

INDIRECT EFFECT OF EU LAW UNDER CONSTITUTIONAL SCRUTINY – THE OVERVIEW OF APPROACH OF CZECH CONSTITUTIONAL COURT¹

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Summary: The paper deals with the non-normative impacts of the EU law in the national legal systems (Czech Republic in particular) and focuses on the approach of the Czech Constitutional Court (CCC) towards the so-called principle of indirect effect of EU law. The authors examine the case law of CCC and offer the conclusions about the place, constitutional relevance and (national) limits of the EU-consistent interpretation of national law. CCC up to date case law clearly indicates that a EU-consistent interpretation is the most ideal tool for meeting the Czech Republic's membership obligations. But it is simultaneously a tool for preserving the autonomy of the national authorities applying law and reduces possible tensions between supranational and nation law. CCC accepts the indirect effect broadly and used this concept even in controversial cases (European arrest warrant, State responsibility for damages etc.). But still it does not approach this effect without reservations. CCC points on the necessity to protect the fundamental constitutional values ('Solange' concept) even in connection with the duty of EU-consistent interpretation.

Keywords: EU law, indirect effect, EU-consistent interpretation, limits, Czech Republic, Constitutional Court, EU Charter.

1 Introduction

EU law reaches its goals either through the effect of its own norms or through national law based on European rules. Thus, also the question of the relationship between European and national law (as a whole) must reflect these two options. To summarize, the application of EU law within the legal system of a Member State can be of two different types:

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- Direct, normative influence on the national legal system, i.e. its enrichment with new 'European' norms.
- Indirect, value-based influence, when the goals of European integration, the ideological basis of the EU and its law, the intentions and purposes of the EU's legislator, etc., must be considered by national authorities when interpreting national law, i.e. it is enriched with new 'European' meanings.

The first type of influence is connected with the direct application of EU legal norms in national law or with the application of EU norms contained in national legislation, which transposes EU law. These types of EU legal effects open space for clashes between European and national law. There is a danger of a 'genuine conflict' between the national and EU norms. It is because two different norms stemming from independent legal systems can potentially apply to the identical situation. Because these norms originate in different (independent) legal systems, none of the traditional imperative relationships of supremacy (*lex superior derogat legi inferiori*), temporality (*lex posterior derogat legi priori*), or speciality (*lex specialis derogat legi generali*) apply. The resolution of the relationship between these norms under such circumstances depends on the extent and will of national authorities to apply or rather accept the principle of primacy of EU law over national law (as the Court of Justice perceives it).²

The second type covers the indirect effects when the implementing authority does not face the dilemma of choosing between the national and EU norm, yet it also struggles with challenges relevant to EU law. Specifically, the challenges are related to the existence of its obligation to interpret national law in line with the EU norm (EU-consistent interpretation). Here the same possibility of tensions between supranational and national law exists. The clashes may arise especially when objectives of the EU norm which national authority should follow when interpreting national law could be considered as conflicting with the requirements of the national law and its building principles.

2 EU-consistent interpretation of national law – the foundations

The foundations of the principle of the indirect effect of the European Union law, i.e. the obligation to interpret the national law in conformity with the EU law requirements were settled in *Von Colson*³ case. It represents another pillar of effective impact of EU law in proceedings before national authorities. Basically it means that the national judge (or another authority responsible for application of law) is obligated to interpret the national law in the light of objectives and con-

2 This is the consequence of heterarchy and pluralistic reality within the European constitutionalism. See further DE BÚRCA, Gráinne, WEILER, Joseph. *The Worlds of European Constitutionalism*. Cambridge: Cambridge University Press, 2012, 348 p., especially contributions from Neil Walker, Daniel Halberstam and Nico Krisch.

3 *Von Colson and Kamann vs. Land Nordrhein-Westfalen*, 14/83, ECLI:EU:C:1984:153.

tent of rules of EU law. It was originally associated with the directives. According to the Court of Justice: ‘the Member States, obligation arising from a directive to achieve the result envisaged by the directive and their duty under article 5 of the Treaty to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation, is binding on all the authorities of Member States including, for matters within their jurisdiction, the courts. It follows that, in applying the national law and in particular the provisions of a national law specifically introduced in order to implement directive [...], national courts are required to interpret their national law in the light of the wording and the purpose of the directive in order to achieve the result referred to in the third paragraph of article 189. [...] It is for the national court to interpret and apply the legislation adopted for the implementation of the directive in conformity with the requirements of community law, in so far as it is given discretion to do so under national law.’⁴ The Court of Justice resolved here a question whether the directive may have some legal effects even though its provisions do not meet requirements laid down by *Van Gend en Loos*⁵ formula (aren’t sufficiently clear, precise and unconditional) and thus they cannot be directly applicable. It replied this question in the affirmative because it stated an obligation of national courts to interpret their law in line with the meaning of the directive. The arguments for the imposition of such a new duty on national authorities were based on the binding nature of directives and the principle of loyalty (article 4, paragraph 2, third subparagraph 3 TEU) which impose to Member States the duty to take any measures to fulfil the obligations conferred upon them by Treaties.

The subsequent case-law of the Court of Justice brought the substantial development of the principle of the indirect effect. The duty to interpret national law in the light of EU norms evolved both qualitatively and quantitatively. At the very beginning it covered only the duty to interpret national law adopted in order to implement directives in the light of this particular directive. It was introduced as some kind of alternative to the lacking direct effect⁶ but developed to the influential impact of EU regulative power. The crucial expansions were brought by the decision in *Marleasing*⁷ case where Court of Justice brought a clarification of some problematic aspects of this principle:

It extended the scope of national law that has to be interpreted in the light of rules of EU law. One of the most problematic issues of the doctrine of indirect effect was whether the duty of consistent interpretation covers only that part of the national law that implemented a certain directive into the national legal system of the Member State or whether it covers also other national laws whose adoption was not related with the implementation. The Court of Justice stated

4 Ibid., points 27–28.

5 *Van Gend en Loos*, 26/62, ECLI:EU:C:1963:1.

6 See further BETLEM, Gerrit. The Doctrine of Consistent Interpretation – Managing Legal Uncertainty. *Oxford Journal of Legal Studies*, 2002, vol. 22, no. 3, pp. 397–418.

7 *Marleasing vs. Comercial Internacional de Alimentación*, C-106/89, ECLI:EU:C:1990:395.

that duty of consistent interpretation has to be understood widely and acknowledged that indirect effect covers all the national law even that which was not adopted in the connection with the implementation of the directive and no matter whether it was adopted before or after the adoption of the directive. Basically the principle of indirect effect affects the national legal order as a whole (including the national constitutions).

Another important issue is that Court of Justice acknowledged the impact of indirect effect also in so-called horizontal relationships. National courts are according to this wide view obliged to interpret the national law in a harmony with EU requirements even in disputes between individuals, where indirect effect served mainly as an alternative to the prohibition of horizontal direct effect of directives.

3 EU-consistent interpretation of national law – a path to indirect dominance of supranational rules

The Court of Justice claims that independent character, binding force and efficiency of EU norms require full and unitary application of EU law from the moment of its adoption and throughout its legal ‘existence’ in all Member States. The Court of Justice does not distinguish between EU and national laws in their application by national courts and public authorities. On the contrary, it establishes that the EU legal provisions are indispensable parts of the Member States’ legal systems (see *Van Gen den Loos*; *Simmenthal*⁸ or *Melki and Abdeli*⁹ cases). Direct (immediate) applicability includes a command for the national courts to accept supranational law as their own and apply it as originally adopted, i.e. without transposition into national law – this command is an expression of general obligation to apply¹⁰ which binds the national institutions.

National authorities must accept EU law as an integral part of their national legal system. But moreover they have to consider the content and objectives of the EU when interpreting national norms (principle of indirect effect). This broad capability of EU law to affect the legal practice within the Member States also indirectly stands as a consequences of Member State’s commitment to solidarity or loyalty (see article 4 paragraph 3 TEU). The principle of indirect effect implies the obligation of national authorities to reflect the aims of EU law and to follow the goals of EU norms when interpreting national law. EU law stands here as a dominant matrix and forces the national authorities to choose the pro-European options of given possible mods of national law interpretation.

8 *Simmenthal*, 106/77, ECLI:EU:C:1978:49.

9 *Melki and Abdeli*, C-188/10, ECLI:EU:C:2010:363.

10 Described by PRECHAL, Sacha. Direct Effect, Indirect Effect, Supremacy and the Evolving Constitution of the European Union. In BARNARD, Catherine (ed). *The Fundamentals of EU Law Revisited. Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, pp. 35–69.

The indirect effect moreover stands as a ‘robust’ EU law principle¹¹ and its wide consequences seem to be more crucial for the national sovereignty and national law autonomy discussions than the direct applicability and primacy. It is because indirect effect is connected with all provisions of EU law and touches all fields of national law and is capable to turn the established way of interpretation of domestic norms (and therefore the adjudication processes).

Additionally indirect effect of EU law stands also as a “flexible” principle. It produces several consequences in national practice which are dependent on the wording and strength of EU law norm (used as the model) and wording and scope of national rule as well. EU law may be used as argument in different forms:

- as confirmative argument to underline the relevance of the chosen decision, which clearly flows from national law,
- as mediatory argument where EU norm determines which of plausible paths of interpretation of national law must be chosen.
- as evolutive argument where EU law bent the traditional interpretation of national norm and open it for new non-established meanings.¹²

4 Omnipresent but not omnipotent

The wide influence of EU law via indirect effect is balanced by the fact that it is still national law, which is applied here. In comparison with direct effect and primacy we do not face here the penetration of norms produced by different public power and replacement of national norms. It is also worth to say here, that direct effect is not limitless. Court of Justice expressed several boundaries of EU-consistent interpretation of national law, which more or less should act to protect the autonomy of national rules. It has formulated following rules in the connection with the limits of obligation of national judges to interpret the national law in the light of the European Union norms¹³:

- The interpretation of the national law in the light of European Union law provisions is limited by the scope of discretionary competences of the national authority applying law and interpretation methods governed by the national law (*Von Colson*).
- The EU-consistent interpretation of the national law may not lead into conclusions denying the essence of the national legislation, i.e. to decisions *contra legem* (*Marleasing*).

11 BOBEK, Michal. The Effects of EU Law in the National Legal Systems. In BARNARD, Catherine; PEERS, Steve. European Union Law. Oxford: Oxford University Press, 2014, p. 155.

12 Michal Bobek recalls these three options as weak/medium and strong indirect effect. Ibid, p. 154.

13 See detailed analysis in PRECHAL, Sacha. Directives in EC Law, 2nd edition. Oxford: Oxford University Press, 2005, pp. 193–210.

- The position of an individual may not be aggravated in the meaning of the establishment or the extension of the criminal responsibility (*Kolpinghuis*¹⁴).
- In case of indirect effect of a directive the obligation of the harmonious interpretation may be established only after the expiration of the period prescribed for the implementation of a directive (*Adeneler*¹⁵).

Next to the above-mentioned limits that have been introduced by the Court of Justice (EU-universally), one must also take into account the pluralistic set-out of the Union and potentiality of introduction of special national approaches towards the effects of EU law, including the burden of EU-consistent interpretation. In next sections we will shift to these special limitations as have been settled by the Czech Constitutional Court.

5 CCC approach towards indirect effect

5.1 Openness towards EU-consistent interpretation of national (constitutional) law

The up to date case law of the CCC displayed openness and good will to accept all categories of effects and consequences of EU law in the national legal system.¹⁶ We can say the same about the acceptance of the so called indirect effect of EU law. The approach of the CCC towards the acceptance of the duty of EU-consistent interpretation shall be described as very open and has its origin even in the pre-accession period. CCC accepted the EU law as source of inspiration and expressed good will to seek for EU-consistent interpretation in several decisions prior to accession to EU in the 1st May 2004.¹⁷ It is worth to mention here, that CCC accepted EU law as important guideline for its decisions voluntarily, because before accession Czech Republic was not committed to follow the loyalty principle. I see this as another the example of unprecedented dominance of EU law in the European legal space.

The crucial developments of CCC approach towards principle of EU-consistent interpretation of national law were drawn up in its seminal 'European' decisions of 2006 – *Sugar Quotas* and *European Arrest Warrant* cases.¹⁸ In the course

14 *Kolpinghuis Nijmegen*, 80/86, ECLI:EU:C:1987:431.

15 *Adeneler and others*, C-212/04, ECLI:EU:C:2006:443.

16 See further BOBEK, Michal, KÜHN, Zdeněk. What about that "Incoming Tide"? The Application of the EU Law in the Czech Republic. In LAZOWSKI, Adam (ed). *The Application of EU Law in the New Member States – Brave New World*. Hague: TMC Asser Press, 2010, 325–356.

17 *Sanctioning of the competitors for abusing the dominant position on market*, III. ÚS 31/97, ECLI:CZ:US:1997:3.US.31.97; *Milk Quotas*, Pl. ÚS 5/01, ECLI:CZ:US:2001:Pl.US.5.01.

18 *Sugar Quotas III*, Pl.ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04; *European Arrest Warrant*, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04. For details see HAMULÁK, Ondřej. New Fighter in the Ring: The Relationship between European Union Law and Constitutional Law of Member States from the Perspective of the Czech Constitutional Court. *Journal of Eurasian Law*, 2011, vol. 3, no. 2, pp. 279–303.

of a few months CCC presented answers to the questions how it would approach this principle, which part of EU law it would consider as a model for interpretation of national law and vice versa, which part of Czech law it would open to a pro-European bending. It focus further also on the question what are (not only constitutional) limits of application of indirect effect of EU law in national practice.

In the first of the abovementioned rulings, the CCC agreed that '[it cannot] entirely overlook the impact of Community law on the formation, application, and interpretation of national law, all the more so in a field of law where the creation, operation, and aim of its provisions is immediately bound up with Community law. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law.'¹⁹ The most important outcome of quoted opinion is the fact, that CCC accepted the impacts of indirect effect even in connection with national constitutional law. This approach brought significant consequences in the second seminal decision in *European Arrest Warrant* case. CCC described the duty of EU-consistent interpretation of national law as a constitutional principle that must be followed even by the Constitutional Court itself.²⁰ According to CCC this constitutional principle 'can be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the constitution, should be interpreted in conformity with the principles of European integration and the cooperation between Community and Member State organs. If the Constitution, of which the Charter of Fundamental Rights and Basic Freedoms forms a part, can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected with supports the carrying out of that obligation, and not an interpretation which precludes it.'²¹

Abovementioned decisions describe the main contours of the approach of CCC towards the principle of indirect effect of EU law, but they cannot be understood as rare examples. CCC uses indirect effect quite frequently. This method of work with EU law influence was used in other cases, including the ones with big constitutional relevance. Here are some examples:

- *Burden of proof in discrimination disputes*.²² Here CCC rejected the proposal to revoke provision of the Civil Procedure Code (§ 133a/2) which

19 *Sugar Quotas III*, Pl. ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04.

20 KOMÁREK, Jan. European Constitutionalism and the European Arrest Warrant: In Search of the Limits of „Contrapunctual Principles“. *Common Market Law Review*, 2007, vol. 44, no. 1, pp. 9–40.

21 *European Arrest Warrant*, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 61.

22 *Burden of proof in discrimination disputes*, Pl. ÚS 37/04, ECLI:CZ:US:2006:Pl.US.37.04.

deals with the so-called reverse burden of proof for alleged contradiction with the right to a due process established in the Czech constitutional order. CCC claimed that national constitutional rules must be understood and interpreted with respect to the goals of the EU, its value framework and supranational system of human rights protection. Based on this, it accepted the institution of reverse burden of proof as a legitimate goal of the EU, which does not contradict our constitutional order.²³

- *Protection of the principle of trust in the contract relations*²⁴, where CCC accentuated the duty of general courts to consider the value impact of EU law also in cases of legal relationships which emerged prior to accession to the EU and even before the adoption of the EU legislation, which introduced the legal rules in question. Opinion of the CCC gets ahead of the Court of Justice case law, which does not require such retroactive application of EU law principles.²⁵
- *State liability for damages caused by violation of EU law*²⁶, where CCC considered the principle of a state's liability as a special autonomous liability regime valid in the Czech Republic, despite the absence of an explicit national legislation defining the process of prosecuting liability caused by the violation of EU law by a state. The acknowledgement of 'state liability principle' as legal institution which must be accepted by national courts was based on the pro-European bending of Czech national rules.²⁷

5.2 The special influence of the Charter of Fundamental Rights of the European Union

Granting the legally binding force to the Charter of Fundamental Rights of the European Union (EU Charter) in 2009 brought significant changes within the EU legal system as whole.²⁸ Thanks to the EU Charter the project of Euro-

23 See further Matochová, Soňa. Právo Evropské unie a Evropských společenství v judikatuře Ústavního soudu ČR [EC and EU Law in the Case Law of the Czech Constitutional Court]. In MALÍŘ, Jan et al. (eds) *Česká republika v Evropské unii (2004–2009). Institucionální a právní otázky členství* [Czech Republic in the EU (2004–2009). Institutional and Legal Aspects of Membership], Praha: Ústav státu a práva AV ČR, 2009, pp. 29–30.

24 *Protection of the principle of trust in the contract relations*, II. ÚS 3/06, ECLI:CZ:US:2007:2.US.3.06.1.

25 *Ynos*, C-302/04, ECLI:EU:C:2006:9.

26 *State liability for damages caused by violation of EU law*, IV. ÚS 1521/10, ECLI:CZ:US:2011:4.US.1521.10.1.

27 For detailed analysis of the decision see Komárek, Jan. Ústavní soud České republiky: Odpovědnost státu za škodu způsobenou porušením práva EU. [Czech Constitutional Court: State liability for Damages Caused by Breach of EU Law]. *Právní rozhledy*, 2011, vol. 19, no. 9, pp. 331–335.

28 See in detail KERIKMAE, Tanel. EU Charter: Its Nature, Innovative Character, and Horizontal Effect. In KERIKMAE, Tanel (ed). *Protecting Human Rights in the EU*. Heidelberg:

pean integration entered a new stage and got a new image. Breakthrough importance of adopting a legally binding catalogue of fundamental rights has several aspects. It's a tool of making fundamental rights (which were present only in the form of unclear principles in the past decades) visible and therefore strengthening the legal certainty of addressees. EU Charter itself legitimises the EU public power in "black letter" understanding. Its active use as the source of legality review by the Court of Justice²⁹ deepens this impact in real world.³⁰ It's a tool of universalisation of fundamental rights notion since it formally associate all traditional generations of fundamental rights into the one legal source. And last but not least, the EU Charter reaches also the spheres of the Member States as they are included in to the list of "negative" addresses – the entities obliged to respect this catalogue. Given the predominantly decentralized effects of EU law, the national dimension of understanding, reflection and application of the EU Charter forms the crucial issue for the functioning of EU fundamental rights protection. EU Charter itself has a big potential to shift and change the content, nature and mechanisms of the fundamental rights protection within all Member States. It forms a part of EU law and therefore is connected with the obligation of national courts to take into account its contents when interpreting domestic law. It is obvious that CCC must and starts to use the EU Charter as a source of inspiration or a supporting argument in its decisions. CCC's approach to the EU Charter confirms its "positive" relationship with the indirect effect of EU law in general.

The indirect use of the EU Charter should be twofold. Firstly, it can be used as another supporting argument for the conclusions about unconstitutionality (the breaches of the Czech Charter of Fundamental Rights and Freedoms – CRF) of national legal sources or acts of public authorities. This should be understood as some false indirect effect, when the EU Charter (its quotation by the CCC) does not affect the decision of the CCC in normative way – it's just a supportive argument. Secondly there may be cases where the EU Charter is used as interpretative guidance in interpreting Czech constitutional norms, so as a source, which affects the final decision. This should be titled as real indirect effect of the

Springer, 2014, pp. 5–20.

- 29 As very visible example of the real impact of the Charter one may recall to the crucial decision of the Court of Justice *Digital Rights Ireland*, C-293/12, ECLI:EU:C:2014:238, where Court used the Charter as the main argument for the (surprising) invalidation of the so called Data Retention Directive (2002/58/EC) as whole. Another strong example is *Opinion on the Agreement on Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms*, 2/13, ECLI:EU:C:2014:2454, where Court of Justice found the incompatibility between the proposed agreement and EU law including the Charter (stating the doubts about sufficient protection of autonomy of Charter, see points 186–190).
- 30 DE BÚRCA, Gráinne (2013). After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? *Maastricht Journal of European and Comparative Law*, 2013, vol. 20, no. 2, pp. 168–184.

EU Charter. Here the norms of the EU Charter determine the outcome of the proceedings.

As an example of the first category of indirect effect one may point to the decision of the CCC in case II. US 164/15³¹. CCC rejected a constitutional complaint in which the petitioner claimed the interference with the constitutionally protected right to assemble and freedom of expression. The complainant protested against the decision of the Czech authorities that had banned a demonstration against artificial abortion, part of which should be a radically natural photographic documentation of abortions. One of the reasons for the ban was the interest in protecting children from the negative effects of disclosure of such visual documentation. CCC in its arguments acknowledged that interest in child protection (protected by article 32 para. 1 second sentence of CFR) can be a legitimate purpose, which should lead to the limitations of other constitutional rights. When using this argument CCC referred also to the article 24 of EU Charter, under which the higher interest of the child should always be protected. In other decision III. US 1956/13³², the CCC dealt with the question of the right to access to the file in criminal proceedings by the so-called other persons (suspicious persons, suspects, the owners of seized goods etc.). Under Czech criminal Codes these persons did not have the right to access to the file. CCC found the limited regulation unconstitutional. In its argumentation it opted for broad understanding of the right to access to the file also by using the supporting argument of EU Charter, which guarantees this right in article 41 in very broad manner even in the context of administrative proceedings.

The second variant of the indirect effect appears in CCC decision Pl. US 12/14³³ (although explicit mention of the EU consistent interpretation absents there). CCC considered the question of the constitutionality of the exclusion of judicial review of the decisions of subsidy provider to suspend the payment of subsidies.³⁴ CCC assessed the exclusion of judicial review as unconstitutional (contrary to article 36 para. 2 of CFR) and in its arguments is referred, inter alia, to article 47 of the EU Charter (ensuring the right to effective remedies). Its decision on the unconstitutionality of the contested part of the law on budgetary rules is significantly based on the Czech Republic's obligations towards the European Union (CCC directly refers to the principle of sincere cooperation within the European Union). The absence of judicial review within the subsidy proceedings could (according to the CCC) led also to the violation of the requirements

31 Nález Ústavního soudu II.ÚS 164/15, Zákaz konání shromáždění z důvodu zvláštní ochrany zájmu dětí, ECLI:CZ:US:2015:2.US.164.15.1.

32 Nález Ústavního soudu III. ÚS 1956/13 Právo podezřelého na nahlížení do policejního spisu a přiměřenost nařízení a provedení domovní prohlídky. ECLI:CZ:US:2014:3.US.1956.13.1.

33 Nález Ústavního soudu Pl. ÚS 12/14 K protiústavnosti výluky soudního přezkumu u pozastavení výplaty části dotace, ECLI:CZ:US:2015:Pl.US.12.14.2.

34 Prescribed the Act no. 218/2000 Coll., on budgetary rules.

of EU Charter. At first glance, it seems that this decision is rather an example of the first category of indirect effect. But the intensity and thoroughness of “European” arguments used by the CCC, leads us to the conclusion that without that European “pressure” the decision of the Constitutional Court might be different.

The second variant of indirect effect of the EU Charter is not merely a manifestation of voluntary willingness to reflect EU catalogue as another source of fundamental rights. It’s a consequence of the duty of loyalty prescribed by the EU law as well as obligation to comply with the international obligations which flows from article 1 para 2 of the Constitution of the Czech Republic. This form of use of the Charter certainly will not be so frequent, as the first option. Firstly, it will come into consideration especially in cases covered by article 51 para. 1 of the EU Charter (the cases of “implementation” of EU law by the Member States). Secondly, it will apply only under twofold condition (1) provided that EU Charter offers more extensive protection of concrete right than narrowly interpreted norm of constitutional order; and (2) provided that protection offer by the EU Charter in individual case does not contradict with the core requirements of the Czech constitutional law – that it is not *contra legem*, as we shall describe in the incoming part of this paper.

5.3 Limitations of the EU-consistent interpretation

Even though the principle of indirect effect obviously plays an important role in the case law of CCC and is brought up relatively often, it does not mean that CCC uses it by hook or by crook. On the contrary CCC has defined some limitations of the EU-consistent interpretation of national law, partly inspired by Court of Justice case law, partly introduced by its own.

According to the CCC the norms of Czech constitutional law cannot be bent by interpretation in a biased or voluntarist way. Thus, in cases when the methodology of law interpretation does not offer any suitable method, it will not be possible to reach the expected aims of EU law. Therefore the indirect effect of EU law is limited by potential non-existence of a national interpretation method (and on a constitutional level by the existence of the method of interpreting constitutional law) suitable for reaching the goals anticipated by EU law. Here the view of the CCC is fully compatible with the position of the Court of Justice, which takes into account the principle of national procedural autonomy and does not request national courts to meet EU goals by an absurd or fictitious reading of national law. The principle of indirect effect should be applied only within the limits of national court’s discretion as established by national law. The obligation to apply EU-consistent interpretation does not mean that the reading of constitutional norms must always be in a line with the EU law requirements. It is limited by the content and systemic logic of the constitutional text. In this context CCC stated that: “The constitutional principle that national law shall be interpreted in conformity with the Czech Republic’s obligations resulting from

its membership in the European Union is limited by the possible significance of the constitutional text. Article 1 par. 2 of the Constitution is thus not a provision capable of arbitrarily modifying the significance of any other express constitutional provision whatsoever.³⁵ It's clear that CCC admits a pro-European reading only to the extent which is allowed by the logical content of the national constitutional norm. The more general (and therefore more flexible) the rule of the constitutional law is, the possibility of its EU-consistent interpretation is bigger. That happened to be the case in relation to the article 14 paragraph 4 second sentence of the Czech Charter of Fundamental Rights and Freedoms³⁶ interpreted in *European arrest warrant* case. It is so general and abstract that it gave CCC a space for a pro-European interpretation. Nevertheless, in case of strict rules which do not offer the space for interpretative manoeuvres, the principle of indirect effect of EU law cannot be applicable. In this situation the current form of the constitutional text must be respected and preferred. Under these conditions there is only one way how to meet the obligations stemming from the EU membership. It is a change of that part of Constitution which prevents the fulfilment of the Czech Republic's commitment to loyalty to the EU. According to the CCC: 'If the national methodology for the interpretation of constitutional law does not enable a relevant norm to be interpreted in harmony with European Law, it is solely within the Constituent Assembly's prerogative to amend the Constitution.'³⁷

CCC realizes the importance of meeting the integration goals and prefers 'to adopt a European normative approach'³⁸ in cases where the national constitutional text impedes the employment of these goals. Here we are facing another specific impact of dominance of EU law. Apart from the role of EU law as an interpretation guideline, it can also serve as a legislative incentive to adopt changes or modifications to the national Constitution.³⁹

However this incentive is not unlimited. Under the rule of law, the absolute autonomy of European law cannot be presumed, even if the EU legal system is often declared to be *sui generis*.⁴⁰ Barents warns, "that in such an approach Community law is in danger of being conceived in a visionary way, strongly influ-

35 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

36 Article 14 paragraph 4 second sentence of the Convention says that 'No citizen may be forced to leave its homeland'.

37 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

38 See GRUSZCZAK, Artur. European Arrest Warrant – success story or constitutional troublemaker. In GRUSZCZAK, Artur et al. *European Arrest Warrant – Achievements and Dilemmas*. Warsaw: European Centre Natolin, 2006, p. 9.

39 This is the example of the so called 'l'aiguilleur' (the pointsman) role of the Constitutional Courts . See SADURSKI, Wojciech. *Constitutionalism and the Enlargement of Europe*. Oxford: Oxford University Press. 2012, p. 135.

40 KERIKMÄE, Tanel. *Estonia in the European Legal System: Protection of the Rule of Law Through Constitutional Dialogue*. Tallinn: Tallinn University, 2009.

enced by ideology and idealism.⁴¹ CCC realizes this and repeats that the fulfilment of the Czech Republic's obligations stemming from its EU membership cannot lead to derogation of the inviolable core of the Czech Constitution. CCC states that constituent authority can decide to modify the Constitution '[...] only under the condition that it preserves the essential attributes of a democratic law-based state (Art. 9 par. 2 of the Constitution), which are not within its power to change, and not even a treaty pursuant to Art. 10a of the Constitution can assign the authority to modify these attributes ([...])⁴² The so called 'Solange' concept of the CCC (introduced in *Sugar Quotas*⁴³ case), by which CCC accepts the effects of EU with reservation of non-violation of core constitutional values, applies also in this respect.

6 Final remarks

The up to date case law makes it clear, that CCC adopted broad approach to the indirect effect. We may conclude that CCC considers all national norms (including constitutional level) as 'EU-consistently bendable' and reflects also itself as an addressee of the obligation to follow the EU-consistent reading of national law. EU-consistent reading of constitutional law represents an easy and effective tool for the elimination of potential contradictions between the demands of EU law and the demands of the Czech constitutional order. The relevance of this approach is significant mainly because indirect effect works as a preventive tool eliminating the 'hard' strains between EU law and national norms. Even though there might be some tensions between demands of EU law and national law in case of using the EU-consistent interpretation the conflict is only putative. Legal contradictions which can be settled by interpretation are only a seeming one. Only contradictions which are not removable by interpretation bring us before a true normative conflict.⁴⁴

Case law of the CCC clearly indicates that a EU-consistent interpretation is the most ideal tool in meeting the Czech Republic's membership obligations. But it is simultaneously a tool for preserving the autonomy of the national authorities applying law and reduces possible tensions between supranational and national law. Furthermore, a quantitative view tells us that the phenomenon of indirect effect of EU law is in comparison with a direct applicability of the EU norms a more distinctive characteristic of supranational legal system. The approach of

41 BARENTS, René. *The Autonomy of Community Law*. The Hague: Kluwer Law International, 2004, p. 16.

42 European Arrest Warrant, Pl. ÚS 66/04, ECLI:CZ:US:2006:Pl.US.66.04, point 82.

43 Sugar Quotas III, Pl. ÚS 50/04, ECLI:CZ:US:2006:Pl.US.50.04.

44 KYSELA, Jan. Mezinárodní smlouvy podle čl. 10a po 'lisabonském nálezu' Ústavního soudu [International Treaties under article 10a after Lisbon decision of the Constitutional Court]. In GERLOCH, Aleš; WINTR, Jan (Eds). *Lisabonská smlouva a ústavní pořádek ČR* [Treaty of Lisbon and the Constitutional Order of the Czech Republic]. Plzeň: Aleš Čeněk, 2009, pp. 49–61.

CCC shows that it understands this principle as a necessary component of 'everyday' practice of general courts, and not as some ultimate solution for a situation when the courts reach a dead end in their interpretations. Also, we need to mention that the application of a EU-consistent reading is defined broadly in both subject (relates to all components of the Czech Republic's legal system including constitutional law) and time matter (its use excludes neither relationships nor fact situations which emerged, or rather set in, before EU accession).

Finally, we have to remember, that even so broadly accepted impact of EU law has its limits. Besides the limits prescribed the case law of the Court of Justice, there are also some national boundaries. The problems in positioning the EU law into the domestic legal system are even more evident in the cases where the EU rule or precedent is not commonly understood or is differently interpreted. By Williams: "Identifying a central principle is an essential step in the process of judgment. But it is not enough. A mere rhetorical observation.... is patently insufficient. We need to look further for guidance. What concerns us is how the principle is or not fulfilled. In other words, the principle is not the last word in values. We must also consider the means by which it is brought into effect. Only then can effective evaluation be made as to the extent to which the principle has been and is realized."⁴⁵ The 'Solange' concept of relative acceptance of EU law, which serves to protect the core values of Czech constitutional order, must be accepted and should be applied also in connection with the principle of indirect effect. Primacy of EU law over member states constitutions claimed by the Court of Justice has always been controversial as the national constitutions are the source of allowing the EU law to enter to the national legal system. Constitutional homogeneity can be seen as a precondition for loyalty to European Union. This kind of homogeneity cannot be (legally) framed, but must be seen as a process where the values emerge and develop through the communications between the two levels.⁴⁶

45 WILLIAMS, Andrew. Respecting Fundamental Rights. In BARNARD, Catherine. *The Fundamentals of EU Law Revisited: Assessing the Impact of the Constitutional Debate*. Oxford: Oxford University Press, 2007, p. 82.

46 KERIKMÄE, Tanel. *Estonia in the European Legal System: Protection of the Rule of Law Through Constitutional Dialogue*. Tallinn: Tallinn University, 2009.