NEJVYŠŠÍ SOUD
Mgr. Aleš PAVEL
ředitel kanceláře předsedy soudu

Brno, 27. 5. 2020
Sp. zn.: Sz 10/2020

Vážená paní magistro,

v příloze zasílám doplnění dotazníku Evropské komise k novému mechanismu o fungování právního státu, které obsahuje stručný přehled zásadní judikatury k jednotlivým tématům v anglickém jazyce.

S vědomím skutečnosti, že dotazník byl již Ministerstvem spravedlnosti odeslán na Úřad vlády a také na Evropskou komisi a že uplynula již lhůta pro jeho podání ze strany Evropské komise, souhlasím se zadáním dotazníku v tom slova smyslu, že judikatura patří ke klíčovým informačním zdrojům pro připravovanou zprávu o stavu právního státu, která zaslaným dotazníkem nebyla zcela pokryta. Prosím tedy o postoupení přiloženého dokumentu na Úřad vlády a následně na Evropskou komisi.

Děkuji za spolupráci.

S pozdravem

Mgr. Aleš Pavel, v. r.
ředitel kanceláře předsedy Nejvyššího soudu

Příloha:
Doplnění dotazníku Evropské komise k novému mechanismu o fungování právního státu.

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I. Justice Systems

Challenges, current workstreams, positive developments and best practices

A. Independence

4. Allocation of cases in courts

Concerning the allocation of cases in courts, the Constitutional Court (judgement of 5 February 2019, Ref. No. IV.ÚS 4091/18) dealt with the situation of non-respecting the conclusion of a superior court by a regional court. The City court was in this case of the opinion that the regional court was not able to free itself from incorrect assessment of evidence and it therefore ordered the regional court to decide the case in a different formation of the chamber. The Constitutional Court stated that the removal of a case from a judge is an extraordinary procedural means which must be properly justified. It further held that the principle of binding effect of the legal opinion expressed by the court of higher instance does not prevent particular court, in its own consequent assessment, from taking into consideration other conclusions and considerations in order to attain the correct decision, should it give properly justified reasons.

In this respect, the Supreme Administrative Court in the case Ref. No. 16 Kss 7/2017 of 7 March 2018 held that "*the binding effect of the opinion of the higher instance court cannot be taken in itself as an interference with the judicial independence. The judicial system is organised in instances exactly for the reason of mutual interaction of lower and higher instance courts that produces the best possible outcomes*." Both from this decision and from the judgement of the Constitutional Court of 13 April 2017, Ref. No. I. ÚS 564/17, follows that a court cannot be obliged namely to formulate particular conclusion (both factual and legal questions) but only to remove the "objective" deficiencies.

B. Quality of justice

12. Accessibility of courts (e.g. court fees, legal aid)

The Constitutional Court also recently issued a decision concerning court fees, legal representation and foreseeability of decision-making (judgement of 17 May 2019, Ref. No. II. ÚS 1966/18). The case concerned the applicant demanding a liberation from court fees and legal representation by an attorney due to his financial situation. The Constitutional Court considered that the Supreme Administrative Court by its different assessment of two cases concerning the same applicant breached the principle of legal certainty, since in one case it dismissed the application against the decision which dismissed the demand for a legal representation, whereas in a different case it annulled such decision. The Supreme

Administrative Court did not give explanation for different assessment as to whether the applicant needs a legal representation. The Constitutional Court thus held that the constitutional principles of equality and legal certainty require the same interpretation of the law in comparing cases that is the principle of foreseeability of decision-making which means that the parties to legal relationships should legitimately expect that public authorities will decide in comparable situations in the same manner.

The Constitutional Court in respect to the fees for filing a complaint to the Office for the Protection of Competition (judgement of 30 October 2019, Ref. No Pl. ÚS 7/19) held that the requirement of unambiguity of the law and its internal consistency is valid especially where the law stipulates the obligation to pay a fee in the meaning of Art. 11 (5) of Czech Charter of Fundamental Rights and Freedoms. This obligation must be laid down by the law in an ambiguous, comprehensible, consistent and foreseeable manner. The Constitutional Court held that the legislature established the fee for filing the application even in the situation where the state is obliged to carry out one of the activities stipulated by the law. It thus repealed a provision of the Law on public procurement since it contravened the requirement of foreseeability and consistency due to the fact that the payment of the fee was the condition for an action of the administrative authority even in cases of *ex offo* proceedings.

II. Anti-corruption Framework

Challenges, current workstreams, positive developments and best practices

B. Prevention

21. Rules on preventing conflict of interests in the public sector

In relation the Rules on preventing conflict of interests in the public sector, two decisions of the Constitutional Court were issued recently. First decision (judgement of 11 February 2020, Ref. No. Pl. ÚS 4/17), concerning the Law on conflict of interests known as lex Babiš, the Constitutional Court stated that in the democratic state governed by rule of law, it is its obligation to preclude a person elected to a public position in the general elections to use the entrusted power to enforce its own private interests at the expense of public interest. It further noted that the public or general interest could and should be superior to the private interests of those who are temporarily called to represent the public power. According to the Constitutional Court, it is not in violation with the constitutional order if the law stipulates the conditions for citizens to become public officials which interfere with the

freedom or right to conduct a business as stipulated in the Art. 26 of the Czech Charter of Fundamental Rights and Freedoms.

In its second decision (judgement of 11 February 2020, Ref. No. Pl. ÚS 38/17) concerning the central register of notifications, the Constitutional Court assessed the issue of access to and publication of the information concerning the property and income of public officials to this register. It held that the access to such information consisting of direct publication of data from the register of notifications is not necessary for the attainment of legitimate aim (which in this case is to prevent the performance of public power in favour of private interests). If the aim of viewing into the register is prevention or detection of the conflict of interests, or increase of public trust in the functioning of the public power, and not solely to satisfy personal curiosity or detection for unlawful purposes, the formal barrier in the form of individual application cannot be considered as an obstacle hindering the fulfilment of the above-mentioned aim.

III. Media Pluralism

C. Framework for journalists' protection

33. Rules and practices guaranteeing journalist's independence and safety and protecting journalistic and other media activity from interference by state authorities

Journalists' protection is a matter traditionally considered, by Czech courts, in connection to the freedom of expression, the right to information, and the right to respect for private and family law. Czech courts have attempted to set principles of such a protection in accordance with the requirements of the European Convention on Human Rights.[1] In its recent judgement of 24 March 2020, file no. **III. ÚS 2300/18**, the Constitutional Court held that the freedom of expression is a fundamental attribute of a democratic state; in the field of journalism, however, protection of this freedom in matters of public interest may be granted only if the media act in good faith, inform on a precise factual basis and provide reliable and accurate information in accordance with journalistic ethics. The law grants no protection to an expression especially if by such expression, in the eyes of the public, a person – including public figures – is being ridiculed in a targeted manner. The factual basis of this case was thus distinguished from the case of *Oberschlick v. Austria (No. 2),* 20834/91.

A case of the Czech Republic's President's statements about the already deceased journalist Mr Peroutka was recently widely discussed in the media. Mr President ascribed publicly to Mr Peroutka the authorship of the article called “Hitler is Gentleman” and cited several statements that Mr Peroutka had putatively pronounced and which implied that Peroutka

[1] See the judgment of the Constitutional Court of 3. 2. 2015, file no. II. ÚS 2051/14.

sympathized with Nazism. The truthfulness of the statements as well as that of the authorship remained unproved. First, civil courts held liable the Office of the President of the Republic (as a representative of the Czech Republic in this manner) for slander. On an extraordinary appeal brought by both the defendant and the claimant, the Supreme Court (cf. its judgement of 9 May 2018, file no. **30 Cdo 5848/2016**) quashed the decisions of lower courts for procedural reasons, namely that the plaintiff's claim was to be subsumed under different legal rules and, as a consequence, different "organizational unit" of the State was to act as its representative in the proceedings (so the civil proceedings before lower courts continue). The Supreme Court nevertheless agreed with lower courts as to the point that although the President of the Republic is not responsible for the performance of his duties (see Art. 54 (3) of the Czech Constitution), there needs to be a subject to which a defective performance of such duties is to be attributable in case of a violation of one's personal rights.

35. Access to information and public documents

According to the section 2 (1) of the Act no. 106/1999 Coll., On Free Access to Information, (hereinafter "the Information Act") *"[t]he legally bound persons, who under this Act have the duty to provide information related to their competencies, are the state agencies, territorial self-governing bodies and public institutions."* A question arose as to the interpretation of the term "public institutions" in the case where a joint-stock company in which the State owns 100 % of stocks is asked to provide internal information. In its previous decisions, the Constitutional Court held that, first, even a private company owned by the State (state enterprise) may be considered as public institution within the meaning of the section 2(1) of the Information Act, provided the criteria of assessment set therein are fulfilled,[2] however in a subsequent judgement the Constitutional Court ruled out the possibility that commercial companies could be regarded as public institutions, unless they were "*a public joint stock company set up by a special law governing its activities and whose sole owner is the State which is as well responsible for deciding on its dissolution".*[3] Indeed, in the recent judgement of 21 February 2019, file no. **II. ÚS 618/18**, the Constitutional Court clarified the law by holding that a private company (such as a joint stock company) is to be regarded as public institution within the meaning of section 2 (1) of the Information Act if the state or another public corporation has a majority ownership interest in that private company. As a consequence, companies such as public transport companies owned completely by municipalities are not excluded from the duty to provide information to applicants requesting such information.

[2] See the judgment of the Constitutional Court of 24. 1. 2007, file no. I. ÚS 260/06.
[3] See the judgment of the Constitutional Court of 20. 6. 2017, file no. IV. ÚS 1146/16.

IV. Other institutional issues related to checks and balances

A. The process for preparing and enacting laws

37. Stakeholders'/public consultations (particularly consultation of judiciary on judicial reforms), transparency of the legislative process, rules and use of fast-track procedures and emergency procedures (for example, the percentage of decisions adopted through emergency/urgent procedure compared to the total number of adopted decisions).

On 13th March 2020, the Czech Government declared the state of emergency due to the SARS-CoV-2 outbreak.[4] Further, the Government adopted several measures (incl. the prohibition of free movement of persons and the prohibition of retail sale and sale of services in establishments) pursuant to section 6 of the Act No. 240/2000 Coll., the Crisis Act. In the following days, however, several new measures – so-called extraordinary measures – were being taken by the Ministry of Health to replace some of the Government's measures. The authority of the Ministry to adopt such extraordinary measures was seen to rest in section 80 (1) (g) together with section 69 (1) (i) and (2) of the Act No. 258/2000 Coll., on Public Health Protection. In its judgement of 23 April 2020, file no. **14 A 41/2020**, the Municipal Court in Prague declared four extraordinary measures[5] of the Ministry of Health void. The Court said, in particular, that the declaration of the state of emergency had set a specific regime in which the Government is authorized to adopt measures imposing restriction of fundamental rights and freedoms; the Government is not allowed to delegate such authority to another body.

38. Regime for constitutional review of laws

The above-mentioned declaration of the state of emergency together with several Government's measures (adopted following such declaration) were the subject of assessment of the Constitutional Court in its decision of 22 April 2020, file no. **Pl. ÚS 8/20**.[6] The Court here decided about the constitutional complaint of a private individual. First, the Court declared itself incompetent to review the declaration of the state of emergency. It regarded the declaration as an "act of governance" that is subject to review primarily by a political body, ie the Chamber of Deputies (according to the Constitutional Act on Security

[4] See the Government Resolution No. 194 of 12 March 2020 whereby, in accordance with Art. 5 and 6 of Constitutional Act No. 110/1998 Coll. on Security in the Czech Republic the government has declared a state of emergency for the territory of the Czech Republic due to the threat to health presented with the proven incidence of coronavirus (identified as SARS CoV-2) in the territory of the Czech Republic.

[5] Namely the extraordinary measure of 17. 4. 2020, Ref. No. MZDR 16193/2020-2/MIN/KAN, extraordinary measure of 15. 4. 2020, Ref. No. MZDR 16195/2020-1/MIN/KAN, extraordinary measure of 26. 3. 2020, Ref. No. MZDR 13361/2020-1/MIN/KAN, and extraordinary measure of 23. 3. 2020, Ref. No. MZDR 12745/2020-1/MIN/KAN.

[6] In a different matter to the one which was resolved by the previously mentioned decision 14 A 41/2020.

cited above). The only exception to this rule would be the interference with the so-called material core of the constitution. Next, the Court characterized the measures taken by the Government as a *sui generis* law regulation, ie. as an "other law regulation" within the meaning of section 64 of the Act No. 182/1993 Coll., on the Constitutional Court. As a consequence, provided such declaration alone does not interfere with an individual's rights, the individual is not entitled to seek the repeal of this law regulation before the Constitutional Court. Finally, the Court qualified the extraordinary measures adopted by the Ministry of Health (cf. above) as the co-called measures of a general nature. Since the measures of a general nature must be primarily challenged in administrative judicial proceedings, the Court declared the complaint inadmissible to this extent.