until 31 December 2007.

Final remarks

The *obiter dicta* of the analysed decisions of the Czech Constitutional Court in 'European cases' demonstrate that legislation implementing Community or Union acts which leave national authorities no discretion can be reviewed by the Court only against the core values and principles of the Czech constitutional order (including fundamental rights, as long as the level of their protection is higher than the Union standard). Other, i.e., non-necessitated, Czech legislation can additionally be tested against the other provisions of the Czech constitutional order. If

[60] Case C-222/00 *Commission* v. *Finland* [2003] *ECR* I-5727, case C-424/99 *Commission* v. *Austria* [2001] *ECR* I-9285.

an infringement of the core constitutional values and principles occurs on account of a Community or Union act, the implementing legislation will be annulled, since the Community or Union act in question, adopted in excess of powers transferred on the Community/Union, would be unenforceable within the Czech legal order. Prior to taking such a decision, the Constitutional Court admitted that it should, first, act as a European court, i.e., act on the basis of an *acte clair* or submit the question for preliminary ruling.

Compared to constitutional and highest courts in other member states, the Constitutional court thus seems take 'the middle of the road'. It was inspired by the German *Bundesverfassungsgericht* rather than by the Austrian or Polish constitutional courts. Its European stance is comparable to that of the French *Conseil constitutionnel*, which reserves its testing power only to statutes contradicting express (in the Czech situation: 'core') provisions of the Constitution, and close to the position of the Italian Constitutional Court, too.[61]

Although there is no explicit reference to this in the judgments, the Constitutional Court is likely to have taken into account the Czech *ex ante* system of the constitutional review of international and integration treaties (Article 87(2) Constitution). The constitutionality of the Treaty of Accession, including the whole body of *acquis communautaire et de l' union,* could have been reviewed prior to its ratification in 2004.[62] But since no such *ex ante* review had been asked for and a Treaty cannot be challenged retroactively, it must now be assumed that there are no obstacles of full effect of Union law within the Czech constitutional order (except of course in case of infringement of core values and principles). This may be the only presumption consistent with the principle of legal certainty, making the body of Union law immune from any challenges concerning its peaceful coexistence with the Czech Constitution; otherwise this procedure of *ex ante* review would be meaningless. Nevertheless, the Constitutional Court did not go so far in its *obiter dictum* as to draw conclusions from the *status quo* of accession *pro futuro*. However, there is no reason to believe that the Court will depart from its doctrine of European law. It rather will refine it when it is faced with other effects of Community law in the Czech legal system, like the principles of the primacy, direct effect and state liability for damage arising out of a breach of Community law.

[61] This Court maintains a reservation against already recognized principle of supremacy of Community law over national law in respect of the protection of fundamental rights guaranteed by the Constitutional Charter: Corte cost., the decision of 27 Dec. 1973, No. 183 *Frontini e Pozzani*, Foro italiano 1974 I, p. 314, confirmed later by the decision of 8 June 1984, No. 170 *Granital*, Foro italiano 1984 I, p. 2062.

[62] Cf. the decision of the Polish constitutional court on the Treaty of Accession (*supra* n. 26), for commentary see Krystyna Kowalik-Bańczyk, 'Should we Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', *German Law Journal* (2005) 10, p. 1357; J. Galster (ed.), *Podstawy prawa Unii Europejskej* (Torun 2004), chapter XIII.4 by K. Witkowska-Chrzczonowicz, p. 548-550.

The Court also seems to be aware of the need of self-restraint. It avoids unnecessary judicial activism and retreats to the background if it can leave the adjudicating to ordinary courts in their role of 'European' courts.

The constitutional position of acts of Third Pillar Union law in the Czech legal order is remarkable. Although not all effects of framework decisions in member states' legal orders have as yet been clarified by the Court of Justice,[63] and even the validity question concerning the framework decision on the European Arrest Warrant had not been answered at the time of its decision,[64] the Constitutional Court felt encouraged to decide the case on implementation of this framework decision, employing *lege artis* interpretative methods of European law without hesitation. Its reasoning has probably been helpful to the Court of Justice in deciding the *Advocaten voor de Wereld* case. But perhaps the main message that the decision of the Constitutional Court sends is that a firm stance of national courts on issues as the validity or interpretation of *in casu* the framework decision, might be just another manifestation of the fruitful dialogue between national courts and the ECJ. This approach is to be welcomed as an intellectual inspiration for the Court of Justice and an indicator of the capacity of national judiciaries to influence its opinions.[65]

[63] The case of *Maria Pupino supra* n. 42 makes clear that there is a duty of consistent interpretation, but is clear on other effects of framework decisions, if any.

[64] Cf. the reference of the Belgian Arbitragehof of 13 July 2005 for a preliminary ruling (case No. C-303/05), not decided by the ECJ until 3 May 2007 (n.y.r.).

[65] Anne-Marie Slaughter, Alec Stone Sweet, Joseph H.H. Weiler (eds.), *The European Court and national Courts – Doctrine and Jurisprudence. Legal Change in Its Social Context*, Juliane Kokott, Report on Germany, Oxford 2000, p. 130.