

Preliminary references in the Czech Republic

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I. Preliminary references from Czech courts, 1 May 2004 – 30 April 2011 – “business as usual”

14 preliminary references; 8 from first-instance courts, 6 from supreme courts (5 SAC):

- C-475/05 Vorel: 28 November 2005, Okresní soud v Českém Krumlově (first instance court); order of the Court,
- C-64/06 Český telecom: 7 February 2006, Obvodní soud pro Prahu 3 (first instance court);
- C-161/06 Skoma-Lux: 24 March 2006, Krajský soud v Ostravě (first instance court);
- C-282/06 OSA: 28 June 2006, Krajský soud pro Střední Čechy (first instance court);
- C-572/07 RLRE Tellmer Property: 24 December 2007, Krajský Soud v Ústí nad Labem (first instance court);
- C-233/08 Kyrian: 30 May 2008, Supreme Administrative Court (cassation – last instance court);
- C-111/09 Bilas: 23 March 2009, Okresní soud v Chebu (first instance court)
- C-299/09 DAR Duale Abfallwirtschaft und Verwertung Ruhrgebiet: 30 July 2009, Supreme Administrative Court (cassation – last instance court);
- C-339/09 Skoma-Lux: 24 August 2009, Supreme Administrative Court (cassation – last instance court);
- C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany: 5 October 2009, Supreme Administrative Court (cassation – last instance court);
- C-399/09 Landtová: 16 October 2009, Supreme Administrative Court (cassation – last instance court);
- C-17/10 Toshiba Corporation and Others: 11 January 2010, Krajský soud v Brně (first instance court)
- C-327/10 Lindner: 5 July 2010, Okresní soud v Chebu (first instance court);

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- C-514/10 Wolf Naturprodukte: 2 November 2010, Supreme Court (extraordinary appeal, last instance court)

II. The Czech Constitutional Court and preliminary references to the ECJ

Concerning the “Simmenthal mandate” of ordinary courts

Order of 2 December 2008, Pl. ÚS 12/08, “TV v kapse” (published in the official report of the CC) – dealing with the question of priority of review quite liberally:

“34. The Constitutional Court is of the view that, in such a situation, the [ordinary court referring a question of constitutionality to the CC] should have decided in the first place on the basis of the requirements laid down in the judgment Simmenthal II concerning the non-applicability, where appropriate, of a contested provision due to its conflict with European Community law. *The Constitutional Court leaves it entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the Czech Republic.* If it primarily focuses on the review of the conflict with European Community law and asserts, as in this case, that the statutory provision under review is in conflict therewith, it must draw from its conviction the consequences in accord with the Court of Justice’s jurisprudence, that is, that the contested provision not be applied (on this point, cf. the similar approach of the German Federal Constitutional Court in its 11 July 2006 Judgment in the matter 1 BvL 4/00, BVerfGE 116, 202 at p. 214, points 51 to 53). In principle it is not within the Constitutional Court’s competence to interfere with an ordinary court’s considerations as to whether its conclusion on the conflict of the contested provision with European Community law is well-founded or not; it does, however, draw attention to the fact that such conclusion must be duly reasoned, otherwise it could become the subject of review on the part of the Constitutional Court, in the context of a proceeding on a constitutional complaint, as to whether the court’s interpretation of the decisive legal norms is foreseeable and reasonable, whether it corresponds to the settled reasoning of judicial practice, or whether, on the contrary, it is an arbitrary (wilful) interpretation which lacks meaningful reasoning, whether it diverges from the bounds of the generally (consensually) accepted understanding of the affected legal institutes, alternatively whether it does not represent an extreme or excessive interpretation (see Judgment No. III. ÚS 346/06 of 19 December 2007, the thirteenth paragraph of the reasoning).”¹

- this seems compatible with the ECJ’s ruling in Joined Cases C-188/10 and C-189/10 Melki

Enforcing the obligation to refer

Judgment of 8 January 2009, II. ÚS 1009/08, “Pfizer”:

“21. Although the referral of a preliminary question is a Community law matter, the failure, in conflict with Community law, to make a reference may, in certain circumstances, also entrain a violation of the constitutionally-guaranteed right to one’s

¹ All quotations are taken from the translations of the judgments of the CC, available at its website, <http://www.usoud.cz>.

statutory judge. After all, one must bear in mind the fact that the prerequisite for the entitlement to submit a constitutional complaint is the exhaustion of all procedures afforded the complainant by law for the protection of rights ... A violation of the right to one's statutory judge comes about in the case where a Czech court (against whose decision there is no longer any further remedy afforded by sub-constitutional law) applies Community law but fails, in an arbitrary manner, that is, in conflict with the principle of the law-based state ..., to refer a preliminary question to the ECJ. As follows from the conjunction of Art. 2 para. 3 of the Constitution and Art. 4 para. 4 of the Charter, state power must be asserted only in cases, within the bounds, and in the manner provided for by law, while at the same time preserving the essence and significance of the fundamental rights and freedoms. Should it be otherwise, then that action or act of state power would constitute arbitrary conduct. As the Constitutional Court has repeatedly emphasized, it is not every violation of the norms of ordinary law, in their application or interpretation, which entails a violation of an individual's fundamental rights. Nevertheless, the violation of certain of the norms of ordinary law in consequence of arbitrary conduct (carried out, for ex., by the failure to respect a peremptory norm) or in consequence of interpretation which is in extreme conflict with the principle of justice, might be capable of encroaching upon an individual's fundamental rights or freedoms (...)."

- reasoning very much inspired by the BVerfG's approach (violation of the duty to refer as a violation of one's right to the statutory judge)

Duty to deal with EU law, if it is properly raised

Judgment of 9 February 2011, IV. ÚS 1521/10 "Midwives" (applies the previous ruling beyond the context of preliminary references).

Will the CC itself ever refer to the ECJ?

Judgment of 22 March 2011, Pl. ÚS 24/10, "Data Retention Case":

"25. Above all, the Constitutional Court had to assess the petition filed by the complainants to submit to the European Court of Justice, in compliance with Article 234 of the EC Treaty, a reference for a preliminary ruling concerning the (in)validity of the Data Retention Directive, since there is a significant risk that the Data Retention Directive, on its own, which has been implemented into the Czech legal system by means of the contested provisions and contested Decree, is inconsistent with the EC law. In this respect, the Constitutional Court points out that even after the accession of the Czech Republic to the EU (since 1 May 2004), the norms and standards of Czech constitutional order have remained the reference framework for review performed by the Constitutional Court, since the role of the Constitutional Court lies in protecting constitutionality (Article 83 of the Constitution of the Czech Republic) in both aspects, i.e. the protection of the objective constitutional law, and subjective (i.e. fundamental) rights. *The Community law is not part of the constitutional order, and therefore the Constitutional Court is not competent to interpret it.* Despite this, the Constitutional Court cannot entirely overlook the impact of the Community law on the formation, application and interpretation of national law, all the more so in the field of law where the creation, operation and aim of its provisions is bound up with community law (cf. the relevant judgments of the Constitutional Court Pl. ÚS 50/04 of 8 March 2006 [Sugar Quota III], Pl. ÚS 36/05 of 16 January 2007 [European Arrest Warrant], or II. ÚS 1009/08 of 8 January 2009 Pfizer]. The content of the Data Retention Directive, however, provides the Czech Republic with sufficient space to implement it in conformity with the constitutional order, since its

individual provisions in fact only define the obligation to retain data. For the transposition purposes the objective defined by the corresponding Directive must be met, yet in case of specific laws and bye-laws concerning data retention and handling, including security measures and misuse prevention, it is necessary to follow the constitutional standard based on the Czech constitutional order as interpreted by the Constitutional Court. The reason for this is the fact that the particular implementation form, i.e. the challenged provisions of the relevant laws and bye-laws, is an expression of the will of the Czech legislator, which may vary to some extent as far as the choice of relevant means is concerned, while observing the Directive's objective, yet when making such choice, the legislator was at the same time bound to the constitutional order.”

- ... and a sort of judicial hypocrisy:

“55. Taking the form of an obiter dictum only, the Constitutional Court maintains that it is aware of the fact that owing to the development of modern information technologies and communication means, new and more sophisticated ways of commitment of crime occur, which need to be addressed accordingly. *Nonetheless, the Constitutional Court expresses its doubts whether the very instrument of global and preventive retention of location and traffic data on almost all electronic communications may be deemed necessary and adequate from the perspective of the intensity of the intervention to the private sphere of an indefinite number of participants to electronic communications. Within the European context, such opinion is not at all rare, since the Data Retention Directive has faced substantial criticism since its coming into force, both from the Member States (e.g. the governments of Ireland, the Netherlands, Austria or Sweden have been hesitating to implement it or have not implemented it yet, whereas the latter two have done so despite a publicly announced warning of the Commission to initiate proceedings with the European Court of Justice), and from legislators in the European Parliament, the European Data Protection Supervisor ... All the bodies mentioned above have sought to put the location and traffic data with more adequate instruments (e.g. so-called data freezing allowing the monitoring and retention of necessary and certain data relating to the specific participant to communication selected in advance, provided certain conditions are met), or they have sought its amendments, mainly in the form of providing the individuals affected with sufficient guarantees and means of protection, as well as applying more restrictions on retained data security against threats of third-party leaks and misuse.*

- is it compatible with Melki, para. 56?:

“Before the *interlocutory review* of the constitutionality of a law – the content of which merely transposes the mandatory provisions of a European Union directive – can be carried out in relation to the same grounds which cast doubt on the validity of the directive, national courts against whose decisions there is no judicial remedy under national law are, as a rule, required – under the third paragraph of Article 267 TFEU – to refer to the Court of Justice a question on the validity of that directive and, thereafter, to draw the appropriate conclusions resulting from the preliminary ruling given by the Court, unless the court which initiates the interlocutory review of constitutionality has itself referred that question to the Court pursuant to the second paragraph of Article 267 TFEU. In the case of a national implementing law with such content, the question of whether the directive is valid takes priority, in the light of the obligation to transpose that directive. In addition, imposing a strict time-limit on the examination by the national courts cannot prevent the reference for a preliminary ruling on the validity of the directive in question.”

Finally: the Slovak pensions imbroglio

The case involves a long-time controversy concerning calculation of pensions of retired people who worked a part of the time relevant for the calculation of their pension in the other part of the former Czechoslovak federation.

- the basic rule for calculation was set in the Agreement between the CR and the SR on social security: the seat of the employer determines which state is competent (and obliged to) pay the relevant part of the pension
- the problem: people living all their life in the Czech part of the federation, but working for an employer with the seat in the Slovak part of the federation – according to the Agreement they got their pension from Slovakia
- different economic development in the both parts of the former federation – pensions paid in Slovakia were significantly lower
- numerous constitutional complaints based on the right to social security and the prohibition of discrimination – judgment of 3 June 2003, II. ÚS 405/02 (available in EN at <http://www.usoud.cz/view/4376>):

“The Constitutional Court is not authorized to evaluate the constitutionality of an already ratified international agreement. On the other hand it is required to be guided by Article 88 (2) of the Constitution, under which the judges of the Constitutional Court are bound in their decision making only by the constitutional order and the [Constitutional Court Act]. The Agreement between the CR and the SR on social security is not an agreement which could be considered a component of the constitutional order (see Constitutional Court judgment of 25 June 2002, published under no. 403/2002 Coll.). It is also not an agreement under Art. 10 of the Charter, in the version before the “Euro-amendment.” As its preamble clearly indicates, its purpose was not to secure the fundamental rights and freedoms of citizens. The parties were guided by “the desire to regulate their relationships in the area of social security.” *Therefore, the Constitutional Court can not accept as constitutional an application of one of its provisions which would result in a situation which is not in accordance with the Charter or the Constitution as parts of the constitutional order.*”

- Czech authorities must compensate for the lower pension paid to *Czech citizens* from Slovakia, who *have their permanent residence in the Czech Republic*
- a series of judgments of the SAC disagreeing with the CC – a “ping-pong” between the two courts: so far 16 decisions of the CC quashing decisions of the SAC dealing with various aspects of the problem

The European dimension of the case

The SAC argued that the conditions for compensation (citizenship + residence) would be contrary to EU law once the Czech Republic joins the EU; it implicitly meant that after the CR’s accession to the EU, the “special increment” would have to be paid to any EU citizen to whom the agreement would apply.

The CC rejected this argument, most explicitly in judgment of 20 March 2007, Pl. ÚS 4/06

“the argument put forward concerning Council Regulation (EEC) No 1408/71 ‘can only be designated as inapposite and inappropriate’, since pursuant to its Art. 7 (2), (c), as subsequently amended, ‘this Regulation does not affect the obligations resulting from the provisions of the social security conventions listed in Annex II’; it follows therefrom, that European law has no relevant application ...”

In judgment of 3 March 2009, I.ÚS 1375/07, the CC repeated:

“The Constitutional Court emphasises that the situation resulting from the devolution of the Czech and Slovak Federative Republic was so specific that the adoption of the Agreement was required with regard to legal certainty of citizens in the field of social security. Conclusions made in relation to this case therefore naturally do not apply to pension rights of other migrant persons.”

The problem with this argument: conditions for paying the “special supplement” to pension directly discriminatory against EU citizens, who are not citizens of the Czech Republic and do not have permanent residence there. The CC moreover seems to read the Regulation incorrectly (the Agreement is NOT in the relevant annex to the Regulation; the Regulation cannot authorize directly discriminatory treatment).

The ECJ gets involved...

On 16 October 2009 the SAC referred two preliminary questions to the ECJ, essentially asking whether the CC got it wrong: Case C-399/09 Landtová (first question concerning the compatibility of the special supplement with the Regulation; the second with the prohibition of discrimination on the grounds of nationality):

- problematic involvement of the Czech government
- Salomon-like opinion of AG Cruz-Villalón: it is discriminatory and thus contrary to EU law, but the solution is to pay the special supplement to all
- judgment to be announced 22 June 2011 (after this handout had been prepared)

Some general reflections: on the place of constitutional courts in the EU – from the point of view of the ECJ – “ordinary courts”

- continuing on the themes of “In the Court(s) We Trust?”² concerning national judicial hierarchies and their importance
- “Kelsenian” constitutional courts form part of the European post-war constitutional settlement (Peter Lindseth) with “negotiable constitutions” (Grégoire Webber)
- a different kind of legitimacy than ordinary courts
- who should take part in the “negotiation”?
- “Paul Craig’s question”: comparing national constitutional courts and the ECJ

² J Komárek, “‘In the Court(s) We Trust?’ On the need for hierarchy and differentiation in the preliminary ruling procedure’ (2007) 32 European Law Review 467.