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# **XVith Congress of the Conference of European Constitutional Courts in 2014**

**Cooperation of Constitutional Courts in Europe –  
Current Situation and Perspectives**

**QUESTIONNAIRE**

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## **I. CONSTITUTIONAL COURTS BETWEEN CONSTITUTIONAL LAW AND EUROPEAN LAW**

### **1. Is the constitutional court obliged by law to consider European law in the performance of its tasks?**

The Constitutional Court of the Czech Republic dwells on the dynamics of European law extensively, and it is appropriate to stress here by way of an introduction that its case law also underwent a certain development in relation to European law.

Even before the Czech Republic's accession to the European Union (the "EU"), the Constitutional Court took a pro-active approach, and in its case law, it developed and then further elaborated on an approach to values that does not give preference to the level of formalist perception of the law in the interpretation of legal regulation, and instead stresses the value aspects of EU law that should not be *a priori* viewed as foreign law, but rather as law influencing legal interpretation in what was then still a candidate country (cf. Constitutional Court Judgment Pl. ÚS 5/01 of 16 October 2001, the "Milk Quotas Case").

On 1 July 2002, Constitutional Act No. 395/2001 Sb., referred to as the "Euro-amendment to the Constitution", entered into force. For the sake of lucidity of this national report, let us also work with this (not quite exact) term. Said amendment to the Constitution responded in particular to the existing problematic definition of the relationship between international law and domestic law that might have caused complications in the performance of international undertakings, given the pending integration of the Czech Republic into EU structures. The Euro-amendment to the Constitution brought about the following three principal changes:

- the Czech Republic adopted a monistic model of perception of international law, and removed a double-track application of international treaties (i.e., human rights conventions and other international treaties)
- the Czech Republic created a constitutional basis for the delegation of some of its powers to an international institution or organization
- the Czech Republic internationalized its judiciary because as of the effective date of the Euro-amendment to the Constitution, domestic courts are precisely those courts that decide on compliance or non-compliance of national law with international law, and are obliged to apply international law where there is a conflict. Moreover, the Constitutional Court was entrusted with the power to ascertain the constitutionality of an international treaty prior to ratification, whereby it concurrently also serves as a hypothetical filter with regard to a future contended conflict between an international treaty and the Constitution.

In summary, as of 2002, the relationship between European law and the national legal order is provided for first and foremost in Articles 10 and 10a of the Constitution which read as follows:

#### **ARTICLE 10**

*Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.*

## ARTICLE 10a

*(1) Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.*

*(2) The ratification of a treaty under paragraph 1 requires the consent of Parliament, unless a constitutional act provides that such ratification requires the approval obtained in a referendum.*

However, even the full wording of those articles does not directly answer the question whether the Constitutional Court is obliged to consider European law in its decision-making. This is due to the fact that the Constitutional Court is not a part of the system of general courts, and pursuant to Article 88 (2) of the Constitution, judges of the Constitutional Court are bound **solely by the constitutional order and the Act on Constitutional Court** in their decision-making.

The Constitutional Court is aware of the long-standing position of the Court of Justice of the European Union (1964 - *Flaminio Costa v. Enel*, or 1978 – *Amministrazione delle Finanze dello Stato v. Simmenthal*) consisting in the enforcement of the principle of unreserved primacy of EU law. However, other European constitutional courts (German Constitutional Court in *Solange I*, *Solange II*, *Maastricht*, *Bananenmarkt*; Italian Constitutional Court in *Frontini*) also ruled that there are certain boundaries beyond which unreserved respect for CJEU's postulate on the primacy of any European law is not appropriate. The Constitutional Court of the Czech Republic was inspired in particular by the case law of its German counterpart.

The Constitutional Court defined its attitude to European law and its binding effect most precisely in the "Sugar Quotas Case III" (Constitutional Court Judgment Pl. ÚS. 50/04 of 8 March 2006). While it did state that it did not intend to assess the validity of Community law norms,

*"The Constitutional Court is not competent to assess the validity of Community law norms. Such questions fall within the exclusive competence of the European Court of Justice. In terms of Community law, as it has been expounded by the European Court of Justice (hereinafter „ECJ“), Community law norms enjoy applicational precedence over the legal order of Member States of the EC. According to the case-law of the ECJ, where a matter is regulated solely by EU law, it takes precedence and cannot be contested by means of referential criteria laid down by national law, not even on the constitutional level.“;*

and that it promoted interpretation of the law compliant with Community law,

*"Although the Constitutional Court's referential framework has remained, even since 1 May 2004, the norms of the Czech Republic's constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law.“;*

on the other hand, it did not surrender its functions related to sovereign protection of national constitutionality. To illustrate the relationship between European law and the Constitutional Court's reference criteria, it is thus appropriate to note that the Constitutional Court did not accept the doctrine of absolute primacy of European law over constitutional law, and similarly to the German Constitutional Court, it does not view the delegation of powers from the national state to the European Union and its bodies as a permanent, irreversible and unrestricted process. In the above-referenced judgment, the Constitutional Court stated as follows in this regard:

*" ... the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. In such determination the Constitutional Court is called upon to protect constitutionalism (Art. 83 of the Constitution of the Czech Republic). According to Art. 9 par. 2 of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself."*

Similarly to the German Constitutional Court in Karlsruhe, the Constitutional Court of the Czech Republic expressed its commitment to respecting the properties of EU law but only to the extent that such law is compatible with fundamental values of constitutionality, in particular sovereignty pursuant to Article 1 (1) of the Constitution, and the material core of a democratic rule of law pursuant to Article 9 (2) of the Constitution.

In conclusion, it can be summarized that from a formal legal perspective, the Constitutional Court is not obliged to use European law as a reference criterion in its decision-making; however, the principle of interpretation compliant with EU law occupies a fundamental position in the case law of the Constitutional Court of the Czech Republic (see for instance Constitutional Court Judgment Pl. ÚS 66/04 of 3 May 2006, "European Arrest Warrant"):

*"If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected which supports the carrying out of that obligation, and not an interpretation which precludes it."*

## **2. Are there any examples of references to international sources of law, such as:**

### *a) the European Convention on Human Rights*

The Convention became a key international law document for the Czech Republic, and thus also for its Constitutional Court. The Convention entered into force vis-a-vis the legal successor of the Czech Republic - the Czech and Slovak Federal Republic - upon the deposition of ratification instruments on 18 March 1992. It became binding on the Czech Republic as well as of that date, and pursuant to Section 2 of the Constitutional Act which introduces the Charter of Fundamental Rights and Basic Freedoms, and later on Article 10, or rather Article 10a, of the Constitution of the Czech Republic, it has a general binding effect and applicational precedence over the law. The Convention also undeniably influenced the formulation of the country's own national catalog of basic human rights (the Constitutional Act - Charter of Fundamental Rights and Basic Freedoms).

For the Constitutional Court, the Convention has been one of the most significant ideological basis, and continues to be a key reference criterion not only in proceedings addressing individual constitutional complaints but also in proceedings related to an abstract control of regulations. Pursuant to Article 87 (1)(a) of the Constitution (prior to the Euro-amendment to the Constitution, see above), up to 2002, the Constitutional Court ruled "*to annul statutes or individual provisions thereof if they are in conflict with the constitutional order or an international treaty pursuant to Article 10.*". Until then, the Constitutional Court thus did instance abolished, by its Judgment Pl. ÚS 43/93, the criminal acts of disparagement of the Parliament, government and Constitutional Court in the Criminal Code also due to conflict with Article 10 of the Convention, or inferred, through its application of Article 6 (1) of the Convention, that a number of the institutes existing in the administrative justice system were unconstitutional (cf. for instance Judgment Pl. ÚS 18/96 on orality of process, Judgment Pl. ÚS 28/98 on judicial review of disciplinary fines, or Judgment Pl. ÚS 9/2000 on judicial review of less serious offenses). By its Judgment Pl. ÚS 16/99, the Constitutional Court eventually abrogated the entire Part V of the Rules of Civil Procedure, thus initiating the creation of an entire new system of administrative judiciary. The court noted in its judgment:

*"...current administrative judiciary in the Czech Republic, as far as process and jurisdiction are concerned, generally corresponds to the Constitution and the Charter, but does not correspond to Art. 6 par. 1 of the Convention, as the Convention clearly requires that a court or similar body decide on the law (that is, on the matter itself, and not only the legality of the foregoing administrative act)."*

After the Euro-amendment to the Constitution entered into force, Article 87 (1)(a) of the Constitution was also amended whereby the right of derogation on the grounds of conflict with an international human rights treaty as an express reference criterion applied by the Constitutional Court in proceedings ascertaining constitutionality of legal regulations was removed. However, the Constitutional Court itself inferred, in its Judgment Pl. ÚS 36/01 of 25 June 2002, that

*"The inadmissibility of changing the substantive requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can be interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms."*

Therefore, the Constitutional Court included, in the notion of constitutional order it is to follow after the Euro-amendment to the Constitution, also ratified and promulgated international treaties on human rights and fundamental freedoms. The Constitutional Court thus continues using the Convention as a reference criterion, and even annulled a part of a legal regulation as contrary to the Convention, without declaring it contrary to the Constitution, Charter or other national constitutional act (in its Judgment Pl. ÚS 45/04, the Constitutional Court clearly stated in the decision proper that pursuant to Article 5 (4) of the Convention for the Protection of Human Rights and Fundamental Freedoms, the accused has to be heard by a court before a decision can be made on his/her complaint against the public prosecutor's resolution on continuing custody).

In conclusion, for the sake of a complete outline of the situation in terms of statistics, it can be noted that the Constitutional Court mentioned the Convention or referred to its specific provisions in more than 1,600 of its judgment, i.e., in every third decision in merit it issued.

*b) the Charter of Fundamental Rights of the European Union*

The Charter of Fundamental Rights of the European Union is not a document that would be frequently used by the Constitutional Court as a reference criterion. This fact is after all understandable also because the recent case law of the Constitutional Court, as indicated in more detail in the answer ad Section 1 of this questionnaire, supports the value postulate that the Constitutional Court does not deem EU law to be an autonomous reference criterion for the review of constitutionality. Moreover, during the process of ratification of the Treaty of Lisbon, the Czech Republic had reservations with regard to the Charter, and when signing the Treaty of Lisbon, it made a declaration on the Charter of Fundamental Rights wherein it stressed the limitations on its application in the Czech Republic. During a further stage of the national ratification process, the Czech president conditioned the ratification of the Treaty of Lisbon on agreement on the same "exemption" from the Charter as that negotiated earlier by Poland and the Great Britain. The Czech Government thus reached agreement that the Czech Republic could accede to the Protocol on the Application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom, annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union; unlike the declaration, the Protocol is a legally binding instrument.

The Constitutional Court of the Czech Republic reviewed the Treaty of Lisbon twice, and concluded unequivocally in both cases that neither the Treaty of Lisbon itself, nor the Charter of Fundamental Rights of the European Union, were in conflict with the constitutional order of the Czech Republic. The Constitutional Court noted as follows in its "Treaty of Lisbon I" judgment (Constitutional Court Judgment Pl. ÚS 19/08 of 26 November 2008):

*"...what will be important is application of the Treaty of Lisbon, or the Charter of Fundamental Rights of the European Union, in specific cases that can be contested before the Constitutional Court of the Czech Republic by individual constitutional complaints, concerning possible (exceptional) excesses by Union bodies and Union law into fundamental rights and freedoms. The Constitutional Court states (and repeats)*

*- The Constitutional Court generally recognizes the functionality of the EU institutional framework for ensuring review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional.*

*- In terms of the constitutional order of the Czech Republic – and within it especially in view of the material core of the Constitution – what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application.*

*- The Constitutional Court of the Czech Republic will (may) also – although in view of the foregoing principles – function as an ultima ratio and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences. “*

It can be said in summary that in proceedings on abstract control of regulations, the Constitutional Court does not annul national legal regulations due to conflict with EU law as it does not deem EU law to be a part of the constitutional order. On the other hand, the Constitutional Court interprets the notion of "constitutional order" with a view to principles



stemming from EU law. In proceedings on individual constitutional complaints (potentially involving a European element), the Constitutional Court considers carefully whether general courts met their duty of justifying duly why no preliminary query was made to the Court of Justice of the European Union, under the threat that the decision may be quashed. However, the Constitutional Court itself has never submitted a preliminary query. The Charter of Fundamental Rights of the European Union is used only sporadically in the wording of the Constitutional Court judgments (5 times in all), and does not serve as a reference criterion.

*c) other instruments of international law at European level*

**European Social Charter** as one of the key documents of the Council of Europe also tends to be a reference criterion in the decision-making of the Constitutional Court because the Charter can also be subordinated into the category of international treaty that constitute international human rights treaties according to the Constitutional Court's case law. The Constitutional Court used it as a criterion in only a handful of cases; however, it is often invoked by complainants in individual matters.

*d) other instruments of international law at international level?*

The **Universal Declaration of Human Rights** of 10 December 1948 may be considered to be the ideological source of supra-national human rights catalogues: it became the first international document containing a catalogue of rights, or rather principles and freedoms. The initial idea expressed in the preamble, i.e., that "... *whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world*", continues to serve as the basis of other international human rights treaties up to this day. The disadvantage of the Universal Declaration was precisely its "soft", declaratory form, and related theoretical debates as to whether and which of its provisions could become universally binding at least as an international custom. The Constitutional Court does not use the General Declaration as its own reference criterion, but rather argues with the rights entrenched therein on a subsidiary basis, or uses them to illustrate the interconnectedness of sources of human rights protection. Yet, it is appropriate to note that in its Judgment II. ÚS 285/97 of 7 October 1998, the Constitutional Court quashed a contested decision precisely because it was in conflict with the Universal Declaration. Specifically, the case concerned a decision of the Supreme Court that refused the complaining access to rehabilitation for his 1959 conviction for the criminal act of avoidance of service duty when he refused to serve in the army. The Constitutional Court noted in its *ratio decidendi* that: "*The complaining asserted his right to freedom of thought, conscience and religion, as contemplated by Article 18 of the Universal Declaration of Human Rights of 10 December 1948. While the 1948 Constitution, which was in force in 1959, formally guaranteed freedom of conscience and religion, a lower regulation - a law - enabling the citizen to exercise such right was not issued, and practical provisions of other legal regulations of lesser legal force virtually did away with such freedom. The complainant was thus virtually unable to comply with his statutory duties without getting into conflict with his own conscience.*".

A similar fate befell the **Charter of the United Nations** which is only quoted sporadically in judgments of the Constitutional Court. Perhaps only in Judgment IV. ÚS 412/04 of 7 December 2005, it is mentioned as a proof of change in the perception of all fundamental rights, with a stress on human dignity, precluding the treatment of a human being as an object. In Judgment I. ÚS 601/04 of 21 February 2007, it is used as an argument for the contention that "The principle of good faith is a fundamental rule of interpretation in the analysis of the texts of international obligations."



Of other international law instruments, it is appropriate to mention the **International Covenant on Civil and Political Rights**, and the **International Covenant on Economic, Social and Cultural Rights**, both in force as of 1976, quoted by the Constitutional Court in its judgments in over one hundred and fifty instances; the Constitutional Court annulled certain decisions of public authorities (e.g., Judgment IV. ÚS 332/2000 of 27 February 2001) or provisions of legal regulations (e.g., Judgment Pl. ÚS 28/98 of 23 November 1999) because they were in conflict with the individual provisions of either of the Covenants.

References to the **Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment** are fairly sporadic, and the Constitutional Court only referred to it in a handful of cases. The Convention thus became one of the review criteria in the matter in I. ÚS 752/02 of 15 April 2003 when, "*Within the meaning of the case law of the European Court of Human Rights concerning Article 3 of the Convention, and within the meaning of Article 3 of the Convention Against Torture, the Constitutional Court examined whether there were substantive reasons to believe that the complaining was threatened with torture if extradited (the "substantive grounds test")."*", and was referred to in several other extradition-related cases as a direct criterion of interference with fundamental rights (e.g., Judgment I. ÚS 2462/10 of 10 November 2010, or Judgment II. ÚS 670/12 of 5 September 2012).

The **UN Convention on the Rights of the Child** which entered into force in 1990 also serves as a criterion in cases relating to children's rights. IN Judgment I.ÚS 112/97 of 10 March 1998, the Constitutional Court stated that "*If such contact [between a parent and a child] was not made possible due to inactivity on the part of the general court, it would by definition involve lags in the proceeding, and ultimately a breach of the Convention on the Rights of the Child ...*". In its recent Judgment II. ÚS 1835/12 of 5 September 2012, the Constitutional Court used the Convention as a criterion for quashing - precisely with a view to the rights of the child - the general court's decision that a joint custody of a child was possible even with long distances involved (the father in the Czech Republic, the mother in New Zealand).

### **3. Are there any specific provisions of constitutional law imposing a legal obligation on the constitutional court to consider decisions by European courts of justice?**

The answer to this question is negative. While in its Article 87 (1)(i), the Constitution of the Czech Republic expressly grants the Constitutional Court power to adopt measures for enforcement of international court decisions, provided they cannot be enforced otherwise, the notion of an international court is only specified in a sub-constitutional regulation, specifically in Section 117 of the Act on the Constitutional Court. The Constitutional Court thus may proceed by means of two different proceedings – it may decide, upon a governmental proposal, on annulment of a legal regulation the existence of which led to a breach of an international undertaking, or it may decide on an individual motion for renewal of proceeding.

The motion for renewal of proceeding may be filed by a party in whose matter an international court found that due to an intervention by a public authority (*in concreto*, a decision of the Constitutional Court), a human right or a fundamental freedom had been violated in conflict with an international treaty. The Constitutional Court then examines the motion for renewal of proceeding on defined terms:

- the motion is filed within 6 months from the final decision of the international court
- the consequences of the violation of a human right or fundamental freedom are continuing, and

- are not adequately remedied by the grant of just satisfaction pursuant to the decision of the international court, or
- no rectification was attained otherwise.

If the original decision of the Constitutional Court was in conflict with the decision of the international court, the Constitutional Court shall quash its decision, and shall draw on the legal opinion of the international court in its new judgement.

An international court is now deemed to be an international body whose decision is binding pursuant to an agreement meeting the qualification prerequisites as per Articles 10, 10a or 49 of the Constitution. As regards individual motions for renewal of proceedings, this would primarily involve the European Court of Human Rights and potential breaches of the Convention because other international courts cannot make authoritative decisions on obligations arising from breaches of fundamental human rights and freedoms.

However, in a proceeding for the annulment of a legal regulation, the relationship between the Constitutional Court and the Court of Justice of the European Union is secondary and indirect. Should the international court (Court of Justice of the European Union) find that an intervention by a public authority resulted in a breach of an obligation arising to the Czech Republic under an international treaty, in particular of such interference resulted in a breach of a human right or fundamental freedom, and where such breach lies in a valid legal regulation, a proceeding before the Constitutional Court can be initiated upon governmental motion. Should the Court of Justice of the European Union find a violation of EU law due to a conflict of the provision of law with obligations arising from the Czech Republic's membership in the European Union, and should the national Parliament remain inactive even after such condemning judgment of the Court of Justice of the European Union, the government has a legislative tool enabling it to initiate the derogation process before the Constitutional Court. However, in order to respect the subsidiarity principle, the law-maker ought to respond to the situation first, and the Constitutional Court's power of derogation ought to be left as an *ultima ratio* should all the other remedies fail. After all, the Constitutional Court is not obliged to uphold the motion, nor is it – unlike in the proceeding on a motion for renewal of proceeding - expressly bound by the legal opinion of the international court.

#### **4. Is the jurisprudence of the constitutional court influenced in practice by the jurisprudence of European courts of justice?**

Yes, the case law of both the European Court of Human Rights and the Court of Justice of the European Union influences the decision-making practice of the Constitutional Court. A detailed outline is divided into two parts:

##### **4.1. Influence of the case law of the European Court of Human Rights<sup>1</sup>**

Generally speaking, the case law of the European Court of Human Rights has been extremely influential because the Convention represents a reference criteria for the review of both national individual acts, and national normative acts. Especially at the beginning of

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<sup>1</sup>Compiled with the aid of POSPÍŠIL, I. *Vliv Úmluvy a její aplikace ESLP na judikaturu Ústavního soudu; in Bobek, M., Kmec, J., Kosář, D., Kratochvíl, J. (eds). Dvacet let Evropské úmluvy v České republice a na Slovensku. 1st edition. Praha : C. H. Beck, 2013, 288 p.*

constitutional judiciary, Strasbourg case law served as valuable inspiration for the interpretation of certain key notions, including the following:

- the concept of legitimate expectations
- promotion of the concept of positive undertakings of the state in the area of fundamental rights
- reception of criteria for the assessment of impartiality of the judge
- application of reservation of the act defined in the Convention, especially as regards those rights where an express reservation is missing completely in the national Charter.

In contrast to that, there are also areas where the Constitutional Court was influenced by criticism of the European Court of Human Rights, or rather where it has to respond to such criticism by changing its case law. What is particularly problematic is the fact that the European Court of Human Rights views constitutional courts as general courts, i.e., as courts that are procedurally fully subordinated to Article 6 of the Convention (cf. Judgment of the Grand Chamber, 16. 9. 1996, č. 20024/92 *Süssman v. Federal Republic of Germany*), while constitutional court feel themselves (in terms of their mission, value and reference framework) to be closer to the European Court of Human Rights than to general courts. Dogmatic insistence on rigid adherence to Article 6 even in proceedings before constitutional courts could paradoxically lower the national standard of protection of fundamental rights and freedoms. Let us mention two examples:

- Contradictoriness of proceeding and equality of arms. Since the judgment in *Milatová v. Czech Republic* (Judgment of 21 June 2005, No. 61811/00) the position of the European Court of Human Rights has been known, i.e., that the Constitutional Court is obliged to send replies of the parties to the plaintiff for response. While the Constitutional Court does so now, it is still possible to doubt whether the proceeding before the Constitutional Court is truly an adversary proceeding in principle.
- The Constitutional Court as a remand court. In its judgment of 27 September 2007, No. 18642/04, *Smatana v. Czech Republic*, the European Court of Human Rights stated that proceedings on constitutional complaints (directed against decisions on custodial matters) fall under the notion of proceedings on the legality of deprivation of freedom within the meaning of Article 5 (4) of the Convention. However, this is problematic for a number of reasons. One, the Constitutional Court is not authorized to order release from custody (it may only quash the decision of the remand court), and further, it is not authorized to decide on the legality of custody but only on a potential interference with fundamental rights; moreover, judicial protection in custodial matters is already provided by general courts. Despite that, the Constitutional Court registers and tackles "custody" complaints as quickly as possible, and with a view to the legal opinion of the European Court of Human Rights.

#### **4.2 Influence of the case law of the Court of Justice of the European Union**

As outlined in the previous chapter, the relationship of the Constitutional Court to the Court of Justice of the European Union is not and cannot be one of subordination, much as the Constitutional Court respects and supports interpretation of disputed issues that is compliant with EU law. In the above-referenced Constitutional Court's judgment in "*Sugar Quotas III*" which remains a flagship of approach to EU law and the Court of Justice of the European Union, it was defined that the scope and terms of direct effect of EU law at national level are autonomous and enter onto national level through Article 10a of the Constitution. However, their assessment is left up to the Court of Justice of the European Union as the sole authority formed for this purpose. The Constitutional Court holds the view that EU law cannot serve as

its criterion for review of constitutionality of domestic law, and as such, it does not permeate the materia of constitutional law that would have to be observed by the Constitutional Court.

The Constitutional Court believes that the national constitutional order and EU law are two different systems and two reference criteria, each of which is used autonomously by a different body. The ambits of the Court of Justice of the European Union and the Constitutional Court thus do not overlap, much as the Constitutional Court (driven by the German Solange doctrine) reserved the right to intervene, should the European Union overstep powers delegated to it by the Czech Republic (acting *ultra vires*), or should it interfere with the material core of the Constitution (according to the Constitutional Court, the pursuit of essential requirements of democratic rule of law cannot be delegated to the European Union because it lies outside the constitution-maker's powers – see also Constitutional Court Judgment Pl. ÚS. 27/09 of 10 September 2009).

The fact that although the Constitutional Court sanctions, by derogation, general courts if they do not submit a preliminary query to the European Court in Justice when in doubt, it has never submitted a preliminary query itself, relates to the above. However, at the same time, the Constitutional Court respects that it is necessary to assess compliance of a disputed provision with EU law, although it is unable to do so directly and itself under its doctrine. Therefore, where the general court did not submit a preliminary query, and during the subsequent review, the Constitutional Court does not see any reason for its submission, it notes, in agreement with the general court, that the conditions of the *acte clair* were satisfied (cf. Constitutional Court Resolution III. ÚS 2738/07 of 24 July 2008, or Constitutional Court Resolution I. ÚS 2553/07 of 15 February 2010). However, in such cases the Constitutional Court does not deem it necessary to interpret whether it is a court within the meaning of Article 267 of the TFEU. If the general court did not submit a preliminary query but should have done so in the Constitutional Court's opinion, the Constitutional Court will quash the contested decision of the general court, instructing it to submit a preliminary query, or to duly justify its failure to do so. However, the grounds for derogation do not lie in a conflict with EU law but rather in a conflict between the decision and Article 38 (1) of the Charter of Fundamental Rights and Freedoms, i.e., the right to a lawful judge (see Constitutional Court Judgment II. ÚS 1009/08 of 8 January 2009).

In conclusion, the case law of the Court of Justice of the European Union is of limited importance to the application practice of the Constitutional Court due to the mutual non-connectedness of the two judicial systems.

## **5. Does the constitutional court in its decisions regularly refer to the jurisprudence of the Court of Justice of the European Union and/or the European Court of Human Rights? Which are the most significant examples?**

### **5.1 References to case law of the European Court of Human Rights**

References to case law of the European Court of Human Rights represent – next to references to the Constitutional Court's own case law - the most frequent and wide form of citing in the decision-making practice of the Constitutional Court. The European Court of Human Rights is mentioned in some way in more than 3,000 decisions of the Constitutional Court, of which nearly 600 works with more detailed references to its ample case law. It is difficult to select only some out of such a wealth of references, especially since the Constitutional Court both applies judgments of the European Court of Human Rights in which the Czech Republic was found guilty of Convention violations, and refers to judgments in which a different member

state was a party but which brought a closer interpretation of certain provisions of the Convention.

Therefore, only certain key judgments of the Constitutional Court will be mentioned where the case law of the European Court of Human Rights was applied as a reference criterion for the review of constitutionality of a law:

- Constitutional Court Judgment Pl. ÚS 16/99 of 27 June 2001 pertaining to the requirement of full jurisdiction in the review of administrative decisions. By virtue of its judgment, the Constitutional Court annulled Part Five of the Rules of Civil Procedure in its entirety. It stated that the current regulation of administrative judiciary exhibited serious deficits from the perspective of constitutional law. First and foremost, certain activities, or inactivity, as the case may be, of state administration are not subject to judicial control at all. Further, not everyone whose rights may be affected by an administrative decision is entitled to turn to a court. And where the party does have such right, it is not a party in a full-fledged fair process within the meaning of Article 6 (1) of the Convention, although this ought to be the case in numerous matters. The court decision rendered is then final, and (save for a constitutional complaint) incapable of reform, and this in turn leads both to inconsistent case law and to unequal standing of the administrative body, i.e., to a status that is not compliant with rule of law requirements. The Constitutional Court concluded that the finality of certain decisions (termination of proceeding) may ultimately lead to a denial of justice. In its appeal to the legislators, it stated that the legislators now have the duty to ensure full judicial control in all areas that, according to the ample case law of the European Court of Human Rights, are deemed to constitute "civil rights or obligations", or fall under the notion of "any criminal charge" within the meaning of Article 6 (1) of the Convention.
- Constitutional Court Judgment Pl. ÚS 45/04 of 22 March 2005 by which it annulled provisions of the Criminal Code because pursuant to Article 5 (4) of the Convention, the accused must be heard by a court before decision can be made on its complaint against the public prosecutor's decision on continued custody. Its argumentation was supported by an extensive analysis and quotes from the case law of the European Court of Human Rights (e.g., Assenov et al v. Bulgaria, 1998; Sancher-Reisse v. Switzerland, 1986; Kampanis v. Greece, 1995; Nikolovová v. Bulgaria, 1999, Niedbala v. Poland, 2000, Garcia Alva v. Germany, 2001, and many other)
- Constitutional Court Judgment Pl. ÚS 3/09 of 8 June 2010, annulling a part of a provision of the Rules of Criminal Procedure which permitted a search of other premises solely upon the order of a public prosecutor or a police body. With the argument that autonomous conduct of private life on the one hand, and work or interest activities on the other hand, were closely related, the Constitutional Court rejected a sharp spatial separation of privacy in places used for residential purposes, from places serving for work or business activities or to satisfy one's needs or interest activities. It demonstrated this using the approach of the European Court of Human Rights which includes, in the right to respect for one's home pursuant to Article 8 (1) of the Convention, also the right to respect for the privacy of company seats, branches or establishments of legal entities (decision of 16 April 2002, Société Colas Est. v. France), office premises (decision of 25 February 1993, Crémieux v. France, or decision of 25 February 1993, Mialhe v. France), or premises of law firms (cf. decision of 12 December 1992, in Niemietz v. Germany).
- Constitutional Court Judgment Pl. ÚS 10/13 of 29 May 2013 by virtue of which the Constitutional Court ruled that the legal regulation of restitution of property to



churches (restitution for church properties confiscated after the Communists came to power) was compliant with the constitutional order. For the purposes of this proceeding, the Constitutional Court quoted case law of the European Court of Human Rights in several places; in accordance with said case law, it inferred that the role of the state was to act as a neutral and impartial administrator of various religions, faiths and beliefs, and noted that its role consisted in the maintenance of order, religious harmony and tolerance in a democratic society (quoting the judgment in *Manoussakis et al v. Greece*, 1996; judgment of the Grand Chamber in *Hasan et Chaush v. Bulgaria*, No. 30985/96, 2000, or judgment of the Grand Chamber in *Refah Partisi et al v. Turkey*, 2003).

## **5.2. References to case law of the Court of Justice of the European Union**

As already mentioned several times in this questionnaire, EU law is not a reference criterion for the assessment of constitutionality of a domestic law. According to its own case law, the Constitutional Court is not competent to examine compliance of a national legal regulation with EU law, and the interaction between the two institutions is thus limited, as is the quantity of quotations from case law of the Court of Justice of the European Union. Even though several dozen references to the CJEU and its case law (or the European Court of Justice) can be found in judgments of the Constitutional Court, such references are not a part of the assessment process but rather a part of the narrative section, or a part of a broader comparison within the legal relationship or institute being examined. For instance, in Judgment Pl. ÚS 43/05 of 2 December 2008, pertaining to judicial review of conditions for entry into the Commercial Code, the Constitutional Court reminded that the ECJ does not view entry into the Commercial Register, or entry into the property register, for that matter, as a decision addressing disputed issues before an independent court, and instead views such entry as an administrative decision which is not ended by a decision having the nature of a court decision (quoting i.a. the decision in *Doris Salzman*, C-178/99).

Despite that, we deem it correct to mention key judgments of the Constitutional Court by which it defined its approach to EU law and the Court of Justice of the European Union:

- Constitutional Court Judgment Pl. ÚS 5/01 of 16 October 2001 (milk quotas). Still prior to accession to the European Union, the Constitutional Court ruled that EU law, and in particular its principles as excerpted by the European Court of Justice, are not irrelevant for the Constitutional Court:

*"Thus, primary Community law is not foreign to the Constitutional Court, but to a wide degree permeates – particularly in the form of general legal principles of European law – its own decision making."*

- Constitutional Court Judgment Pl. ÚS 50/04 of 8 March 2006 (Sugar Quotas III). This was the first judgment by which the Constitutional Court was able to define its position vis-a-vis the fundamental principles of EU law, such as direct applicability and primacy of EU law, from the perspective of a supreme body of judicial power of an EU (now a member) state. The delegation of powers was then defined as conditional, and divided into formal and material levels. As regards the former level, it referred to the power attributes of state sovereignty, while the material level was defined as the material prerequisites of a democratic rule of law.



*"The Czech Republic conferred ... powers upon EC organs. In the Constitutional Court's view, this conferral of a part of its powers is naturally a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1 par. 1 of the Constitution of the Czech Republic. ... The delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state. In such determination the Constitutional Court is called upon to protect constitutionalism (Art. 83 of the Constitution of the Czech Republic). According to Art. 9 par. 2 of the Constitution of the Czech Republic, the essential attributes of a democratic state governed by the rule of law, remain beyond the reach of the Constituent Assembly itself.*

*Direct applicability in national law and applicational precedence of a regulation follows from Community law doctrine itself, as it has emerged from the case-law of the ECJ. If membership in the EC brings with it a certain limitation on the powers of the national organs in favor of Community organs, one of the manifestations of such limitation must necessarily also be a restriction on Member States' freedom to designate the effect of Community law in their national legal orders.*

*The Constitutional Court is of the view that – as concerns the operation of Community law in the national law – such approach must be adopted as would not permanently fix doctrine as to the effects of Community law in the national legal order. A different approach would, after all, not correspond to the fact that the very doctrine of the effects that Community acts call forth in national law has gone through and is still undergoing a dynamic development. This conception also best ensures that which was already mentioned, that is, the conditionality of the transfer of certain powers.“.*

- Constitutional Court Judgment Pl. ÚS 66/04 of 3 May 2006 (European Arrest Warrant). The Constitutional Court refused to recognize the doctrine of the Court of Justice of the European Union if it should mean absolute precedence of EU law, i.a., due to conflict with the material core of the Constitution:

*"The constitutional principle that national law shall be interpreted in conformity with the Czech Republic's obligations resulting from its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 par. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever. 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 Constituent Assembly's prerogative to amend the Constitution. Naturally, the Constituent Assembly may exercise this authority only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes.“.*

At the same time, it presented its attitude in a broader framework assessing the qualitative standard of protection of rights in the EU as a consequence of a dynamic transformation of the international community; at the same time, however, as an adequate standard that does not necessitate the Constitutional Court's intervention:

*"If Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is naturally in this context that a certain degree of responsibility must be accepted along with these advantages. The investigation and suppression of criminality which takes place in the European area, cannot be successfully accomplished within the framework of individual Member States, but requires extensive international cooperation. The results of this cooperation is the replacement of the previous procedures for the extradition of persons suspected of criminal acts by new and more effective mechanisms, reflecting the life and institutions of the 21st century. 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 for the protection of fundamental rights, through invoking the principles arising therefrom, is of a lesser quality than the level of protection provided in the Czech Republic."*

- Judgment Pl. ÚS 36/05 of 16 January 2007 (Reimbursement of Medications). This proceeding concerned a decision relating to the system of reimbursement of medication in light of the principle of the right to a fair process. Although did this not involve any elaboration on the doctrine of the relationship between the Constitutional Court and the Court of Justice, the Constitutional Court inferred, on the basis of case law of the Court of Justice in C-229/00, Commission v. Finland (2003), ESD I-5727 and C-424/99, and Commission v. Austria, (2001) ESD I.-9285, that interference with the right to fair process was also involved in the case on hand.

*"The way in which the European Court of Justice construes the principles corresponding to the fundamental rights and freedoms necessarily has repercussions when domestic law and its conformity with constitutionally protected rights are construed. Art. 1 of the Charter bestows special protection upon fundamental rights. If then that Court concluded that the decision on the inclusion of medicinal preparations into the list of medications covered by public health insurance funds results in an interference with the rights of their producers and distributors and, for that reason, it is necessary to see to it that the principles of fair process are consistently observed, then the Constitutional Court must take this line of argument into account when interpreting Art. 36 para. 1 or para. 2 of the Charter."*

- Judgments Pl. ÚS 19/08 of 26 November 2008 and Pl. ÚS 29/09 of 3 November 2009 (Treaty of Lisbon I and II). In these proceedings, the Constitutional Court examined conformity of the Treaty of Lisbon with the constitutional order of the Czech Republic (first upon a motion filed by the Senate of the Czech Parliament, second upon a motion filed by a group of senators), still before its ratification. In both cases, the court concluded unequivocally that the international treaty under examination was not in conflict with the constitutional order. Although the Constitutional Court accepted the concept of pooled sovereignty, and underscored the voluntary nature of integration and its positive aspects, it reserved the "last say" in the control of constitutionality and adherence to competences of EU bodies. It thus adhered to its position, as expressed in

its judgment in Sugar Quotas III, i.e., that the powers of the Constitutional Court as a means of control *ultima ratio* continues to exist, that the delegation of powers is not in perpetuity and unchangeable, and that the constitutional order and EU law were two different legal systems:

*"In terms of our constitutional law, the Constitution (and the Czech constitutional order generally) remains the fundamental law of the state; as regards the Czech legal order and European law, they are relatively independent and autonomous systems. The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of the Czech Republic; ... If European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic. In accordance with this, the Czech Constitutional Court also intends to review, as ultima ratio, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them."* (Pl. ÚS 19/08)

## **6. Are there any examples of divergences in decisions taken by the constitutional court and the European courts of justice?**

There are not many areas of friction or divergences between the decisions of the two European courts of justice and the decision-making of the Constitutional Court. This is due to the fact that the European courts of justice do not occupy a superior or hierarchic position vis-a-vis the Constitutional Court, and their decisions are binding on states in their capacity as high contracting parties, rather than directly on a body entrusted with national protection of constitutionality. This applies despite the great degree of respect for the authority of both courts, and it has no bearing on the fact that the Constitutional Court considers interpretation of EU law or the Convention conducted by the two courts more apt than interpretation of the Convention or EU law as might be undertaken by the Constitutional Court itself.

### **6.1 Divergence from the case law of the European Court of Human Rights**

As regards the European Court of Human Rights, the Constitutional Court fully respects the case law of the European Court of Human Rights and its interpretation of the Charter, much as it may believe at times that the Strasbourg solution is not fully compatible with conditions prevailing in the Czech Republic. After all, even the Act on the Constitutional Court, by which the Constitutional Court is bound in its decision-making, obliges the Constitutional Court to respect the legal opinion of an international court in the proceeding following a permission to renew proceedings in a matter in which the international court found a violation of a human right or fundamental freedom through intervention by a public authority contrary to an international treaty.

However, unlike the legislators, the Constitutional Court cannot create law, i.e., to respond to inadequacies, gaps or shortcomings in the legal order by direct creation of legal standards compliance with the legal opinion of the European Court of Human Rights. If cassation in individual matters under complaint, and derogation in the control of laws, is the only power it has in this regard, then it is apparent that the application of judgments of the European Court of Human Rights is mainly up to the legislative and executive forces. Despite that, the Constitutional Court, at least through its case law, actively implements the legal opinions of

the European Court of Human Rights, thereby creating a standard for subsequent case law of general courts.

The Constitutional Court thus for instance after the decision in *Kohlhofer et Minarik v. Czech Republic* (complaints Nos. 32921/03, 28464/04 and 5344/05) started pointing out actively that minority shareholders had to be protected within the light of Strasbourg case law (see also Judgments I. ÚS 1768/09, III. ÚS 2671/09, or Derogation Judgment Pl. ÚS 14/10). Similarly, reference can be made to the right of the accused to be heard, whereby through its Judgment I. ÚS 573/02, and in particular Judgment ÚS 45/04 of 22 March 2005, the Constitutional Court made more stringent the general courts' duty to hear the accused in custodial proceedings, also with a view to the case law of the European Court of Human Rights; however it was the European Court of Human Rights in *Husák v. Czech Republic* (judgment of 4 December 2008, No. 19970/04) which ruled that the hearing of the accused is to take place periodically (in intervals not shorter than two months). The accused is then entitled to seek release from custody (i.e., to be heard) upon the elapse of 30 days from the entry into force of the last decision rejecting his/her motion for release from custody, i.e., even more frequently than that.

## **6.2 Divergence from the case law of the Court of Justice of the European Union**

With a view to the fact that the Constitutional Court of the Czech Republic did not accept in its case law unreserved applicational precedence of EU law, and does not feel it is the national body that ought to submit preliminary queries to the Court of Justice of the European Union, the area in which the case law of the two courts might collide is fairly clearly defined.

The case law of the Constitutional Court was in collision with the case law of the Court of Justice of the European Union in the matter of "Slovak Pensions". As a result of the split up of Czechoslovakia in 1993, situations occurred where Czech citizens received their pensions from Slovakia, the only reason being for instance the fact that their employer's branch was formally registered there. However, the pensions paid by Slovakia were lower than Czech pensions for a comparable profession. The Constitutional Court's case law thus inferred the obligation to pay an equalisation allowance in addition to old age pension, whereby the amount would equal the amount of pension the person in question would receive if the entire time worked in the territory of the former Czechoslovak federation was assessed pursuant to Czech legal regulations and in the Czech pension system. Based on a preliminary query raised in a different proceeding by the Supreme Administrative Court, this issue was addressed by the Court of Justice of the European Union in its Judgment C-399/09 of 22 June 2011, *Landtová v. Czech Republic*. The Court of Justice of the European Union concluded that while the case law of the Constitutional Court in the matter of Slovak pensions is contrary to the ban on discrimination on the grounds of nationality, it is acceptable if such rule of equalisation allowance applied not only to Czech nationals but also to migrating citizens of other EU member states. Following up on this judgment, the legislators banned payment of any equalisation allowance or settlement for insurance periods received prior to January 1, 1993 pursuant to Czechoslovak legal regulations, which are deemed to be Slovak Republic's insurance periods pursuant to the Social Security Treaty between the Czech Republic and the Slovak Republic.

The Constitutional Court responded to the decision of the Court of Justice of the European Union in *Landtová* by its Judgment Pl. ÚS 5/12 of 31 January 2012. In essence, it dealt with a constitutional complaint filed by a Czech national who previously worked as an engine driver for the Czechoslovak Railways, his place of work having been in Slovakia. However,

the Czech Administration of Social Security granted a pension to the complainant in an amount corresponding to the period of time worked in the territory of the Czech Republic, without giving consideration to the Social Security Treaty between the Czech Republic and the Slovak Republic of 29 October 1992, conducted in the past by the Constitutional Court with a view to the principle of equality of citizens. In its judgment, the Constitutional Court recapitulated the doctrine of the relationship between national and EU law, and stressed the thesis that constitutional courts remain supreme protectors of constitutionality even in EU conditions, and even against potential excessive actions on the part of EU bodies. The Constitutional Court concluded in this regard that the European regulation on the coordination of pension systems between member states cannot be applied to the completely specific situation of the Czechoslovak Federation's breakup and the resultant consequences thereof, especially with a view to the fact that the period of employment with an employer domiciled in what is now the territory of the current Slovak Republic cannot be retroactively viewed as period of employment abroad, even more so since social security was a federal matter throughout the existence of the federation. The Constitutional Court thus expressed its belief that social security relations and claims thereunder do not contain a foreign element in the case of Slovak pensions; however, the application of a coordination procedure is conditioned on the existence of such foreign element. The issue of "Slovak pensions" does not compare to the assessment of social security claims with a view to inclusion of time worked in different states; instead, it has to do with the issue of consequences of the federation's breakup, and distribution of social security costs between the successor states.

The Constitution Court inferred that the Court of Justice of the European Union had overlooked these facts, as it otherwise would have had to conclude that EU law was not applicable in the situation on hand:

*“Due to the foregoing, European law, i.e. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, self-employed persons, and members of their families moving with the Community, cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; and, based on the principles explicitly stated by the Constitutional Court in judgment file no. Pl. ÚS 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires.”.*

## **7. Do other national courts also consider the jurisprudence of European courts of justice as a result of the constitutional court taking it into consideration in its decisions?**

In the conditions of the Czech Republic, the Constitutional Court is not a body that would be hierarchically superior to other courts, nor is it a part of their structure. Given the level of its ambit, it is thus unable to provide completely objective answer as to how general courts use the case law of European courts, and whether that is in consequence of the decision-making of the Constitutional Court.

One may only form an idea based on the decisions of general courts reviewed by the Constitutional Court in order to ascertain their constitutionality. It can be inferred subjectively from this "sample" that higher courts in particular work with the case law of the two courts



frequently, and references to decisions of the European Court of Human Rights and the Court of Justice of the European Union are published in the case law of the Supreme Court and the Supreme Administrative Court on a regular basis.

However, there is no evidence available to support the contention that general courts refer to European case law because the Constitutional Court does so as well. One may reasonably believe that quotations from European case law are due to the fact that in their decision-making, the courts must apply both the Convention and EU law. Both European courts are then the highest authorities in terms of interpretation, which fact then lends conviction and strength of argumentation to the *ratio decidendi* of a general court's decision.

It is appropriate to add in addition to the above that pursuant to Article 89 (2), enforceable decisions of the Constitutional Court are binding on all bodies and persons. Therefore, if the Constitutional Court for instance inferred that particular conduct was in conflict with rights guaranteed by the Convention, and supported its view by referring to the case law of the European Court of Human Rights, general courts are obliged to adhere to its legal opinion. However, they may adhere to same without expressly referring to the judgment in question, or they may quote only the judgment itself, and not the case law of the European Court of Human Rights contained therein (or the other way round, as the case may be).

#### **8. Are there any examples of decisions by European courts of justice influenced by the jurisprudence of national constitutional courts?**

The Constitutional Court of the Czech Republic is not aware of the European Court of Justice or the European Court of Human Rights quoting case law of the Constitutional Court of the Czech Republic in support of its argumentation, or as inspiration behind its decision. Although the Constitutional Court is sometimes mentioned in decisions, such mentions are made in the narrative part of the decision, i.e., in the description of case development on national level.

However, that does not mean that the Constitutional Court is not engaged at all in proceedings before the two European courts. At the request of the government agent representing the Czech Republic before the European Court of Human Rights (more often) or the government agent representing the Czech Republic before the Court of Justice of the European Union, the Analytical Department of the Constitutional Court drafts answers to questions that were posed by either of the courts to the Czech government, that relate to the ambit of the Constitutional Court, or that concern a proceeding the subject matter of which pertains to a matter decided by the Constitutional Court.



## II. INTERACTIONS BETWEEN CONSTITUTIONAL COURTS

### 1. Does the constitutional court in its decisions refer to the jurisprudence of other European or non-European constitutional courts?

Apart from the most frequent references to the case law of the European Court of Human Rights (and, to a lesser extent, to the case law of the Court of Justice of the European Union), the Constitutional Court of the Czech Republic often refers to the decisions, ideological bases or methodology of other European constitutional courts. While in current continental law, it is inconceivable to have binding precedents between individual decisions of constitutional courts of sovereign states, the protection of constitutionality and fundamental human rights, and the tools for such protection entrusted to constitutional judiciary often lead to a meeting of minds in the activities pursued by the various European constitutional courts. If any constitutional court deems the methodology, interpretation or assessment employed or made by another constitutional court in a similar matter potentially applicable to a matter being reviewed by it, it can and ought to refer to such a decision. It will not only strengthen the convincingness of its own arguments, but also lend a dynamics and room for new points of view to the national constitutional judiciary.

A causal nexus between the matters heard, or rather the applicability of approaches or methods employed by the foreign constitutional court, is the reference criterion for reference to the case law of a foreign constitutional court. However, a direct connection between the subject matters of two proceedings does not have to be the only reason for quoting foreign constitutional case law: individual interpretation of certain constitutional institutes and processes may also be the reason. For instance, in the decision of the Constitutional Court of the Czech Republic on a motion for annulment of the act on taxation of electricity produced by photovoltaic plants (Pl. ÚS 17/11), a decision of the Austrian Constitutional Court was quoted:

*"The Austrian Constitutional Court (Verfassungsgerichtshof – VfGH), in its decision file no. G 6/11-6 of 16 June 2011 VfGH, denied a petition to declare unconstitutional legal regulation that lowered the age limit for entitlement to family welfare contributions from 26 years to 24 years for dependent children (with certain tax implications). The Court concluded that the legislature is given wide discretion in this area, and continuing the line of its previous case law it stated that confidence that the current legal framework will not change does not enjoy constitutional protection."*

Two more examples (out of many other quotations of foreign constitutional courts) can be mentioned just for the sake of illustration. In its Judgment Pl. ÚS 9/08 of 12 July 2011, on retroactivity in the imposition of a tax duty, the Constitutional Court used the case law of the German Constitutional Court:

*"The matter is concerned with enactment of legislation in the course of the taxation period and its application within the same period. In such a case the retroactive nature is not an unambiguous one; comparative reference is made to the case law of the Federal Constitutional Court of Germany [for instance decision dated December 19, 1961 BVerfGE volume 13, page 261; dated May 14, 1986 file no. 2 BvL 2/83, BVerfGE volume 72, pg. 200] Such a procedure with no additional aspects is not assessed by the Constitutional Court as true retroactivity."*

When deciding on the constitutionality of freezing of judges' salaries (Constitutional Court Judgment Pl. ÚS 33/11 of 3 May 2012), the Constitutional Court used the case law of its Polish counterpart:

*"The following fundamental, general theses regarding the constitutionality of salary restrictions on judges arise from the case law of the Constitutional Court, as well as from comparison with the case law of European constitutional courts (see, in particular, decisions of the Constitutional Court of the Polish republic file no. P 1/94 of 8 November 1994, K 13/94 of 14 March 1995, P 1/95 of 11 September 1995, P 8/00 of 4 October 2000, K 12/03 of 18 February 2004):... "*

An overwhelming majority of foreign case law quoted by the Constitutional Court of the Czech Republic concerns European constitutional courts. Of non-European courts, perhaps only the U.S. Supreme Court is quoted; despite its name, it also serves to protect constitutionality, and can be deemed to belong to the broader family of the constitutional courts of the world to some extent. It was quoted for instance in connection with a higher degree of admissible criticism of public figures (Constitutional Court Judgment I. ÚS 823/11 of 6 March 2012).

*"Public active figures, i.e., politicians, public agents, celebrities, etc, must accept a greater degree of public criticism than other citizens. The case law of the European Court of Human Rights [in detail, for instance in Lingens v. Austria (1986)], or the case law of the U.S. Supreme Court [cf. for instance New York Times Co. v. Sullivan 376 U.S. 254 (1964), and Gertz v. Robert Welch, Inc. 418 U.S. 323 (1974)]."*

## **2. If so, does the constitutional court tend to refer primarily to jurisprudence from the same language area?**

Pursuant to Section 33 (1) of the Act on Constitutional Court, the Czech language is used in proceedings before the Constitutional Court. A party to the proceeding, witness or expert may also speak Slovak before the Constitutional Court (subject to the other parties' consent) as it is a related and linguistically very similar language. Czech falls into the category of West Slavic languages, and is - as mentioned above - most closely related to Slovak, followed by Polish and Sorbian.

The language area with common roots can thus be delineated by the Republic of Poland and the Slovak Republic. However, the number of quotation of case law of the respective constitutional courts in the overall quotation practice of the Constitutional Court of the Czech Republic is less than 10%, and it can thus be said in conclusion that the language area is not a factor that would in any way determine the frequency or selection of the source of quotes.

## **3. In which fields of law (civil law, criminal law, public law) does the constitutional court refer to the jurisprudence of other European or non-European constitutional courts?**

In order to answer this question, the Constitutional Court conducted a search of its case law, with the following result:

<b>Fields</b>	<b>100%</b>
<b>Civil law (including commercial and labour law)</b>	32%
<b>Criminal law</b>	16%
<b>Public law (administrative, tax, international)</b>	52%

References related to public law thus prevail.

#### **4. Have decisions of the constitutional court noticeably influenced the jurisprudence of foreign constitutional courts?**

The Constitutional Court of the Czech Republic does not have any specific feedback as to quotations or case law of foreign constitutional courts. However, given the historical and legal closeness of the Constitutional Court of the Slovak Republic, it is known that the Slovak Constitutional Court referred to decisions of the Constitutional Court of the Czech Republic, for instance, in its judgments PL. ÚS 6/04-67, PL. ÚS 19/09, II. ÚS 398/08, I. ÚS 50/2010, or III. ÚS 302/05.

It can further be considered significant that in its review of the Treaty of Lisbon (BVerfG, 2 BvE 2/08 of June 30, 2009), the German Constitutional Court in Karlsruhe referred to the judgment of the Constitutional Court of the Czech Republic in the same matter (judgment of the Constitutional Court of the Czech Republic Pl. ÚS 19/08 of 26 November 2008).

#### **5. Are there any forms of cooperation going beyond the mutual acknowledgement of court decisions?**

In the conditions of the Constitutional Court of the Czech Republic, there are three ways in which one may acquaint oneself with the case law of foreign constitutional courts above and beyond an individual search conducted by a judge or his/her expert team when deciding on a specific matter.

A) Collaboration with the Venice Commission of the Council of Europe.

Thanks to the Venice Commission, one may obtain an overview of case law of the other constitutional courts through the regularly published Bulletin on Constitutional Case-Law, which serves as a platform for an exchange of information on constitutional law issues that may arise in parallel in different countries and that are addressed in the case law of national constitutional courts.

Further, there is the CODICES database, also administered by the Venice Commission. It contains both the content of all the Bulletins published thus far, and full text decisions of decisions of constitutional courts and wordings of constitutions. Thanks to its advanced search mechanism and multi-language structure, it is a highly efficient tool for the search for and evaluation of foreign constitutional case law.

Last but not least, there is a network of liaison officers at the individual constitutional courts, and through the apparatus of the Venice Commission, they may approach their foreign colleagues to request information concerning a specific matter or issue. One can thus quickly get an idea which constitutional courts addressed certain constitution law issues currently being examined in the country of the party requesting information, and how.

#### B) Activities of the Analytical Department of the Constitutional Court

The Analytical Department of the Constitutional Court primarily provides support to judges in their decision-making, specifically, through active monitoring of foreign databases of court decisions, comparative analyses, and structured searches related to a specific issue, including the foreign case law available, in collaboration with a particular judge.

#### C) Bilateral relations

Bilateral meetings with representatives of foreign constitutional courts, both at expert and judge levels, are an important element in getting acquainted with foreign case law. Topics of such bilateral meetings are pre-agreed and then discussed, and the discussion may include details from the parties own case law, with regard to both material and procedural issues.

For historical reasons, the most intensive collaboration is that with the Constitutional Court of the Slovak Republic with whom bilateral meetings are held annually. They consist in bilateral exchange of information on the most important judgments issued in the meantime, and in intensive comparative debates over the rationale, circumstances and constitutional bases of the individual decisions.

### III. INTERACTIONS BETWEEN EUROPEAN COURTS IN THE JURISPRUDENCE OF CONSTITUTIONAL COURTS

#### 1) Do references to European Union law or to decisions by the Court of Justice of the European Union in the jurisprudence of the European Court of Human Rights have an impact on the jurisprudence of the constitutional court?

In response to this question, it can be noted on a general level that both EU law and the case law of the Court of Justice of the European Union (CJEU) are of interest to the Constitutional Court of the Czech Republic in relevant cases. Similarly, references to EU law or decisions of CJEU in the case law of the European Court of Human Rights influence the case law of the Constitutional Court of the Czech Republic where there is a reference to an issue similar to that being examined by the Constitutional Court. However, it needs to be stressed that the incidence of such decisions of the European Court of Human Rights is not very high. This may be documented by the fact that in the information system of the European Court of Human Rights, HUDOC, roughly 20 references were found to the Court of Justice of the European Union (e.g., *SusoMusa v. Malta*, judgment of 23 July 2013, complaint No. 42337/12, *Maktouf et Damjanovic v Bosnia and Herzegovina*, judgment of 18 July 2013, complaints Nos. 2312/08 and 34179/08, *Vronchenko v Estonia*, judgment of 18 July 2013, complaint No. 59632/09, *Yildirim v Turkey*, judgment of 18 December 2012, complaint No. 3111/10, *Michaud v France*, judgment of 6 December 2012, complaint No. 12323/11, *Nada v Switzerland*, judgment of 12 September 2012, complaint No. 10593/08, *Hristozov et al v. Bulgaria*, judgment of 13 November 2012, complaints Nos. 47039/11 and 358/12, *Centro Europa 7 s.r.l. et Di Stefano v. Italy*, judgment of 7 June 2012, complaint No. 38433/09, *Konstantin Markin v Russia*, judgment of 22 March 2012, complaint No. 30078/06, *Herrmann v. Germany*, judgment of 26 June 2012, complaint No. 9300/07, *HirsiJamaa et al v. Italy*, judgment of 23 February 2012, complaint No. 27765/09, *von Hannover v. Germany No. 2*, judgment of 7 February 2012, complaint No. 40660/08, *Axel Springer AG v. Germany*, judgment of 7 February 2012, complaint No. 39954/08, *M. S. S. v. Belgium and Greece*, judgment of 21 January 2011, complaint No. 30696/09, *Ullens de Schooten et Rezabek v. Belgium*, judgment of 20 September 2011, complaints Nos. 3989/07 and 3835/07, *Karoussiotis v. Portugal*, judgment of 1 February 2011, complaint No. 23205/08, *Demir et Baykara v. Turkey*, judgment of 12 November 2008, complaint No. 34503/97, *Maslow v. Austria*, judgment of 23 June 2008, complaint No. 1638/03, *Vajnai v. Hungary*, judgment of 8 July 2008, complaint No. 33629/06).

To be specific, as concerns this question, the following references in the case law of the Constitutional Court of the Czech Republic can be mentioned: reference to the judgment in *Ullens de Schooten et Rezabek v. Belgium*, complaints Nos. 3989/07 and 38353/07, in Czech Constitutional Court Judgments II. ÚS 1658/11 and II. ÚS 2504/10 and II. ÚS 1658/11, or in Resolutions IV. ÚS 135/13 and IV. ÚS 2493/12. These had to do with the issue of assessment of a potential violation of the right to a lawful judge as a result of the breach of duty by a court of the last instance to submit a preliminary query. But then again, Judgment Pl. ÚS 19/08 Treaty of Lisbon referred to the judgment in *Bosphorus Hava Yolları Turizm v. Ticaret Anonim Şirketi v. Ireland*, complaint No. 45036/98).

In the above-referenced Judgment II. ÚS 1658/11, Violation of the right to a lawful judge (<http://nalus.usoud.cz/>), the complainant believed that his right to a lawful judge was violated when the Municipal Court in Prague failed to submit a preliminary query to the Court of Justice of the European Union (CJEU) pursuant to Article 267 of the Treaty on the

Functioning of the European Union, although, in the complainant's opinion, it was obliged to do so as its decision depended on interpretation of EU law, and at the same time, it decided on merit as the court of last instance with a view to the applicable provisions of domestic procedural law (Section 202 (2) of the Rules of Civil Procedure). Although the complainant requested that the Municipal Court submit a preliminary query, the Municipal Court failed to address the complainant's request for preliminary query, or the complainant's contention concerning the significance of the existence of EU law violation in the matter; according to the complainant, this constitutes a violation of his fundamental right to a fair process. In its *ratio decidendi*, the Constitutional Court used i.a. argumentation referring to the case law of the European Court of Human Rights in *Ullens de Schooten et Rezabek v. Belgium*, pursuant to which national courts are obliged to provide a rationale for any decision by which they refuse to submit a preliminary query. See para 18 of Judgment II. ÚS 1685/11 provided below.

In Judgment Pl. ÚS 19/08, Treaty of Lisbon (see the English version at [www.usoud.cz](http://www.usoud.cz)), the Constitutional Court of the Czech Republic referred directly to the *Bosphorus* case to document that in the current state of affairs, the European institutional provision for the standard of protection of human rights and fundamental freedoms can be deemed compatible with the standard provided for by the constitutional order of the Czech Republic. The Constitutional Court of the Czech Republic noted in this context that it concurs with the government's view that even after the Treaty of Lisbon enters into force, the relationship between the Court of Justice of the European Union and the constitutional courts of the members states will not be subject to any substantial hierarchy; it ought to have the form of a dialogue between equal partners respecting and complementing one another in their efforts, rather than competing with one another.

### ***Case law of the Constitutional Court of the Czech Republic ad Question 1.***

#### ***Judgment II. ÚS 1685/11***

*"18. Although the submission of a preliminary query is a matter of EU law, under certain circumstances, a failure to submit same contrary to EU law may lead to a breach of the right to a lawful judge, guaranteed by the Constitution. .... Recently, (20 September 2011), the European Court of Human Rights also opined on this issued in its judgment in *Ullens de Schooten et Rezabek v. Belgium* (complaints Nos. 3839/07 and 383353/07, when it stated that Article 6 (1) of the Convention on the Protection of Human Rights and Fundamental Freedoms (the Convention does not provide for the right to a lawful judge as a special and separate aspect of the right to a fair process) places national courts under the obligation to provide rationale for any decision by which they refuse to submit a preliminary query. The European Court of Human Rights thus must always be assured that any refusal it reviews was accompanied by such rationale."*

#### ***Judgment Pl. ÚS 19/08 (Treaty of Lisbon I.)***

*197. ... A key factor here is not only the formulation of the affected right, but much more so the institutional system that ensures protection of it. In this regard we can also point to the Constitutional Court's judgment in the matter of a decree on medicines (judgment file no. Pl. ÚS 36/05, promulgated as no. 57/2007 Coll.), where the Constitutional Court expressly stated that the manner in which the European Court of Justice interprets the principles corresponding to the fundamental rights and freedoms can not remain without a response in*



*the interpretation of domestic law and its consistency with constitutionally guaranteed rights. The European Court of Human Rights had a similar opinion recently in the Bosphorus matter (decision of the European Court of Human Rights in the matter Bosphorus Hava Yollari Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98 of 30 June 2005). For these reasons, in the present situation, we can consider the European institutional guarantee of the standard of protection of human rights and fundamental freedoms to be compatible with the standard ensured on the basis of the constitutional order of the Czech Republic. In any case, we can also agree with the government's opinion that, even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other's activities, not compete with each other."*

## **2) How does the jurisprudence of constitutional courts influence the relationship between the European Court of Human Rights and the Court of Justice of the European Union?**

Although the answer to the question how the case law of constitutional courts influences the relationship between the European Court of Human Rights and the CJEU should more appropriately be put to the institutions concerned, the European Court of Human Rights and the CJEU presumably follow case law of constitutional courts and take it into consideration. This is due to the fact that their protected interest, i.e., the protection of fundamental rights, is identical. Although the degree to which constitutional courts reflect on the relationship between the European Court of Human Rights and the CJEU differs, it is of interest to them. The case law of the Constitutional Court of the Czech Republic shows that this is an issue of heightened interest also to the Constitutional Court of the Czech Republic. Judgment Pl. ÚS 19/08, Treaty of Lisbon (see the English version at [www.usoud.cz](http://www.usoud.cz)), shows how the relationship between the Charter of Fundamental Rights of the European Union (the Charter) and the Convention on Human Rights and Fundamental Freedoms (the Convention) is viewed by the constitutional institution in the Czech Republic, and how it is approached by the Constitutional Court of the Czech Republic. In the above-referenced decision, the Constitutional Court analyzed this issue in detail as regards the purpose of provision for the protection of human rights at European level, the content of such provision and the relationship between the Charter and the Convention. It can be said that this did not involve a mere assessment of compliance of the Charter and the Convention with the constitutional order of the Czech Republic; the Constitutional Court of the Czech Republic also interpreted the relationship between the Charter and the Convention and the complainant and other bodies and citizens (Article 89 (2) of the Constitution of the of the Czech Republic). The relevant parts of the above-referenced judgment are provided below.

### **Case law of the Constitutional Court of the Czech Republic ad Question 2**

#### **Judgment Pl. ÚS 19/08 (Treaty of Lisbon I.)**

*XVII.*

....

*191. As regards the (future) status of the Charter itself, it is evident from the foregoing text that the formulation in Article 6 par. 1 of the Treaty on EU, that the Charter has the same legal force as the Treaties, must undoubtedly be interpreted to mean that the Charters is an integral part of them. If the Treaty of Lisbon enters into force, the Charter would, in the first instance, bind Union bodies, and only then, indirectly, in the application of Union law,*

whether direct or indirect, also bind Czech bodies. The provisions of the Charter, observing the principle of subsidiarity, are intended for the bodies, institutions and other subjects of the Union, and for member states, of course only if they apply Union law (Art. 51 par. 1 of the Charter). This principle also corresponds to current case law, and the application of unwritten human rights principles by the Court of Justice; states are bound by this European standard of human rights when Community law is applied (cf., e.g., Judgment of the Court of Justice of 13 April 2000, *Karlsson and others*, C-292/97, Recueil, p. I-2737, par. 37, under which the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules). It follows logically from this principle that the Charter does not expand the area of competences of Union law beyond the framework of Union competences (Art. 51 par. 2 of the Charter, Art. 6 par. 1 of the Treaty on EU). This is also reflected by recent case law, e.g. in the “Red Star case” (Order of the Court of Justice of 6 October 2005, *Vajnai*, C-328/04, European Court Reports, p. I-8577), which involved the preliminary question, whether a ban on Communist symbols, enforced in Hungary with criminal penalties, is inconsistent with European unwritten human rights principles, this question was considered obviously inadmissible, not because today’s EU law does not recognize freedom of speech, but because Community law does not function in that area, and it is thus fully up to Hungary to regulate the ban of symbols that are unacceptable to it. Analogously. cf. the Judgment of 29 May 1997, *Kremzow*, C-299/95, Recueil, p. I-2629, where a defendant accused of murder attempted to rely on the Community level of protection of human rights, and argued that a sentence would affect his “Community” freedom of movement. The Court of Justice also rejected this argument on the preliminary issue from the Austrian court, because European law was not applicable to the matter in any way. Even if the Charter enters into force, this changes nothing on the inadmissibility of such preliminary questions, because Art. 11 of the Charter is not applicable to such cases.

192. In this regard we can only point out that at the present time, given the lack of a written (binding) catalog of human rights in the framework of the EU, it is the Court of Justice that applies (protects), at the Union level, human rights created or recognized by the Court in the form of unwritten common constitutional principles of member states, that is, in view of the domestic constitutional systems, and the system for protecting human rights conceived by the European Court of Human Rights. Note: The Court of Justice itself refers to the Charter – cf. e.g., the judgment of 27 June 2006, *Parliament v Council*, C-540/03, European Court Reports p. I-5769, point 38; decision of 3 May 2007, *Advocaten voor de Wereld*, C-303/05, European Court Reports p. I-3633, point 46, and others.

193. The Charter itself contains a catalog of fundamental rights and freedoms (concentrated in Title I to Title VI) and general provisions governing the interpretation and application of them (Title VII). The standard of protection of human rights and fundamental freedoms in the European Union must be evaluated, along with the EU Charter, also in view of other related provisions of European law. Article 6 par. 2 of the Treaty on EU provides that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under the third paragraph of that article, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union’s law. This second paragraph is important primarily in view of the formal side of the standard of protection. Materially, the fundamental rights guaranteed by the Treaty are contained in the system of Union protection on the one hand by their being declared to be general principles of Union law, and on the

*other by their role in the case law of the Court of Justice. As a result of acceding to the Treaty, the Union bodies – including the Court of Justice – will become subject to review by the European Court of Human Rights. In terms of the standard of protection based on the constitutional order of the Czech Republic we can say that including the European Court of Human Rights in the institutional framework for protection of human rights and fundamental freedoms in the European Union is a step which only strengthens the mutual conformity of these systems.*

*194. The third paragraph of Article Six concerns the material element of the standard of protection of human rights and fundamental freedoms. In this regard as well, we can say, within the framework of abstract review, that this provision reflects the requirements of the domestic standard, because they both come from the same framework of values. This is also strengthened by the Charter of Fundamental Rights of the EU itself, whose Article 52 par. 3 and 4 provides: “In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.” We must also take into consideration Article 53 of the Charter of Fundamental Rights of the EU, under which, “Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.” We can only comment that this principle is key as regards limiting the reach of EU law, and thus also limiting the transfer of state sovereignty to the EU.*

*195. Thus, if the Charter – as already stated – recognizes fundamental rights that result from the constitutional traditions common to the member states, those rights must be interpreted in harmony with those traditions (Art. 52 par. 4). Here there is a certain change compared to the present, which reflects the fact that a written (binding) catalog of human rights is being newly introduced. Whereas today the constitutional traditions common to the member states are a material source of unwritten human rights, after the Treaty of Lisbon enters into force, that source will be the text of the Charter alone, and the oral traditions will have the character of a source used to assist interpretation, in an obligatory comparative method of interpretation.*

*196. As regards possible conflict between the standard of protection of human rights and fundamental freedoms ensured by the constitutional order of the Czech Republic and the standard ensured in the European Union, it is appropriate to point out that protection of fundamental rights and freedoms falls in the area of the “material core” of the Constitution, which is beyond the reach of the constitutional framers (cf. Pl. ÚS 50/04). If, from this point of view, the standard of protection ensured in the European Union were unsuitable, the bodies of the Czech Republic would have to again take over the transferred powers, in order to ensure that it was observed (cf. the abovementioned judgment in the matter of sugar quotas, file no. Pl. ÚS 50/04).*

...

198. In this regard the Constitutional Court states that the leading principle in the area of human rights and fundamental freedoms is the most effective possible protection of the individual, together with the clear enforceability of the rights directly on the basis of catalogs of human rights, usually without the intermediation of other legal texts of lower legal force. Contemporary democratic Europe, in the period after World War II and after the fall of totalitarian regimes in the 1990s, reached an exception level of protection of human rights; The EU Charter in no way adds problems to this system, but on the contrary – in the area of its competence – suitably expands it, and the individual, for whose benefit the entire structure was built, can only profit from it. Potential future conflicts and disputes about interpretation, which can arise in any area of human activity, are not fundamental from this point of view; the important thing is the overall purpose, based on timeless values that are of the same or similar nature, whether guaranteed on the domestic, European, or international level. “.

### **3) Do differences between the jurisprudence of the European Court of Human Rights, on the one hand, and the Court of Justice of the European Union, on the other hand, have an impact on the jurisprudence of the constitutional court?**

The case law of the Constitutional Court refers to both EU law or CJEU's case law, and to the Convention or the case law of the European Court of Human Rights in specific situations. As regards the question whether the case law of the Constitutional Court of the Czech Republic perceives the differences between the two systems, it is in particular necessary to point out that the treatment by the Constitutional Court of the Czech Republic of EU law which is not a reference criterion in reviews conducted by the Constitutional Court, and which is not a part of the constitutional order of the Czech Republic, differs from the treatment of law pursuant to the Convention, or pursuant to international human rights treaties (see Pl. ÚS 36/01) which form a part of the constitutional order of the Czech Republic.

As regards European law (or EU law or community law), the Constitutional Court of the Czech Republic adopted positions on a number of issues related thereto in its heretofore legislation, e.g., positions on the reference framework for EU law review, the duty to submit a preliminary query to the CJEU within the meaning of Article 267 of the Treaty on the Functioning of the European Union, and on potential breach of the right to a lawful judge where such preliminary query is not submitted.

- Community law cannot serve as a reference criterion for the assessment of constitutionality of a domestic regulation (judgments Pl. ÚS 50/04, Pl. ÚS 36/05, Pl. ÚS 56/05). The Constitutional Court of the Czech Republic is not competent to review compliance of a domestic regulation with community law; if it were presented with a constitutional complaint concerning defective transposition of community law, such complaint would be rejected for lack of jurisdiction (Judgment Pl. ÚS 56/05);
- The Constitutional Court of the Czech Republic outlined the basis for its further assessment in relation to the duty of a general court assessing a conflict with EC law. It warned that although the Constitutional Court of the Czech Republic as a rule is not authorized to interfere with the contemplations of the general court regarding the legitimacy of the grounds for its conclusion that the contested provision is in conflict with EC law, such conclusion must be duly reasoned, otherwise it might become subject to review by the Constitutional Court in a constitutional complaint proceeding.



The review might also examine whether the interpretation of the relevant legal regulations presented by the court is foreseeable and reasonable, whether it corresponds to established conclusions of court practice, or whether, on the contrary, it is not a manifestation of arbitrary interpretation (Judgment Pl. ÚS 12/08);

- The Constitutional Court of the Czech Republic formulated the right and duty of a general court to submit a preliminary query with regard to the court of the last instance. The Constitutional Court concluded that under certain circumstances, i.e., unless the court fails to submit the query arbitrarily, the failure to meet the duty to submit a preliminary query may constitute a breach of the right to a lawful judge; the Constitutional Court also defined examples of such arbitrariness (Judgment II. ÚS 1009/08).

### ***Case law of the Constitutional Court of the Czech Republic ad Question 3.***

#### ***Judgment Pl. ÚS 50/04***

*Therefore, although regulations within the constitutional order remain the reference framework for review conducted by the Constitutional Court even after 1 May 2004, the Constitutional Court cannot completely disregard the impact of community law on the creation, application and interpretation of domestic law in an area the creation, effect and purpose of which directly follows up on community law. In other words, the Constitutional Court interprets constitutional law in this area with a view to principles stemming from community law.*

#### ***Judgment Pl. ÚS 56/05***

*"48. .... Before the Constitutional Court formed an opinion on the foregoing questions, it was necessary to deal with the last version of the petitioner's filing, which is based primarily on an alleged conflict between the regulation of the right to a forced buy-out and the Thirteenth Directive (points 6 and 7). ... An obligation arises from Art. 1 par. 2 of the Constitution of the CR for the Constitutional Court, as a state body, of the Czech Republic, to make an interpretation of the constitutional order consistent with European law (see also judgment file no. Pl. ÚS 66/04, no. 434/2006 Coll., in relation to European Union law) in those areas where community law and the legal order of the Czech Republic meet (the undertaking of loyalty under Art. 10 of the TEC). Of course, it has to be a matter of interpretation of the constitutional order in relation to domestic law. However, the petitioner asks that the Constitutional Court decide on its allegations concerning defective transposition of community law. Therefore, the Constitutional Court left them aside. If the petitioner limited itself only to those allegations, the petition would have to be denied due to lack of jurisdiction of the Constitutional Court. Of course, in cases of annulling legal regulations, the Constitutional Court must take European Union membership into account in terms of Art. 1 par. 2 of the Constitution of the CR, and weigh the possible use of the opportunities given to it by §70 par. 1 of the Act on the Constitutional Court."*

#### ***Judgment Pl. ÚS 12/08***

*34. ... 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).“.*

***Judgment II. ÚS 109/08***

*22. The Constitutional Court notes that in its view, arbitrary conduct includes such conduct of a court of last instance applying community law standards that completely omits to ask the question whether the court ought to submit a preliminary query to the ECJ, and fails to provide rationale for such non-submission, including an assessment of exemptions covered by the ECJ in its case law. In other words, this is a case where the court completely disregards the existence of a mandatory provision of law contained in Article 234 of the Treaty Establishing the European Communities, which is binding on the court. The mere view of the court that it deems the interpretation of the problem on hand obvious cannot be viewed as a proper rationale; such statement is particularly inadequate in a situation where a party to the proceeding opposes the court's view. A rationale that fails to explain properly how and why the solution chosen meets the purpose of the community regulation is also inadequate. This further includes a case where the court neglected to interpret the mandatory regulation contained in Article 234 of the Treaty Establishing the European Communities, thus depriving specific parties of their right to a lawful judge, guaranteed by Article 38 (1) of the Charter.*



## SUMMARY

### Ad Part I.

- The Constitutional Court of the Czech Republic is not obliged to apply European law because the Constitution and selected international human rights treaties are its reference criterion.
- The Constitutional Court does not assess issues of validity of community/European law standards as it has no competences in this regard.
- The Constitutional Court respects EU law as a peculiar normative system, and prefers interpretation of disputed provisions of legal regulations which is compliant with EU law.
- The European Convention on the Protection of Human Rights has been a reference criterion of the Constitutional Court, and is frequently quoted in its case law.
- The Charter of Fundamental Rights of the European Union is not a reference criterion and is virtually unmentioned in the case law.
- The Constitutional Court refers to a broad array of human rights catalogs at European and international levels, and uses them actively, in particular in the protection of individual fundamental rights and freedoms.
- The Constitutional Court is not subordinated to any other international court; however, if a decision of an international court is in conflict with its prior case law, there are ways of amending such a previous decision (however, outside of potential conflict with case law of international courts, the decisions of the Constitutional Court are final and unchangeable).
- The Constitutional Court monitors, uses and respects the case law of the European Court of Human Rights and harmonizes its own case law therewith.
- The ambit of the Court of Justice of the European Union and the Constitutional Court does not overlap but the Constitutional Court fully respects the position of the CJEU as the interpreter of European law.
- The Constitutional Court does not recognize the doctrine of absolute precedence of community law.
- Differences in the case law of the Constitutional Court and the European Court of Human Rights lead to amendments to the case law of the Constitutional Court.
- Differences in the case law of the Constitutional Court and the CJEU are due in particular to the fact that the Constitutional Court intends to protect fundamental human rights and values of democratic rule of law even after the delegation of certain national powers to EU bodies in the event of excessive conduct or overstepping of powers delegated to EU bodies by an international treaty.
- Although in the conditions of the Czech Republic, general courts work with the case law of European courts, there is not clear link between references in the case law of the Constitutional Court and references in the case law of lower courts.

## **Ad Part II.**

- The Constitutional Court fairly frequently quotes the case law of foreign constitutional courts, in particular those from the continental legal environment. As regards non-European courts, only the case law of the U.S. Supreme Court is quoted on a regular basis.
- The Constitutional Court does not direct its quotations at the same language area (less than 10% of all the foreign quotations). The most frequently quoted case law is that of the German Constitution Court.
- More than one half of quotations from foreign case law concerns public law.
- There are only several decisions of the Constitutional Court that have been quoted by foreign constitutional courts.
- The Constitutional Court becomes acquainted with the case law of other constitutional courts in particular through its collaboration with the Venice Commission of the Council of Europe, activities of the Analytical Department of the Constitutional Court, and through bilateral relations.

## **Ad Part III.**

- While references to the case law of the Court of Justice of the European Union in the case law of the European Court of Human Rights are not very frequent, if they concerned an issue similar to one being assessed by the Constitutional Court, they would probably influence its decision-making.
- Although it is likely that European courts follow and analyze the case law of national constitutional courts, the Constitutional Court of the Czech Republic has no information at its disposal that would allow it to establish the potential influence of its case law on the relationship between the two European judicial bodies.
- The differences in the case law of the European courts have no direct impact on the decision-making practice of the Constitutional Court because these are (from the perspective of our national constitutional law) two different systems. The former (EU law) does not constitute a reference criterion for review for the Constitutional Court, and the latter (represented by the Convention and other international human rights treaties) is in contrast understood to form a part of the constitutional order.