EVROPSKÉ PRÁVO A ČESKÉ SPRÁVNÍ SOUDNICTVÍ: TŘI ROKY POTÉ

EUROPEAN LAW AND CZECH ADMINISTRATIVE JUDICIARY: THREE YEARS AFTER

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Abstrakt

Příspěvek osvětluje zavádění práva Evropské unie, resp. Evropského společenství v právní praxi České republiky jako nového členského státu na příkladu jeho správního soudnictví (krajské soudy a Nejvyšší správní soud). Správní soudnictví nejvíce uplatňuje toto právo, neboť evropské právo je především právo správní. Přesto je uplatňování tohoto práva dosud poměrně vzácné. Toto právo se uplatňuje ve spojení, popřípadě dokonce ve střetu s právem českým. Uplatňování znesnadňuje mnohojazyčné zachycení, opožděné zpřístupnění v češtině i omezená znalost tohoto právního řádu.

Klíčová slova

Evropská unie; Evropské společenství; správní právo; správní soudnictví; mnohojazyčnost; přímý účinek; přednost; nepřímý účinek

Abstract

The Paper describes and analyzes introduction of law of the European Union and of the European Community in legal conditions of the Czech Republic as new member state, focusing on

administrative judiciary (regional courts and the Supreme Administrative Court). Administrative judiciary applies this law most frequently, because European law is predominantly administrative law. Nevertheless, its application remains rare. This law is applied together with Czech law, sometimes conflicting. Its application is complicated with its multilingualism, with delayed accessibility in Czech language and with limited knowledge of it.

Keywords

European union; European Community; administrative law; administrative judiciary; multilingualism; direct effect, primacy, indirect effect.

There is impossible to evaluate and describe the application of law in its entirety. National laws and international treaties are certainly published. Therefore, legal framework is accessible.

Nevertheless, there is always limited information about its application. For example, judgements are available only partially. Usually, only judgements of constitutional and supreme courts are systematically published. Administrative, commercial and private practice can be observed only indirectly through judgements. These judgements show, however, only part of application of the law in modern country. Individuals cannot gain full personal experience with administrative, commercial or private application of law. Information about practice is often regarded confidential by both lawyers and officers.

For these reasons, I have decided to describe early application of European law in Czech administrative judiciary. I am afraid that especially European law suffers from ignorance of its application in member states.

The law of the European Community - I will label it in simplified form as European law - is supranational law with privileged position towards the national law of member states[1].

[1] Law of the 2nd and 3rd pillar of the European Union can be applied in Czech administrative judiciary indirectly only. Sanctions established by joint positions of the European Union in the 2nd pillar can be applied together with

The Czech Republic is new member state of the European Union (and member state of the European Community as the eldest and the most important pillar of the first one) since May 2004. We can observe early application of European law in the Czech Republic now.

Communist history of the Czech Republic shall be taken into consideration. Czech law was profoundly and turbulently changed within fifteen years following collapse of communism in Central and Eastern Europe. It remains quite unstable. This lack of stability has visible impact on early application of European law in the Czech Republic.

From the point of view of national law, particular segments of European law belong mainly to administrative law. Principal purpose of European law is complex economic integration of Member States. It can be roughly divided into negative and positive parts.

Negative part is embodied in basic economic freedoms. These freedoms exclude incompatible rules and standards of national administrative law of member states. Growing part of European law can be described as positive administrative law. It inspires, accompanies or replaces administrative law of Member States. There are many parts of national administrative law which are profoundly influenced by supranational European law. Taxation and customs, social security, regulatory affairs or the protection of environment shall be mentioned at the first place.

European law may be perceived sometimes as key source of various administrative rules and standards. Therefore, administrative judiciary starts to be the most affected part of judiciary of every Member State.

The impact of European law into civil as well as criminal law is significantly less important. Certainly, there are areas of civil law influenced by it. For example, relations between employers and workers, organisation of companies and consumer affairs are touched by standards set by

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Czech administrative legislation. Czech administrative sanctions curb activities which are punished as crimes in many other Member States. Furthermore, linkage with 3rd pillar standards on *ne bis in idem* is possible. Nevertheless, I cannot provide any example of application of the 2nd and the 3nd pillar law in Czech administrative judiciary.

European law. Judicial cooperation in civil matters can be added to the list. Nevertheless, European element is less visible there if compared with administrative law. Taking the size of civil and judiciary into consideration, European law is applied in more diluted form if compared with its application in administrative judiciary.

The importance of European law for criminal law is the least. The European Union coordinates and harmonizes criminal laws of Member States up to limited extent only. It is done using tools resembling international law. Supranational elements are scarce or nonexistent in this third pillar of the European Union. Only in case of requirements of administrative law are to be supported by criminal law, the European law is to be applied. Nevertheless, there are few examples of this type of application of European law in the Czech Republic.

Let me describe the organization of Czech administrative judiciary since its reorganisation in 2003. Administrative judiciary for public law matters is based on the Code of Administrative Justice[2]. Administrative decisions on private-law are controlled by civil judiciary. Unclear line between private and public law has already led to several disputes decided by special judicial bodies.

There are two instances of new administrative judiciary: administrative judiciary sections of seven regional courts (*krajské soudy*) and of the City Court in Prague (*Městský soud v Praze*) of the same position are served by one hundred judges approximately. These judges decide in actions filed against decisions of administrative authorities. The Supreme Administrative Court (in Brno) with twenty-five judges, numerous assistants of judges and several advisers decides on cassation complaints. Case-law of the Constitutional Court on cases of administrative law shall not be ignored too.

[2] Soudní řád správní, 150/2002 Sb.

We can observe a little bit delayed, quite slow, but gradual and continuous entry of European law into Czech administrative judiciary in last two years.

There are several grounds for this delay. Few Czech authorities only started to apply European law systematically since the day of accession. Other authorities have been or are confronted with this new law only occasionally. Judicial application of European law has been therefore significantly postponed.

The first year of Czech membership was almost free of application of European law in Czech administrative judiciary. This application was launched first of all using European law indirectly as an instrument of interpretation in cases of applicability in Czech law before the accession.

The number of European law cases has increased significantly in 2006 and increases in 2007 too. Nevertheless, these cases continue to represent only small part of caseload. Few percent of all cases are European law cases. Pure Czech law cases dominate in judicial practice doubtlessly. There are several dozens European law cases reported in whole administrative judiciary only. There were regional courts which administrative judges reported no European law cases at all during the year 2005. Therefore, there is no urgent need to pay special attention to European law.

Several purposes of such limited number of euro-cases in Czech administrative judiciary may be recognised. Administrative authorities usually apply harmonized Czech law. Czech legislation complies with requirements of European law in general[3]. Numerous rules and standards of Czech law extend themselves beyond requirements of European law. It is worth to mention that there is often out of range Czech government intent.

Majority of cases decided in administrative judiciary lacks any European law element. Furthermore, attorneys are equipped by only partial and limited knowledge of European law.

[3] Even though the Czech Republic was labelled as one of the least successful Member State by the Commission in transposition of directives relating to internal market. 48 of 1620 directives are not transposed according to notifications (press release IP/06/1008, 18th July 2006)

There is an extremely complicated law for them with quite limited applicability. Therefore, they often fail to argue with it. On the other hand, there are examples of false an inappropriate argumentation with European law too.

Several types of application of European Law by Czech administrative courts, other Czech courts and other Czech institutions may be found. These types of application perform different features and problems.

The first mode is direct application of European law – mainly regulations - without any collision with Czech law. Direct effect of their rules is key feature of this mode. Priority is potential only. This application seems to be easy. In general, it is comparable with application of Czech law. Nevertheless, laws of Member States shall provide support for it. Czech law lacks this supportive legislation sometimes or it is unsuitable at all.

The second mode of application of European law performs its preferential use. European law enjoys general priority if applied together with incompatible law of Member States. My experience with rare cases of this type of application of European law shows that judges often hesitate to set off detailed Czech legislation due to basic freedoms or other principles of European law. These freedoms and principles are based on general provisions of the Treaty Constituting the European Community. This second mode of European law application is complicated seen by psychological point of view. Courts are expected to act similarly as constitutional courts[4]. Only the latter of them are accustomed to do so. Moreover, they shall take in consideration huge case-law of the Court of Justice.

[4] Foreign readers shall be informed about the short tradition of constitutional review in the Czech Republic. Constitutional judiciary was established in 1993. Numerous decisions of the Constitutional Court counter considerable resistance of other Czech courts.

The third mode of European law application is based on indirect effect. European law in general and directives in particular shall be taken into consideration while relevant law of Member States is applied by their courts and other institutions.

There is visible tendency to apply directives as an instrument of interpretation of Czech pre-accession law. That is correct in general. Czech law was gradually approximated to European law requirements since early 1990. Sometimes, however, there can be raised doubts, if automatic application is required or suggested. It is based on erroneous assumption that Czech law should be in full compliance with European law years before the Accession. Proponents of this mode of European law application tend to ignore that the European Agreement on Association (1993) expected and encouraged gradual approximation of Czech law. Nevertheless, it did not require full compliance with European law.

All three modes of conscious application of European law is or will be certainly less frequent than application of Czech law without any knowledge of their European origins. There is not necessary to know always that European law (directives) is behind Czech legislation. Nevertheless it should be taken into consideration in many cases for correct understanding of harmonized Czech law.

Let me describe shortly several interesting decided and pending cases of regional courts and the Supreme Administrative Court. According to my opinion, these cases represent the most important features and troubles of early application of European law in the Czech Republic.

The Supreme Administrative Court and eight regional courts have started to apply Regulation 1408/71 which establishes framework for coordination of social security schemes of Member States. The number of migrant workers and individual entrepreneurs, however, is limited. Czech social security authorities and administrative courts usually apply the Regulation correctly. They have continuous experience while applying bilateral treaties which provided for similar approach until the accession.

The most interesting and frequent application of the Regulation or its taking into consideration is never-ending line of cases of Czechoslovak pensioners. Bilateral Czech-Slovak treaty distributed due to the dissolution of Czechoslovakia actual and future pensioners to the Czech Republic and Slovakia according to seat of their employer at the moment of dissolution[5]. This strange criterion was the only feasible. There was shortage of data relating place of employment of people migrating between Czech and Slovak territory of former country. Several thousand Czech nationals with significant tie with Czech part of the territory blamed the outcome. Plenty of them have been compensated for lower pension they got in Slovakia during early prime years by the Ministry without any legal framework. The Constitutional Court however, demands compensation for several other Czech nationals[6] without closer ties with Czech territory in period of former Czechoslovakia.

Compensation based on citizenship, however, is apparently inadmissible after the accession if the principle of equal treatment is respected and the Czech Republic does not want and cannot compensate all Slovak pensioners. Therefore, the Supreme Administrative Court and regional courts continue to reject the case-law of the Constitutional Court.

In my opinion, these cases cannot be resolved without involvement of the Court of Justice. This court shall decide whether privilege required by the Constitutional Court – in leading case already twice[7] – is compatible with European law.

As an example of delayed applications of the Europe Agreement establishing an Association of the Czech Republic may be mentioned cases pending at Regional Court in Brno. Special levy was charged on both produced and imported wine since 2002. All money was allocated to Winery Fund of the Czech Republic for the re-establishment and improvement of Czech (or - better said -

[5] Czech-Slovak Treaty on Social Security (228/1993 Sb.). Its disputed article 20 has been incorporated by the Treaty of Accession (2003) in the list of special rules of the Regulation.

[6] Judgements II.ÚS 405/2002 or III. ÚS 252/2004.

[7] Judgement of the Constitutional Court in plenary session Pl. 4/06 higlighted duty of inferior courts to comply with its interpretation of laws. Nevertheless, it does not clarify the problem as such. Attached dissenting opinion is much more convincing for me.

Moravian) vineyards before the accession. If case-law of the Court of Justice interpreting prohibition of duties and charges having equivalent effect in the Treaty will be used for interpretation of verbatim provision of the Agreement[8]. The levy imposed on imported wine will be illegal since the entry into force of new version of Article 10 of the Constitution. This constitutional amendment enlarged the scope of direct application of international treaties and established their privileged position towards Czech legislation. Therefore, the Agreement shall be applied and incompatible Czech law ignored.

The Parliament of the Czech Republic enacted new Law concerning Value Added Tax at the moment of accession. Czech administrative courts, nevertheless, continue to apply former value added tax legislation due to lengthy administrative and judicial proceedings. There are numerous attempts to use the Directive 77/388/EEC as an instrument of interpretation this legislation. For example, the Supreme Administrative Court reversed decisions of both the Regional Court in Brno and South-Moravian tax authorities[9]. General and special rules of service taxation in this directive taken into consideration lead to conclusion, that agency contract for reconstruction of glass-welding unit in Slovakia is taxable – and deductible - in the Czech Republic if the agency is provided by Czech agent. The use of the directive for interpretation of applicable legislation seems to be adequate. Nevertheless, nobody in the European Community and its elder member states expected the frequency of agency contracts for businesses which obviously do not need it. These agencies often cover embezzlement or tax evasion.

The Supreme Administrative Court adopted *Halifax* judgement[10] for pre-accession Czech law[11]. It accepted that tax subjects can legitimately prefer some economic activities for their tax advantages. The notion of abusive practices in sphere of taxation should be applied with

[8] See Czech and other language versions of Art. 26 Europe Agreement and of Art. 25 of the Treaty. There is established case-law of the Court of Justice labelling charges used for support of domestic production as charges having equivalent effect.

[9] Judgement 2 Afs 92/2005-43 (29th September 2005)

[10] Judgement of the Court of Justice C-255/02.

[11] Judgement 2 Afs 178/2005-64 (23rd August 2006)

precaution. Therefore, economic activities cannot be labelled as tax evasion only for their tax-decreasing effects.

The first cases of administration of value added tax after the accession emerge in 2007. It can be expected, however, that this quasi-European tax will contribute to requests of Czech courts to the Court of Justice. There seem to be many cases which cannot be decided with consideration of case-law related to elder member states. There are many specific features of post-socialist economy. I can mention only generally tax-related issues of regulated leasing of apartments.

The number of actions in customs matters declined sharply since the accession. Majority of international trade is not subject to customs procedures. The first judgements of regional courts confirm that European customs legislation replaced very similar Czech legislation. This pre-accession Czech legislation followed European model since 1993. Nevertheless, even the small number can provide interesting cases with general consequences (Skoma-Lux case).

One interesting customs-related case is based on tension between European and Czech transitional provisions. The Treaty of Accession says that national law is applicable to a customs debt which was incurred before the accession[12]. The Czech Republic, on the other hand, limits the application of pre-accession (Czech) law to pending cases. However, request for repayment of paid customs if imported goods are re-exported due to bad quality or non-compliance with contract is to be decided in new proceedings. Therefore, Czech customs authorities claim that exportation from the European Community is necessary. Nevertheless, there is absurd if goods were imported from Denmark one month before the accession. Regional Court in Hradec Králové confirmed the refusal of customs authorities[13]. Cassation complaint has been submitted. Nevertheless, the Supreme Administrative Court decided to uphold the decision. These both judgements confirm reluctance of Czech administrative courts to take into consideration arguments based on European law if the matter is complicated.

[12] See Annex IV. (List referred to in Art. 22 of the Act of Accession), 5 (Customs Union), point 14 of the Treaty of Accession.

[13] Judgement 30 Ca 100/2005 (17th March 2006).

European Standards for environment protection provide considerable procedural safeguard for concerned public. Recent Czech case-law severely curtails access of organised environmental activists or indirectly concerned parties to courts.

Landmark judgement tried to adopt above mentioned safeguards is case of new runway for Prague Airport[14]. The Supreme Administrative Court – acting as the court of the first and last instance – repealed amendment of zone planning ordinance of the City of Prague. The court applied directly the Aarhus Convention as a document of both international and European law for justification of its competence to do it if requested by owners of houses potentially affected by noise of airplanes.

However, the approach of the Court (1st chamber) was questioned quickly and the decision was reversed as soon as at the beginning of 2007. The Extended Chamber of the Court analysed more carefully the wording of the Convention which distinguish planning and decisions on individual projects in case of highway R52 from Pohořelice to Mikulov.[15] Therefore, it rejected judicial review of regional and local zoning plans established as ordinances of units of regional and local government.

These two decisions of the Supreme Administrative Court show how difficult it is to apply nebulously formulated requirements of European environmental law.

The most visible application of European law is requests for preliminary ruling and judgements-responses of the Court of Justice. Czech lawyers are very well informed about this instrument. It has been favourite topic of Czech papers and monographs in the last years. Almost three and half years since the accession, there is, however, not more than twenty requests for preliminary ruling made by all courts of ten new Member States.

[14] Judgement no. 1 Ao 1/2006 (18th July 2006).

[15] Decision no. 3 Ao 1/2007 (13th March 2007).

The introduction of European law into practice of new Member States is gradual. It is obvious that many issues are dealt by case-law of the Court of Justice. If doctrines *acte clair* and *acte éclaire* are respected, there is little opportunity to request. Several requests of court of new Member States for preliminary ruling were already labelled as unnecessary by the Court of Justice.

Czech administrative judiciary requested for preliminary ruling once only. *Skoma-Lux* case[16], however, seems to be one of the most important requests of judiciary of new Member States.[17] Czech importer of Moldavian wine has been fined for false declaration of the type of imported wine in customs proceedings. It raised an important objection. European customs legislation was not published in Czech language at the moment of its application. The objection has been proven true. Special Editions of the Official Journal of the European Union including the Czech one were significantly delayed. The Customs Code was published several month later than applied.

Therefore, the Regional Court in Ostrava wanted to learn (1) whether European law may be applied against individual without its publication in relevant language and (2) what court shall decide on the objection of absence of applicable language version.

It must be taken into consideration that there are new sources of legal information. The European Union published new language version of its law in Internet before its final authentication. Therefore, these objections can be often labelled as wanton. On the other hand, standards of publication could not be simply ignored without destabilisation of law as system of formalized rules.

Case-law of courts of several other new Member States reveals considerably different approaches to this trouble following both last enlargements of the European Union and the European Community. For example, Polish inferior courts reject application of European law if not

[16] Case C-161/06.

[17] It is assigned to the Grand Chamber of the Court of Justice.

published in Polish language. On the other hand, the Supreme Court of Estonia conceded applicability of European law without its publication in Estonian language.

These differences are confirmed by variability of opinions of the Member States and the Commission submitted to the Court of Justice in *Skoma-Lux* case and balancing opinion of the attorney general.[18] She proposes inapplicability of unpublished law towards individuals. Nevertheless, she does not explain whether individuals shall raise this objection, or courts and tribunals of member states shall cease to apply it systematically. I expect that the outcome of the judgement which is to be expected in few months will be similarly

The last Czech case I want to mention shortly is the last judgement of the Constitutional Court on sugar quotas[19]. Sugar quotas form part of administrative law. The court decided on action by group of members of the Parliament for annulment of Sugar Quota Regulation of the Government of the Czech Republic. The Court renounced its pre-accession case-law. The Court admitted its restricted competence for assessment of constitutionality of Czech legislation enacted for enforcement of European Law. Therefore, it declined to analyse the compliance of quota allocation with constitutional principle of equality. I am afraid that the Constitutional Court extends application of European law unnecessarily and inappropriately. European law allocates national quotas only. Allocation of individual quotas is task of member states. I have not found any justification for ignorance of basic rights and principles in this agenda.

Let me draw some conclusions from above-mentioned cases of early application of European administrative law in the Czech Republic by its administrative courts and the Constitutional Court.

European law is not subject of day-to-day application. It is applied only occasionally. I hope that this nature of European law and its position in legal practice of the Czech Republic as new

[18] Delivered at 18th September 2007.

[19] Judgement Pl. 50/2004 (8th March 2006).

Member State substantiate involvement of specialists in decision-making and creation of special departments or teams at supreme courts. Judges simply cannot be familiar and cannot have sufficient experience with European law.

There is almost no evidence of manifest resistance to supremacy of European law. Nevertheless, some judgements and attitudes of judges show limited readiness to apply European law if conflict with Czech law occurs. On the contrary, Czech attorneys and judges are sometimes zealous to apply European law to extent not required in reality by the European Union.

European law is multilingual. I have already mentioned troubles caused by delayed publication of European law in Czech. Multilingualism, however, causes other problems. I can mention them only briefly.

Czech lawyers are only shortly skilled in comparison of language versions of legal documents. They start to discover differences between Czech version and other language versions of European law[20]. Sometimes they are anxious unnecessarily. Divergence between Czech and other language versions is often putative. Terms are to be presumed to have the same meaning.

Nevertheless, there are certainly many examples of poorly translated provisions of Czech language version of European law.

Furthermore, expected application of European law as explained by huge-case law of the Court of Justice is hard to expect if only small part of case-law has been translated in Czech language.[21]

[20] EUR-Lex (http://www.europa.eu.int/eur-lex/lex/en/index.htm) provided by the European Union enables easy confrontation of Czech and other language versions of European law documents.

[21] I have described and analysed various aspects and problems of multilingualism of European law in *Křepelka F.*, Mnohojazyčnost Evropské unie a její důsledky pro českou právní praxi (Multilingualism of the European Union and its consequences for Czech legal practice), Masarykova univerzita, Brno, 2007.

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