

# THE REVIEW OF ONE CZECH COURT'S DECISION – ARE WE MORE EUROPEAN THAN THE EUROPEAN UNION ITSELF?

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## Abstract in original language

Cílem tohoto příspěvku je analyzovat jedno z rozhodnutí českého Krajského soudu v Praze. Tento soud položil předběžnou otázku Evropskému soudnímu dvoru týkající se výkladu pojmu používaného českým autorským zákonem. Následně ale v jiném řízení ESD sporný pojem interpretoval způsobem, který znamenal, že dosavadní česká legislativa přestala být eurokonformní. S ohledem na to, že se řízení před českým soudem týkalo právě možné aplikace směrnice, se autor v článku zabývá jednotlivými řešeními tak, jak vyplývají z judikatury Evropského soudního dvora. Zkoumána je zejména možnost přímého účinku či nepřímého účinku. Autor se dále kriticky vyjadřuje ke konečnému rozhodnutí českého soudu, které ale, byť je odůvodněno nepřesně a v rozporu s judikaturou Evropského soudního dvora, nakonec přece jen je správné. V dané věci totiž bylo nutné zohlednit závazné mezinárodní smlouvy, u nichž limity v případě jejich bezprostřední použitelnosti obdobné zákazu horizontálního přímého účinku směrnice neexistují.

## Key words in original language

Přímý účinek, nepřímý účinek, směrnice, implementace směrnice, povinnost interpretovat národní právo v souladu s komunitárním právem.

## Abstract

The aim of this article is to analyze one decision of the Czech Regional court in Prague. This court referred for a preliminary ruling to the ECJ with a question concerning an interpretation of a term “communication to public” which was used by a Czech Copyright Act. Consequently, in another proceeding the ECJ gave its ruling on the same question. Its answer was not positive for the Czech legislator as the definition in Czech Copyright Act became different from the definition adopted by ECJ. The article analyzes this situation and possible solution of the initial proceeding at the Czech court. The question was whether a direct or indirect effect of the directive was possible in this case. The author criticizes the judgment of the Czech court as its decision and justification was not in compliance with the established ECJ's case law. However, the result itself is correct, as the Czech court also had to reflect the existence of international Treaties which are binding on the Czech Republic and take precedence over Czech statutes with no limits similar to those which applies in case of directives.

## Key words

Direct effect, indirect effect, directive, implementation of a directive, duty to interpret national law in accordance with the EC law.

## 1. INTRODUCTION

In my contribution, I would like to deal with a problem which concerns directives and their possible effect on individuals. I would like to describe the approach of the European Court of Justice (hereinafter referred to as the „ECJ“) first and then describe a decision of a Czech regional court in Prague which shows, that theory and practice might be different. The

hypothesis which I would like to prove is that the doctrine of direct effect of a directive is too new for Czech first instance courts to accept in their day-to-day practice.

## 2. 2. DIRECTIVE ENFORCEMENT

A directive is a legislative act of the EC which requires Member States to achieve a particular result without dictating the means of achieving that result. As such, directives are only binding on the member states to which they are addressed. Individuals are not addressees of directives and cannot therefore in general establish their rights or impose duties on them.

However, it may happen, and it often does,<sup>1</sup> that a Member State fails to fulfill its obligation to implement a directive into its national law. It does not matter whether such a breach was done voluntarily or not,<sup>2</sup> the result is same – a different legal standard in this state and in states that fulfilled their obligations. To overcome this problem the ECJ has developed certain doctrines which allow enforcing directives through the national courts. Three principal means were established:<sup>3</sup>

- a principle of direct effect<sup>4</sup>
- a principle of indirect effect<sup>5</sup>
- a principle of state liability (“Francovich liability”)<sup>6</sup>

Direct effect in general means that a directive under certain conditions becomes enforceable before national courts of the Member states. This allows individuals invoke the directive directly and claim an individual right based on such directive against a state. For a number of

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<sup>1</sup> On the date November 18, 2008 30 directives were not duly implemented to the Czech legal order - see <http://isap.vlada.cz/>

13 proceedings total against the Czech Republic have been initiated for failure to implement a directive since it became a Member State of the EC/EU. For details see the Appendix.

<sup>2</sup> The Czech Republic often tries to excuse itself arguing that the delay in implementation was caused due to the election to the Chamber of Deputies. Such argument is however generally not accepted by the ECJ.

<sup>3</sup> The development of these doctrines was possible only due to the fact, that the Community law has primacy over national law. For primacy of Community law and recent development in Lisbon Treaty see Sehnálek, David. *The Primacy of Community Law*. EU Watch, 2008, 11, pp. 25-32.

<sup>4</sup> This principle was initially developed for the EC Treaty in case 26-62, *NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v Nederlandse administratie der belastingen*; In cases of directive the ECJ held that they might be directly effective in cases: 41-74, *Yvonne van Duyn v Home Office*; 152/84 *Marshall v Southampton a South-West Hampshire Area Health Authority (Teaching)*; case 148/78 *criminal proceedings against Tulilo Ratti*, case C-91/92 *Faccini Dori v Recreb* and in other cases.

<sup>5</sup> This principle was developed in case C-106/89, *Marleasing SA v La Comercial Internacional de Alimentacion SA* and in case 14/83, *Sabine von Colson a Elisabeth Kamann proti Land Nordrhein-Westfalen*.

<sup>6</sup> This principle was developed mainly in cases: C-46/93 a C-48/93 *Brasserie du Pêcheur SA v Bundesrepublik Deutschland* and the *Queen v Secretary of State for Transport, ex parte: Factortame Ltd*; C-6/90 a C-9/90, *Andrea Francovich and Danila Bonifaci v Italy*; C-224/01, *Gerhard Köbler v Austria*; For conditions for state liability see Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tomkins, A., *European Union Law: Text and Materials*, Cambridge university press, 2006. pp. 390 – 408.

reasons, it is not possible to do the same thing against other individuals.<sup>7</sup>

Sometimes, a directive cannot have a direct effect; however, it can still affect the national law through its indirect effect. This principle requires national courts to interpret domestic law consistently with directives in as much as it is possible.<sup>8</sup> This duty is not only limited to the euoconform interpretation of statutes which were adopted after the expiration of the implementation period but to all relevant national laws.<sup>9</sup>

Both direct and indirect effects have one thing common. They cannot result in imposing an obligation to any individual. This effect is reserved only for regulations and some provisions of the EC Treaty.<sup>10</sup>

### 3. PROCEEDING AT THE CZECH REGIONAL COURT

One can see that both principles require national courts to fulfill states obligations where the national legislator failed to fulfill its duty to properly implement a directive into national law.<sup>11</sup> One would expect that national courts will favor the national law and will generally be reserved in case of these rather unusual principles. It is hard to find an answer on this question as we do not have any statistical data on courts decisions. However, sometimes we do find some important decision which shows us what the current approach of national courts might be.

Such a decision is a judgment of the Czech regional court in Prague about which I would like to briefly comment.<sup>12</sup> This decision was concerning the term “communication to public” which is used by a directive 2001/29. However, this directive does not exactly define this term.

This directive was implemented into the Czech Copyright Act. According to this statute as amended by Law 81/2005 Coll. it does not cover situations, where a work is played on a TV by hotels, where such TV is situated in a private part of the premises used for accommodation

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<sup>7</sup> The ECJ refuses to allow a directive to have a direct effect even in its recent case law. See for example Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tomkins, A., *European Union Law: Text and Materials*, Cambridge university press, 2006. p. 371. However, the ECJ has lately developed a doctrine of incidental effect of a directive between individuals. See Senyücel, O. *The Direct Effect of Community Directives: The Effect of the Unilever Judgment*, Ankara Law Review, Vol.2 No. 1 (Summer 2005), from p. 84.

<sup>8</sup> For detailed information on duty and limits of euroconform interpretation of national law see Sehnálek, D. *Povinnost a limity (euro)konformního výkladu vnitrostátního práva*. Časopis pro právní vědu a praxi, Brno : Právnická fakulta MU, XVI, 1/2008, pp. 8-15, ISSN 1210-9126. 2008.

<sup>9</sup> See Kičinová, E. *Nepriamy účinok komunitárneho práva*. EMP, 2004, No. 1, p. 18.

<sup>10</sup> For the reasoning see Chalmers, D., Hadjiemmanuil, Ch., Monti, G., Tomkins, A., *European Union Law: Text and Materials*, Cambridge university press, 2006. p. 372 – 377.

<sup>11</sup> According to the Art. 10 of the EC Treaty Member states shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community. They shall facilitate the achievement of the Community's tasks. This duty has not only the state itself but also all its institutions. Thus, not only the legislator but also national courts are obliged to take all necessary steps in order to achieve the Community's tasks. This duty was however extended even to the 3<sup>rd</sup> pillar of the EU even though the Treaty on EU does not have any provision similar to Art. 10 of the EC Treaty. See Zemánek, J. *Eurokonformní výklad rámcového rozhodnutí - povinnost nebo nepřipustný soudcovský aktivismus?*. Jurisprudence, 2005, No. 8.

<sup>12</sup> Judgment of Krajský soud v Praze (the Czech Regional Court in Prague) č.j. 36 C 115/2004.

– in a room.

The Czech OSA – which is a Czech organization established in order to protect rights of authors had a different opinion than the statute and the legislator and sued some hotel owner. According to their opinion, this Czech regulation was not in compliance with the EC law and with several intl. treaties. They claimed, that the term “communication to public” was misinterpreted by the Czech legislator in order to favor the hotel lobby.

The Czech court referred to the ECJ for a preliminary ruling but after that, the ECJ gave its ruling on the same question in another case.<sup>13</sup> In its ruling the Court said, that the term “communication to public” must be understood that it includes also a distribution of a TV signal in private hotel rooms. After that the Czech regional court in Prague removed its reference and what is important it decided the case in favor of OSA arguing that it is necessary to give the precedence to the European and international law. The decision established an obligation of a hotel owner to pay remuneration for its TVs.

The question is – was this judgment correct and conform to the EC law? The answer is not simple.

In case of directives which were not duly implemented into the national law national courts have to proceed as follows. They must first try to apply such directive directly. If direct effect of the directive is not possible they must try to interpret the current national law in conformity with such directive.<sup>14</sup>

However, the direct effect of the directive and the precedence over national law is not possible in our case, as according to the ECJ case law it is not possible to invoke a directive against another individual – which was this case.

Indirect effect was also not possible as the Czech wording of the Art. 23 of the Czech Copyright Act did not allow any different, euroconform interpretation. The exemption of hotels was explicit. Euroconform interpretation would be contrary to the wording of the Czech Copyright Act.

In my opinion, any other side effect of the directive precluding the application of national act could not help in this case as the amendment was adopted before the ECJ ruling on interpretation of the directive. In other words it was adopted in the time when it was not clear whether it is contrary to the directive or not. The directive could not therefore lead to an inapplicability of the amendment and the EC law could not take precedence over national law in this case.

The only solution of this problem possible according the EC law is to hold the Czech Republic liable for damages and loss caused to the OSA as a result of breach of Community law.<sup>15</sup> However, in this case the state liability would be possible only for damage and loss

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<sup>13</sup> In Case C-306/05, Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA.

<sup>14</sup> See Týč, V. K aplikaci sekundárního práva ES v členských státech. EMP, 1999, No. 4, p. 31.

<sup>15</sup> See Týč, V. K aplikaci sekundárního práva ES v členských státech. EMP, 1999, No. 4, p. 31.

which arose after the interpretation of the directive has become clear, in other words after the ECJ finally interpreted the term “communication to public”.<sup>16</sup>

#### 4. CONCLUSION

My conclusion is that this decision of the Czech court itself was correct, but its reasoning was not fully in conformity with the EC law. Why? The court solved the conflict of a national and community law by giving precedence to the EC law and international law. As it was said already, no direct, indirect or even side effect of the directive is possible in this case. This means that the reasoning of the Czech court was not correctly based on the case law of the ECJ. However, the Czech court did well as it relayed on international Treaties.<sup>17</sup> According to the Art. 10 of the Czech Constitution international treaties should take precedence over the national statute as well. This reasoning is eventually correct as in case of international treaties there are no such limits similar to limitation of horizontal effects of directives.<sup>18</sup>

This case is very interesting. It is hard to make any general conclusion based on just one judgment. It may be just one random eccentricity. On the other hand, this decision may imply that Czech courts are willing to apply EC law and that they are for unknown reasons willing to be more pro-European than the EU itself. Or, maybe they just do not understand the concept of direct effect and supremacy of EC law.

#### 5. APPENDIX

##### **CASES WHERE THE CZECH REPUBLIC WAS SUED FOR FAILURE TO IMPLEMENT A DIRECTIVE**

1. In case C-203/06 the ECJ declared that the Czech Republic failed to adopt laws, regulations and administrative provisions necessary to comply with Council Directive 93/16/EEC of 5 April 1993 to facilitate the free movement of doctors and the mutual recognition of their diplomas, certificates and other evidence of formal qualifications.
2. In case C-204/06 the ECJ declared that the Czech Republic failed to adopt laws, regulations and administrative provisions necessary to comply with Council Directive 78/686/EEC of 25 July 1978 concerning the mutual recognition of diplomas, certificates and other evidence of the formal qualifications of practitioners of dentistry, including measures to facilitate the effective exercise of the right of establishment and freedom to provide services.

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<sup>16</sup> See also Schlupková, K., K problematice odpovědnosti členských států za škodu způsobenou jednotlivci porušením komunitárního práva [cited on December 2, 2008]. Available at [http://www.europeum.org/disp\\_article\\_text.php?aid=285](http://www.europeum.org/disp_article_text.php?aid=285).

<sup>17</sup> Following international treaties are relevant to this case:

1. the Berne Convention for the Protection of Literary and Artistic Works (Bernská úmluva o ochraně literárních a uměleckých děl);
2. the Universal Copyright Convention (Všeobecná úmluva o autorském právu);
3. the WIPO Copyright Treaty (Smlouva Světové organizace duševního vlastnictví o právu autorském);

<sup>18</sup> Tight space limit does not allow us to further examine this effect of international law. For further reading on international treaties and their potential effects on national law and individuals see a very good study on this case by Telec. See Telec, I., Televizní přijímače na hotelových pokojích, Právní rádce, 2005, No 7, from p. 4.

3. In case C-46/06 the Czech Republic was sued for its failure to adopt laws, regulations and administrative provisions necessary to comply with Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society. The application was however removed from the register as the Czech Republic introduced necessary measures.
4. In case C-140/06 the Czech Republic was sued that it did not take legal and administrative measures necessary to comply with Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 relating to the assessment and management of environmental noise. The application was however removed from the register as the Czech Republic introduced necessary measures.
5. In case C-60/07 the ECJ declared that the Czech Republic failed to comply with Commission Directive 2004/33/EC of 22 March 2004 implementing Directive 2002/98/EC of the European Parliament and of the Council as regards certain technical requirements for blood and blood components. The Czech Republic tried to justify its position by an argument that the legislative process had to be started again because of the newly elected government and the Chamber of Deputies.
6. In case C-114/07 the ECJ held that the Czech Republic failed to implement the Directive 2004/24/EC of the European Parliament and of the Council of 31 March 2004 amending, in regards to traditional herbal medicinal products, Directive 2001/83/EC on the Community code relating to medicinal products for human use. The Czech Republic tried to justify its position by an argument that the legislative process had already been initiated.
7. In case C-115/07 the ECJ held that the Czech Republic failed to implement the Directive 2004/27/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/83/EC on the Community code relating to medicinal products for human use.
8. In case C-116/07 the Commission sued the Czech Republic for its failure to implement the Directive 2004/28/EC of the European Parliament and of the Council of 31 March 2004 amending Directive 2001/82/EC on the Community code relating to veterinary medicinal products. The application was removed from the register as the Czech Republic introduced necessary measures in its legal order.
9. In case C-117/07 the ECJ held that the Czech Republic failed to implement the Commission Directive 2005/28/EC of 8 April 2005 laying down principles and detailed guidelines for good clinical practice as regards investigational medicinal products for human use, as well as the requirements for authorisation of the manufacturing or importation of such products.
10. In pending case C-41/08 the Czech Republic is being sued by the Commission for failure to adopt the laws, regulations and administrative provisions necessary to comply with Council Directive 86/378/EEC of 24 July 1986 on the implementation of the principle of equal treatment for men and women in occupational social security schemes.
11. In case C-71/08 the Czech Republic was sued for failure to implement the Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets

in financial instruments amending Council Directives 85/611/EEC and 93/6/EEC and Directive 2000/12/EC of the European Parliament and of the Council and repealing Council Directive 93/22/EEC, 1 most recently amended by Directive 2006/31/EC of the European Parliament and of the Council of 5 April 2006 amending Directive 2004/39/EC on markets in financial instruments, as regards certain deadlines. The application was however removed from the register as the Czech Republic introduced necessary measures.

12. In case 87/08 the ECJ held that the Czech Republic failed to implement the Directive 2006/73/EC of 10 August 2006 implementing Directive 2004/39/EC of the European Parliament and of the Council as regards organisational requirements and operating conditions for investment firms and defined terms for the purposes of that Directive.
13. In case C-343/08 the Czech Republic is being sued for its failure to implement the Directive 2003/41/EC of the European Parliament and of the Council of 3 June 2003 on the activities and supervision of institutions for occupational retirement provision.

This list shows that the Czech Republic should be worried about the Lisbon Treaty which simplifies the enforcement procedure.

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