2008/12/02 - PL. ÚS 12/08: NON-APPLICABILITY OF CONTESTED PROVISION

HEADNOTES

If the ordinary court submitting the petition to annul the statute or individual provision thereof states unambiguously that it believes that the contested provision is not only in coflict with constitutional order but also with European Community law, then the petitioner should have decided in the first place on the basis of the requirements laid down in the judgment Simmenthal II concerning the non-applicability of a contested provision due to its conflict with European Community law. The Constitutional Court leaves it entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the Czech Republic. If it primarily focuses on the review of the conflict with European Community law and asserts, as in this case, that the statutory provision under review is in conflict therewith, it must draw from its conviction the consequences in accord with the Court of Justice's jurisprudence, that is, that the contested provision not be applied.

CZECH REPUBLIC
CONSTITUTIONAL COURT
RESOLUTION

IN THE NAME OF THE CZECH REPUBLIC

The Constitutional Court's Panel IV, composed of its Chairman, Miloslav Výborný and Justices Vlasta Formánková and Pavel Rychetský (the Justice Rapporteur), on the petition of the Prague Municipal Court, on whose behalf is acting JUDr. Eva Pechová, Panel Chairwoman at the Prague Municipal Court, proposing the annulment of § 17 para. 4 of Act No. 231/2001 Sb., on the Operation of Radio and Television Broadcasting and on Amendments to further Statutes, as subsequently amended, with the participartion of the Assembly of Deputies and Senate of the Parliament of the Czech Republic, decided as follows:

The petition is rejected on preliminary grounds.

REASONING

I.
Summary of the Petition

1. With its petition, submitted pursuant to Art. 95 para. 2 of the Constitution of the Czech Republic (hereinafter "Constitution") and § 64 para. 3 of Act No. 182/1993 Sb., on the Constitutional Court, as subsequently amended, and delivered

to the Constitutional Court on 20 March 2008, the Prague Municipal Court (hereinafter also “petitioner”) sought the issuance of a judgment annulling, on the day which the Constitutional Court sets in its judgment, § 17 para. 4 of Act No. 231/2001 Sb., on the the Operation of Radio and Television Broadcasts and on Amendments to further Statutes, as subsequently amended.

2. The petitioner considers that the contested provision conflicts with Art. 26 para. 1 of the Charter of Fundamental Rights and Basic Freedoms (hereinafter “Charter”), as well as with provisions of European Community law not specified in more detail.

3. The petitioner stated that it is conducting a proceeding, file no. 5 Ca 168/2007, in the matter of the company, T-Mobile Czech Republic, a. s., (hereinafter "T-Mobile"), in which the plaintiff seeks the quashing of the decision of the Council for Radio and Television Broadcasting (hereinafter “Council”). In the contested decision, the Council rejected on the merits T-Mobile’s request to be granted a license to broadcast programs to mobil handsets in the DVB-H standard.

4. The contested Council decision is based on § 17 para. 4 of Act No. 231/2001 Sb. (hereinafter “the contested provision”). This provision precludes the grant of a license to broadcast radio and television programs to an entrepreneur responsible for a network of electronic communications. Since T-Mobile is just such an entrepreneur, the Council rejected its application to be granted a license, even though, according to the reasoning of its decision, it had positively assessed T-Mobile’s project in respect of all significant criteria.

5. According to the petitioner, such a restriction is in conflict with Art. 26 para. 1 of the Charter, which enshrines the freedom to engage in commercial or other economic activity in a chosen field. The cited provision of the Charter envisages the possibility to restrict by law the right to engage in certain professions or activities, without specifying the aim of the restriction; however, such restriction must pass the test of proportionality (proportionality in the broader sense). The petitioner based its conclusions on the criteria specified by the Constitutional Court in its decisions. It expressly referred to Judgment No. Pl. ÚS 38/04 of 20 June 2006 (N 125/41 SbNU 551; 409/2006 Sb.).

6. According to the petitioner, it can be presumed that the aim of the contested provision is to prevent unequal economic competition. The contested provision is said to prevent an entrepreneur providing an electronic communications network from advantaging itself when diffusing radio and television broadcasts, if it became the holder of a license or registration for digital broadcasting. According to the petitioner, however, this aim can be achieved in a less intrusive manner than by means of a total prohibition of entrepreneurial activity in the given domain for all subjects specified in this provision. It also refers to T-Mobile’s arguments. According to it: “[T]he existing enactments regulating economic competition and laying down contractual obligations of entrepreneurs providing electronic communications networks constitute a sufficient guarantee that entrepreneurial activity in this domain ensures the equal status of individual broadcasters. For this reason, the prescribed prohibition violates, in the petitioner’s view, the principle of necessity.”

7. In addition to this, the contested provision also violates the principle of proportionality in the narrow sense, as it prevents admittance to commercial activity of a large number of subjects, without such a restriction being necessary and sufficiently justified by the public interest. As the petitioner states, the term "provision of an electronic communications network" and "electronic communications network" which are crucial for the determination of the group of subjects whom the restrictions laid down in the contested provision affect, are defined in Act No. 127/2005 Sb., on Electronic Communications, as subsequently amended. As follows from the statutory definition of this term, this restriction relates to all entrepreneurs providing an electronic communications network, regardless of the type of information transmitted, thus even to entrepreneurs providing a network which cannot even be used for television or radio broadcasting. It also applies to the very case of the plaintiff in the proceeding before the petitioner, T-Mobile, which operates an electronic communications network for a mobile telephone network on frequencies outside of the band of television broadcasting. Thus, in the petitioner's view, the contested provision "also affects subjects who cannot even potentially advantage themselves when diffusing radio and television broadcasts, since it could not even diffuse its programs through its own electronics communications network, but only through an electronics communications network owned by another subject.

8. The petitioner further states that the contested provision is "in conflict with Community law, as it excessively restricts one of the fundamental freedoms of the internal market, namely the freedom of admittance of certain subjects to commercial activity in a given domain." In its petition, however, it did not further elaborate upon this line of argument.

II.
Procedural History and Summary of Statements of Parties to the Proceeding

9. At the Constitutional Court's invitation, the Assembly of Deputies of the Parliament of the Czech Republic submitted, pursuant to § 69 of the Act on the Constitutional Court, its statement through its Chairman, Ing. Miloslav Vlček. The Senate of the Parliament of the Czech Republic did the same through its Chairman, MUDr. Přemysl Sobotka.

10. In its statement, the Assembly of Deputies summarizes the legislative history of the contested provisions. It states that they were incorporated into Act No. 231/2001 Sb. by Act No. 235/2006 Sb., which Amends Act No. 231/2001 Sb., on the Operation of Radio and Television Broadcasting and on Amendments to further Statutes, as subsequently amended, and certain additional Statutes, and was subsequently amended in part by Act No. 304/2007 Sb., which Amends certain Acts in connection with the Completion of the Transition from Terrestrial Analogue Television Broadcasting to Terrestrial Digital Video Broadcasting. After exhaustively summarizing the individual steps in the legislative process resulting in the adoption of both statutes (which the Constitutional Court summarizes below in Part IV), the Assembly of Deputies asserted that "both statutes were approved by the necessary majority of Deputies of the Assembly of Deputies, were signed by the competent

constitutional officials, and were duly promulgated."

11. Just as had the Assembly of Deputies, in its statement, the Senate also confined itself to summarizing the legislative history of both affected statutes. In the conclusion of its statement, the Senate then asserted that it "sends the statement in the awareness that it is entirely up to the Constitutional Court to assess the constitutionality of the contested provisions."

III.
Summary of other Subjects' Statements under § 49 of the Act on the Constitutional Court

12. According to § 49 of the Act on the Constitutional Court, the Constitutional Court also addressed the parties to the proceeding before the Municipal Court. A statement was submitted both by the plaintiff, T-Mobile, through its legal representative, Mgr. P.J., and by the defendant, the Council, through its Chairman, Ing. Václav Žák.

13. In its statement, T-Mobile "expressed its full agreement with the Prague Municipal Court's petition, . . . because [the contested provision] is in conflict with the constitutional order of the Czech Republic and with Community law, by which the Czech Republic is bound." It refers in detail to the complaint which the company submitted in the proceeding before the petitioner.

14. In its statement T-Mobile focuses on two lines of argument, the first relating to the contested provision's alleged conflict with the constitutional order, the second with respect to its conflict with European Community law.

15. As far as concerns conflict with Art. 26 para. 1 of the Charter, the petitioner adopts the major part of T-Mobile's line of argument. Over and above the petitioner's line of argument, which is summarized above in points 5 to 7 of this Resolution, T-Mobile sees as a disproportionate restriction, prescribed by the contested provision (see above, point 7), also the fact that it affects a broad group of subjects who are personally and economically tied to a subject which provides any sort of electronic communications network. According to T-Mobile, such a restriction is in no sense justified, and no other legal provision of such breadth is currently in effect. T-Mobile draws attention to the ambiguous formulation of the contested provision; moreover it does not, for example, define the degree of economic and personal connectedness of subjects to whom the restriction relates. The contested provision thus "causes legal uncertainty of subjects who wish to do business in the given domain and burdens regulators with disproportionate demands relating to the checking of property and personal structures of the companies applying for registration or licenses."

16. T-Mobile also calls into doubt the contested provision's conformity with the freedom of expression and the right to disseminate information; moreover, the restriction laid down in the contested provision is manifestly unjustified and disproportionate, thus in conflict with Art. 17 para. 4 of the Charter.

17.As regards the conflict of the contested provision with European Community law, T-Mobile states that this law "creates for entrepreneurship in the field a free area and directly requires free competition between individual service providers with reference to ensuring the free movement of goods and services and the formation of opinion ," whereas, according to the company, the Czech legal rule simply controverts these principles. At the same time, T-Mobile refers to Directive 2002/20/EC on the authorisation of electronic communications networks and services (Authorisation Directive, Official Journal L 108, p. 21; Special Edition 13/29, p. 337), adopted with the aim of liberalizing the provision of services in the field of electronic communications, which, according to T-Mobile, "directly presupposes that the relevant subject providing an electronic communications network can also be a subject which diffuses a prepared content (that is, is the holder of a content license)." The broadly conceived restriction laid down by the contested provision [which also results from the breadth of the term, "electronic communications network", as defined in Art. 2, lit. m) of the Directive cited here and as it also was transposed into the legal order of the Czech Republic – on this, see above, point 7 of this Resolution] violates the principle of proportionality, which, by contrast according to T-Mobile, the legal rules of the European Communities always respected.

18. According to T-Mobile the contested provision also restricts the free movement of services, since, according to it, television broadcasting must be considered as a service in the sense of the Treaty Establishing the EC, such as is laid down, for example, by Council Directive 89/552/EEC of 3 October 1989 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities (Official Journal L 298, p. 23; Special Edition 06/01, p. 224). In addition, that service is, according to the Twelfth Recital of the above-cited Directive "a specific manifestation . . . of a more general principle, namely the freedom of expression as enshrined in Article 10 (1) of the Convention for the Protection of Human Rights and Fundamental Freedoms".

19. In its statement the Council recapitulated the proceeding which resulted in the issuance of the decision which T-Mobile contested before the Prague Municipal Court. It also explicitly confirmed therein that "the sole grounds, in the case under assessment, for refusing the grant of a license . . . was the real obstacle formed [by the contested provision]." It added that "in the given licensing proceeding, there were even more free spaces for the operation of broadcasting in the DVB-H standard than applications submitted in the licensing proceeding." According to the Council, "under the condition that the statutory criteria were fulfilled, it would have thus been possible to decide favorably for all parties to the licensing proceeding."

20. The Council believes that it "is not competent to assess whether a statute conforms to the constitutional order of the Czech Republic or with Community law." However, it draws attention to Directive 2002/21/EC of the European Parliament and of the Council of 7 March 2002 on a common regulatory framework for electronic communications networks and services (Framework Directive) [Official Journal L 108, p. 33; Special Edition 13/29, p. 349], specifically to its Art. 8 para. 1 and para. 2, lit. b). The Council cites these provisions in the following

manner. According to the first of them, in the Council's view, "the Member States [must] ensure that, in carrying out their regulatory tasks (in particular, those whose aim is to ensure effective economic competition), national regulatory bodies shall, to the utmost degree, take into account to the need to create enactments that are neutral in terms of technology." The Council paraphrased the second cited provision of the Directive as follows: "national regulatory bodies [must] support economic competition in providing networks and providing services by the fact, among others, that they will ensure that no impairment or restriction of economic competition occurs in the branch of electronic communications."

21. As the conclusion of its statement, the Council asserts that the "[a]ssessment of the contested national legal rules' congruity with the Framework Directive is, of course, entirely within the Constitutional Court's competence."

IV.
The Wording of the Contested Provision of the Legal Enactment and its Legislative History

22. The contested provision of Act No. 231/2001 Sb., at the time the petition was submitted, as well as on the day of the decision on the petition, reads as follows:

"§17
Facts Significant for Decision on the Application for the Grant of a License.
[…]
"(4) A license to engage in a radio or television broadcasting diffused by means of a transmitter solely digitally cannot be granted to an entrepreneur providing an electronic communications network (hereinafter "entrepreneur of an electronic communications network"), to a group of entrepreneurs of an electronic communications network, or to a person who is economically or personally tied to an entrepreneur or group of entrepreneurs of an electronic communications network; this does not apply in cases where the license to operate the radio or television broadcast diffused by means of a transmitter only digitally is granted directly ex lege. The phrase, "persons economically or personally tied", is understood to mean a person who shares directly or indirectly in the management, control or stock of a second person or if an equivalent legal or natural persons directly or indirectly shares in the management, control or stock of both persons. Participation in the control or stock is understood to mean ownership of more than 20 % of the shares of authorized capital or a shares with voting rights; share in the authorized capital or a share with voting rights in the tax period is laid down as the share of the sum of holdings on the final day of each month and the number of months in the tax period.

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1) Act No. 127/2005 Sb., on Electronic Communications and on the Amendment to certain related Acts (Act on Electronic Communications), as subsequently amended."

23. In the period from 31 May 2006 (the entry into force of the first amendment to Act No. 231/2001 Sb., that is Act No. 235/2006 Sb., which Amends Act No. 231/2001 Sb., on the Operation of Radio and Television Broadcasting and on

Amendments to further Statutes, as subsequently amended, and certain additional Statutes) until 31 December 2007 (the entry into effect of the second amendment to Act No. 231/2001 Sb., that is Act No. 304/2007 Sb., which Amends certain Acts in connection with the Completion of the Transition from Terrestrial Analogue Television Broadcasting to Terrestrial Digital Video Broadcasting) the restriction laid down in the contested provision was even broader (compare the highlighted passage of the provision):

"(4) A license to engage in a radio or television broadcasting diffused by means of a transmitter solely digitally or by registration [§ 2 para. 1, lit. g), § 26 and foll.] to engage in solely digital retransmitting cannot be granted to an entrepreneur providing an electronic communications network (hereinafter "entrepreneur of an electronic communications network"), to a group of entrepreneurs of an electronic communications network, or to a person who is economically or personally tied to an entrepreneur or group of entrepreneurs of an electronic communications network; this does not apply in cases where the license to operate the radio or television broadcast diffused by means of a transmitter only digitally is granted directly ex lege. The phrase, "persons economically or personally tied", is understood to mean a person who shares directly or indirectly in the management, control or stock of a second person or if an equivalent legal or natural persons directly or indirectly shares in the management, control or stock of both persons. Participation in the control or stock is understood to mean ownership of more than 20 % of the shares of authorized capital or a shares with voting rights; share in the authorized capital or a share with voting rights in the tax period is laid down as the share of the sum of holdings on the final day of each month and the number of months in the tax period.

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1) Act No. 127/2005 Sb., on Electronic Communications and on the Amendment to certain related Acts (Act on Electronic Communications), as subsequently amended."

24. As follows from the Assembly of Deputies' statement (cf. point 10 of this Ruling), the contested provision was incorporated into Act No. 231/2001 Sb. by Act No. 235/2006 Sb. Initially the amending bill did not contain the contested provision. That was not added to the amending bill until it was in the Senate, which returned the bill to the Assembly of Deputies with proposed amendments. According to the Senate's statement, this provision was proposed by Senator Václav Jehlička, the Rapporteur of the Committee on Education, Science, Culture, Human Rights, and Petitions. According to the stenographic minutes from the deliberations on the amending bill, at the 10th Session in the Senate's 5th Electoral Term, Senator Jehlička said the following concerning the contested provision: "[T]he final point to which I feel the need to refer, is the 'cross ownership'. This relates also to the issue of economic competition. If the license-holder had ownership ties to the owner of a multiplex, then, in my opinion, it gains advantages in economic competition over the other licensed broadcasters in the given multiplex. It obtains more favorable conditions, has better access to information of a commercial character. I think the this would be a case of unfair competition. And that is the third area in which the guarantee committee submits proposed amendments." The Assembly of Deputies finally adopted the amending act in the wording proposed by the Senate, the President of the Republic signed the amending bill, and it came

into effect on 31 Mary 2006.

25. The contested provision was subsequently revised by a further amendment to Act No. 231/2001 Sb., by Act No. 304/2007 Sb. The impermissibility to grant, in addition to a license to operate radio or television broadcasts transmitted by means solely of a digital transmitter, also registration to operate was omitted from the contested provision, whereas the provision formulated in this fashion was already contained in the bill itself and was not the subject of debate in either of the chambers of Parliament. However, the changes to the contested provision effected by Act No. 304/2007 Sb. in no way affected the essence of this provision and the reasons for which the petitioner objected that it conflicts with the constitutional order.

V.
The Petitioner's Standing

26. The petitioner derives its standing to submit the petition under adjudication from Art. 95 para. 2 of the Constitution, which provides that, in the case a court comes to the conclusion that a statute which should be applied in the resolution of a matter is in conflict with the constitutional order, it should submit the matter to the Constitutional Court. This power of a court is concretized in § 64 para. 3 of the Act on the Constitutional Court as the power to submit a petition proposing the annulment of a statute or the individual provisions thereof. That means that a court's standing to submit a petition proposing the annulment of a statute or individual provisions thereof derives from the subject of the dispute and its legal classification. In other words, a court may submit a petition proposing the annulment only of such a statute, or individual provisions thereof, which should be applied in resolving the dispute before that ordinary court. The consideration about its application must be substantiated, must be derived from the fulfillment of the prerequisites for a proceeding, including the parties' factual standing and, if a substantive legal enactment is at issue, then from an unambiguous ascertainment that such enactment should be applied [see Judgment No. Pl. ÚS 50/05 of 16 October 2007 (2/2008 Sb.), point 11].

27. As unambiguously follows from the petition of the Prague Municipal Court, the contested provision should be applied in the proceeding, thus providing the basis for its decisional grounds; the amendment to the contested provision effected by Act No. 304/2007 Sb. in no way affected the essence of this provision and the legal issue which the Municipal Court is faced with resolving. However, the petitioner asserts that, in addition to being unconstitutional, the contested provision is also in conflict with European Community law (see point 8 of this Ruling). It did not elaborate in detail on its line of argument in this respect, in contrast to the complainant in the proceeding which it was hearing (see above, points 17 and 18 of this Ruling). The petitioner does not at the same time assert that the fact that the contested provision is in conflict with European Community law should be seen as a grounds for a finding that it is unconstitutional.

28. According to the jurisprudence of the Court of Justice of the European Communities (hereinafter "Court of Justice") "a national court which is called

upon, within the exercise of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation" [see, e.g,., Judgment Amministrazione delle Finanze dello Stato v Simmenthal SpA of 9 March 1978 ("Simmenthal II"), 106/77, Recueil, p. 629, points 21-24, cited from the Judgment of 18 July 2007, Lucchini Siderurgica, C-119/05, coll. of decisions, p. I-6199, point 61].

29. In its decisions, the Constitutional Court has expressly approved this jurisprudence of the Court of Justice. For example, in its 21 February 2006 Ruling, No. Pl. ÚS 19/04 (accessible at http://nalus.usoud.cz), it declined to continue a proceeding on a petition proposing the annulment of a statute which had, in the meantime, been repealed, although the doctrine defined in its 10 January 2001 Judgment, No. Pl. ÚS 33/2000 (N 5/21 SbNU 29; 78/2001 Sb.) would otherwise have enabled it to do so. According to this doctrine, Art. 95 para. 2 of the Constitution contains an implicit obligation for the Constitutional Court to provide ordinary courts with assistance by its decision on the constitutionality or unconstitutionality of the statute which should be applied, regardless of whether the statute was subsequently amended or repealed. However, according to the proposition of law declared in the cited Ruling, No. Pl. ÚS 19/04, this doctrine must take into account the Czech Republic's membership in the European Union, and the fact that, starting with 1 May 2004, each public authority is obliged to apply European Community law in preference to Czech law in the case that Czech law is in conflict with it. Since the petitioner in the proceeding which was being heard before the Constitutional Court (the Regional Court in Hradec Králové) had argued in its petition that the already repealed provisions were in the first place in conflict with European Community law and only in the second place in conflict with the Czech constitutional order, the Constitutional Court came to the conclusion that, if it were perhaps necessary, according to the regional court's legal opinion, to apply already repealed statutes in the matter before it, then it must itself resolve the issue of the conformity of those enactments with European Community law, without the Constitutional Court playing any role, alternatively, where such would be necessary, under the conditions laid down in European Community law, even by means of a preliminary reference to the Court of Justice. The Constitutional Court concluded that it is in principle not competent to involve itself in the adjudication of such issues.

30. In its 27 March 2008 Judgment, No. Pl. ÚS 56/05 (257/2008 Sb.), the Constitutional Court declared that, within the confines of the constitutional review of statutes pursuant to Art. 87 para. 1, lit a) and Art. 88 para. 2 of the Constitution, it is not competent to review the conformity of European Community law with national law. In the Constitutional Court's opinion, the application of European Community law, as directly applicable law, is within the competence of the ordinary courts which, in the case of doubt as to the application of this law, have the possibility, alternatively the obligation, to refer a preliminary question to the Court of Justice pursuant to Art. 234 EC Treaty. The Constitutional Court again referred to the Court of Justice's judgment in Simmenthal II.

31. Although the conclusions expressed in the last-cited judgment relate first and foremost to the determination of the framework of referential norms for the

review of the constitutionality of laws, the conclusion can be derived therefrom that the Constitutional Court emphasized the responsibility of ordinary courts for the due application of European Community law. Thus, if an issue arises before an ordinary court that a national legal provision conflicts with European Community law, the ordinary court is not authorized to refer the matter to the Constitutional Court with a petition proposing the annulment of such provision due to its conflict with European Community law in the sense of Art. 95 para. 2 of the Constitution and, instead of that, it must itself, on the basis of the above cited jurisprudence of the Court of Justice, decide on the non-application thereof. In this respect, a proceeding initiated on the petition of a court in the sense of Art. 95 para. 2 of the Constitution, in conjunction with § 64 para. 3 of the Act on the Constitutional Court, differs from a proceeding pursuant to Art. 87 para. 1, lit. a), mentioned above in point 30 and initiated pursuant to § 64 paras. 1 and 2 on the proposal of the subjects mentioned there, whose standing is not bound to the necessity to apply the contested provision – which follows, among other things, also from the character of the petitioners listed there.

32. The case under consideration concerns a somewhat different situation. The crux of the grounds upon which the Prague Municipal Court proposed the annulment of the contested provision lies in its conflict with the constitutional order, specifically with Art. 26 para. 1 of the Charter, and not with European Community law. In this respect the case differs from the above-cited case, which the Constitutional Court decided by its Ruling No. Pl. ÚS 19/04 (cited above, in point 29 of this Ruling), where the petitioner in its petition made the argument that the already-repealed enactments were in the first place in conflict with European Community law and only in the second place with the Czech constitutional order.

33. On the other hand, however, it is also true that the petitioner itself unambiguously stated that it believes the contested provision is also in conflict with European Community law, even though it has not advanced any arguments in favor of that conclusion.

34. The Constitutional Court is of the view that, in such a situation, the petitioner should have decided in the first place on the basis of the requirements laid down in the judgment Simmenthal II concerning the non-applicability, where appropriate, of a contested provision due to its conflict with European Community law. The Constitutional Court leaves it entirely to the discretion of the ordinary court whether it will concern itself with reviewing the conflict with European Community law of the statutory provision which it should apply or will focus on the review of its conflict with the constitutional order of the Czech Republic. If it primarily focuses on the review of the conflict with European Community law and asserts, as in this case, that the statutory provision under review is in conflict therewith, it must draw from its conviction the consequences in accord with the Court of Justice's jurisprudence, that is, that the contested provision not be applied (on this point, cf. the similar approach of the German Federal Constitutional Court in its 11 July 2006 Judgment in the matter 1 BvL 4/00, BVerfGE 116, 202 at p. 214, points 51 to 53). In principle it is not within the Constitutional Court's competence to interfere with an ordinary court's considerations as to whether its conclusion on the conflict of the contested provision with European Community law is well-

founded or not; it does, however, draw attention to the fact that such conclusion must be duly reasoned, otherwise it could become the subject of review on the part of the Constitutional Court, in the context of a proceeding on a constitutional complaint, as to whether the court's interpretation of the decisive legal norms is foreseeable and reasonable, whether it corresponds to the settled reasoning of judicial practice, or whether, on the contrary, it is an arbitrary (wilful) interpretation which lacks meaningful reasoning, whether it diverges from the bounds of the generally (consensually) accepted understanding of the affected legal institutes, alternatively whether it does not represent an extreme or excessive interpretation (see Judgment No. III. ÚS 346/06 of 19 December 2007, the thirteenth paragraph of the reasoning).

35. This conclusion is not called into doubt even by the requirement that no amendment to the Constitution may be interpreted in a sense in consequence of which the already achieved procedural level for the protection of fundamental rights and freedoms would be limited [see Judgment No. Pl. ÚS 36/01 ze dne 25. 6. 2002 (N 80/26 SbNU 317, 329-330; 403/2002 Sb.) and related jurisprudence], which requirement also projects into the limits to the transfer of powers to the European Union on the basis of Art. 10a of the Constitution [see Judgment No. Pl. ÚS 50/04 of 8 March 2006 (N 50/40 SbNU 443, 492-493; 154/2006 Sb.)]. A part of the doctrinal opinion has deduced from Judgment Pl. ÚS 36/01 (cited above, in the preceding point of this Ruling) that it is incompatible with the above-stated requirement of the Court of Justice, expressed in the judgment Simmenthal II. According to that view, it is necessary to consider the centralized review of the compatibility of statutes with human rights as that procedural level which is unamendable (Kühn, Z.: Derogation and Applicational Primacy in Relation of Municipal, International, and Community law, Judicial Views [Soudní rozhledy], 2004, No. 1, p. 1-9, at p. 7). From this perspective, the non-application of a provision which is in conflict both with European Community law and with the constitutional order of the Czech Republic would impede the Constitutional Court in considering the issue of its constitutionality. After all, the ordinary court would not meet the standing requirements for submitting a petition to the Constitutional Court since, in consequence of the application of the contested provision being ruled out on the basis of the preferential operation of European Community law, it would not be a provision which should be applied in the resolution of the matter in the sense of Art. 95 para. 2 of the Constitution.

36. The already achieved procedural level of protection must, however, be understood first and foremost as the retention of the referential criteria for the adjudication of constitutionality, both in norm control proceedings and within the framework of decision-making on constitutional complaints. In its Judgment Pl. ÚS 36/01 (cited above), the Constitutional Court above all established that the amendment to the Constitution effected by Constitutional Act No. 395/2001 Sb., which Amends Constitutional Act of the Czech National Council No. 1/1993 Sb., The Constitution of the Czech Republic, as subsequently amended, "cannot be interpreted in the sense that it eliminated the referential norms provided by ratified and promulgated treaties on human rights and fundamental freedoms for the Constitutional Court's assessment, with derogational effects on domestic law" (N 80/26 SbNU 317, 330). The Constitutional Court did not place so much emphasis on the retention of its centralized status in the review of constitutionality, rather

on the retention of the referential norms in its review. That was otherwise confirmed by further decisions, in which, in interpretating the term, "constitutional order", so as also to include international human rights conventions, the Constitutional Court substantiated, for example, its authority to assess the constitutionality of a statute in the light of international human rights conventions, even though the petitioner invoked solely the provisions of the Charter [Judgment No. Pl. ÚS 44/02 of 24 June 2003 (N 98/30 SbNU 417; 210/2003 Sb.)], as well as its authority to assess also individual constitutional complaints in the light of international human rights conventions [for ex., Judgment No. II. ÚS 142/03 of 2 October 2003 (N 116/31 SbNU 45) or Judgment No. II. ÚS 321/04 of 24 February 2005 (N 33/36 SbNU 367)].

37. Nothing is changed, in this regard, by the fact that, in its Judgment Pl. ÚS 36/01 (cited above, in point 35 of this Resolution), the Constitutional Court gave reasons for the necessity of including within the compass of the constitutional order ratified and published international conventions on human rights and fundamental freedoms as follows: whereas in the case of a statute's conflict with a constitutional act, an ordinary court judge is not competent to adjudicate the matter and is obliged to submit the matter to the Constitutional Court, in the case of a statute's conflict with a human rights convention, which constitutionally is of the same nature and quality, pursuant to Art. 10 of the Constitution, she is obliged to proceed in accordance with the international convention. According to the proposition of law expressed by the Constitutional Court in that Judgment, such a decision, without regard to the judicial instance which decided it, could never, in a legal system that does not contain judicial precedents having the quality and binding nature of a source of law, also acquire actual derogational consequences. The Constitution would thereby create for two situations of identical constitutional character a procedural disparity that is in no way justified. In the case of the contested provision's conflict with European Community law, however, it is not a situation indentical with conflict with the constitutional order. In the case the Prague Municipal Court does not apply the contested provision, it would not be due to its conflict with a human rights convention, that is, due to a conflict which constitutionally is of the same character and quality as its conflict with municipal provisions of the constitutionl order, rather due to its conflict with provisions of European Community law, which has an entirely distinguishable character. Moreover, that law operates in the Czech Republic legal order on the basis of Art. 10a of the Constitution (see Judgment No. Pl. ÚS 50/04, N 50/40 SbNU 443, 494), and not Art. 10, as do human rights conventions, to which the above-cited judgment relates. Thus, one cannot state that according applicational primacy to European Community law, on the basis of the Court of Justice's jurisprudence, would create a procedural disparity that is in no way justified and which would thereby impinge upon the substantive core of the Constitution.

38. Thus, since compliance with the requirements of the Court of Justice's jurisprudence resulting from its judgment in Simmenthall II does not impede the essential attributes of the democratic law-based state, such as the Constitutional Court has interpreted them in the above-cited decisions, and since the petitioner states that it believes the contested provision is in conflict with European Community law, it is obliged itself to ensure full effect to this law, even by setting the contested provision aside on its own authority. In such a case, however, the

petitioner does not meet the requirements for standing to submit a petition, as defined above in point 26 of this Resolution. The Constitutional Court has no option but, pursuant to § 43 para. 2, lit. b) in conjunction with § 43 para. 1, lit. c), to reject the petition on preliminary grounds.

Notice: A Constitutional Court ruling may not be appealed.