The Supreme Administrative Court is a living institution

The Supreme Administrative Court is aware that it does not and cannot exist in a social vacuum. Thus, it strives to cultivate active relations with expert and lay community, with press, with other courts and authorities of public administration in the Czech Republic, and with institutions providing similar functions in other states, especially in Europe. At the same time it also strives to increase the professional expertise of its judges and employees.

National and International Cooperation

During the first seven years of the Court's existence, the court officials and judges met with their colleagues from the Constitutional Court, the Supreme Court, from other Czech courts (mainly with judges from administrative sections of regional courts), with ombudsman, and also on different occasions with the representatives of legislative and executive authorities, juridical expert associations, the academic sphere or authorities of public administration.

Some national institutions co-operate with the Court by participating in the process of publishing the Court Reports of the SAC (*Sbírka rozhodnutí Nejvyššího správního soudu, which is later referred to as "Sb. NSS"*). Their comments to judgments proposed for publication represent very valuable feedback for the decision-making of administrative courts.

Relations with the Constitutional Court

The SAC comes into contact with the Constitutional Court most frequently as the party of the proceedings on constitutional complaints against its judgments (for further information see the chapter *Constitutional complaint against the judgments of the Supreme Administrative Court*) or as a plaintiff of the proceedings on annulment of a legal regulation or its parts.

During the first seven years of its activity, the SAC initiated 16 proceedings on annulment of selected legal provisions to the Constitutional Court. The Constitutional Court has partially allowed 7 of the petitions, 7 proposals are pending to this time.

	2004	2005	2006	2007	2008	2009
Petitions by SAC	**4**	**2**	**2**	**4**	**4**	**6**
Out of those: – upheld	2	0	1	3	0	1
– dismissed	1	0	1	1	2	0
– dismissed as inadmissible	1	1	0	0	0	0
– discontinued	0	1	0	0	0	0
– pending	0	0	0	0	2	5

Table No. 2 Number of the SAC petitions referred to the Constitutional Court on annulment of statutory provisions on 31 December 2009.

For instance, in 2005 the SAC proposal led to the annulment of an exemption from a subsidiary application on general regulations of administrative procedure in the proceedings on declaring an object a cultural monument[1]. In 2006 the Constitutional Court along with the SAC found that the provisions of Act No. 155/1995 Coll., on Pension Insurance, were discriminatory when they obliged men taking care children to the age of four (respectively of a child till the age of 18, if the child was disabled and required special care) to apply for pension insurance[2]. Without applying, they would not be entitled to pension insurance during this period of care giving. At the same time women in a similar position were entitled to pension insurance even without filing such applications. The Constitutional Court confirmed the view of the SAC on unconstitutionality of excluding from judicial review decisions regarding administrative expulsion of foreigners residing in the Czech Republic irregularly,[3] or exclusion from judicial review of certain decisions taken by the Security Information Service official bodies (Pl. ÚS 10/07).

[1] Plenary judgment of Constitutional Court of 26 April 2005, No. Pl. ÚS 21/04, No. 240/2005 Coll.
[2] Plenary judgment of Constitutional Court of 6 June 2006, No. Pl. US 42/04, No. 405/2006 Coll.
[3] Plenary judgment of Constitutional Court of 9 December 2008, No. Pl. ÚS 26/07, nalus.usoud.cz.

On the contrary, the Constitutional Court took a different opinion than the SAC on the unconstitutionality of a provision setting different retirement ages for men and women depending on the number of children.[4] It also dismissed the proposal to annul some tax law provisions, which imposed on the state the obligation to repay possible overpayment in the cases of declared bankruptcy of a tax debtor in such a way, that the state could not include this overpayment against the other tax arrears, as it is common in tax proceedings. In the negative finding in this case[5] the Constitutional Court decided that Article 11 of the Charter of Fundamental Rights and Freedoms cannot be interpreted as providing increased protection to the state's rights as owner, which in the case of declared bankruptcy would lead its preferential position and would grant it a de facto privileged position compared to other creditors.

The Constitutional Court dealt with the status of tax guarantor and his or her limited rights compared to those of a tax debtor on two occasions. In the first decision[6] on this issue the proceeding was discontinued, because the Parliament of the Czech Republic fundamentally changed the legislation on the guarantee for payment of tax in the meantime. However, since the SAC had to apply the challenged provision again in the version before those amendments and considered that the alleged non-compliance with the constitutional order of the Czech Republic could not be overcome even by conforming to the constitutional interpretation, the SAC filed another petition proposing the Constitutional Court to declare on its unconstitutionality. This time the Constitutional Court upheld the petition.[7] The SAC also successfully struggled on the retrospective declaration of unconstitutionality in the case of the refusal to issue and the withdrawal of travel documents of a prosecuted person.[8]

By the end of 2009 the Constitutional Court had dealt with seven proposals of the SAC to annul statutory provisions. The contested concepts in matters which are pending include, for example, confiscation of illegally transported goods or vehicles in which such goods are transported if the person owning such goods or vehicles is known to the controlling customs

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[4] Plenary judgment of Constitutional Court of 16 October 2007, No. Pl. ÚS 53/04, No. 341/2007 Coll., and plenary decision of Constitutional Court of 27 January 2005, No. Pl. ÚS 72/04, nalus.usoud.cz.

[5] Plenary judgment of Constitutional Court of 2 July 2008, No. Pl. ÚS 12/06, No. 342/2008 Coll.

[6] Plenary decision of Constitutional Court of 11 July 2006, No. Pl. ÚS 30/05, nalus.usoud.cz.

[7] Plenary judgment of Constitutional Court of 29 January 2008, No. Pl. ÚS 72/06, No. 291/2008 Coll.

[8] Plenary judgment of Constitutional Court of 20 May 2008, No. Pl. ÚS 12/07, nalus.usoud.cz.

authority, although not simultaneously controlled (Pl. ÚS 31/08), disciplinary decisions made during the execution of a sentence (Pl. ÚS 32/08), and also certain aspects of disciplinary prosecution of judges (Pl. ÚS 33/09) and enforcement agents (Pl. ÚS 38/09 and Pl. ÚS 39/09).

Relations with the Supreme Court

The SAC judges retain the closest contact with the Supreme Court and its judges when dealing within a special chamber established under Act. No. 131/2002 Coll. on Deciding Certain Jurisdiction Conflicts. This judicial body is further discussed at the end of this publication.

Moreover, the Supreme Court is one of the bodies receiving the decisions of administrative courts intended for publication in *the Court Reports of the SAC judgments* (this process is further discussed under the sub-chapter *Court reports of the Supreme Administrative Court* below). At the same time, the SAC supplies the Supreme Court with comments on the judgments on civil, commercial and criminal cases. In this respect, the SAC judges may attend a meeting of the Supreme Court divisions for civil and commercial law cases.

Membership of the court in international organizations

In order to guarantee proper implementation of international commitments of the Czech Republic in the protection of fundamental human rights and the enforcement of the European Union law in the Czech Republic, the SAC and its judges assume membership in various professional associations.

The only representative international organization bringing together top authorities of the administrative courts in the member states of the European Union is **the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (ACA Europe).** After the phase of getting to know the Association (starting in June 2003, the SAC retained the status of an observer), the Court became its full member on 15 June 2004. Thanks to that, the Czech judiciary is now involved in the information exchange system used for the correct application of Community law (or European Union Law)[9] for administrative justice in the Czech

[9] With effect from 1 December 2009 "European Union Law". Content of this report refers to period before the mentioned date, therefore in the case, when Community law was applied, this term will be used.

Republic. This goal is achieved through participation in expert seminars and colloquia, as well as through access to the database JuriFast, which contains the most important decisions of national courts in Europe in which the highest administrative courts applied EC (EU) law.

Membership of the SAC in **the International Association of Supreme Administrative Jurisdictions (IASAJ)** from 14 April 2008 extends the opportunities for exchanging experiences, views and contacts with partner institutions, which have their registered office outside the European Union. At the moment the first contribution of the SAC to the international community of administrative courts was the active participation of justice Milada Tomková in the congress of the Association in 2007 (Bangkok, Thailand).

Furthermore, some judges are personally engaged in international organizations. To give an example, Justice Jan M. Passer is an active member of **the Forum of Judges for the Environment EU (EUFJE)**.

Foreign visits and visits by representatives of the court in foreign courts

In 2003 the SAC hosted the members of the constitutional committee of the National Council of the Slovak Republic, judges from the Netherlands, as well as ombudsmen from Poland (Andrzej Zoll) and Romania (Ioan Muraru).

In the spring of 2004 the SAC was visited by constitutional judges from Slovakia and Lithuania, in the summer by the Montenegrin Minister of Justice (Željko Šturanović) and judges from Belarus, Ukraine and Moldova, and in autumn of the same year the then Vice-President of National Council of France (Renaud Denoix de Saint Marc) and Austrian ombudsmen (Rosemarie Bauer and Peter Kostelka).

In 2005 the Court was granted a visit by the representatives of the Austrian Independent Administrative Court Chambers, the Constitutional Court of the Russian Federation and the Vietnamese National Assembly. The President of the SAC also hosted the United States Ambassador (William Cabaniss H. E.) and the Ambassador of Austria (H. E. Margot Klestil- Löffler).

In 2006 the SAC welcomed the Ukrainian Supreme Court judges, judges of the Spanish, Polish and Slovak Constitutional Court, President of the Administrative Court of South Carolina and judges of the Austrian ordinary courts. The Slovak and Czech Ministers of Justice met at the SAC in October.

In 2007, the SAC was visited by the judges from Hungarian, Slovenian and Italian Constitutional Courts and the Ambassador of the Islamic Republic of Afghanistan (H. E. Mohammad Kacem Fazelly).

In 2008, the SAC welcomed a delegation of representatives from the government of Uzbekistan, Uzbek professional organizations and other experts on tax law.

In April 2009 the SAC was visited by the delegation of Austrian judges and lawyers. In the same year the Court welcomed the visit of Ukrainian judges and the delegation of Dutch judges with the aim of learning about competence, decision-making and the application practice of the SAC. At the end of the year the judges of the SAC welcomed the representatives of the National People's Congress from China.

In addition to official visits, between 2003 and 2009 the SAC hosted domestic and foreign students of law (e.g. from Serbia or the United States of America), representatives of organizations for the protection of human rights (e.g. from Belarus) and representatives of professional organizations (e.g. Belarus and Chinese attorneys at law).

The representatives of the SAC officially visited the Austrian Administrative Court in Vienna in 2004, the Polish Supreme Administrative Court in Warszawa in 2004 and 2005 and the Supreme Administrative Court of Lithuania in Vilnius in 2006.

Providing information

For the highest judicial instance, which normally acts without hearings and without the presence of the parties and which could, therefore, be suspected of practices of 'cabinet justice', transparency is an essential part of its overall credibility. Therefore, the policy of openness has been consistently promoted since the beginning of its activities.

Spokesperson

Shortly after the beginning of its activities the SAC demonstrated its openness by creating the post of a **spokesperson**. Marika Komoňová became the first spokesperson in 2003. She was replaced in January 2005 by Sylva Dostálová, a journalist and then national media spokesperson and media advisor to the Pardubice Region. Since February 2008 František Emmert, a former journalist in regional and national papers and the author of professional and nonfiction publications from the field of modern history, has been holding an office of spokesperson of the SAC.

In the first six years of its existence, the Court reported 50 press releases per year on average, there were four press conferences organized, the spokesperson replied to almost 250 formal requests for information and handled hundreds of telephone and written (mostly e-mail) inquiries from professionals and the general public.

One of the ways of providing information about the Court to journalists and through them to the general public is by using **press releases**. They are sent to journalists, who are interested in them, and they are also placed on the SAC website. Their aim is to highlight the breakthrough decisions or the decisions in any way interesting to the public. While *the Court Reports of the SAC* are considered a 'shop window' of the Court's jurisprudence for the professional public, the news section on the website of the Court should play the role of a 'shop

window' for the wider public. Furthermore, there are efforts to provide information about the Court's life, events, seminars or conferences held by the Court which might interest the general public.

The SAC is **presented** in all types of contemporary media. Besides the periodical press, it is often presented in economic weekly newspapers, in law journals and also on internet news sites. The presentation of the President of the Court and other judges in the coverage of public or private media (e.g. Czech Radio, Czech television, etc.) and their participation in live broadcasts or discussions directly in the studio is also notable. As a response to press releases, there have been requests for sound recordings by the editorial office of Slovak radio stations, the editorial offices of Czech radio in the U.S. or countrymen broadcasts from Sydney Australia.

Due to the specific position of the SAC and the method of its decision-making, **press conferences** are less important. They are organized approximately once a year in connection with the statistics of the SAC, with the decisions of the Court in election cases, with the anniversary of the Court, etc. The historical first press conference on the theme 'News on the Supreme Administrative Court or How the SAC lives' was organized in October 2005. The discussion primarily concerned the impact of the amendment of the Asylum Act to the SAC, the newly presented publication of all decisions on the Court's website, or constitutional complaints lodged against the decisions of the SAC. Another press conference was held in July 2006 which concerned the 'complaints in elections to the Chamber of Deputies (House of the Parliament) in 2006'. In 2007 a press conference was held presenting 'the Statistics of the SAC', especially the statistics on the length of the proceedings and the number of received, decided and pending cases divided according to individual agendas. In January 2008, the spokesperson organized a press conference for the five-year anniversary of the existence of the SAC.

Notice board

The SAC declares the judgments by posting the written copy of the summary without the grounds of the decision on the notice board for 14 days in cases when the judgment was promulgated in absence of the parties. Judgments in matters of international protection are thus presented only on the notice board in the Court premises. Since October 2003 other judgments have been posted in parallel on the website.

In the proceedings concerning elections, the decisions of the Court are in force as from the day of posting on the notice board. Full decisions are delivered to the parties of the proceedings at the same time with the posting on the notice board.

Website

The Court launched its own website (www.nsssoud.cz) soon after the beginning of its activities in October 2003. The Court publishes as much information as possible about its activities and internal conditions on the website.

At the time of its creation, the website immediately included an electronic version of a notice board and statistics of decision-making. Pages could be searched using the search mask on the notice board and since August 2004 also in selected published judgments.

Since April 2004 one can also find press information there (in the news section), reporting on the current decision-making of the court, thereby contributing to the public discussion on issues related to administrative judiciary and spreading further education on matters falling within the scope of the SAC.

Notices of upcoming court proceedings are also published.

In October 2005 one of the most significant contributions to the Court's openness was made, whereby almost all judgments of the court are made public from the beginning of its existence in its full (partially anonymised) version with good search facilities for necessary information. Consequently, on October 2, 2006 the SAC was awarded second place in the category "Otevřeno" ("Open") in the contest "Otevřeno x zavřeno" ("Open x Closed"), organized annually by the Otevřená společnost, o. p. s. By the end of the relevant period, the database contained 20,366 full texts of judgments and 1,961 head notes of judgments published in *the Court Reports of the SAC*. This database is continually updated with new judgments shortly after their release.

In August 2009 the SAC made the information on the stage of the proceedings publicly available, which were instituted after 1 January 2008. This is possible through the application "InfoSoud" on the website of the SAC. In particular, the professional public welcomed the publication of more detailed information on the proceedings taken before the Extended Chamber of the SAC (see section *The Extended Chamber*).

The SAC has opened to the foreign public by the making of an unofficial translation into English of the Code of Administrative Justice in December 2004 and launching the English

version of the website, including the translations of others important provisions of the Czech law in July 2006.

The high visit rate on Court's websites is a confirmation of the usefulness of their existence and the ongoing updates and improvements.

Individual requests for information

Since 2003 the SAC has allowed access to information for the general public. It has been doing so mainly through its own websites, as well as orally, in writing, electronically or by telephone. It based the provision of information on the constitutional right to information within the meaning of Article 17 of the Charter of Fundamental Rights and Freedoms, and on the corresponding functioning of the Court as an open institution. The Court has also responded to the requests for information not submitted in accordance to Act No. 106/1999 Coll., on Free Access to Information. It did not charge any fees for providing information.

Year	**2003**	**2004**	**2005**	**2006**	**2007**	**2008**	**2009**
Requests together	**12**	**49**	**65**	**39**	**32**	**20**	**27**
From that: – suspended	0	3	1	0	0	0	0
– dismissed as inadmissible	0	0	2	0	0	4	7
– dismissed	0	0	3	7	0	0	0
Appeals lodged against decisions	0	0	1	0	0	1	0
Penalty proceeding	0	0	0	0	0	0	0
Judgments on violation of the law	0	0	0	0	0	0	0

Table No. 3 Number of requests under Act No. 106/1999 Coll., on Free Access to Information.

Applicants (natural and legal persons, as well as state institutions) have most often lodged their applications via e-mail. The media has never submitted a request under this Act; all of their questions were dealt with in standard communication with journalists.

At first, a large number of requests were related to provision of decisions of the SAC in an anonymised form. After the publication of judgments on the Court's website this agenda has gradually changed to identify a certain decision (finding its reference number) and its provision. Other requests concerned mainly statistical data, the organization of web pages, the use of the state symbols on the Court's website, publication of all decisions and case-law of the Court on this site and the competence of the SAC.

The most common reason for non-compliance with the requests was that the questions did not fall within the jurisdiction of the Court (requests dismissed as inadmissible and some suspended requests) or that the applicant did not specify the request (requests dismissed as inadmissible), and also that the requests related to legal advice or the Court's decision-making activity (requests dismissed).

In that period, there was no judgment in a matter reviewing the Court's decision for withholding information. The SAC has always responded to all applicants within the time-limits provided by law. Throughout the existence of the SAC there were no penalty proceedings against the Court for non-compliance with the Act on Free Access to Information.

Training of judges and other staff

The SAC puts emphasis on the systematic training of its staff – judges and their assistants as well as other employees of the Court. Pursuant to Section 82 para. 2 of Act No. 6/2002 Coll., on Courts and Judges, judges are required to enhance their legal and other professional expertise which is necessary to properly perform their duties through systematic training. To this end, they may take advantage of the **educational events held by the Judicial Academy** which provides systematic training for judges as well as educational events within the training of judicial and legal candidates and other persons working in the judiciary. Furthermore, the Court organizes **language courses** for judges and other staff within its premises on a weekly basis (legal English, French and German). Moreover, judges and their assistants have organized many seminars as administrators.

In particular, thanks to cooperation with the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union and the Academy of European Law, the Court has sent its judges and assistants for seminars held by these organizations. Thus, they had the opportunity to acquaint themselves with the application of European law in other Member States.

Between 2003 and 2004, the judges of the SAC and the judges of administrative sections of regional courts met at several seminars in order to seek solutions to common problems arising from the fact that the judicial administrative proceedings were new (e.g. in matters of social security, financial matters or general matters of administrative law).

In the first half of 2005 a series of lectures on the functioning of the European Union and European Community law as such was held. In the spring the Court organized several seminars on administrative offences and on the new administrative procedure; they were followed by a seminar on planning and building regulations in November.

The following year a seminar on the economic analysis of the functioning of administrative courts took place at the premises of the Judicial Academy. Additionally, the Court held at its

premises seminars on "asylum law beyond the horizon of the courtrooms", on free access to information (focusing on the changes introduced by Act No. 61/2006 Coll.) and a two-day course on selected issues of accounting. Furthermore, at the opening ceremony of its new seat in mid-November 2006 the Court in cooperation with the International Institute of Political Science of Masaryk University, the Faculty of Law of Masaryk University and the Konrad Adenauer Foundation hosted a conference entitled "The role of Supreme Courts in European constitutional systems – time for a change?". The papers presented at this conference were thereafter published in a collection under the same title.

The year 2007 was for the Court marked by the organization and co-organization of seminars for both the Tax and Financial Division of the Court and the Social Security Division of the Court; in addition to seminars on the use of the case-law, on the application of procedural rules by administrative courts, on the decision-making on electoral matters, on the application of the new Act on Conflict of Interests (in cooperation with Transparency International), or on the administrative justice in practice (in cooperation with the Czech Bar Association). In May, the floor was given to Jan Komárek who gave a lecture on European arrest warrants in the laboratory of constitutional pluralism. In early November Irena Pelikánová, a Czech judge at the Court of First Instance, brought news from the courts of the European Communities. In the end, a meeting of the representatives of the Research and Documentation Services from the partner courts within the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union was held in Brno in October in order to discuss the operation and development of databases for the Association and to strengthen contacts.

In 2008 the Court participated in the organization of seminars on competition law, on Czech and Slovak tax law (in cooperation with the Chamber of tax advisers), on judicial protection in the field of environmental law (in cooperation with the Association of environmental organizations), on current issues of social security as well as administrative law in general, on commercial aspects of tax law, on the Czech experience with references for a preliminary ruling to the Court of Justice of the European community (since 1 December 2009 the Court of Justice of the European Union) (in cooperation with the Czech Society for European and Comparative Law), and on justice in electoral matters (with focus on elections to regional councils). Besides that, the Court staff took part in training and seminars regarding the environment, cultures and religions of asylum seekers from various regions, the protocol of organization, or etiquette.

Year	2004	2005	2006	2007	2008	2009
Number of seminars on administrative law	23	19	10	20	8	20
Number of language seminars	6 (EN, FR)	9 (EN, FR, GER)	15 (EN, FR, GER)	3 (EN, FR, GER)	4 (EN, FR, GER)	4 (EN, FR, GER)
Number of other seminars (IT, communication, management)	–	8	7	2	6	10
Number of educational events held by the Court	3	2	5	7	4	11
Number of educational events held by other organizations	8	4	4	13	11	22
Total number of educational events	**40**	**42**	**41**	**45**	**33**	**57**

Table 4 Seminars on administrative law, language and other seminars were mainly provided by the Judicial Academy. The Court events were organized in cooperation with the Judicial Academy or other organizations.

Seminars and training abroad

Foreign study trips were used to enhance the expertise of the Court staff in the field of the Court's jurisdiction. These opportunities were used mostly by judges and, to some extent, by other Court staff, particularly judge's assistants and advisors from the Research and Documentation Services.

In 2003 judges of the Court participated among other foreign educational events in the seminar on State aid (Brussels, Belgium) and in the conference on employment (Athens, Greece).

In 2004 the Court staff attended seminars on labour law in a united Europe (Trenčianske Teplice, Slovakia), on the new model of social security (Bratislava, Slovakia), on the information systems of the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union (Trier, Germany) and on the new acquis in the field of asylum and migration (Brussels, Belgium).

In 2005 the Court sent its delegates to a conference on Community law in the field of protection of the environment (Luxembourg, Luxembourg), on the reform of Community competition law (Brussels, Belgium); additionally, to a seminar on the application of Community competition law by national courts (Vienna, Austria), on migration law (Brussels, Belgium), on trademarks and industrial designs of the Community (Alicante, Spain), on asylum law (Budapest, Hungary), on the use of European competition law in national justice (Budapest, Hungary), on immigration and asylum policy of the European Union (Rome, Italy) or on the pan-European comparative research on administrative justice (Trier, Germany). In addition, judges and judge's assistants attended the conference on the prevention of and compensation for environmental damage (Rome, Italy), the VIII. European Congress on labour law (Bologna, Italy) and the workshop and the conference of the International Association of Refugee Law Judges (Lund, Sweden).

In 2006 the Court had its representatives, among others, at the seminars on the role of a judge in national and European Law (Luxembourg, Luxembourg), on the protection of citizens' social rights in proceedings before administrative courts and in their decisions (Trenčianske Teplice, Slovakia), and on European competition law (Oxford, United Kingdom). They also participated at the conference on support for migration and border management in Moldova (Chisinau, Moldova).

In 2007 representatives of the Court took part in conferences on the legitimacy of the highest court rulings (Rotterdam, Netherlands), on the definition of cartels and practices distorting competition in Europe (Brussels, Belgium), on the efficient use of funds from the European Social Fund in the labour market (Bologna, Italy), on taxes in the European context (Trier, Germany) and on asylum policy (Strasbourg, France). Seminars that the Court staff attended related to the impact of the Court of Justice of the EC on taxation in the Member States (Trier, Germany), the access to justice in Community law and the role of national judges (Paris, France), the foundations of competition law in the Community (Budapest, Hungary) and the protection of the environment through criminal law (Luxembourg, Luxembourg).

Conferences attended in 2008 related to the tasks of national administrative courts in the field of environmental law in the Community (Brussels, Belgium and Paris, France), methods for refugee status determination (Prato, Italy) and the assessment of the ten-year existence of the Aarhus Convention (Amsterdam, Netherlands). The most common theme of the seminars was asylum law (Berlin, Germany), in particular detention and deportation on account of national security (Athens, Greece), the Procedures Directive (2005/85/ES) (Brussels, Belgium), country of origin information research (Vienna, Austria), and immigration and asylum policy (Barcelona, Spain). Among others, the following topics were dominant: taxes (Trier, Germany), trademarks and industrial designs (Alicante, Spain), the unity of the application of Community law by national administrative courts (Santander, Spain), cancellation of election results (Valletta, Malta), discrimination (Trier, Germany), European competition Law (Budapest, Hungary) and regulation of telecommunications in the European Union (Brussels, Belgium). In March 2008, judges and judge's assistants went on a study trip to the United Kingdom where they visited several courts of the administrative judiciary, as well as some government authorities and self-government bodies of the English courts and judges. In order to discuss some internal affairs the Association of the Councils of State and Supreme Administrative Jurisdictions of the European Union organized a meeting of the Committee to support the database JuriFast (Lisbon, Portugal) and a meeting of its General Assembly (Warsaw, Poland).

Over the course of the year 2009 conferences attended by representatives of the SAC were focused on the quality of the legal framework (Brussels, Belgium), on the making of judicial lawor the transparency of the judicial decision making (Senec, Slovakia). The seminars most frequently attended focused on competition law (Budapest, Hungary and Oxford, United Kingdom) and on administrative justice in connection with the creation of European portal e-Justice (Athens, Greece and Istanbul, Turkey). The judges and judge's assistants also participated in seminars focusing on telecommunications law (Bruxelles, Belgium), in European Summer School focusing on immigration and asylum (Bruxelles, Belgium), or seminars on election matters (Madrid, Spain), and tax law (Paris, France). As members of the Council of Judicial Academy the judges of SAC participated in a study visit at the European Court of Human Rights in Strasbourg (France) during which they got acknowledged with the jurisprudence and activities of this court. The SAC was also represented at the meeting of the General Assembly of the Associations of State Councils and Supreme Administrative Courts in Luxembourg (Luxembourg).

Year	Number of judges or other staff of the Court on study trips or visits abroad	Countries visited
2003	3	Belgium, Hungary, Greece
2004	16 (thereof 2 on a study visit in Lyon, France)	Austria, Belgium, France, Germany, the Netherlands, Poland and Slovakia
2005	13 (thereof 2 on an internship in Brussels, Belgium)	Austria, Belgium, Hungary, Germany, Italy, Luxembourg, Poland, Spain, Sweden and the United Kingdom
2006	13	Finland, Germany, Lithuania, Luxembourg, Moldova, Slovakia and the United Kingdom
2007	14 (thereof 3 on an internship in Paris, France)	Belgium, France, Germany, Hungary, Italy, Luxembourg, the Netherlands, Poland, Slovakia and Thailand
2008	21 (thereof 2 on an internship in Nicosia, Cyprus, and 1 in Brussels, Belgium)	Belgium, France, Italy, Cyprus, Hungary, Malta, Germany, the Netherlands, Poland, Portugal, Austria, Greece, Slovakia, the United Kingdom and Spain
2009	26 (one on the study visit in Florence, Italy, 1 at a study visit in Lisbon, Portugal and 1 at a study visit in New York, USA)	Belgium, France, Luxembourg, Hungary, the Netherlands, Poland, Portugal, Greece, Slovakia, the United Kingdom, the United States, Spain, Turkey

Table 5 The list of foreign study trips and internships includes participation in international conferences and seminars, and internships in foreign courts. Internships in foreign courts and study visits are given in parentheses.

Seminar held in the Plenary hall

In this context, it should be noted that the Court has been a destination for study trips from foreign colleagues as well. Judges and other staff of the Slovak Supreme Court and of the Regional Court in Bratislava got acquainted in September 2007, resp. November 2008, in particular with the system of internal documentation of the case-law, with the procedure of issuing Court Reports, and with the functioning of the Research and Documentation Service. A judge of the French Administrative Court of First Instance during his internship at the end of 2008 became familiar with the activities of the Court as the top court of the Czech system of administrative justice.

Management of the Supreme Administrative Court

At the end of the assessed period the Court had the right to manage the property forming their current seat and several housing units in Brno. The Court acquired the property as a free transfer from the Office of the Government Representation in Property Matters.

Expenditures of the Court in the assessed period were associated particularly with operating and personnel costs and between 2004 and 2006 with the costs for the reconstruction of buildings on Moravian Square (*Moravské náměstí*) in Brno, which is the current seat of the Court. The reconstruction was financed by the program ISPROFIN.

Year	2003	2004	2005	2006	2007	2008	2009
Budget approved	75,001	158,522	77,853	212,392	183,538	109,198	113,130
Budget adjusted	118,093	181,386	88,511	204,542	194,748	116,329	117,742
Actual costs	106,227	205,024	195,092	205,275	198,299	112,240	116,085

Table 6 The data are expressed in thousands of Czech crowns and rounded to the nearest thousand.

Economical and efficient use of budgetary funds was achieved, inter alia, due to compliance with the **internal control system**. In this framework, all senior employees of the Court have the obligation to provide the President of the Court with up-to-date and reliable information on the results achieved in carrying out certain tasks, on the occurrence of significant risks, on serious deficiencies and on corrective measures adopted as well as on their implementation. All operations, performance of which requires expending public funds, are subject to review of (1) compliance with the defined tasks and aims and objectives approved by the Court, (2) compliance with laws and regulations, instructions and other normative acts, and (3) compliance with the principles of economy, efficiency and effective performance of public administration.

The Inner Life of the Supreme Administrative Court

It is not only work that forms the life of a judge. Apart from their workplace and educational events, judges and other staff of the Court meet at sporting events or debating sessions; current issues are being addressed once a year at a special Court session outside the courthouse.

Since 2005, the Court organizes an **outside session** for all judges and judge's assistants every autumn. It is a welcomed opportunity to focus for at least a few days on discussing selected issues related to the activities of the Court and at the same time, it is one of the few occasions when each participant may use the open forum to comment on selected issues or problems from the inner life of the Court.

All of the outside sessions were in some way thematically focused. The main theme of the first outside session (October 2005, Valtice) was a revised law concerning matters of international protection (then asylum) in terms of procedure (e.g. the introduction of the notion of inadmissibility of a cassation complaint in matters of international protection, of writ of certiorari) and in terms of internal organization of the decision-making process (decisions of the Court in matters of international protection were supposed to be made in five-member chambers). In November 2006, the Court moved its outside session to Srní in the Bohemian Forest, where in particular issues of internal personnel and organizational changes within the Court were discussed. These changes occurred in connection with an increasing number of judges and judge's assistants, but also as a result of the reorganization of the Court expert apparatus consisting of the establishment of the Research and Documentation Service. The content of the outside session in October 2007 (Pozlovice near Luhačovice) included, for example, considerations of the public relations of the Court and a statistical retrospective glance at the five-year operation of the administrative judiciary. The venue of the outside session of the Court in November 2008 was the detached workplace of the Slovak Judicial Academy in Omšenie, Slovakia, where the new information system of the Court and related projects of the

Ministry of Justice in the field of e-justice were discussed. Additionally, the session was focused on the jurisprudence of the extended chamber of the Court and on the new regulations regarding disciplinary proceedings in cases of judges and public prosecutors. There were issues that occurred in debates repeatedly, e.g. amendments or creation of new internal rules of the Court (the draft schedule of work for the next year is always discussed at the outside sessions). A regular part of the outside sessions are formed by debates over legislative proposals for laws, which are more or less related to administrative justice, or over the form of the representation of the Court in various international fora. Some recurring topics of outside sessions are matters relating to the issuance of the Court Reports. The most recent place of an outside session was Harrachov in October 2009. The discussions focused on the implementation of the data boxes and their use.

Judges and other staff of the Court participate in various **sporting events**, including both privately and as representatives of their home institution, such as the "Judicial games" under the auspices of the Ministry of Justice or the badminton competition "The trophy of the ombudsman". Among the major events organized by the Court is the badminton tournament "The Cup of the President of the Supreme Administrative Court", which took place for the first time on 25 April 2007 and has been regularly held each December since then. The Cup is a travelling trophy. Additionally, judge's assistants of the Supreme Court and the SAC organize bowling tournaments about four times a year: participation in them is open also to teams from other judicial bodies located in Brno.

One of the non-judicial activities of the Court has also been since 2006 the so-called **debating Tuesdays** which are held in cooperation with the Constitutional Court and the Office of the Ombudsman. These are informal evening meetings of judges and staff of top judicial institutions in Brno cafes, where participants debate with prominent personalities of contemporary Czech life. Guests always first present the pre-selected theme at their opening speech, which is then further developed by a moderated discussion. An effort is taken not to invite only major or original personalities from the field of law (previous debate guests to date have been e. g. Eliška Wagnerová, Vojtěch Cepl, Stanislav Balík, Petr Hajn, Zdeněk Kühn or Jan Kysela), but also people from other fields of interest (diplomat Jiří Dienstbier, economist Josef Šíma, geologist Václav Cílek, archaeologist Pavel Pavel who did experiments with moving ancient statues on Easter Island, managing director of ČEZ Martin Roman and many others). It has already become an annual tradition at the turn of autumn and winter to hold "special

debating Tuesdays" which go beyond simply meeting and debating. In the autumn of 2006 there was a debating Tuesday with architects who designed the reconstruction of the new seat of the Court and the area in front of it. The meeting included a professional tour around the premises of the Court with explanations of the embedded artistic intentions. In autumn 2007, the whole day was dedicated to a nine-hour document from the trial with Milada Horáková; this event took place in the plenary hall of the Court and was accompanied by a discussion with five historians and their commentaries. In December 2008 a concert of the Young Brno Symphonists was held at the seat of the Office of the Ombudsman under the title "St. Nicholas's musical gifts"; the concert included debates with the conductor Tomáš Krejčí and members of the orchestra.

Decision-making of the Court

The SAC is the supreme jurisdiction dealing with matters in the jurisdiction of administrative courts. Administrative courts in general provide protection of public subjective rights (*droits publics subjectifs, subjektiv-öffentliche Rechte*) of natural and legal persons (in procedures dealing with actions against the decisions of administrative authorities), which is supplemented by protection against failure of administrative authorities to act and protection from unlawful interference, instruction and coercion from administrative authorities. Apart from that, regional courts deal with some disputes in election and local referendum matters and in matters of violation of public officials duties set by the Act on Conflict of Interest.

The SAC has in particular jurisdiction to decide on cassation complaints against the decisions of regional courts on actions and on petitions dealing with protection of public subjective rights. Moreover, it deals in the first instance with some specific fields of law, such as election matters, dissolution of political parties and political movements, suspension and resumption of their activity, in matters of annulment of measures of general nature or parts of these measures, as well as in positive and negative jurisdiction conflicts between public administration authorities. Some of the procedures before the SAC are described in more detail below.

Extraordinary remedies: cassation complaints and new trials

Generally, courts take decisions in one instance in the administrative justice. There is no appeal or other ordinary remedy admissible against their decision. However, it is possible to initiate review of final decisions of regional courts before the SAC by an extraordinary remedy – cassation complaint – unless the character of the matter does not allow for that, for instance in election matters.

Cassation complaint is a widely construed extraordinary remedy by which the complainant may seek remedy both as regards substantive issues and deficient procedures. It may be lodged

against a decision on the merits, as well as against a number of decisions dealing with procedural issues; however, only for reasons foreseen and enumerated by law. Apart from examining the admissibility of a cassation complaint, the SAC also deals with specific grounds of admissibility (writ of certiorari) of cassation complaints in matters of international protection (previously, "asylum"), namely whether the legal issue has been resolved by the case-law of the SAC and whether the cassation complaint by its significance goes beyond the individual interests of the complainant. The complainant must be represented by an attorney at law, since drawing a cassation complaint requires expert legal knowledge. There is a two-week time-limit for lodging a cassation complaint. Failure to lodge the complaint within the time-limit cannot be pardoned. Cassation complaints comprise the greatest portion (more than three quarters) of the SAC agenda.

The second possible extraordinary remedy is a **new trial**. It is only permissible in proceedings regarding protection from unlawful interference, in matters of political parties and in matters where the court itself conducted fact-finding. Similar to other codes on procedure, the proceedings consist of two stages: permitting the new trial and the new trial itself. It is first examined whether there are grounds to allow a new trial; if allowed, the new trial takes place within the second stage. The plaintiff may plead for a new trial within three months from the moment she or he learnt of the reason to allow a new trial, at the latest within three years from the contested decision being enforced.

Election matters

All the election matters fall within the jurisdiction of administrative courts since 1 January 2003. Remedy in matters of voters' lists, registration matters (review of lists of rejected candidates or of applications for registration, deleting a candidate from the list or registration of candidate lists or applications for registration), in matters of election validation and voting validation and in matters of termination of mandate of local self-government units assembly councillors. It takes decision within short time-limits set by the law. In general, the matters fall within the jurisdiction of regional courts. Regional courts and the SAC share jurisdiction depending on the type of elections in matters concerning the voting validity, election validity and the validity of candidate elections.

Proceedings in matters of political parties and political movements

There is a specific procedure at the regional court against the Ministry of Interior's procedure in cases where the Ministry has informed the applicant that there were shortcomings in the proposal for the registration of a political party or in the proposal for the registration of the statute's amendment. This procedure is governed by the provisions on special proceedings in matters of political parties and political movements. The SAC follows the same procedure in matters on the dissolution of a political party or a political movement or on the suspension or resumption of its activities.

Procedure on annulment of a measure of general nature or a part thereof

The amendment of the Code of Administrative Justice effective as from April 2005 introduced a new type of procedure before the SAC – the procedure on annulment of a measure of general nature or a part thereof. The SAC is the first and only instance dealing with these matters.

Procedure on jurisdiction conflict actions

The SAC also deals with jurisdiction conflict actions. These arise whenever there is a conflict between the state administrative authority and authority of local self-government authorities, or between local self-government authorities (for instance between the authority of a municipality and the authority of a region) on the jurisdiction to issue decisions in a certain matter. In practice, negative conflicts of jurisdiction are more common (when both parties to the dispute presume that the matter is beyond their jurisdiction), but there are also reverse cases. Disputes on the jurisdiction to decide may also arise at the level of central authorities of the state administration (for instance, between two ministries).

Ensuring consistency in the decision-making of administrative authorities and administrative courts

Cassation complaint is the most common procedural means used to ensure consistency in the decision-making of administrative authorities and courts. Parties to the proceedings before the regional courts avail themselves of this remedy in order to claim that regional courts' decisions are quashed. Should the SAC come to a conclusion that the decision of the regional court was unlawful or non-reviewable (for lack of reasons or incomprehensibility), or that the procedure before the court suffered from defects or was incomprehensible, it shall quash the contested decision and refer the case back to the regional court for further proceedings. In order to guarantee the consistency of administrative authorities' and courts' decision-making, the extended chamber of this Court may adopt principal rulings; however, this option has not yet been used. There are also non-procedural measures to guarantee consistency and lawfulness of administrative courts' decision-making, namely positions taken by individual divisions or by the Plenary of the SAC.

Extended chamber of the Supreme Administrative Court

Extended chamber represents a formalized instrument most commonly used to ensure the consistency of the SAC jurisprudence. The Code of Administrative Justice governs its size and composition in Section 16: should a three-member chamber initiate the procedure before the extended chamber, it is to be composed of seven judges (including the presiding judge of the extended chamber). In other cases the chamber sits in the composition of nine judges.

Given the increase in jurisprudence activities of the Court, and hence the risk of diverging legal opinions and inconsistency of the case-law, the importance of extended chamber and the number of proceedings initiated before it has been gradually increasing. The growing number

of extended chamber's decisions has also had emergent impact on the decision-making of regional courts and administrative authorities.

The obligation to address the extended chamber arises to a chamber when throughout its decision-making process it reaches an opinion different from the legal opinion already expressed in another decision of the SAC. When submitting the case to the extended chamber, the chamber has to give reasons for its different legal opinion (Section 17 of the Code of Administrative Justice). The extended chamber must also be requested for a ruling if individual chambers reached different rulings on the same legal issue. The extended chamber may also be addressed when the chamber again reaches a conclusion different from the opinion on the same issue which was followed by an administrative authority in the contested procedure. In such cases, the extended chamber may also adopt a principal ruling (Section 18 para. 1 of the Code of Administrative Justice). See the chapter on *Case-law*, subchapter *Proceedings before administrative courts*, found on the CD, for more details on the possibility or obligation to submit the case to the extended chamber.

Last but not least, the President of the Court may submit a case to the extended chamber in order to examine legal issues regarding the application and interpretation of laws, draft laws, legal effect of laws (Section 18 para. 4 of the Code of Administrative Justice and Section 74 of the Rules of procedure of the SAC).

Within the years 2003–2009 exactly 126 matters were submitted to the extended chamber, six of them were dealt with by the 9-member extended chamber and 120 with the 7-member chamber. The 7-member chamber resolved 98 matters, while the 9-member chamber resolved four.

The extended chamber of the SAC has resolved primarily procedural issues, including exclusion of jurisdiction (more than half of the case-load), issues relating to taxes, customs duties and tax procedure (approximately one third of the matters). The remaining matters concerned, proportionally, asylum (international protection), administrative procedure, administrative sanctions, building and planning proceedings, social security and telecommunications matters.

Year	Number of resolved matters
2003	2
2004	11
2005	12
2006	10
2007	25
2008	21
2009	21
Altogether	**102**

Table No. 7 Number of case-files resolved by the extended chamber of the SAC.

Positions of the divisions and positions of the Plenary of the Supreme Administrative Court

For the sake of consistency in the decision-making of courts and upon examination of final decisions of courts, the President of the SAC, the presiding judge of one of the divisions or an extended chamber may propose that a division or the Plenary adopts a position. The SAC has so far adopted one Plenary position on the plenary session of April 29, 2004 (No. Sst 2/2003-225, published as 215/2004 Court Reports). One position was adopted by the Social Security Law Division on February 2, 2005[10].

Court reports of the Supreme Administrative Court

In order to efficiently fulfil its primary role of ensuring the consistency in rulings, the SAC makes accessible and publishes its jurisprudence and also, to a certain extent, the jurisprudence

[10] No. S 3401/2004-62, published as 498/2005 Court Reports.

of administrative regional courts. This is done in two forms, both by publishing the Court reports of the SAC and on the Court's website.

The public at large may consult the jurisprudence of administrative courts first and foremost in the Court reports of the SAC (Sbírka rozhodnutí NSS, „Sb. NSS"), which has been published on a monthly basis since December 2003. The Court reports are published in the publishing house Wolters Kluwer ČR, a.s., containing approximately thirty to forty decisions taken by the SAC, by the special chamber established under Act No. 131/2002 Coll. and by regional administrative courts, all in abridged version. The editorial board headed by the President of the Court makes the preliminary choice of the decisions to be published in the Court Reports. The selected decisions are then distributed for comments to all the judges of the SAC, to regional courts and other stakeholders who may comment on the decisions (in particular, courts, law faculties, Office of the Ombudsman) until ultimately discussed and approved by the Court's Plenary. By the end of 2009 more than 1,900 decisions of administrative courts were published in the Court reports. Headnotes of the published decisions can be accessed on the Court's website.

Jurisprudence of the Supreme Administrative Court at the webpage of the Court

Additionally, the SAC makes full texts of its decisions available to the public on the website www.nssoud.cz. The reason behind the incentive of SAC to allow access to its decision-making in electronic form on its own has been the court's effort to improve public control of the work of the judiciary. The possibility of experts and the lay public to use the case-law for scientific, pedagogical, journalistic, educational, or for purely personal purposes, shapes an integral part of this control. All the judgments of the Court, judgments of chambers in election matters, in matters of political parties and movements and judgments of chambers on the jurisdiction conflict actions, decisions of the special chamber established under Act No. 131/2002 Coll., as well as all decisions by means of which court proceedings are completed are published on the website of the SAC in an anonymised form. Full-text search tool is available, as well as search-tool using the reference case number or part thereof, date of decision or a particular time period in which the decision was issued, form of decision, or combination of these criteria. By the end of 2009 more than 20,000 decisions of the SAC had been published on the website.

STATISTICS OF THE DECISION-MAKING ACTIVITY

STATISTICS ON CASE-LOAD AND DECISIONS TAKEN, LENGTH OF PROCEEDINGS

In the years 2003–2009 altogether 29,843 matters were filed at the SAC, out of which 28,843 have been terminated. A noticeable increase in the court's performance with respect to the number of matters completed is apparent on Table 8, in particular as regards the falling number of matters pending.

With respect to the cassation complaints against the judgments of regional courts, **asylum matters** (reference number "Azs") constituted more than half of the agenda in the years 2004 and 2005. In October 2005 an amendment to Act No. 325/1999 Coll., on Asylum, came into force which was expected to bring a decrease in the agenda; however, it was not until autumn 2006 that this actually happened. The reason for the belated effect of the amendment to the Act was that it only affected matters decided by regional courts after October 13, 2005. Since 2006 the number of matters in the international protection agenda has been falling constantly, recently amounting to less than 1,000 cassation complaints per annum.

By contrast, there has been a notable increase in the case-load regarding the "**financial law**" **agenda** (reference number "Afs"), i.e. matters of taxes, duties and customs duties, banking, insurance, competition and public procurement, even though we have also noted a slight decline in this agenda very recently. Nonetheless disputes tend to be more complex. While in the past the arguments related to procedures before the financial authorities, nowadays tax substantive law issues (particularly in income taxes and VAT) are brought into play, as well as commercial law, competition law (including public procurement). The law of the European Union is also being reflected in this field increasingly.

"**Pension law**" **agenda** (reference number "Ads") forms another part of the cassation disputes, including primarily matters of social security and employment, pension, illness and health insurance, health matters, as well as general interest and professional self-regulation, and

service. There has been a slight decline in this agenda partly as a result of consistent case-law and partly as a result of new regulations of the administrative justice which may appear rather complicated to a citizen. Since the Czech Administration of Social Security to a greater extent respects the legal opinions expressed in the court decisions and the evidence on the periods of employment of individual citizens has improved, the initial broad review of decisions on the social security benefits is not necessary any longer. In the years 2007 and 2008 the number of case-load falling within the scope of the pension agenda has slightly increased as a result of the changes in the social policy of the state. The majority of the disputes nowadays relate to the decisions of the Czech Administration of Social Security on dismissing the applications for full or partial disability pensions, a smaller portion of disputes concern the periods of employment necessary to be entitled to old-age pensions, which have not been proven in the opinion of the Czech Administration of Social Security, etc.

Some new concepts introduced in the Czech legal system from 2003 have not been frequently used yet, such as action for **protection against failure of administrative authorities to act** (reference number "Ans") or action for **protection against unlawful interference**, instruction or coercion of administrative bodies (reference number "Aps"). Cassation complaints in these matters have formed merely less than 2 per cent of the total case-load during the seven years of the Court's existence.

The **remaining** cassation agenda (reference number "As") includes diverse matters, such as administrative offences, building procedure, environment, internal administration, migration law, free access to information, etc.

The matters in which the SAC takes decisions other than on the basis of a cassation complaint predominantly include election matters (reference number "Vol"), matters of political parties and movements (reference number "Pst"), jurisdiction conflicts (reference number "Komp") and since 2005 petitions to quash **measures of a general nature** or parts of such measures. The measure of a general nature is a legal concept introduced in the Czech legal framework by Section 171 of the Code of Administrative Procedure (No. 500/2004 Coll.). The SAC retains competence to set it aside in one-instance proceedings. Since it was only vaguely defined, the SAC first specified the definition of this measure in judgment No. 1 Ao 1/2005-98[11].

[11] Judgment of 27 September 2005, No. 740/2006 Court Reports.

There has been a rising number of petitions to quash the measures of a general nature in recent years, which is mainly due to a more extensive application of the new Building Code (No. 183/2006 Coll.).

Year	Case-load	Decisions made	Pending cases at the end of the year
2003	4,243	2,749	1,494
2004	5,684	4,247	2,931
2005	5,194	4,891	3,234
2006	4,193	4,729	2,698
2007	3,604	4,725	1,577
2008	3,626	3,871	1,332
2009	3,299	3,631	1,003

Table No. 8 Statistics of the number of case-load, decisions taken and pending cases.

Year	Ads	Afs	Azs	As
2003	406	227	409	439
2004	272	895	3,124	403
2005	329	935	2,651	555
2006	380	999	1,503	629
2007	453	834	985	611
2008	489	727	841	713
2009	501	704	553	631

Table No. 9 Development in the number of main cassation fields (case-load in the respective year).

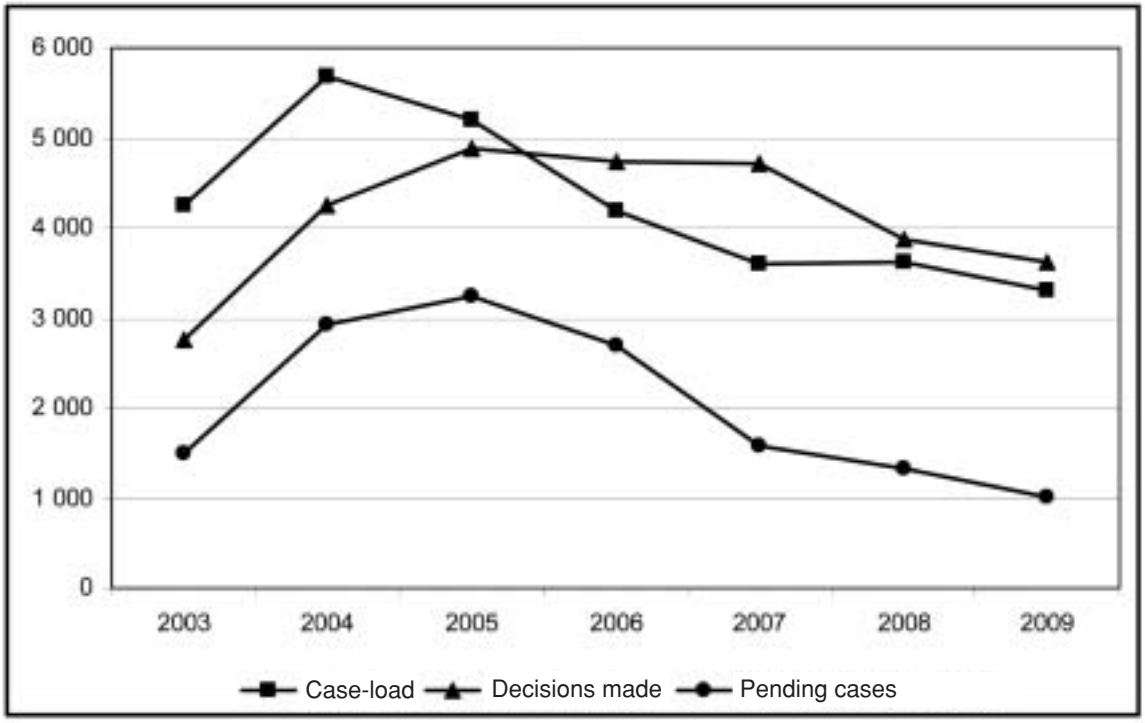

Chart No. 1 Statistics of the case-load, decisions made and pending cases.

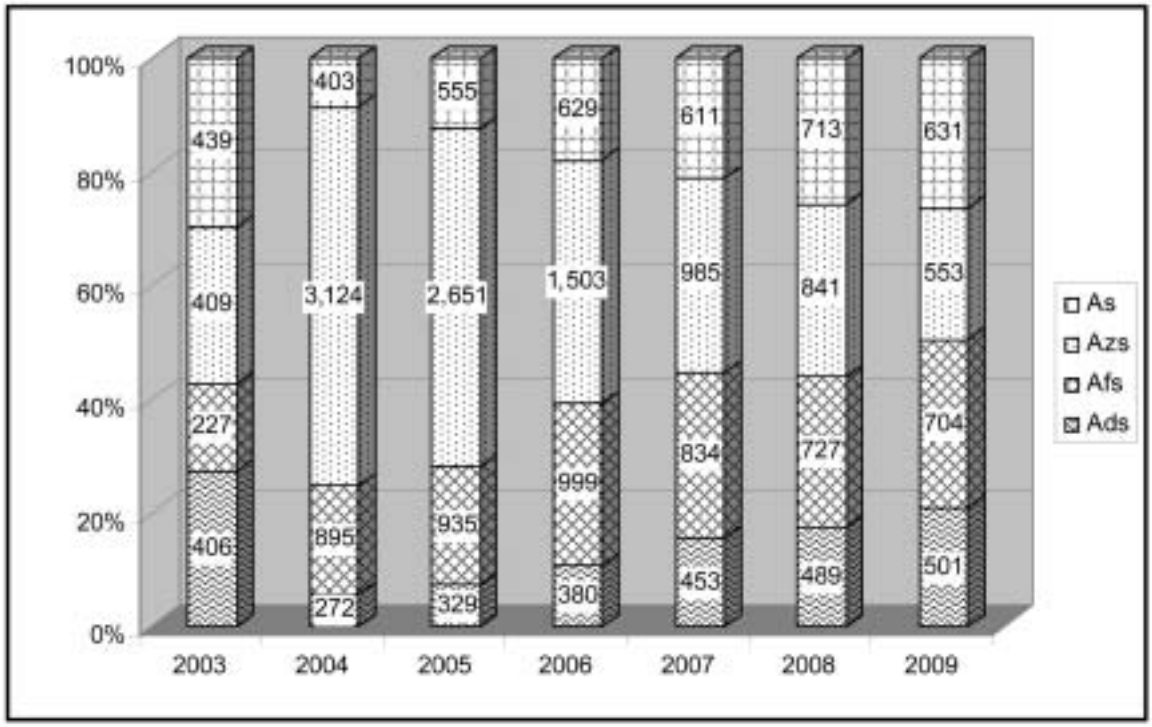

Chart No. 2 Development of the proportion of main cassation fields according to years.

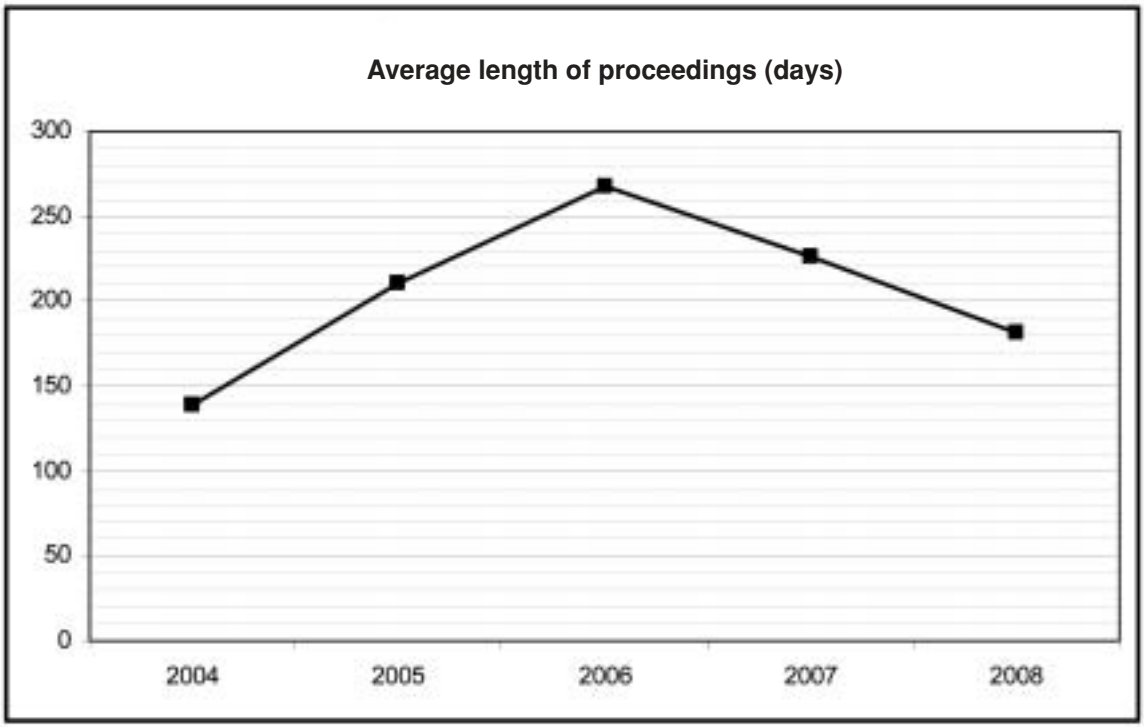

Chart No. 3 Average length of proceedings (in days) which were terminated in individual years. This represents the average length of decision-making in all fields, i.e. the time from the registration of a matter in the Court's registry until the date of decision. In 2003 the length of proceedings was not monitored, since in that year a part of the high courts` agenda was transferred to the SAC. The final figures disregard periods of staying of the proceedings.

Constitutional complaints against the decisions of the Supreme Administrative Court

In the years 2003 to 2009 the Constitutional Court took decisions on 1,545 out of 1,690 lodged constitutional complaints against the decisions of the SAC. The Constitutional Court granted the constitutional complaints in 125 judgments (7.40 % of the decisions reviewed) and dismissed the complaints in 1,420 cases (92.60 % of the decisions reviewed). The remaining 145 constitutional complaints are pending.

Year	Number of decisions of SAC (in total)	Number of constitutional complaints against the SAC decisions	Proportion of the SAC decisions challenged at the Constitutional Court	Number of constitutional complaints lodged at the Constitutional Court in total	Proportion of the constitutional complaints challenging the SAC decisions
2003	2,749	66	2.4 %	2,496	2.6 %
2004	4,247	183	4.3 %	2,713	6.7 %
2005	4,891	254	5.2 %	2,983	8.5 %
2006	4,729	267	5.6 %	3,453	7.7 %
2007	4,725	315	6.7 %	3,302	9.5 %
2008	3,871	275	7.1 %	3,250	8.5 %
2009	3,631	330	9.1 %	3,355	9.8 %
Altogether	**28,843**	**1 690**	**5.9 %**	**21,552**	**7.8 %**

Table No. 10 Development of the number of constitutional complaints against the decisions of SAC.

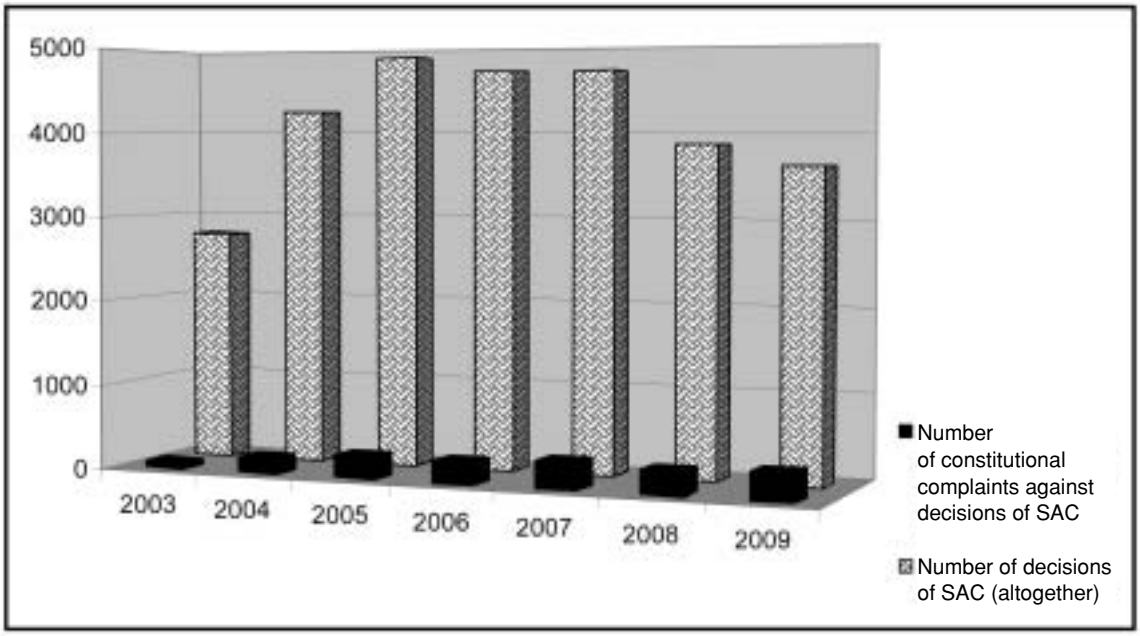

Chart No. 4 Development of the number of the SAC decisions challenged by constitutional complaints.

Total number of constitutional complaints against the decisions of SAC	Decisions taken					Complaints pending
	Granted			Not granted		
	Number	% of decisions on complaints against SAC	% of quashed decisions of SAC out of the total number of SAC decisions	Number	% of decisions on complaints against SAC	
1,690	125	7.40 %	0.43 %	1,420	92.60 %	145

Table No. 11: Outcome of the constitutional complaints against the SAC decisions in 2003–2009.

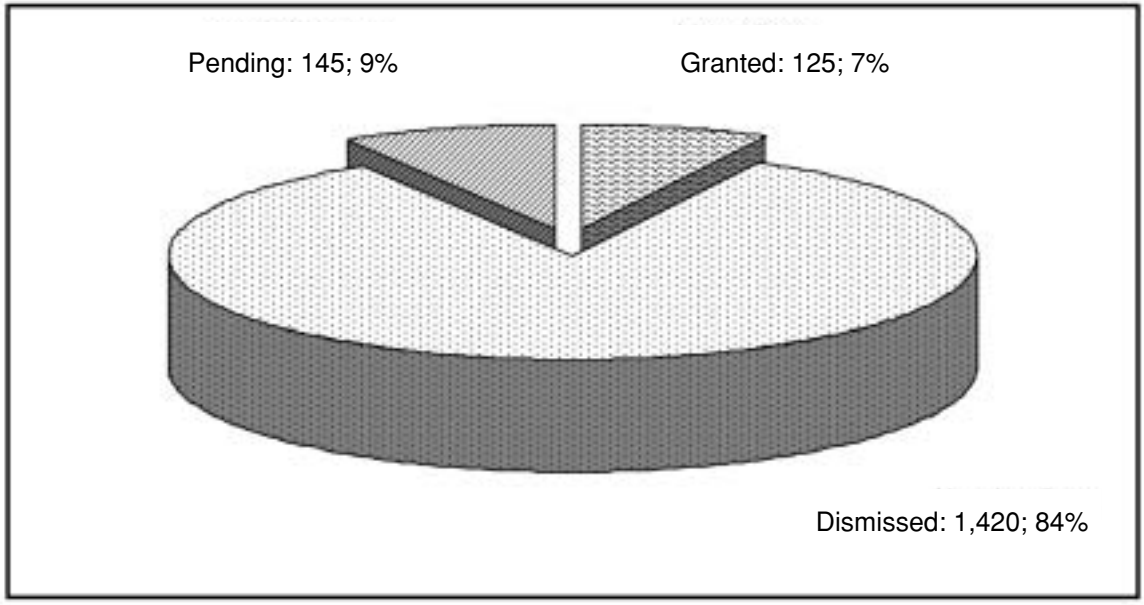

Chart No. *5 Outcome of the constitutional complaints against the SAC decisions in 2003-2009.*

Case-law

The SAC provides protection of public subjective rights of natural and legal persons through its decision-making activity. The crucial part of its case-law is comprised of decisions on cassation complaints filed against decisions of regional courts. As previously mentioned, the SAC also decides on the election matters, on the matters of dissolution of political parties and political movements, on the suspension or the restoration of the activity of political parties or political movements, and on annulment of the measures of general nature or their parts if contrary to law. The decision-making powers of the SAC also include powers to decide on some questions of conflict of jurisdiction between administrative authorities.

General issues of administrative law and administrative justice

Administrative procedure

Taking into account that the fundamental purpose of the administrative justice lies primarily in its judicial review of decisions by administrative authorities, it is not surprising that the case-law of administrative courts applies to procedural rules under which the administrative authorities issue their decisions. In other words, it refers to the administrative procedure in the most general sense, thus to a process which aims at the issuance of an administrative act.

The rules of administrative procedure in the broader sense are not concentrated solely in one legal instrument. However, the Code of Administrative Procedure encompasses at least the legislation that lays down general rules of administrative procedure in one legal instrument, which makes the situation in this regard easier in comparison with the administrative sanctions legislation. As already indicated above, so-called special administrative procedures also exist and their rules are often enacted separately in other legislation. However, even in such cases, the Code of Administrative Procedure applies, even though, merely as a subsidiary source.

As regards the case-law of the SAC considering the administrative procedure, it can be stated that the role of the Court's jurisprudence has been accentuated by significant legislative changes adopted after several decades of existence of the old law. With effect from 1 January 2006 the "old" Code of Administrative Procedure [Act No. 71/1967 Coll., on Administrative Procedure (Code of Administrative Procedure)] was replaced by the "new" Code of Administrative Procedure (Act No. 500/2004 Coll., Code of Administrative Procedure). Final solution of some of the contentious legal issues related to administrative procedure is to be provided by the SAC. Taking into consideration the delays between the decision of administrative authority of the first instance, of the appellate body, of the regional court and possibly of the decision of the SAC in a certain case, the case-law of the SAC in matters of administrative procedure stemming

already from the new Code of Administrative Procedure (of 2004) is still in its rudiments. Nonetheless, the case-law concerning the administrative procedure of the old Code of Administrative Procedure (of 1967) represents in many respects a significant "guideline" for the administrative authorities in the administrative procedure in general, and ultimately, for the interpretation of the new Code of Administrative Procedure of 2004 as well.

The case-law of the SAC in matters of administrative procedure covers a wide area of disputed legal issues, which occur in connection with any procedural rules. The case-law includes both, case-law on general issues of administrative procedure, concerning **fundamental issues and principles of administrative procedure**, and also rather specific case-law with respect to certain provisions or certain concepts of the Code of Administrative Procedure. Certainly, it is not necessary to emphasize in this context that the fundamental principles are not only of theoretical relevance, but the concept of them is in general of considerable importance to the administrative procedure. For example, decision No. 2 As 47/2004-61[12] dealt with an issue of the fundamental principles common for the whole administrative procedure. In that case, the SAC reviewed whether or not the principle of deciding in two instances belongs among the fundamental principles of administrative procedure. The Court came to the conclusion that "*deciding in two instances does not belong among the fundamental principles of decision-making of administrative authorities on rights and duties of natural or legal persons*". In decision No. 1 As 30/2008-49[13] the SAC specified the principle of examination of submissions according to their content, not according to their formal designation, in the sense that from this principle results an obligation of administrative authorities "*to accept the use of ordinary language by non-expert users of the public administration*". The SAC stated, that persons submitting petitions "*are in the vast majority laymen, and it cannot be required that they word their requests accurately by using precise legal terms, or even by citing the precise statutory provisions within the petitions*". In case that the terms of everyday language raise legal ambiguity with reference to administrative law, the administrative authority is obliged to call on the applicants to specify the content of their applications. Administrative authorities are also obliged to explain to the applicants why it is necessary to do so. In other words, if the principles of good governance "*refer to the most appropriate means of handling a matter, they are certainly referring to the most appropriate means of handling for users of public administration, not for the*

[12] Judgment of 27 October 2005, No. 1409/2007 Court Reports.
[13] Judgment of 11 September 2008, No. 1746/2009 Court Reports.

administrative authorities". In summer 2009 the extended chamber defined under what circumstances the administrative practice establishes a legitimate expectation and also binds an administrative authority. It claimed that *"administrative practice establishing a legitimate expectation is a stable, uniform and long-term activity (or omission) of public authorities, which reaffirms a certain interpretation and application of legislation. The administrative authority is bound by such practice. Administrative practice can be changed if consequences of the change are manifested in the future, if the entities concerned have had opportunity to get acquainted with the change and if the change is duly justified by serious circumstances."*[14]

By means of its case-law, the SAC has also played a major role in issues of **proper conduct of administrative procedure**. Through the interpretation of the Code of Administrative Procedure, the SAC has prevented possible obstructions to the proceedings (delaying the decision-making process) initiated by the parties. Decision No. 2 As 28/2004-31[15] may be mentioned as an example. In this case, the SAC held that "*the essential prerequisite for the effective administrative procedure is the interaction and cooperation between administrative authorities and parties to the case. Therefore, the Court cannot accept mere formal notification of a change of residence, which occurred as an intentional effort of a party to impede or prevent the delivery of official mail. In assessing whether the alternative delivery came about under the provision of Section 24 para. 2 of the Code of Administrative Procedure, it was necessary to examine the factual residence of the party at the time of the delivery of a decision. It was insufficient to rely merely on formal notification of the residence carried out by the party.*" On the other hand, the SAC has dealt regularly with inverse cases when the administrative authorities enabled the parties to avail themselves of some of their privileges merely formally, which led to a violation of the procedural rights of the parties. For example, in decision No. 6 A 143/2001-151[16], the SAC held, among other points, that a party to administrative proceedings "*has the right to make a copy from the administrative file, or to request such copies, although it is not expressly stipulated in the text of Section 23 of the Code of Administrative Procedure. This is not only implicitly resulting from this provision, but also from the principle of interaction and cooperation and from the comparison with the legislation contained in other procedural codes*."

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[14] Judgment of the extended chamber of 21 July 2009, No. 1915/2009 Court Reports.

[15] Judgment of 9 December 2004, No. 990/2006 Court Reports.

[16] Judgment of 31 August 2004, No. 501/2005 Court Reports.

Case-law related to the **failure of the administrative authority to act** is also connected with the issue of proper conduct of administrative procedure. The SAC primarily ruled what represented actual failure of the administrative authority to act and when the submission of action pursuant to Section 79 of the Code of Administrative Justice was appropriate. Typically, for example, it is so, when the administrative authority does not respect the decision of the administrative court;[17] specifically, for example, when the Chamber of Deputies of the Czech Republic (House of Parliament) does not initiate a procedure to restore activity of a political party, when the affected political party hands in the required documents.[18] However, it is not considered as failure to act, if the legal fiction of a decision on the right to information is in question,[19] if the administrative authority decides to discontinue the administrative proceedings,[20] or when the decision was issued but not delivered to a certain party.[21] The protection against failure of administrative authorities to act cannot be invoked under circumstances that the administrative authority issued an administrative act, although it did not formally designate it as such[22]. However, it is not possible to refuse protection against failure to act merely because the plaintiff's claim is of substantive private law nature.[23]

To some extent, the opposite situation to the failure of an administrative authority to act arises when the administrative authority carries out an **unlawful interference**, issues an unlawful instruction or uses unlawful coercion. It is necessary to point out that whereas the action for protection against failure of an administrative authority to act may be brought at any time respecting statutory and time limits, the action for protection against unlawful interference, instruction or unlawful coercion represents merely a subsidiary means to the protection of public subjective rights in addition to the action against a decision of an administrative authority. In other words, if it is possible to file both mentioned actions, it is not upon the preference of the plaintiff which one of them he or she files and which proceedings he or she considers more

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17 Judgment of the extended chamber of the Supreme Administrative Court of 24 April 2007, No. 2 Ans 3/2006-49, No. 1255/2007 Court Reports.

18 Judgment of 29 August 2007, No. Obn 1/2006-11, No. 1386/2007 Court Reports.

19 Judgment of 14 November 2007, No. 1 Ans 5/2007-195, No. 1485/2008 Court Reports.

20 Judgment of 16 May 2007, No. 2 Ans 5/2006-96, No. 1293/2007 Court Reports.

21 Judgment of 16 April 2008, No. 1 Ans 2/2008-52, No. 1626/2008 Court Reports.

22 Judgment of 26 October 2004, No. 6 Ans 1/2003-101, No. 652/2005 Court Reports.

23 Judgment of 14 July 2004, No. 5 As 31/2003-49, No. 487/2005 Court Reports.

favourable. Primarily, the action against the decision itself must be lodged.[24] Before lodging an action against a decision and likewise before lodging an action for protection against unlawful interference, instruction or coercion, the plaintiff must exhaust all available remedies and protections against administrative authority, regardless of whether or not he or she subjectively considers them effective.[25] Determining whether an act of an administrative authority may be by definition an unlawful interference, instruction or coercion is a question of foundedness of the action (part of deciding on the merits), not a question of existence of conditions of the proceedings.[26] A large part of case-law concerning this topic is devoted to the issue of what qualifies under the term "unlawful interference, instruction or coercion". The case-law then discloses that under certain circumstances it may be the initiation and implementation of a tax audit[27] or review conducted by the Supreme Auditing Office;[28] but not a withdrawal of full disability benefits;[29] a record of a note in the land register[30], a decision by the President of regional court on the dismissal of an expert from his or her function[31], an act of police authority while exercising its powers as an authority acting in criminal proceedings (as opposed to interference while exercising powers in public administration)[32], nor an issuance of an inspection report by the Czech School Inspectorate[33]. According to decision No. 8 Aps 1/2005-82[34], an order from a municipal police officer to tow a vehicle at the expense of the operator of the vehicle in cases when the vehicle was not an obstacle on the road also constitutes an unlawful interference. Nonetheless, the operator's payment for the vehicle to be towed and for parking at the tow

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[24] Judgment of 4 August 2005, No. 2 Aps 3/2004-42, No. 720/2005 Court Reports.
[25] Judgment of 1 December 2004, No. 3 As 52/2003-278, No. 983/2006 Court Reports.
[26] Judgment of the extended chamber of 16 December 2008, No. 1773/2009 Court Reports.
[27] Judgment of the extended chamber of the Supreme Administrative Court of 31 August 2005, No. 2 Afs 144/2004-110, No. 735/2006 Court Reports.
[28] Judgment of 19 September 2007, No. 2 Aps 1/2007-68, No. 1382/2007 Court Reports.
[29] Judgment of 8 October 2004, No. 5 Ads 53/2003-50, No. 467/2005 Court Reports.
[30] Judgment of special panel established under the Act No. 131/2002 Coll. on Deciding Certain Jurisdiction Conflicts, decision of 31 January 2007, No. Konf 30/2006-5, No. 1244/2007 Court Reports.
[31] Judgment of 29 April 2005, decision No. 4 As 17/2004-55, No. 626/2005 Court Reports.
[32] Judgment of 28 April 2005, decision No. 2 Aps 2/2004-69, No. 623/2005 Court Reports.
[33] Judgment of 22 February 2006, decision No. 3 Aps 2/2005-44, No. 860/2006 Court Reports.
[34] Judgment of 15 November 2005, No. 935/2006 Court Reports.

vehicle parking lot cannot be regarded as a continuing consequence of the unlawful interference, which would justify submission of an action for protection against unlawful interference.

As indicated above, the case-law of the SAC on administrative procedure also concerns **interpretation regarding particular provisions** applied to rather specific situations, which also happen over the course of the administrative procedure, and which the administrative authorities must also be able to cope with. In this regard, decision No. 6 A 17/2000-54[35] can be mentioned. In this decision, the SAC ruled that *"the Code of Administrative Procedure does not provide for a provision according to which a party has the right to administrative proceedings before an administrative authority in his or her mother tongue, however, if the mother tongue differs from the Czech language, an interpreter should be appointed."* If the party fails to state that he or she does not speak the language, in which the proceedings are being conducted, and such information does not result from the content of the administrative file, and the administrative authority continues the proceedings in Czech language, the right of the party to have an interpreter appointed is not infringed (Article 37 para. 4 of the Charter of Fundamental Rights and Basic Freedoms).

Administrative sanctions

Decision-making of administrative courts in matters of administrative sanctions represents a rather specific part of the agenda. Any punishment, i.e. any guilty verdict and punishment for a breach of the law, is a rather significant interference with the rights of the punished person. Therefore, appropriate judicial protection should be adapted accordingly. The significance of the SAC case-law on administrative sanctions is underlined by the fact that apart from the Act No. 200/1990 Coll., on Administrative Offences, the legal framework of administrative sanctions in the Czech Republic is fragmented and dispersed.

In this field, it is of key importance that the interrelations between the judicial punishment on the one hand and administrative sanctions on the other are well defined. While it is true that there is a **difference between administrative sanctions and criminal** law, in its case-law the SAC has nonetheless logically found a number of identical features between these sanctions. In that respect particular attention should be drawn to case No. 8 As 17/2007-135[36], in which the SAC

[35] Judgment of 27 January 2004, No. 341/2004 Court Reports.
[36] Judgment of 31 May 2007, No. 1338/2007 Court Reports.

concluded that "*to assess whether administrative offences are punishable, principles applied to criminal offences must be applied in analogy. Therefore, concurrence of administrative offences must be excluded in case that a continuous, multiple, or continuing administrative offence has taken place.*" The Court also came to the conclusion that "*material aspect of the offence must be fulfilled in order to conclude that the act is punishable and necessity excludes criminal liability for conduct which would otherwise have all the aspects of an offence*". Criminal law principles are frequently applied to the administrative sanctions and can be traced in a number of decisions of the SAC. As an example decision No. 6 As 57/2004-54[37] can be cited, which implies that "*in the situation of concurrence of several administrative offences it is admissible that the principle of absorption is applied in analogy (Section 12 para. 2 of Act No. 200/1990 Coll., on administrative offences) unless the relevant law sets forth otherwise*".

It is worth noting that in some cases, while there is no concurrence of offences in the context of national law, there is concurrence of offences punished under national law and under European Union law (such situations are likely to occur in the field of competition law). The SAC therefore stated in case No. 5 Afs 9/2008-328[38] that "*single commission of offences (ideal concurrence) under European Union law and under national law [adjudicated on in the proceedings] is possible because the interests protected by constitutive elements of administrative offences under the EC Treaty and by constitutive elements of administrative offences under Act No. 143/2001 Coll., on the Protection of Competition, are different.*" The Court added that the concurrent bringing in a verdict of guilty under Community and national law in a single decision of the administrative authority is not prevented by the principle of *ne bis in idem*, as is clear from the general legal principles of Community law, from Article 4 para. 1 of Protocol No. 7 to the Convention for the Protection of Human Rights and Fundamental Freedoms and from Article 40 para. 5 of the Charter of Fundamental Rights and Freedoms because it does not concern a situation where the proceedings is repeatedly conducted in respect of the same matter which had been already resolved by a final decision. The SAC addressed the principle of *ne bis in idem* also in its decision No. 6 As 44/2008-142[39]. The Court ruled that this principle represents a leading principle in the field of administrative sanctions compared to the adversarial principle as well as to the principle of review of administrative decisions under the factual and legal situation existing at the time of decision-making of an administrative

[37] Judgment of 22 September 2005, No. 772/2006 Court Reports.
[38] Judgment of 31 October 2008, No. 1767/2009 Court Reports.
[39] Judgment of 4 March 2009, No. 1842/2009 Court Reports.

authority. The administrative court is therefore entitled to apply the principle *ne bis in idem* even in situations where such an objection has not expressly been raised by the complainant.

The judicial review of decisions of administrative authorities concerning administrative sanctions represents certain particularity, because the administrative authorities must satisfy increased requirements as regards the **form of the decision on administrative sanction and requisite elements contained in it** (especially as regards the disposition and the grounds of decisions). In this context, decision No. 6 A 173/2002-33[40] can be mentioned, in which the SAC expressed that the "*disposition of the judgment relating to the guilt and to the punishment for an administrative offence cannot rely solely on internal provisions (...), if the law sets forth no limits or conditions which would have obliged the author of this internal regulation. Such an approach to administrative sanctions would be contrary to the principle of nullum crimen sine lege*".

The case-law of the SAC referring to administrative sanctions is quite abundant and varied. In fact, it covers all areas of administrative law (see several chapters below on substantive administrative law). In addition, some of the decisions of this field of law show in a well illustrated manner, a huge complexity of existing forms of legislation on administrative sanctions, and at the same time they also point out specific "modern" modification of social relations. As an example, decision No. 1 As 14/2006-68[41] can be mentioned, in which the SAC had to deal with a fundamental issue of discrimination. The Court ruled that "*it is not possible to impose an administrative sanction in case that a breach of law, for which the punishment is to be imposed, is in fact encouraged by other legal provisions. If, however, the author of the discriminatory legislation* de facto *coincides with the administrative authority which is actually applying these discriminatory provisions, then, such a body may be – as an exception to the rule – held liable since this would in fact punish the one who caused the discrimination*".

To conclude, it is necessary to state that in the decision-making activity related to the administrative sanctions, administrative courts are frequently obliged to replace the legislature. This is because they determine the basic principles applied commonly to all legislation of this field, which is a difficult task bearing in mind the number of and the dispersion of legislation of the topic of concern.

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[40] Judgment of 23 September 2004, No. 444/2005 Court Reports.

[41] Judgment of 20 December 2006, No. 1162/2007 Court Reports.

Actions on conflict of jurisdiction

Considering the proper functioning of the public administration, the competence of the SAC to decide upon the actions on conflict of jurisdiction is of great importance. The disputes adjudicated by the SAC within this jurisdiction can arise between an administrative authority and a self-government body, between two self-government bodies or between central administrative authorities versus each other. The matter of these disputes concerns the question: who is in a particular case obliged to issue a decision? The action on conflict of jurisdiction can take the form of a negative conflict, in which administrative authorities disclaim jurisdiction to issue a decision, or it can take the form of a positive conflict, when both authorities claim jurisdiction to issue a decision on the same particular case.

Existing case-law of the SAC mainly refers to the definitions of the **parties of the procedure on conflict of jurisdiction** and to the **procedural issues** related to this specific decision-making activity. The concept of positive and negative conflicts is based on the existence of a particular procedure involving the rights and obligations of its participants. If such a procedure was not initiated, the court has to dismiss the action as inadmissible for the lack of jurisdiction.[42] In the judgment No. Komp 1/2003-27[43] the SAC defined parties to one of the types of the conflicts when it stated that "*jurisdiction conflict in the sense of the Section 97 para. 1 letter c) of the Code of Administrative Justice can conceptually arise only between the central administrative authorities. A conflict of jurisdiction between the ministry and the Security Information Service, which is not a central administrative authority, concerning the issue of who has jurisdiction to issue a decision on a grant for a service of a former member of the Federal Security Information Service, is not a conflict of jurisdiction between central administrative authorities, therefore, the jurisdiction to decide upon this dispute is not vested in the Supreme Administrative Court by law."* This legal view was reasserted in decision No. Komp 1/2004-70[44], which concluded that only those public authorities of the Czech Republic which are explicitly defined as the central administrative authorities or the central state administrative bodies in Act No. 2/1969 Coll., for the Establishment of the Ministries and Other Central Administrative Authorities of the Czech Republic, or in another special

[42] Decision of 30 March 2009, No. Komp 5/2008-85, www.nssoud.cz.
[43] Decision of 27 May 2003, No. 10/2003 Court Reports.
[44] Decision of 23 July 2004, No. 339/2004 Court Reports.

legislation, can be regarded as central administrative authorities in the sense of the above mentioned Section of the Code of Administrative Justice. In connection with defining the parties to this particular type of dispute, the SAC was compelled to cope with a problematic position of local administrative authorities, which, on the one hand, work as bodies of local self-government (with original power) and, on the other hand, as state administrative authorities (with delegated power). This has an essential impact on the definition of the parties to a jurisdiction conflict. On this point the SAC observed in its decision No. Komp 2/2004-51[45] that "*the conflict of jurisdiction action which occurred between the regional administrative authority carrying out delegated power and the Ministry for Environment shall be dismissed by the Supreme Administrative Court as inadmissible under the Code of Administrative Justice. (...) The regional administrative authority cannot represent a party concerning a conflict of jurisdiction, because it is neither a body of local, interest-group or of professional self-government, nor a central administrative authority.*"

In the subsequent case-law on the conflicts of jurisdiction, the SAC gave a legal opinion on the **form** and **elements of actions** filed in such matters, and also gave a legal opinion on the **form of the jurisdiction conflict procedure**. In this respect, attention must be drawn to decision No. Komp 4/2006-103[46], in which the SAC ruled that in the jurisdiction conflict procedure "*the court is obliged to follow the determination of the conflict as stated in the action; however, the court is not bound by the party's proposal of the disposition of the judgment submitted in the action. If the plaintiff turns to the court with an action to decide that the defendant is a competent authority to issue a decision, regardless of whether the court reaches a contrary conclusion, the court will not dismiss the action but will decide that the administrative authority competent to issue the decision is the plaintiff.*"

The definition of jurisdiction of some of the particular administrative authorities will be presented in the following chapters, which are focused on the individual areas of the substantive law.

Proceedings before administrative courts

Even though the administrative courts' judicial decision-making is mainly focused on the interpretation of substantive law provisions of administrative law and on judicial review of lawfulness of administrative procedure carried out by the administrative authorities, an integral

[45] Decision of 20 December 2006, No. 1429/2008 Court Reports.
[46] Judgment of 22 February 2008, No. 1555/2008 Court Reports.

part of their decision-making is also devoted to issues related to the proceedings before the courts. In this respect, the interpretation of individual concepts and provisions included in the key legislation on the administrative justice procedure (the Code of Administrative Justice) is primarily concerned.

In the beginning, it is appropriate to mention that the SAC in its jurisprudence pursued a thorough examination of the issue of **powers vested in administrative courts** to review decisions issued in particular situations. Often it is not very clear whether or not the review of some of the decisions issued by the administrative authorities actually falls within the jurisdiction of administrative courts. Public administration authorities issue a number of acts in their everyday agenda, but only some of them are reviewable under the jurisdiction of administrative courts. In this respect, decision No. 4 Aps 3/2005-35[47] is no doubt one of the fundamental decisions. The SAC held in this decision that "*the right of equal conditions to access elected and other public offices (in this particular case to access the office of judge), as well as the right to due consideration of a case without unreasonable delay in connection with the right not to be discriminated, is not excluded from the judicial review with respect to Article 36 of the Charter of Fundamental Rights and Basic Freedoms (...)*". The final part of this decision observed that "*acts and actions of the President of the Czech Republic performed while exercising the powers to appoint someone as a judge are subject to judicial review with respect to the above mentioned rights*". This decision fairly clearly illustrates that basically all decisions of administrative authorities (depending on the form of a particular act) including the presidency acts, are subject to judicial review. However, the distinction between the acts issued by administrative authorities which are reviewable by an administrative court and which are not is in many cases imprecise, as decision No. 2 As 54/2007-94[48] indicates. In this decision, the SAC came to the conclusion that "the *refusal of the Czech Episcopal Conference to consent to mark wine introduced to the market as mass wine (...) is not subject to judicial review. That is because the meaning of such consent actually inheres above all in the information that this particular kind of wine can be used for mass purposes, and it is upon the Church to lay down the conditions. In this situation the Roman Catholic Church does not decide from a position of an administrative authority and its refusal to consent in this particular case does not cause any infringement of subjective public rights to anyone*".

[47] Judgment of 27 April 2006, No. 905/2006 Court Reports.

[48] Judgment of 21 January 2008, No. 1556/2008 Court Reports.

Also in the case of questions connected with proceedings before the administrative courts, the SAC focused on **fundamental principles** upon which the proceedings before the administrative courts should be based first and foremost. In reference to this, an example can be given on the application of the principle of proportionality and restraint[49], principle of concentration[50], or drawing upon the principle of *perpetuatio fori* in administrative judiciary[51]. In this regard, the judgment of the extended chamber of the SAC No. 5 Afs 16/2003-56[52] unquestionably deserves closer attention. In this decision, the SAC gave voice to approaches of courts to various petitions of parties to the proceedings and stated that "*exaggerated formalism used at the examination of elements of actions and also of other procedural acts of parties to the proceedings corresponds neither with the principle of the material legal state, nor with the role of judiciary. Courts are independent and impartial bodies of the State, which endeavour to find justice through their jurisprudence on particular cases and which cannot refuse to consider certain cases only for formal or rather formalistic reasons. Such refusal can only be taken into consideration in situations in which the circumstances allow the exclusion of judicial protection. When interpreting the limits of law concerning fair trial, which are determined by the Code of Administrative Justice, it is necessary to examine, pursuant to Article 4 para. 4 of the Charter of Fundamental Rights and Basic Freedoms, their substance and meaning and not to abuse them for other purposes than the ones they were determined for (...). Under the circumstances when two possible interpretations are present, one in favour of exercising the right to a fair trial and the other one against it, the court must always choose the first interpretation.*" It is also worth noting decision No. 7 As 5/2008-63[53], in which the SAC drew attention to an exemption from an otherwise generally applicable rule under which a court reviews the disposition of a decision to the extent specified in pleas in law. This exception concerns the situation where a court reviews a decision issued in a security procedure under Act No. 412/2005 Coll., on the Protection of Classified Information and Security Eligibility. In such a case the court is not bound by pleas in law in relation to the factual and legal questions concerning source materials for decision-making that were not

[49] Above mentioned decision No. 2 Ao 2/2007-73, No. 1462/2008 Court Reports.

[50] Judgment of 22 January 2004, No. 5 Azs 43/2003-38, No. 525/2005 Court Reports.

[51] Decision of 12 June 2003, No. Nad 52/2003-38, No. 27/2003 Court Reports.

[52] Judgment of the extended chamber of the Supreme Administrative Court of 12 October 2004, No. 534/2005 Court Reports.

[53] Judgment of 9 April 2009, No. 1915/2009 Court Reports.

made available to parties. Therefore, the court reviews a decision taking into account all factors that may affect lawfulness of the decision, given the nature of the proceedings.

The vast majority of case-law related to questions of procedure before the Court concerns individual types of proceedings contained in the Code of Administrative Justice. Even though this Code sets forth common and general rules for all the proceedings, the individual proceedings show specific characteristics, which, of course, had to be reflected in case-law of the SAC. The most numerous and important questions which arise in this context, are questions related to the proceedings concerning an action against a decision of an administrative authority and those related to the proceedings concerning a cassation complaint. In respect of the **proceedings concerning an action against a decision of an administrative authority**, the crucial issue is – who, under what circumstances and against what acts is entitled to protect their rights by means of this action (this mainly concerns the interpretation of Section 65 of the Code of Administrative Justice). In this respect, ruling of the extended chamber of the SAC in judgment No. 6 A 25/2002-42[54] must be considered as a fundamental and groundbreaking decision. In this decision, the SAC reached a conclusion that "*it is not possible to interpret Section 65 of the Code of Administrative Justice by applying a literal linguistic interpretation, but according to its meaning and purpose in the way that plaintiffs have legal standing in all cases, where the act of an administrative authority, relating to a particular matter and particular addressee, interferes into the legal sphere of the plaintiff.*" A related question is which of all the acts issued by administrative authorities can be considered a "decision" reviewable by an administrative court. For example, a binding opinion was under discussion for a long time. The discussion was ended by judgment of the extended chamber No. 8 As 47/2005-86,[55] which found that although a binding opinion is not an administrative decision under Code of Administrative Procedure, it is an administrative decision under Section 65 paragraph 1 of the Code of Administrative Justice. Among other things this means that the content of a binding opinion, especially of a negative one, should at least basically meet the requirements for the substantiation of administrative decisions. Only then can its lawfulness be reviewed by administrative courts.[56] When issuing a binding opinion,

[54] Judgment of the extended chamber of the Supreme Administrative Court of 23 March 2005, No. 906/2006 Court Reports.

[55] Judgment of the extended chamber of 21 October 2008, No. 1764/2009 Court Reports.

[56] Judgment of 22 October 2009, No. 9 As 21/2009-150, www.nssoud.cz.

whose content is binding on the disposition of an administrative authority decision, it is therefore necessary to apply the provisions on the content, form and essentials of an administrative decision as appropriate.[57]

As regards the **cassation complaint proceedings** before the SAC, attention must be drawn to decision No. 1 Azs 13/2006-39,[58] in which the SAC ruled in connection with the application of a new criterion of admissibility: writ of certiorari of the cassation complaint (in the matter involving granting international protection) and also on some general questions relating to the proceedings concerning international protection. The SAC held that "*it is necessary to distinguish between writ of certiorari (admissibility) of a cassation complaint, admissibility of a cassation complaint and the foundedness of a cassation complaint. The admissibility of a cassation complaint (more precisely, an absence of any cause of inadmissibility) is given if the statutory procedural conditions are fulfilled, such as the submission of a cassation complaint on time (Section 106 para. 2 of the Code of Administrative Justice), proper representation (Section 105 of the Code of Administrative Justice), absence of other statutory reasons for inadmissibility (Section 104 of the Code of Administrative Justice) etc. The foundedness of a cassation complaint is, on the other hand, a question of consideration of reasons for a cassation complaint related to the merits of a case which the complainant stated in his or her cassation complaint (Section 103 para. 1 of the Code of Administrative Justice).*" The above cited decision represents a very interesting overview of possible procedural situations which can occur during the cassation complaint proceedings. Generally, when a regional court quashes a decision issued by an administrative authority, but the disposition of a court's decision is based on the wrong grounds, the SAC will quash the court's decision in the cassation proceedings and send the case back to the lower court. Nevertheless, pursuant to decision of the extended chamber[59], in a situation where the grounds of the judgment would stand on their own, the SAC shall dismiss the cassation complaint and replace the incorrect grounds with its own grounds. The administrative authority is subsequently bound by the legal opinion of the regional court as it was corrected by the legal opinion of the SAC.

Within this context, it is necessary to point out the case-law which relates to the issue of **powers and jurisdiction of the extended chamber** to decide upon cases brought forward to it.

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[57] Ibid.

[58] Judgment of 26 April 2004, No. 933/2006 Court Reports.

[59] Judgment of the extended chamber of 14 April 2009, No. 8 Afs 15/2007-75, No. 1865/2009 Court Reports.

In case of conflicting case-law, the powers are vested in the extended chamber to solve such a situation if two conditions are fulfilled: existence of conflict of legal opinions delivered by the chambers of the SAC and the necessity to form a legal opinion for further decision-making of the chamber which brought the case forward to the extended chamber[60]. The extended chamber has jurisdiction to decide even in cases when the legal opinion denied by a chamber which brings the case before the extended chamber was not of essence in the case[61]. To the contrary, it is not necessary to refer a case to the extended chamber when a provision of a directive of the European Communities clearly and unequivocally requires a departure from the existing case-law of the SAC which occurred within the expiration period for transposition of the particular directive[62]. The powers to deal with the same matter would be vested in the extended chamber in case of repeated cassation complaint only if the facts of the case or the legal circumstances change, or if the case-law undergoes significant change, which must be respected by every regional court as well as every chamber at the SAC in their decision-making [such a situation can occur, for example, if in the meantime from the first quashing decision of the SAC and its new decision-making on repeated cassation complaints on the same legal issue, the Constitutional Court, European Court for Human Rights, European Court of Justice (Court of Justice of the European Union), or even the extended chamber of the SAC in the proceedings under Section 17 of the Code of Administrative Justice decide otherwise, or the Plenary or the court division adopt a contrary particular legal position under Section 19 of the Code of Administrative Justice]. By reference of a case to the extended chamber, the ordinary chamber deciding on a new cassation complaint, cannot accomplish a change in the original legal opinion if the circumstances of the particular case do not change.[63] Similarly, the SAC ruled in judgment No. 1 Afs 140/2008-77[64]: "*The case-law of administrative courts is not immutable, even the existing legal opinion expressed in a decision of the extended chamber cannot prevent challenging*

[60] Decision of the extended chamber of the Supreme Administrative Court of 26 August 2008, No. 8 As 51/2006-105, www.nssoud.cz.

[61] Judgment of the extended chamber of 26 August 2008, No. 7 Afs 54/2007-62, No. 1742/2009 Court Reports.

[62] Judgment of 15 August 2008, No. 5 Azs 24/2008 – 48, No. 1724/2008 Court Reports.

[63] Decision of the extended chamber of 8 July 2008, No. 9 Afs 59/2007-56, No. 1723/2008 Court Reports.

[64] Judgment of 8 January 2009, No. 1792/2009 Court Reports.

the validity of the legal opinion repeatedly by filing a cassation complaint. On the other hand, reasonable stability of the case-law is a necessary precondition of legal certainty as one of the fundamental attributes of rule of law. Changes in the case-law in a situation of unamended legislation should take place when justified by fundamental grounds, especially because legislation related to the interpreted law was changed; because legal opinions of courts, whose case-law the Supreme Administrative Court has to take into account, changed; because the circumstances relevant for the application of legal norms as interpreted by case-law changed; because other important reasons emerged newly which could provide a basis for such a change of the legal opinion of the Supreme Administrative Court, if the need for such a change outweighs the interests of persons acting in good faith in the continued existence of the case-law. (...) The fact that the case-law was unified by the extended chamber brings especially important arguments in favour of maintaining the legal position taken thereby. (...) In contrast, if a complainant offers new arguments against the legal conclusion of the extended chamber, the Supreme Administrative Court is obliged to adequately address them, and if the SAC is convinced by such arguments that the legal conclusion of the extended chamber was incorrect, it is obliged to refer the matter to the extended chamber under Section 17 paragraph 1 of the Code of Administrative Justice." The extended chamber is not vested with powers to decide on a case under circumstances that the question referred to the extended chamber is abstract and missing a connection with the facts in the particular case[65]. The extended chamber expressed its negative opinion on its jurisdiction also in a situation, when the ordinary chamber of the Supreme Administrative Court had purported to depart from the existing case-law in order to accept the legal opinion on a particular legal issue by the Constitutional Court. In decision No. 2 Afs 66/2004-53[66], the extended chamber stated that under such circumstances the focal point of the difference of both legal opinions "*does not occur in the internal domain* [at the Supreme Administrative Court]*, which would elicit the necessity to unify the case-law by way of activating the extended chamber, but is given as a consequence of the case-law of the Constitutional Court. Therefore, it is an external factor which is beyond control of the Supreme Administrative Court, and its consequences are comparable to the amendment of legislation or to the jurisprudence of international courts.*"

The SAC played a significant role in the judicial decision-making concerning the concept of the **measures of general nature**. Unfortunately, the legal regulation of this new concept had not been very appropriately chosen; therefore, the SAC has to deal with it in its jurisprudence

[65] Decision of the extended chamber of 12 June 2007, No. 2 Afs 52/2006-86, No. 1762/2009 Court Reports.
[66] Decision of the extended chamber of 11 January 2006, No. 1833/2009 Court Reports.

in various contexts. In this regard, decision No. 1 Ao 1/2005-98[67] (the very first decision concerning the measure of general nature) is fundamental. In this decision, the SAC defined the concept of measure of general nature itself, and also determined in a very precise way characteristics of the review procedure of the measure of general nature or its part (the so-called algorithm of judicial review of the measure of general nature), which lies in five steps: "*first, in review of powers of administrative authority to issue a measure of general nature; second, in review of a question whether or not the administrative authority when issuing the measure of general nature exceeded statutorily defined jurisdiction (ultra vires); third, in review of a question, whether the measure of general nature was issued in a manner prescribed by law; forth, in review of the content of the measure of general nature if the measure of general nature (or its part) is not contrary to law (material criterion); fifth, in review of the content of the measure of general nature with respect to its proportionality.*" It is also necessary to give reasons in the grounds for the disposition of the measure of general nature and to state what source materials and considerations were taken into account by the administrative authority when evaluating the circumstances of the case and interpreting the legislation. Lack of decision-making grounds causes non-reviewability.[68] When it comes to a question of legal effect of a measure of general nature the SAC ruled in decision No. 2 Ao 2/2007-73[69] that "*a measure of general nature is effective only after its valid publication (Section 173, paragraph 1 of the Code of Administrative Procedure). However, if it was displayed on the official board of a municipal authority for the prescribed period of 15 days, including the date of displaying it and the date of removing it from the board, this is to be regarded as proper service of the measure. The aim and purpose of such a publication is, on the one hand, to provide information that such an act was issued and that it would have legal effect and, on the other hand, to acquaint the public with its content.*" In addition to general questions relating to this new concept the SAC addressed a number of specific issues brought by existing practice; they will be dealt with in the relevant chapters below.

[67] Above mentioned, No. 740/2006 Court Reports.
[68] Judgment of 16 December 2008, No. 1 Ao 3/2008-136, No. 1462/2008 Court Reports.
[69] Judgment of 24 October 2007, No. 1462/2008 Court Reports.

Application of European Union Law

Soon after the accession of the Czech Republic to the European Union on May 1, 2004 the Czech SAC took into consideration the necessity of compliancy with the law of the European Communities. The European Community (since 1 December 2009, European Union) law shall generally be applied only to legal matters arising after the accession; however, it may change the subject-matter of long-lasting legal relationships, which had arisen before the accession but with consequences into the future. The SAC went even further in its case-law. In decision No. 2 Afs 92/2005-45[70], the SAC held that European Community law should function as an interpretative guidance for the Czech legislation which had been adopted under the approximation process of Czech law to that of the European Community, even before the actual accession took place. This legal opinion was subsequently used in many other cases in which the facts of a case under consideration had originated in the time before the accession; nevertheless, the approximation provisions were applied.

Cases in which Community law is **fully applicable**, whose factual circumstances fall into the period after the accession, reach the SAC with a typical time lag of two or three years due to the two instance procedure before administrative authorities and the procedure before the administrative court. The Community law exercises two roles in these cases according to the case-law of the SAC: first, the Court itself directly or indirectly applies Community law; second, the SAC requires administrative authorities to apply Community law autonomously; otherwise their decisions may be quashed as unlawful. An example of the first mentioned situation can be found in decision No. 3 Azs 259/2005-42[71]. In this decision the SAC drew a conclusion about the direct effect and priority for an application on provisions of the Protocol on Asylum for Nationals of Member States of the European Union[72]. However, the SAC also stated that the national regulatory framework must be observed by administrative authorities while respecting the obligations arising from Community law. Regarding the pensions of migrants between Member States, the SAC ruled in decision

[70] Judgment of 29 September 2005, No. 741/2006 Court Reports.

[71] Judgment of 19 July 2006, No. 977/2006 Court Reports.

[72] Protocol (No 29) on Asylum for Nationals of Member States of the European Union (1997) to the Treaty establishing the European Community.

No. 3 Ads 102/2006-60[73] that the administrative authority cannot refer to a national legislation, thereby restricting the scope of individual rights guaranteed under Community law regulations. The SAC is *ex officio* obliged to take into account the Community law if violation thereof would lead to the defects mentioned under Section 109 para. 2 and 3 of Code of Administrative Justice or to other defects, which the Court has obligation to take into account even when applying national law.[74]

However, the Community law should be, from a SAC perspective, taken into account as an **interpretative guidance** for decision-making of administrative authorities. This conclusion was emphasized by the SAC in its decision No. 1 As 3/2007-83[75]. In this case, the SAC examined whether or not transmitting television broadcasts through the Internet to third-generation mobile phones is still television broadcasting and should be as such regulated by law. While resolving this issue, the SAC took into consideration the regulations of the Community law, which pre-dated the Czech legislation in that area, and the Community case-law. This issue had already been contemplated by the European Court of Justice with respect to whether or not broadcasting prepaid cable television is to be regarded as public access television. As the SAC emphasized at the end of the aforementioned decision, Community law and Community case-law represent obligatory interpretative guidance for administrative authorities adjudicating legal matters that emerged after the accession to the European Union. The SAC also held that there is an obligation to interpret national provisions to comply with the EU law and an obligation resulting from it to depart from the existing case-law of the SAC in cases when the transposition period for the implementation of the Community directive expired and when no text changes in the statutory provisions have occurred.[76]

Within the first four years of becoming a member of the European Union, the Czech Republic SAC did not submit any **references for preliminary rulings** to the European Court of Justice. In several cases, the SAC concluded that the question under consideration represents an important aspect of Community law, however, the SAC found the answer to these questions so obvious that there was no need to submit them to the European Court of Justice for

[73] Judgment of 28 February 2007, No. 1648/2008 Court Reports.
[74] Judgment of 18 June 2009, No. 8 As 33/2009-56, No. 1908/2009 Court Reports.
[75] Judgment of 29 August 2007, No. 1401/2007 Court Reports.
[76] Judgment of 13 August 2008, No. 2 Azs 45/2008-67, No. 1713/2008 Court Reports.

a preliminary ruling[77]. The need to submit a question for a preliminary ruling occurred for the first time in 2008, with respect to delivery and enforcement of customs and tax assessment notices issued by other Member States of the European Union, and with respect to recovery of claims arising from enforceable payment assessments in tax and customs matters. The Court of Justice of the European Union is carrying out proceedings on this reference for a preliminary ruling under case C-233/08.[78] Since then, the SAC has made four other references for preliminary ruling, which are discussed in the relevant chapters below.

[77] For example, judgment of 29 August 2007, No. 1 As 13/2007-63, No. 1461/2008 Court Reports.

[78] The Court of Justice of the European Union responded to this question by its judgment of 14 January 2010, *Kyrian* (C-233/08, not yet published in the ECR).

Security

Internal security of the Czech Republic is one of the most important parts of the Czech legal framework which is notably influenced by the jurisprudence of the SAC. In light of the numerous incidents the current world has to face (terrorist attacks, internal and international conflicts) the importance of administrative justice in this area will undoubtedly play an ever increasing role.

The Police of the Czech Republic and municipal police

The issues of internal security in decisions of the SAC have many forms. First, questions of the very competence and inner organization of the Police of the Czech Republic and of individual bodies of municipal (metropolitan) police should be mentioned. Broader attention should be paid to judgment No. 1 As 12/2008-67[79] in which the Court dealt with the issue – broadly echoed by the news media – of competence of municipal police and local self-government to measure the speed of vehicles on surface roads and the question of their entitlement to delegate such authority to other bodies. The SAC unambiguously concluded that "*measuring the speed of vehicles on surface roads which forms part of the competence of police and municipal police to oversee the safety on surface roads and the traffic flow under the Act No. 361/2000 Coll., on Road Traffic, cannot be delegated to other bodies without legal authorisation*."

The judgment No. 7 As 60/2007[80] deals with the questions of personal data processing by the Police of the Czech Republic. The police may process the information (including personal data) only as long as this is needed in order to perform their tasks, to the extent necessary and solely in connection with the criminal proceedings. The police authority making a decision on the request

[79] Judgment of 2 April 2008, No. 1607/2008 Court Reports.
[80] Judgment of 29 May 2009, No. 1914/2009 Court Reports.

to erase or correct false or inaccurate personal data must always consider whether these conditions are satisfied *ex officio*, because eventual reasons for refusal of the request cannot stand alone unless the abovementioned restrictions are observed. The police authority may refuse to grant the request to erase or to correct false or inaccurate personal data only for two reasons. The first reason consists in the existence of such processed data if further processing of the data is justified by Section 42j of Act No. 283/1991, on the Police of the Czech Republic[81]; the second reason lies in processing of data which cannot be considered as false or inaccurate. In both cases the negative decision has to be justified with regard to the individual aspects of the matter and thus mere reference to a provision of law that provides for such procedure would be insufficient.

Classified information (classified materials)

The matters of classified information (formerly *classified materials*) – except for questions of civil service in individual security forces which are mentioned separately in the next subchapter – presumably belong to the most important part of the internal security agenda. Like in other areas of legal regulation which are affected by the Court's jurisprudence, here the Court had to deal not only with significant legislative (and terminological) changes but also with disputes related to the transfer of competence of administrative bodies involved in the field[82]. This fact has naturally emphasized the significance of the Court's case-law. On 1 January 2006, Act No. 412/2005 Coll., on the Protection of Classified Information and on Security Eligibility, came into force. This act replaced the Act No. 148/1998 Coll., on the Protection of Classified Materials and on Amendments to Some Acts.

Judgment No. 6 Azs 142/2006-58[83] is considered to be one of the most important and also most interesting decisions of the SAC in this area which at the same time proves the importance and legal complexity of classified information protection. In this decision the Court assessed to what extent a participant (in the framework of administrative proceedings before the

[81] Since 1 January 2009 replaced by Act No. 273/2008 Coll., on the Police of the Czech Republic.

[82] See foremost decision of the extended chamber of 10 October 2007, No. Nad 13/2007-39, No. 1458/2008 Court Reports, where the extended chamber of Supreme Administrative Court dealt with the issues related to the liquidation of Board of the Classified Materials Section.

[83] Judgment of 6 June 2007, No. 1337/2007 Court Reports.

administrative body) in asylum procedure (nowadays, *international protection* procedure) is allowed to learn about the content of classified materials, which he otherwise could not access without a special certificate, if the classified materials were grounds for not granting him asylum. The SAC ruled that "*if classified materials pursuant to Act No. 148/1998 Coll., on Protection of the Classified Materials, (in this case: materials of the Security Information Service with respect to the asylum-seeker) were a determining basis for a decision that asylum cannot be granted in asylum procedure, and if the grounds for such a decision are not apparent from the grounds of the administrative body decision, the asylum seeker cannot be barred from getting acquainted with the content of the classified materials; this does not affect the administrative body's obligation to ensure that the security of the state and safety of third persons are not threatened*." In other words, it follows from the judgment that while protection of certain classified materials is necessary (from the viewpoint of internal state security), the protection of such information is nonetheless not absolute and has its limits.

Judgment No. 1 As 47/2009-93[84] was widely covered by media, too. The Court dealt with the reasons for not granting certificate to allow access to classified information. The Court ruled that the security risk consisting in participation in activities leading to repression of human rights or freedoms is also present if the concerned person was involved in this activity in an official position at the lowest level of a hierarchical organized structure (in this case, the district prosecutor's office). The person concerned cannot relieve from his or her personal liability by mere statement that he or she followed instructions and acted with approval of superiors and superior bodies.

The civil service of the security forces

Jurisprudence in the so-called civil service matters forms an integral part of administrative courts' judicial decision-making in the field of internal security. In these cases, the importance of the Court's decision-making has recently been emphasized by legislative changes. Despite repeated deferrals of entry into force of Act No. 361/2003 Coll., on the Civil Service of Officers of Security Forces, it finally came into force on 1 January 2007, replacing older legal regulation on the civil service of officers of individual forces. Although this act applies to a majority of security forces (besides the Police of the Czech Republic also to the Fire Emergency Brigade of the Czech

[84] Judgment of 26 August 2009, No. 1942/2009 Court Reports.

Republic, the Czech Customs Administration, the Prison Service of the Czech Republic, the Security Information Service and the Office for Foreign Relations and Information), most of the decisions of the Court in these matters relate to officials of the Police of the Czech Republic.

The jurisprudence of the SAC has so far focused on disputes regarding assignments to another position[85], disciplinary misconducts in the framework of civil service[86] and dismissals from civil service (mainly because of "*a particularly serious breach of service oath*")[87]. For example, in decision No. 6 A 48/2001-76[88] the SAC stated that presumption of innocence is not denied if a prison administration official is released from the service owing to the breach of service oath. Presumption of innocence applies in criminal proceedings which cannot be confused with administrative proceedings on dismissal from civil service under Section 106 para. 1 letter d) of Act No. 186/1992 Coll., on Civil Service of the Members of Police of the Czech Republic. In the abovementioned decision No. 6 As 60/2004-56[89] the Court accented that service of an official of the Police of the Czech Republic is a public law relation and as such is regulated by a system of strictly defined rights and obligations of officials which is based on entirely different principles than in the sphere of private labour relations. The police officer promises by oath that he or she is going to be honest, brave and well-disciplined, and these requirements on his or her behaviour also apply when off-duty. Thus the Court considered that the police officer's refusal (involved in a car accident) to undergo the blood test after having taken a breath test (which was not documented) was, with regard to his status, honourless, unbrave and undisciplined. At the same time, the Court qualified such act as a breach of the service oath.

In judgment No. 6 Ads 25/2009-87[90] the Court dealt with the conditions for dismissal of a police officer from civil service for reason of theft. Such an act committed by a member of Police was described by the Court as condemnable and capable of putting the good reputation of Police in jeopardy. Nevertheless, unless the act constitutes the crime of theft, the conditions for dismissal from the service pursuant to Section 106 para. 1 letter d) of Act No. 186/1992 Coll. are not satisfied.

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[85] Judgment of 29 November 2007, No. 3 Ads 113/2007-78, No. 1497/2008 Court Reports.

[86] Judgment of 20 December 2007, No. 5 As 47/2006-66, No. 1530/2008 Court Reports.

[87] Judgments of 20 October 2004, No. 1 As 10/2003-58, No. 896/2006 Court Reports, and of 6 January 2006, No. 6 As 60/2004-56, No. 849/2006 Court Reports.

[88] Judgment of 12 June 2003, No. 201/2004 Court Reports.

[89] See abovementioned, No. 849/2006 Court Reports.

[90] Judgment of 29 April 2009, No. 1875/2009 Court Reports.

TAX PROCEDURE

It is possible to characterize tax procedure as a procedure affecting administrative authorities and taxpayers for the purpose of ensuring the implementation of rights and obligations arising from tax relations[91]. Decision-making on tax disputes is fairly frequent at the SAC.

In decision No. 5 Afs 155/2006-90[92] the SAC emphasized that **submission of a tax return** on an incorrect blank form must be dealt with by means of a properly conducted procedure set forth for incorrect tax returns and declarations, not only by a telephonic notice or by mailing an informal notice. Such acts of a tax administrator do not result in any legal consequences. However, in this particular situation, it is not even possible to give a formal notice to a party for the proceedings to make a submission of a tax return, and to initiate new tax proceedings, because the proceedings are already in process, therefore litispendence as an elementary procedural obstacle exists.

The notion of **notice to appear** before tax authorities addressed to a party for the tax proceedings was a subject-matter of decision No. 2 Afs 45/2005-50[93]. In this regard, the SAC considered Section 29 para. 1 of Act No. 337/1992 Coll., on Administration of Taxes and Fees, and admitted that even though the right of the tax administrator to give a notice to appear refers also to legal persons, it is clear that only natural persons can actually appear before the tax administrator. However, the SAC found that it was necessary to differentiate between the situation when the notice to appear is addressed to a natural person who acts as a representative of a legal person, and the situation when he or she is not acting on behalf of someone else. In

[91] Bakeš M. a kol. *Finanční právo* (Finance Law). 4th Edition, Prague: C. H. Beck, 2006 pg. 362.
[92] Judgment of 11 October 2007, No. 1441/2008 Court Reports.
[93] Judgment of 9 March 2006, No. 892/2006 Court Reports.

the first case, the SAC held that the imposition of a purely personal fine for failure to appear for the proceedings on a natural person acting in the capacity of someone else was unacceptable.

Also the issue of **time-limits** is fairly often covered by the case-law of the SAC. In decision No. 5 Afs 42/2004-61[94], the Court reviewed if it is necessary that decisions on assessment of tax and retrospective assessment of tax come into force within the time-limit set forth in Section 47 para. 1 of the Act on Administration of Taxes and Fees. The SAC held that since the competence of the tax administrator to assess or to retrospectively assess a tax extinguishes after the statutory time-limit expires, it is necessary that the decision becomes perfect, i. e. final, by the end of the statutory time-limit. Conversely, the process of assessment of tax and retrospective assessment of tax is completed at the time when the tax administrator is no longer vested with powers to assess the tax or retrospectively assess the tax. The extended chamber of the SAC reached the same conclusion in the case No. 9 Afs 86/2007[95]. Furthermore, the Court held that assessment and retrospective assessment of tax liability outside the scope of the three year statutory time-limit embodied in Section 47 para. 1 of the Act on Administration of Taxes and Fees is an unlawful decision; nevertheless, such a decision cannot be regarded as null and void. According to the extended chamber of the SAC, such an error in decision is not dire and obvious to such a degree that it would cause its actual nonexistence. Resulting from the case-law, courts need not take into account expiration of time-limits *ex officio*. The Constitutional Court did not accept the opinion of the SAC and quashed its decision[96]. In decision No. 2 Ans 1/2005-57[97], the SAC considered the question of to what extent the internal instruction of the Ministry of Finance laying down the time-limits for the closure of proceedings in the cases of incorrect tax returns and declarations is binding for administrative authorities. The SAC stated that even though the internal instruction does not represent a generally binding regulation, administrative practice has been created upon its basis, which lies in adherence to the time-limits for the closure of proceedings in the cases of incorrect tax returns and declarations stipulated in those internal instructions. The administrative authority cannot depart from the

[94] Judgment of 31 May 2006, No. 954/2006 Court Reports.

[95] Judgment of the extended chamber of 23 October 2007, No. 9 Afs 86/2007–161, No. 1542/2008 Court Reports.

[96] Judgment of the Constitutional Court of 26 February, No. I. ÚS 1169/07, http://nalus.usoud.cz.

[97] Judgment of 28 April 2005, No. 605/2005 Court Reports.

practice created in this way. The principle of being bound by its own administrative practice when discretion is allowed by law stems from the principle of prohibition of arbitrariness and unjustified discrimination.

With respect to **assessment of taxes**, it is necessary to mention decision No. 8 Afs 78/2006-74[98], in which it was conclusively determined that an adjustment notice for the retrospective income tax assessment of a deceased person (of a ceased taxable person), represents an error, which causes nullity of the decision.

Case-laws concerning **tax guarantor** and his **status** are rich and diverse. Before the decision was settled in this matter, the Constitutional Court had to deal with it several times. The regulation of this concept, which was in force until the amendment of the Act on Administration of Taxes and Fees by Act No. 230/2006 Coll., considerably limited the possibility of tax guarantors to defend against the application of the concept of guarantee in the appellate proceedings. Upon the interpretative judgment of the Constitutional Court[99], the SAC inferred that in cases when a guarantor has identical liability as the tax debtor (i.e. liability to pay tax arrears, which reduce the property of a guarantor in the same manner as the debtor's payment of tax does), this cannot justify the fact that the guarantor qualitatively has a very different possibility to defend against identical liability[100]. Furthermore, the SAC also dealt with the assignment of the position of a tax guarantor to the successor of a legal person. In this respect, the SAC ruled that the tax liability of a guarantor arises when the notice to pay the tax arrears for the tax debtor is delivered: at that moment the guarantor becomes the taxpayer and de facto the tax debtor as well. Imputation of this liability to a legal successor of the guarantor can only occur if the notice was delivered to the guarantor before the guarantee extinguishes[101].

The SAC dealt also with the right of person liable for payment to inspection of documents[102]. It held, that tax authority is obliged to provide on demand all information used

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[98] Judgment of the extended chamber of the Supreme Administrative Court of 13 May 2008, No. 1629/2008 Court Reports.

[99] Judgment of the Constitutional Court of 29 January 2008, No. Pl. ÚS 72/06, No. 291/2008 Coll.

[100] Case-law in connection with previously mentioned judgment of the Constitutional Court No. Pl. ÚS 72/06, for example the judgments of 13 March 2008, decision No. 5 Afs 7/2005-127, No. 1575/2008 Court Reports and decision No. 5 Afs 174/2004-68, No. 1770/2009 Court Reports.

[101] Judgment of 29 August 2008, decision No. 5 Afs 129/2005-110, No. 1769/2009 Court Reports.

[102] Judgment of 29 January 2009, No. 9 Afs 8/2008-117, www.nssoud.cz

by deciding on rights and obligations, except for information protected by Act No. 337/1992 Coll., on Administration of Taxes and Fees, or by special law.

Judgment No 1 Afs 19/2009-57[103] is of great importance for protection of rights of an individual in tax procedure. The Court considered nature of the report of the hearing acquired in criminal proceeding and conditions of use of this report **as evidence in tax procedure**. Hearing of an accused is both an evidence and defence plea and the accused is not obliged to tell the truth in the criminal proceedings. In tax procedure the person liable for payment has the right to participate in taking evidence and the right to express opinion of it. If the hearing of an accused could not be repeated in tax procedure, the report of the hearing in criminal proceeding cannot be the only decisive evidence used by tax authority, which should infirm accounting of person liable for payment.

Income Tax

Income tax covers the second most important item of the state budget. The importance of income tax manifests from the number of decisions from the SAC concerning this issue.

It is possible to divide the decisions covering this topic into a few groups. The first group includes decisions in which **some of the fundamental concepts** of this legal field are determined. As an example, decision No. 5 Afs 68/2007-121[104] can be referenced, whereby the term "income" (of the employee) was specified to mean the sum which brings about the increase of a taxable person's property. Financial compensations, which do not fulfil this criterion, cannot be included into the tax base. Under decision No. 2 Afs 112/2008-44[105] transfer of company from father to son for free is not a "business income". This operation is not subject to income tax. In decision No. 2 Afs 62/2004-70[106] the SAC determined material criteria which must be fulfilled in order to consider certain activity as employment for purposes of Act No. 586/1992 Coll., on Income Tax. Apart from the determination of the activity through existence of the orders of the payer, there must also be the presence of actual dependency on the payer. According to the SAC it is so if

[103] Judgment of 22 July 2009, No. 1 Afs 19/2009-57, No. 1936/2009 Court Reports.
[104] Judgment of 28 February 2008, No. 1574/2008 Court Reports.
[105] Judgment of 24 February 2009, No. 1820/2009 Court Reports.
[106] Judgment of 24 February 2005, No. 572/2005 Court Reports.

a long time activity is being considered and if the conclusion of the employment contract is primarily realised in the interest of the person who carries out the activity.

Decisions which cover cases of **abuse of the tax law** fall within the latter group. Attention can be drawn to decision No. 1 Afs 107/2004-48[107] concerning the abuse of the tax advantage for gifts bestowed to a civil society association. In this decision the SAC stressed that it was not possible to deduct the value of gifts for tax purposes in cases whereby the gifts were provided to a civil society association for the purpose of using them to finance the sporting, cultural and educational needs of the members of that association and the members only include people who provided the gifts and their family members. In that case, the exercise of subjective public rights could not be considered, because this would be considered to be an abuse of these rights. Submission of an application of expenditure representing expenditure incurred for the pursuit of obtaining, securing and maintaining of taxable income also amounts to abuse of this right if it is shown as an activity which does not have any economic or other rational purpose and if the only purpose is to gain some tax advantage in violation of the aim of the Act on Income Tax[108].

A number of decisions also refer to **obtaining, securing and maintaining the taxable income**. In decision No. 2 Afs 44/2003-73[109] the SAC held that real expenditures need not always reflect the income of the taxpayer which means that expenditures need not always affect the income. However, expenditures must be incurred for a particular purpose, and there must be a material and time link between the income and the expenditures in a certain tax period. In decision No. 2 Afs 45/2003-118[110] the SAC dealt with the issue, whether expenditures on fuel incurred by employees for private purposes can be regarded as expenditures for obtaining, securing and maintaining the taxable income of a tax person. According to the SAC salaries paid to employees are no doubt deductible expenses in the sense of Section 24 para. 1 of the Act on Income Tax, therefore the same must apply to the barter part of the salary paid to the same employee. If the tax administrator does not require proof of factual relationship between income and expenditures relating to one part of the employee's salary, a different approach cannot be taken in case the other part of the salary is paid to the same employee. The SAC took

[107] Judgment of 10 November 2005, No. 869/2006 Court Reports.
[108] Judgment of 17 December 2007, No. 1 Afs 35/2007-108, www.nssoud.cz.
[109] Judgment of 1 April 2004, No. 264/2004 Court Reports.
[110] Judgment of 31 August 2004, No. 402/2004 Court Reports.

a similar decision in No. 2 Afs 185/2004-42[111] when it observed that a bonus for life anniversaries can be considered as a deductible expense only if it does not contain lump-sum rewards. On the contrary, if the particular work performance of individual employees is considered, then such a bonus can represent a deductible expense.

To conclude this overview of decisions on income tax, attention must be drawn to one of the decisions on **double taxation**. It is decision No. 9 Afs 55/2007-76[112] in which the SAC considered whether cases concerning the income of a person with income arising from a personally performed activity as a professional sportsman in the territory of the Czech Republic, could be understood as income that represents the income of a sportsman from activity personally performed or taken into account in the Czech Republic [Section 22 para. 1 letter f) point 2 of the Act on Income Tax], or whether such income could be understood also as income from activities carried out within a permanent place of business [Section 22 letter a) of the Act on Income Tax]. The SAC applied the Convention between the Czech Republic and the Slovak Republic for the Avoidance of Double Taxation with Respect to Income Tax and Property Tax (No. 257/1993). Article 16 of this Convention sets forth that the income of a resident of one of the contractual states, who personally carries out activity in the other state as a sportsman, could be taxed in this other state (in this particular case in the Czech Republic). Article 16 precludes income taxation of income obtained while personally carrying out activity as a sportsman otherwise than in accordance with this Article 16 of the Convention. Therefore, the SAC deduced that this income could not be taxed as general income of an enterprise resulting from an activity performed within the permanent place of business.

Value added tax

Value added tax (VAT) represents an indirect tax, which is charged to the end customers; but which is paid by the provider. The VAT is levied in parts in individual stages of production and sales. All transactions with or without consideration which are taxable inland are subject to VAT regardless of whom they are provided. The liability of a seller to apply VAT at the output and the related duty of payment into state budget depends on the taxable transaction. It is

[111] Judgment of 16 February 2005, No. 820/2006 Court Reports.
[112] Judgment of 22 November 2007, No. 1489/2008 Court Reports.

neither dependent on the moment of acceptance of the payment for the consideration nor on circumstances if and in what way the subject-matter of the taxable transaction was used by the buyer. It is not possible to object that in case the negotiated price is not paid, it means that the vendor's duty to declare and pay the VAT does not arise[113]. The moment of taxable transaction at the sale of goods according to the contract of sale differs depending on whether the contract is concluded under the Civil Code or Commercial Code. With reference to a contract concluded under the Commercial Code, the taxable transaction is considered to be realised on the day of the transaction. Considering the contract under the Civil Code, the moment of realisation of the taxable transaction is on the day of the collection of goods or on the day of the payment – depending on which one of them occurs earlier .[114]

In the aforementioned decision No. 2 Afs 92/2005-45[115] the SAC dealt with an issue of determining the place of a transaction of intermediary service. Within the service an intermediary was supposed to conclude a contract for work concerning reconstruction of a complex technological device whose substantial elements were firmly connected with a real property item. It was disputed whether the place of transaction should be interpreted as a place where the intermediary services are provided, or a place where the real property is situated. The SAC came to the conclusion that when determining the place of transaction it is necessary to interpret the Czech legislation adopted in order to achieve approximation of the Czech law and the EC law in a way conforming with the European norm, and it is necessary to proceed so even in situations when dealing with circumstances that occurred before the accession of the Czech Republic to the European Union. The SAC then ruled that the place of such a transaction was the place of the actual provision of services, because the intermediary service in favour of the contractor does not relate to the real property, but to the work, which was intermediated and which was not connected with the real property at all. In this case the legal relation existed exclusively between the contractor and the intermediary and at the same time neither of them intended to dispose of the real property in any way.

However, the main question usually concerns the issue as to what counts as a taxable transaction. For determination of its substance it is necessary that all circumstances are taken

[113] Judgment of 6 December 2007, No. 7 Afs 32/2007-79, No. 1526/2008 Court Reports.
[114] Judgment of 29 June 2005, No. 2 Afs 24/2004-71, No. 742/2006 Court Reports.
[115] Judgment of 29 September 2005, No. 741/2006 Court Reports.

into account. It is necessary to consider circumstances under which the transaction is realised and to identify its characteristic traits. For example, if someone is provided with a sports field in order to carry out a sports activity there, then it is necessary to distinguish a passive granting of the field for use from that of other activities. The crucial issue is whether the transactions at stake can be deemed as a passive grant of real property resulting from the contract that depends solely on the lapse of time without creating any considerable added value, or whether other service is actually provided by such a transaction. In other words, if the grant of property for someone else's use represents a service which can be qualified otherwise for the purpose of VAT.[116] The SAC also ruled on the nature of the taxable transaction concerning the rental of video tapes for customers. The subject-matter of this dispute was whether such activity represented a service subject to a reduced tax rate, because in this case an intermediation of a copy of work was considered. According to the tax administrator and the regional court, the rental of the video tapes represented only a lease of movable property, which was returned to a provider. Therefore, this taxable transaction was subject to the standard tax rate[117]. Also a supplier providing a health institution with a laboratory device, service and materials, who does not provide labour (e. g. complex assessment of blood picture and other examinations), will not be successful if he or she seeks a reduced tax rate. In this respect, the SAC held that in this case the laboratory device is leased, but this cannot be deemed as a provision of services. By mere provision of a device without any active human factor, no blood or other analyses can be carried out, i.e. no declared service is provided. It is not possible to invoke freedom of contract where the intended legal act is contrary to or evades law.[118]

As the SAC reminded all in judgment No. 1 Afs 143/2008-69[119], the European Court of Justice held several times that an enforcement agent executing an independent office is a person liable for the value added tax. A beneficiary of taxable payment, which consists in enforcement, cannot be obligor in execution proceedings. Costs of execution proceedings in conjunction with value added tax imposed to the debit of the obligor fails to satisfy conditions for the creation of the right to tax deduction of the obligor.

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[116] Judgment of 22 March 2007, No. 9 Afs 5/2007-70, No. 1187/2007 Court Reports.
[117] Judgment of 11 November 2004, No. 2 Afs 60/2004-72, No. 890/2006 Court Reports.
[118] Judgment of 13 May 2005, No. 5 Afs 123/2004-61, No. 1320/2007 Court Reports.
[119] Judgment of 22 January 2009, No. 1 Afs 143/2008-69, No. 1821/2009 Court Reports.

With respect to case-law of the European Court of Justice the SAC qualified the **abuse of objective tax law** as any situation where it results from all circumstances that the only reason and at the same time the only result of the conclusion of a contract of sale to supply goods is merely to obtain deductible surpluses without any economical sense of such activity of the taxable person. The SAC ruled so despite the adherence to all formal requirements and conditions in that particular case. Such activities cannot be taken into account with respect to tax purposes.[120]

Excise Duty

Excise duty presents another type of indirect tax. Under the Act No. 353/2003, on Excise Duties, mineral oils, ethyl alcohol, beer, wine, intermediate products and manufactured tobacco rank high among the list of items subject to excise duties.

The excise duties are administered by the customs offices. They are empowered to detain goods, by which it is necessary to prove the fulfilment of tax liability. As the SAC held in judgment No. 2 Afs 198/2005-88[121], performing detention customs offices act in accordance with the Act on Excise Duties, which is lex specialis to Act No. 337/1992, on Administration of Taxes and Fees. Although the detention of thing is a preliminary decision, which is generally excluded from appellate review in administrative justice (see the judgment of the Constitutional Court No. Pl. ÚS 8/99[122]), the Act on Excise Duties explicitly submits the detention of thing to judicial review.

One of the objects of regulation expressed in the Act of Excise Duties (in the Third part) is a sales restriction for spirits and manufactured tobacco. This is reflected in the prohibition of the selling of manufactured tobacco and spirits outside an establishment intended for final inspection approval regarding the sale of goods and provision of services under Section 133 para. 1 of the mentioned act. It is common practice that various goods are sold at gas stations. But it does not mean that every operator of a gas station has a right to sell foodstuffs, spirits and manufactured tobacco (goods different from driving fuel, which is the primary purpose of a gas station) on the basis of the common final inspection approval in the area of gas station.

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[120] Judgment of 27 November 2008, No. 5 Afs 61/2008-80, No. 1779/2009 Court Reports.
[121] Judgment of 14 June 2006, decision No. 2 Afs 198/2005-88, No. 1536/2008 Court Reports.
[122] Judgment of the Constitutional Court of 3 November 1999, decision No. Pl. ÚS 8/99, No. 153/1999 Sb. ÚS.

This applies a fortiori for building approved by common final inspection for service purposes[123].

In judgment No. 7 Afs 95/2008-43 the SAC solved the problem of taxation of spirits made by home manufacturers of alcohol stills. The Alcohol Act No. 61/1997 permits home producers to still up to 30 litres of alcohol. Alcohol in this quantity is taxed with a lowered rate. In this case, the customs office imposed on the still operator a tax in a standard rate for alcohol produced over the limits provided by law. The SAC held that exceeding the limits is an administrative offence punishable under the Alcohol Act, but the operator is not obliged to pay tax in the amount of the difference between the standard and lowered rate of alcohol tax.

Real Estate Tax

Real estate tax constitutes direct tax of a property type. This tax liability is connected with the possession of real property. The subject-matter of this tax consists in general of land and structures in the territory of the Czech Republic, which are in ownership by natural or legal persons without regard to their residency. The taxpayer of real estate tax is the owner of the property. It was originally laid down by law that the duty to pay tax arrears would be transferred from the previous taxpayer to the new owner of the property. In this respect the SAC held that imputation of the duty to pay tax arrears of the previous owner is not automatic, but must be imposed by the tax administrator through a final decision.[124] Guarantee and liability of the assignee to pay the tax arrears of the previous owner are restricted only to the owner who acquired the property from the tax debtor. It is not possible to expect a taxable person to be liable for someone else's failure to carry out tax liabilities if there is no legal relation between them.[125] A person liable to pay the real estate tax can also be a tenant. In decision No. 1 Afs 71/2004-91[126] the SAC ruled that a tenant of land remains a taxpayer despite the termination of the tenancy contract until the land is accessible to the owner. The land must be accessible both

[123] Judgment of 22 April 2008, decision No. 1 Afs 13/2008-74, www.nssoud.cz.

[124] Judgment of 8 December 2005, decision No. 1 Afs 140/2004-55, No. 870/2006 Court Reports and aforementioned judgment No. 5 Afs 129/2005-110, No.1769/2009 Court Reports.

[125] Judgment of 15 February 2006, decision No. 2 Afs 28/2005-55, No. 871/2006 Court Reports.

[126] Judgment of 29 March 2006, No. 936/2006 Court Reports.

factually and legally. The legal accessibility of land means that the owner of the land is guaranteed the access path by means of one of the concepts laid down by law.

Real Estate Transfer Tax

Unlike property tax, real estate transfer tax is imposed when real property is acquired by the new owner. Succession of rights and transfer of a title to real property against payment is subject to this tax. For example, technological equipment of a petrol station is also subject to this tax[127]. In this case, even though objects are considered, which are from a technical point of view able to exist autonomously as buildings and fulfil certain specific functions independently (e. g. service stand, vacuum cleaner), they cannot be considered as independent from the point of view of the operation of a petrol station, if the purpose of the entire premises is to be sustained. The purpose is to operate a petrol station which could otherwise not work without the technological equipment.

Some of the transfers and transfers of titles to real property are exempt from taxation. This also covers the first transfer of a title or devolution of the right to a new building. The exemption from tax relates not only to transfers of titles to the real property of a building as such, but also to transfers to individual parts of a building or transfer of an undivided share of a building. It means that the transfer of a residential unit or non-residential premises, as well as a proportional part of common premises of a house or of an accessory building are subject to an exemption from taxation. However, the transfer of a share of land is not exempted from the tax[128]. The SAC also considers as first transfer against payment a situation in which the real property was already the subject-matter of a contract of sale, although the parties to the contract eventually withdrew from the contract. The first transfer need not necessarily be the first transfer which is exempted from taxation. The possibility to apply exemption from taxation is exhausted only through a transfer, in which the transferor achieves his or her economic goal and the effects of which do not extinguish later on.[129]

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[127] Judgment of 13 December 2004, No. 5 Afs 130/2004-62, No. 1018/2007 Court Reports.
[128] Judgment of 1 February 2006, No. 1 Afs 24/2005-70, No. 888/2006 Court Reports.
[129] Judgment of 22 March 2006, No. 1 Afs 57/2005-61, No. 915/2006 Court Reports.

The price of the real property represents the tax base of the tax in accordance with special provisions. An official expert estimates the value of the real property on the day when the registration of the title for the real property in the Land Register comes into effect, i. e. the estimate relates to the state of the property at the time when the property was still in transferor's possession[130]. The tax base can also consist of a contractual price, which includes all the financial considerations for the sale of the real property handed over to the seller. It also means that additional considerations expressly stated in the contract of sale, which have the character of payment for the real property, must be included in the price[131].

In this case the seller is the taxpayer and the buyer is the guarantor. The obligation of a guarantor extinguishes at the same time when the main debtor extinguishes. If the debtor extinguishes without a legal successor, then also his or her rights and duties including the tax liability become extinguished. As a result of the ancillary and subsidiary nature of the guarantor's obligation, the guarantor's liability to pay the tax arrears also becomes extinguished[132]. The situation is different if the tax administrator gives a formal notice to the guarantor to pay before the debtor extinguishes[133].

Transfer (devolution) of the title to real property can refer to the entire real property but can also refer to a share of joint ownership. Settlement of joint ownership, not even in relation to separate legal objects, does not constitute the transfer of a share of joint ownership. In case the co-owners make an agreement on real division of each object of the joint ownership whereby the value of parts of the objects allotted to each of them is the same as the value of their share in the property owned jointly, then such a termination and settlement of joint ownership is neither subject to real estate transfer tax, nor to gift tax. However, if the co-owner acquires without consideration more than what his or her share in the property used to be, then the value which exceeds the value of his share is subject to a gift tax[134].

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[130] Judgment of 12 January 2005, No. 1 Afs 76/2004-59, No. 653/2005 Court Reports.
[131] Judgment of 20 July 2005, No. 2 Afs 210/2004-81, No. 704/2005 Court Reports.
[132] Judgment of 30 November 2006, No. 1 Afs 73/2006-55, No. 1525/2008 Court Reports.
[133] See above mentioned decision No. 5 Afs 129/2005-110, No. 1769/2009 Court Reports.
[134] Judgment of 30 November 2004, No. 5 Afs 20/2003-45, No. 481/2005 and of 9 November 2006, No. 1 Afs 28/2006-77, No. 1082/2007 Court Reports.

Gift Tax

The difference between the real estate transfer tax and the gift tax lies in a transaction without consideration. All tangible values, not only real property but also movable property and other property benefits, are subject to gift tax. In decision No. 1 Afs 106/2004-57[135] the SAC interpreted the term "other property benefit" in the context of a loan contract concluded without arrangements for the payment of interest. The tax administrator considered the inexistence of an agreement on interest as property benefit on the side of the debtor, which was represented by the ordinary value of interests, and which was subject to the gift tax. The SAC reached the conclusion that other property benefit is subject to tax only if it is a direct subject-matter resulting from a legal act. Tax liability does not result only from the fact that in connection with a legal act property advantage arises to one of the parties of the contract. Therefore, conclusion of a loan contract without an agreement on interest does not represent a legal act on the basis of which the debtor acquires property benefits which would be subject to the gift tax. However, other property benefits are constituted by an obligation of a donee to pay a debt bound to the gift. The property benefit need not arise only from a situation when assets of a certain person have grown, but also from a situation when someone's obligation to perform in the future, which would amount to reduction of his or her property value, extinguishes[136].

Customs and Customs procedures

After the accession of the Czech Republic to the European Union, customs became a duty on which the Community law was directly applicable. The subject–matter of this duty is constituted by relevant matter of law relating to goods crossing the borders of customs territory, upon which the obligation to pay customs duties arises. Goods subject to import duties which are unlawfully imported into inland constitute a customs debt on importation. In this case a customs authority assesses a customs duty and also a value added tax. Customs debt arising from the detection of smuggled goods does not extinguish upon a retrospective

[135] Judgment of 28 April 2005, No. 796/2006 Court Reports.
[136] Judgment of 28 February 2007, No. 5 Afs 123/2005-44, www.nssoud.cz.

declaration stating that, in this particular case, transit in the territory of the Czech Republic was intended.[137] The liability of natural persons and legal persons for customs debt is conceived as strict liability. Liability for the correct completion of uniform customs declaration cannot be conferred on a natural person, which as a representative or as an employee of a legal person, i. e. representative of the declaring person, fills in the uniform customs declaration.[138] In case the customs were not entered in the accounts and levied after the clearance of goods as a result of deviation from customs authority, the subsequent customs check and imposition of post-clearance customs is in principle possible. Customs duty does not have to be imposed and collected if customs authorities erred and the person liable to pay customs duty adhered to all provisions in force regulating the customs declaration, acted in good faith and did not have an opportunity to find out about the error of the customs authorities.[139] It is a defect of first instance procedure in which customs duty should be imposed if the right to assess a tax expires. Any plea of prescription of this right is exercisable only in that first instance procedure and such plea cannot be invoked in the enforcement procedure. The court does not examine the plea of prescription in the enforcement procedure.[140]

Besides the customs debtor, the **guarantor** can also be liable to pay customs duty. Nevertheless, the liability of the guarantor arises only if the debtor does not pay and there is certainty about who the debtor is. Furthermore, the customs duty must be properly imposed on the debtor. Only once the debtor failed to carry out the duty, the guarantor is liable to fulfil his or her obligation. If it is not certain who is liable to pay the customs duty and there in no decision on proper assessment of the customs duty, the liability to pay for the customs debt cannot be conferred on the guarantor[141]. The decision addressed to the guarantor must also be delivered to him or her within the three year peremptory time-limit from the end of the year in which the debt incurred.[142] Joint liability of debtor and guarantor only arises up to the limit stipulated in the certificate of guarantee. After the customs debtor fulfils his or her obligation

[137] Judgment of 27 January 2004, No. 6 A 17/2000-54, No. 341/2004 Court Reports.
[138] Judgment of 27 January 2004, No. 3 As 3/2003-38, No. 389/2004 Court Reports.
[139] Judgment of 30 July 2008, No. 1 Afs 27/2008-97, No. 1701/2008 Court Reports.
[140] Judgment of 16 September 2009, No. 9 Afs 28/2009-124.
[141] Judgment of 13 April 2004, No. 5 A 99/2001-54, No. 314/2004 Court Reports.
[142] Ruling of the extended chamber of the Supreme Administrative Court of 16 October 2008, No. 9 Afs 58/2007-96 No. 1754/2009 Court Reports.

to pay up to the stipulated limit of the guarantee, the guarantor's liability extinguishes. Afterwards, it is only the customs debtor who is liable for paying the rest of the customs debt.[143] If the debtor is allowed to repay the customs debt, the guaranty, which arises out of the clearance of goods concerning the customs procedure and to which the guarantor is bound, does not extinguish. In decision No. 5 Afs 75/2007-161[144] the SAC focused also on the character of the specimen warranty document. The Court held that even though this particular document is provided for by public law, it is not possible to consider this document as an authoritative act of an administrative authority. A warranty document is issued by a guarantor. If the document does not include all the required data, it is not a reason to regard the document as invalid. If some information is missing in the warranty document which the guarantor is obliged to provide, he or she cannot invoke invalidity of the document for the reason that such information is absent.

In connection with customs and customs procedure the SAC referred its first question to the Court of Justice of the European Union for a preliminary ruling. It concerns the interpretation of Article 12 (3) of Council Directive 76/308/EEC of 15 March 1976 on mutual assistance for the recovery of claims relating to certain levies, duties, taxes and other measures. It was brought in the context of proceedings between M. Kyrian and Customs Office in Tabor (CR) concerning the review of the enforceability of an instrument permitting enforcement issued by the Principal Custom Office in Regensburg, Germany.

According to the Court of Justice[145], Czech courts do not, in principle, have jurisdiction to review the enforceability of an instrument permitting enforcement. Conversely, where the Czech court hears an action against the validity or correctness of the enforcement measures, such as the notification of the instrument permitting enforcement, that court has the jurisdiction to review whether those measures were correctly executed in accordance with the laws and regulations of the Czech Republic. Finally, the Court held that an instrument permitting enforcement must be delivered in an official language of the Member State in which the requested authority is situated.

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[143] Judgment of 27 October 2004, No. 6 As 30/2003-44, No. 824/2006 Court Reports.

[144] Judgment of 29 November 2007, No. 1492/2008 Court Reports.

[145] Judgment of the Court of Justice of the European Union of 14 January 2010, *Milan Kyrian v Celní úřad Tábor,* C-233/08.

A number of cases relating to customs law concern the correct **classification of goods within the customs nomenclature**. To find out about the exact classification of goods within the nomenclature, it is often necessary to determine its particular composition. In order to find this out, the customs authorities use customs technical laboratories as expert working places which are technically and in terms of personnel appropriately equipped to carry out the necessary analysis. The fact that these laboratories are an integral part of the organisational structure of customs administration does not diminish the probative value of the expertise exercised by those laboratories. On the other hand, the customs authorities cannot consider the expertise carried out by these laboratories to be of higher probative value than the expertise exercised by other experts of the same particular field. This applies even under circumstances that the other expertise carried out by an external expert is brought forward by the importer to prove facts produced in the customs declaration during the customs procedure[146]. Also decision No. 2 Afs 39/2004-62[147] dealt with this issue, specifically with the classification of gold ingots. Classification of these goods in the customs nomenclature under the subheadings "coin gold", which was not exempt from customs duties, had additional impact on the subject's duties to also pay value added tax. In ruling No. 1 Afs 8/2007-106[148], the extended chamber of the SAC specified rules for classification of mixtures whose composition corresponds to different numbers of Harmonised System. The Court ruled that it was important first of all to determine whether the composition of the mixture corresponds to any specific description under a certain heading, or whether it was necessary to carry out the classification according to the material or components which most characterise the mixture. At the same time, it was important primarily to take into account the nature of goods, the precise proportion of single components of the mixture and possibly its presumptive and common utilisation as well. For example, it was necessary to consider the mixture of sugar and liquorish extract, in which the latter component makes less than 1.2 % of its weight, for customs purposes as sugar with admixture of aromatic flavouring or colorant, not as "extract from liquorish with the content of 10 % of weight of saccharose without admixture of other substances" (which are

[146] Judgment of 24 October 2007, No. 1 Afs 42/2007-55, No. 1493/2008 Court Reports.

[147] Judgment of 15 July 2004, No. 382/2004 Court Reports.

[148] Judgment of the extended chamber of the Supreme Administrative Court of 17 July 2008, No. 1753/2009.

not, inter alia, subject to import quotas). The correct classification of goods within the custom nomenclature is the subject of the second question of the SAC to the Court of Justice for a preliminary ruling (Skoma-Lux[149]). The question refers to the classification of the goods labelled as "red dessert wine", to which beet sugar and corn alcohol have been added.

State Control

With respect to state control, i. e. control focused on management of public finances and material assets and the observance of obligations arising from generally binding regulations, the case-law of the SAC primarily determines the relation between state control and other kinds of control carried out by public authorities. In decision No. 5 Afs 36/2008-146[150] regarding control of disposition of subsidies for research and development, the SAC ruled that during the control of budgetary discipline the fiscal authorities shall proceed in accordance with the Act on Administration of Taxes and Fees not pursuant to the Act on State Control.

The **initiation of control procedure** represents a weak point, because the controlling authorities must give advanced notice to a person who is supposed to undergo the control, so that such a person is provided with an opportunity to defend its rights within the control procedure and if it is possible to be present at the control itself. A question arises when and who should be personally given an advanced notice. The SAC came to the conclusion that if the statutory bodies of controlled corporations are present, they must be given an advanced notice[151]. However, in cases where the statutory body is not present, e. g. when the control is exercised in one of the business premises, it suffices if the head of the particular business premises or even any of the present employees[152] are notified about the control[153].

Considering physical **presence of a controlled person** at the control itself, it is not expressly required by law. In some situations, the presence of a controlled person is even

[149] Decision of 2 September 2009, decision No. 7 Afs 11/2008-75. The Court of Justice of the European Union, *Skoma-Lux sro v Celní ředitelství,* C-339/09.
[150] Judgment of 6 November 2008, No. 1781/2009 Court Reports.
[151] Judgment of 26 January 2006, No. 8 As 12/2005-51, No. 865/2006 Court Reports.
[152] Judgment of 18 October 2006, No. 2 As 71/2005-134, No. 1067/2007 Court Reports.
[153] Judgment of 27 September 2006, No. 2 As 50/2005-53, No. 1034/2007 Court Reports.

objectionable, especially in situations when the absence of such a person can help to minimise risk of manipulation with the subject-matter of the control. Insisting on personal presence at the control of controlled persons in all cases could actually lead to a situation that the intended control would not fulfil its intended purpose. Therefore, the necessity to wait for the return of a worker in charge after his or her incapacity to work[154] or the duty of the controlling authority to notify about measuring the noise coming out of restaurant facilities in advance could actually frustrate purposes of the control[155].

Public Procurement

Part of case-law of the SAC on public procurement concerns the **deposit**, which must be paid at a stipulated time and in a stipulated amount by the complainant filing a petition for review of the acts of the contracting authority to the National Competition Authority. In decision No. 7 Afs 82/2007-87[156] the SAC dealt with a question as to whether it was possible to discontinue the proceedings initiated by the above mentioned petition in cases when the deposit was not paid duly and on time. The law does not set forth any sanctions for failure to pay the deposit; therefore it is necessary to consider the time-limit as a procedural time-limit. The SAC also stressed that failure to pay the deposit is not a defect of the petition which could be cured by the requirement to supplement the petition.

Decision No. 7 Afs 27/2007-707[157] and decision No. 2 A 7/2002-72[158] are connected with the **public procurement supervision**. In the first decision the SAC stated that courts have the jurisdiction to review decisions of the National Competition Authority only to the extent in which the public subjective rights were affected. Therefore, complainants justifiably excluded from participation in the procedure for the award of a public procurement contract are withheld from raising objections to any acts which have no connection with their exclusion and which were conducted after the exclusion. In the latter decision the SAC sought to answer the

[154] Judgment of 4 August 2005, No. 2 As 43/2004-51, No. 719/2005 Court Reports.
[155] Above mentioned decision No. 8 As 12/2005-51, No. 865/2006 Court Reports.
[156] Judgment of 21 December 2007, www.nssoud.cz.
[157] Judgment of 30 August 2007, www.nssoud.cz.
[158] Judgment of 7 April 2007, No. 680/2005 Court Reports.

question that if the contractual fine stated in the tender was lower than the contracting authority demanded, it was a reason to exclude the tenderer from the competition, or if this could be considered as an evident error in calculation, which can be corrected by the contracting authority itself in accordance with the law. The SAC came to the conclusion that there is evident error in calculation only in case the contracting authority is able to find out about the mistake on its own and remove the error without any cooperation with the tenderer. In this case no such error in calculation was at stake; therefore, the contracting authority excluded the tenderer from the competition pursuant to the law. In decision No. 2 A 9/2002-62[159] the SAC drew attention to the existence of borderlines which the public procurement supervising authority must not overstep; otherwise it would take the role of the contracting authority and evaluate the offers.

Sometimes **discrimination** of tenderers occurs in the procedure for the award of a public procurement contract. A latent form of discrimination is present where stipulation of criteria for the award of a public contract with no justification excludes *a priori* particular tenderers or all likely tenderers except for some of them (e. g. setting criterion of technical qualifications conditions obviously excessive to the size, complexity and technical difficulty of a particular public procurement).[160]

Public Sector Budgets and Subsidies

Budgetary resources can only be used in the respective budgetary year and for purposes which were determined within the state budget. If the entities do not spend the resources allocated to them for financial management within the respective budgetary year, they are not allowed to transfer the resources into the next year but they are obliged to return the resources to the state budget. It is not important for what reason the entities did not make use of the resources and whether it was or was not objectively possible for them to do so. While disposing of the budgetary resources, a receiver of a subsidy must adhere not only to the legal rule that state budgetary resources are bound to a specific time-frame and a specific purpose, but also to all conditions stated in the decision on the granting of a subsidy. The receiver of a subsidy

[159] Judgment of 16 March 2004, No. 242/2004 Court Reports.
[160] Judgment of 5 May 2008, No. 1 Afs 20/2008-152, No. 1771/2009 Court Reports.

commits an offence of budgetary discipline in cases where he or she uses the state budget resources in accordance with the purpose of a subsidy and within the budgetary year, but does not fulfil the obligations to finance the activity by his or her own resources in the amount and in the time set within the decision. The subsidy receivers can gain their own necessary resources for payment of part of the price for the subsidized work through their own economic activity or from third parties. The subsidized work must not only be completed within the calendar year but also paid. Therefore, the financial footage cannot be provided by the contractor of the work in the sense that he would wait later for the receiver's payment of the price of the work[161]. According to decision No. 3 Afs 24/2003-35[162] the moment of use of resources that come from the subsidy is connected with the moment when the invoice for goods is paid. That is because only then the receiver's disposition with the budgetary resources ends. As stated above, this moment must occur within the respective year.

In decision No. 6 A 6/2002-65[163] the SAC dealt with an issue of the right to be provided with a subsidy. The Court ruled that there is no entitlement to be granted a subsidy unless otherwise provided by a special law. In this particular case regarding the provision of a subsidy and compensatory allowance as in help to state support programs and non-production functions in agriculture, a special regulation provided that the state should grant the subsidy if the stipulated criterions were fulfilled. It means that if a natural or a legal person fulfils these stipulated criteria and applies for the provision of a subsidy or compensatory allowance, then the person is entitled to it. If a provider of a subsidy prescribes a compensatory allowance in the amount of 0 Czech Crowns within a supplementary decision, even though he prescribed the allowance in a particular range of the original decision, the provider causes non-reviewability of such decision consisting in incomprehensibility.

[161] Judgment of 28 June 2006, No. 1 Afs 92/2005-98, No. 1450/2008 Court Reports.
[162] Judgment of 13 October 2004, No. 901/2006 Court Reports.
[163] Judgment of 13 February 2004, No. 295/2004 Court Reports.

Government regulation

Government regulation is a concept which is not easy to define. In the broad sense, it includes any decision-making on behalf of the state administration which serves as an instrument of administrative regulation concerning the behaviour of the addressees of these decisions. In the narrow sense, government regulation might be perceived primarily as regulation of economic relations in individual sectors.

The disputes in the field of government regulation arise on various levels. First, administrative authorities might not agree on their competence to regulate particular conduct or on the legal framework governing particular activities. Secondly, the SAC, while ruling on cassation complaints, indirectly reviews the decisions of different sector regulators, e. g. the Office for the Protection of Competition, the Council for Radio and Television Broadcasting, the Czech Securities Commission, the Industrial Property Office, etc. in the last instance.

Jurisdiction conflicts between the various regulators are often dealt with by a special chamber of the SAC. An example of this might be decision No. Komp 3/2006-511[164]. In this case, the SAC dealt with a positive conflict of jurisdiction between the Office for the Protection of Competition and the Energy Regulatory Office. Both of them imposed a fine on the company RWE Transgas for charging an unreasonable price for gas to the so-called "eligible customers" in 2005. The Energy Regulatory Office nevertheless fined the company for the high gas price on the grounds that the Act on Prices was violated, whereas the Office for the Protection of Competition came to a conclusion that such behaviour of the company constituted an abuse of its dominant position in breach of the Act on the Protection of Competition. The SAC inferred that there was no conflict of jurisdiction in the present case;

[164] Judgment of 17 December 2007, No. 1517/2008 Court Reports.
[165] Judgment of 31 January 2007, No. 7 As 50/2006-32, www. nssoud.cz.

the company was penalized by two different authorities for having interfered with two different public interests – price proportionality on one side and the interest not to distort fair competition on the other. In case No. 7 As 50/2006 the SAC held that the agreement for the interconnection of networks might be assessed by the Office for the Protection of Competition as to its compliance with the rules of fair competition (whilst it was contended that the only competent authority was the Czech Telecommunication Office).

Conflicts as to the appropriate legal framework are reviewed during the cassation complaint procedure. For instance, in case No. 1 As 3/2007[166] the SAC faced the question as to whether the initial television broadcasting, which is being transferred to the end-user through the internet network and so-called Third generation mobile phones falls within the regulatory framework of the Act on Radio and Television Broadcasting or within the Act on Electronic Communications. The Court held that the first act is applicable as to the content of the broadcasting. The transfer of signal is nevertheless regulated by the latter.

Radio and television broadcasting

As to the indirect review of decision-making of individual sector regulators, the media often cover the review of decisions of the Council for Radio and Television Broadcasting. It is, among other things, empowered to impose fines in cases of breaching the Act on Radio and Television Broadcasting, in particular in cases when broadcasting does not comply with the requirements of decency, ethics and balanced broadcasting that are laid down by law. For instance, in July 2001, the Council for Radio and Television Broadcasting imposed a fine of 500 thousand Czech crowns for an advertisement for the chocolate wafer Fidorka. The TV spot showed a little girl on a pedestrian crossing and a car – cabriolet – which stops in front of it. The co-driver is unwrapping Fidorka. When the little girl becomes aware of this fact she triggers airbags in the car by hitting a doll against the front opening hood so that both car occupants are paralyzed and hereafter she seizes Fidorka from the co-drivers hands. A voice of an adult person comments such an action by saying: "Fidorka. Follow your instincts." The SAC confirmed the accuracy of the fine. It stated that exaggeration in advertisement is naturally possible; however, it always has to be assessed with respect to the addressee of the particular advertisement, his age

[166] Judgment of 29 August 2007, No. 1 As 3/2007-83, No. 1401/2007 Court Reports.

and intellectual maturity. The rather aggressive message on how to get a candy, which the advertisement addressed to small children, exceeded the framework of allowable exaggeration.[167]

Protection of competition

Decision-making of the Office for the Protection of Competition might be regarded as a government regulation with a major economic impact upon the particular economic operators. Its decisions both in the narrow sense of competition law (horizontal agreements, vertical agreements, abuse of dominant position) and as to the issues of concentration of competitors or public procurement review, are subject to review, in the last instance, by the SAC.

During the first seven years of its existence, the SAC sought to define the basic notions and concepts of the Czech competition law: concerted practices[168], abuse of dominant positions[169], definition of the undertaking and of the competitor[170], the action of professional chambers in the nature of bodies limiting the competition[171] and others.

In judgment No. 7 Afs 40/2007-111[172] the SAC assessed whether in cases concerning agreement on commercial representation the representative and the represented together form one single competitor. It explained a criterion of distribution of risks between the agent and the principal. The Court stated that if the representative does not take any risks resulting from his relation with the represented or if such risks are negligible, it is necessary that such persons are seen, from the point of view of the competition, as one single competitor. Furthermore, the Court pointed out the right of a dominant competitor to protect its commercial interests and to adopt necessary measures to this aim. The key question when assessing the proportionality of action is whether the specific means and the intensity of action are proportionate to the interests of the dominant competitor on the market. If the action is found not to be proportionate it is

[167] Judgment of 23 March 2005, No. 6 As 16/2004-90, No. 604/2005 Court Reports.
[168] Conf. the judgment of 9 February 2005, No. 2 A 18/2002 – 58, No. 580/2005 Sb. NSS; the case concerned the so-called „insemination cartel" – forbidden agreement between competitors as to the selling price of insemination doses.
[169] Judgment of 28 January 2005, No. 2 A 13/2002-58, No. 563/2005 Court Reports.
[170] Judgment of 29 October 2007, No. 5 As 61/2005-183, No. 1776/2009 Court Reports.
[171] Judgment of 24 September 2007, No. 5 As 55/2006-145, No. 1445/2008 Court Reports.
[172] Judgment of 3 October 2008, www.nssoud.cz.

nonetheless possible to infer an abuse of the dominant position with reference to general provisions in cases where concrete action of a dominant competitor is by its nature very close to the action listed in one of the sub merits of abuse of the dominant position.

The latest jurisprudence of the SAC after the entry of the Czech Republic to the European Union is characteristic of drawing the line between the EC competition law and the Czech Act on the Protection of Competition. An example of the latter might be judgment No. 5 Afs 9/2008-328[173] by which the Court decided that the Office for the Protection of Competition may impose fines for infringement of EC competition regulation as well as for national competition provisions.

The principle *ne bis in idem* does not hinder an administrative authority from determining the guilt for committing the infringement pursuant to both the national law and the EC law in a single decision, as this situation cannot be seen as proceedings instituted twice for the same cause of action in which a final decision was made. Moreover, the single-action concurrence of administrative offences is equally possible as the interests protected by the merits of the administrative offences according to the EC Treaty and merits according to the Act on the Protection of Competition vary. When imposing penalties for concurrent infringements, the Office for the Protection of Competition must proceed in compliance with the principle of absorption, i. e. to impose a fine for one of the concurrent infringements and within the assessment of its gravity to regard the fact that more infringements were committed as an aggravating circumstance.

Approximation of national law and law of the European Union is manifested also in the interpretation of Czech provisions regulating protection of competition. In such cases it is always necessary to apply case-law of the Court of Justice of the European Union, even if community element is absent or the court assesses facts that occurred before the accession of the Czech Republic to the European Union[174].

Industrial property

Trade marks and the review of the decision-making of the Industrial Property Office constitute another agenda which comes within the issues of government regulation. New Code on

[173] Judgment of 21 October 2008, No. 1767/2009 Court Reports.
[174] Judgment of 25 February 2009, No. 1 Afs 78/2008-721, No. 1878/2009 Court Reports.

Administrative Justice which gave rise to the dualism of review of administrative authorities' decisions (review either according to the Code of Administrative Justice or according to the fifth chapter of the Code of Civil Procedure) induced at first, in the field of trade marks, the necessity for answering the question of jurisdiction, i. e. whether the decisions of the Industrial Property Office should be subject to review by administrative courts according to the Code of Administrative justice or by civil courts according to the fifth chapter of the Code of Civil Procedure. The special chamber for dealing with jurisdiction conflicts resolved this question in favour of the administrative courts[175]. It inferred that acting on the actions against the decisions of the Industrial Property Office in reference to the registration and removal of trade marks falls within the jurisdiction of the administrative courts. A further factual review of issues relating to trade marks is focused in particular on the point of interchangeability and the distinctive character of a trade mark[176].

Consumer protection

One of the important supervisory bodies in the realm of government regulation is also the Czech Trade Inspectorate. The decision-making of that authority pursuant to Act No. 634/1992 Coll., on the Consumer Protection, is of interest. In April 2004 the Czech Trade Inspectorate fined the owner of a small hotel in Podkrkonoší for charging the customers paying by credit card a fee of 3 per cent out of the amount to be paid. The Czech Trade Inspectorate concluded that while charging such a fee, the hotel **discriminated** against a particular group of **consumers** in violation of the law and good manners. The SAC quashed the judgment which confirmed the decision of the Czech Trade Inspectorate; it inferred the contrary, i. e. that the cash payment and the payment by credit card are incomparable payment operations and, therefore, there is no question of discrimination. While cash in Czech crowns is a legitimate means of payment which every shopkeeper has a duty to accept, the credit card and the joined payment operations result from the three-party legal relationship between the card issuer, the bank and

[175] Judgment of the special chamber established according to the Act No. 131/2002 Coll. on Deciding Certain Jurisdiction Conflicts, of 6 January 2004, No. Konf 93/2003-5, No. 276/2004 Court Reports.

[176] See i. a. the judgment of 30 November 2006, No. 5 As 59/2006-85, No. 1097/2007 Court Reports or the judgment of 26 October 2006, No. 1 As 28/2006-97, No. 1064/2007 Court Reports.

the accounting holder, and it depends on the agreement between the subjects of the legal relationship. The same legal opinion was later by analogy applied to the question of the shopkeepers' duty to accept meal tickets[177].

In judgment No. 1 As 14/2006-68[178] the SAC considered the fine imposed by the Czech Trade Inspectorate to the Hradec Králové Public Transport Company which, acting as a city operator, offered a fare reduction to the persons between the ages of 65 and 70 having their permanent residence in selected towns. This action was discriminatory as the only distinctive criterion was the place of permanent residence. The aim alleged by the transport company (the town's duty of care towards its residents' needs) was legitimate; however the means to reach that aim were not proportionate. The contested provision excluded the possibility of enjoying fare reduction for people with permanent residence in other towns and in effect all foreign nationals. With reference to the jurisprudence of the Court of Justice of the EC, according to which the distinction of citizens of other EU member states constitutes discrimination on grounds of nationality, the SAC concluded that if retired individuals were to be granted cheaper fare, it should apply to all the individuals of such a group irrespective of their place of permanent residence. The SAC dealt with an analogous case in its judgment No. 4 As 63/2005-69[179] – the Liberec Public Transport Company justified the benefits granted to Czech citizens with permanent residence in Liberec by the fact that the primary portion of the financial resources in the town budget consists of tax yields obtained from individuals who have their permanent residence or seat in this town. However, the SAC did not consider the tax point of view as an adequate means to meet other legitimate objectives. In addition, the Court did not find a direct link between the payment of taxes and the price advantage.

In judgment No. 3 As 16/2007-57[180] the SAC condemned the conduct of Děčín Public Transport Company, which did not allow passengers to **familiarize themselves with pricing regulations** and the **cost of services before purchasing** them. The posted line timetable only provided information about the fact that the public transport tariff declared by the carrier was

[177] Judgment of 11 April 2006, No. 8 As 35 2005-51, No. 956/2006 Court Reports.
[178] Judgment of 8 November 2007, No. 3 As 49/2007-43, No. 1467/2008 Court Reports.
[179] Judgment of 20 December 2006, No. 1162/2007 Court Reports.
[180] Judgment of 2 October 2007, No. 14472008 Court Reports.

valid, whilst the details of this tariff were displayed behind where passengers pay in the vehicles. Displaying the transport fare at the bus station, at the seat of the transport company and on the website, are consumer-friendly steps; however, they are not sufficient to comply with the legal obligations a seller has under the Consumer Protection Act.

In judgment No. 2 As 75/2008-96[181] the SAC dealt with problem of the correct price marking of goods. A seller gave on a given day a 20 % discount on all ranges of footwear and 10 % discount on electric appliances. The goods were marked with an old price, the seller informed about sale in the press and on an information board in the department store. The Czech Trade Inspectorate imposed a fine on the seller for infringement of consumer protection regulations and for deceptive consumer transactions. The SAC, however, opposed this view and held that legal obligation of the seller to mark goods with the actual price or to inform consumers about this price in a visible place is fulfilled also in cases when a discount is expressed by a simple percentage of discount applicable to all the goods.

In judgment No. 3 As 60/2005-73[182] the SAC declared the **warranty code** of the T-Mobile company as illegal, under which one could claim only the individual components separately but not the set as a whole. The seller also arbitrarily shortened the warranty period from the legal twenty-four months to twelve. In addition, the warranty code provided that if the defect was not detected, the consumer would have to pay the costs of assessing the product. The Czech Trade Inspection imposed a fine on the seller for misleading consumers as to the purchasing conditions and for failing to inform consumers about the scope, conditions and application of liability for defects. The Court rejected the argument that the seller had the right to require the buyer to bear the cost of identifying defects in case these defects were not established, because the seller was not legally liable for any other defects than for those which were proven to be in breach of the purchase agreement after the receipt of goods during the warranty period. The Court further stated that statutory provisions on conditions and forms of accountability cannot be deviated from to the detriment of consumers.

The above mentioned examples are merely illustrative; because of the diversity and the wide scope of the SAC jurisprudence in matters regarding state regulations, this field cannot be

[181] Judgment of 13. 1. 2009, No. 2 As 75/2008-96, No. 1805/2009 Sb. NSS
[182] Judgment of 22 March 2006, No. 897/2006 Court Reports.

covered in its entirety. Similar to other fields of administrative law, this field can also contain all types of cases: starting from regulation of advertisement on funeral services[183] to decisions on starting up the nuclear power-plant Temelín[184].

[183] Judgment of 6. October 2006, No. 2 As 40/2006-71, No. 1061/2007 Court Reports.

[184] Judgments of 29 March 2007, No. 2 As 12/2006-111, and of 9 October 2007, No. 2 As 13/2006-110, both published at www.nssoud.cz.

Population

Supreme Administrative Court decisions often deal with issues relating to fundamental human rights and freedoms. These particularly include decisions concerning the right of assembly and association, the right to vote, the right to freedom of religion, the right to information, the freedom of residence and movement, and finally, matters related to population register and travel documents. Issues connected with citizenship and the rights of foreigners, who turned to the SAC primarily as asylum seekers, are also closely related to these rights.

Citizenship

In the field of acquisition and loss of citizenship in the Czech Republic it is necessary to mention case No. 6 A 25/2002-59[185]. In this judgment the SAC quashed the decision of the Ministry of Interior, which dismissed a naturalization request from a foreigner. The Ministry considered the applicant to be a citizen of the State of Palestine and not to have lost his citizenship yet. Therefore, the Ministry stayed the proceedings stating that should the applicant provide evidence that he had lost his current citizenship and to do so during the staying of the proceedings, the application would be granted "*provided that during this time no circumstances would occur which could prevent approval of the request*." The decision was to also have represented a promise that Czech citizenship would be granted. In the meantime, it was uncovered that the applicant had no citizenship, so the only standstill condition for granting citizenship had actually disappeared. However, the Ministry refused to grant citizenship for not meeting another condition, namely the condition of the applicants prevailing presence in the territory of the Czech Republic throughout the period of permanent residence. This condition was not

[185] Judgment of 20 July 2006, No. 950/2006 Court Reports.

included in the promise, although the Ministry had been aware of this fact (the applicant worked abroad). The SAC considered the practice of the Ministry to be an abuse of the freedom of discretion and to violate the principle of protecting a party to the proceedings who, in good faith, expects that the promise of using discretion in a certain manner made by the administrative authority would be adhered to if the participant met the specified conditions.

The subject-matter of case No. 1 As 26/2009-69[186] was the acquisition of citizenship by descendants of some former Czechoslovak citizens. In the instant case, the parents lost Czechoslovak or Czech citizenship during the period from 1948 to 1990 due to release from the state bond or due to acquisition of another citizenship (under the law then in force). In case the parents acquired the citizenship of the Czech Republic by declaration pursuant to Section 1 para. 1 of Act No. 193/1999 Coll., on the Citizenship of Some Former Czechoslovak Citizens, they may anytime afterwards make a separate declaration on the citizenship of the Czech Republic, also on behalf of the child. The acquisition of citizenship by a minor is not subject to the condition of including the minor in the declaration of the parent or of making declaration on behalf of the child prior to the parent's acquisition of citizenship.

In judgment No. 1 As 62/2006-82 the SAC clarified rules for losing Czech citizenship. In general, Czech citizenship ceases when a person has acquired foreign citizenship. One of the exemptions from this rule is in cases when foreign citizenship was acquired "in relation to entering marriage". The Court decided that "in relation to entering marriage" should be considered a situation of the applicant who acquired foreign citizenship at his or her (in this particular case, a woman) own request and made the request because she intended to live with her husband and family in her husband's country.

There are many cases when the SAC dealt with acquisition, maintaining, or returning citizenship in the context of the so-called Benes decrees, especially the Constitutional Presidential Decree No. 33/1945 Coll., on the Regulation of Czechoslovak Citizenship of Persons of German and Hungarian Nationality[187].

[186] Judgment of 29 April 2009, No. 1873/2009 Court Reports.
[187] E. g. judgment of 25 January 2007, No. 6 As 27/2006-74, No. 1638/2008 Court Reports.

Registers

The index of a name of a foreigner's mother to the registry book was addressed by the SAC in judgment No. 4 As 52/2004-77[188]. The registry office recorded a surname of the husband's mother in its Czech feminine form into the marriage registry book, which meant that the name ended with "-ová", in spite of the fact the husband was a foreigner with a birth certificate and all other official documents his mother possessed encompassed the surname without this ending. The spouses filed an application for rectification of the record in the Czech registry book and registry documents in order to reconcile the record with the original form of the name of husband's mother, i.e. without the suffix "-ová". The application was not granted by both the registry office and the regional authority. The defendant (regional authority) referred to Section 69 para. 1 of Act No. 301/2000 Coll., on Registers, Name and Surname, stating a feminine form of a surname should be formed in compliance with Czech grammar rules. Applying a systematic interpretation the SAC concluded this provision did not refer to the mentioned situation and should not have been used. Making a record to the marriage registry book is covered in the first part of the Act (Section 5 of Act on Registers) and recorded data are verified according to documents needed for entering into marriage under Sections 33 to 38 of the Act. The Act provides in Section 43 para. 6 of the Act that should the foreign registry documents be officially translated into Czech language and legalized, they have the same weight of evidence as public instruments. Such documents were submitted in this case, including legalization, and a registrar was required to ensure record compliance in the marriage registry book with these documents. The provisions referred to by the registry office shall apply only to the surname, which is in connection with a registry event or fact recorded in the registry book and afterwards cited on a certificate; they also regulate the use of multiple surnames and adoption of the former name after divorce. "*Nevertheless, data which reflect facts (events) to be recorded are of importance, e.g. the name of a born child (along with other information such as date of birth, place of birth, gender, etc.) and the names of persons who entered into marriage.*"

[188] Judgment of 28 December 2005, No. 833/2006 Court Reports.

Population register

The extended chamber in its decision No. 2 As 64/2005-108[189] unified case-law on the judicial review of decisions on revocation of "the record of place of residence". The previous case-law ruled that this area was excluded from judicial review[190]. The extended chamber held that the right to select the place of residence under Section 10 of Act No. 133/2000 Coll., on the Population Register, was a public subjective right, and a citizen could seek protection against its violation in a proceeding before an administrative court. Previous case-law of this Court was based on the view that unless the registration of the permanent residence created rights to an object, unless revocation of the record affected a right to vote, and unless negative consequences resulting from the revocation of record were direct, there was no public subjective right which could be infringed. The extended chamber on the contrary ruled that *"the record of place of residence"* was not only of registration importance. The above mentioned grounds simply meant that the decision of a registration office did not have civil law consequences. E.g. an entitlement to housing allowances is linked with the place of residence. The decision of the registration office may also infringe the right to vote: the right to elect members of a district or municipal assembly of a city is only for a voter who is on election day reported as having permanent residence in that district or city. Should the record of place of residence be revoked, a person can only vote for members of council of such a city district where a registration office resides. Cancellation of the record of place of residence also has an effect on the passive electoral right (right to be elected as a member of the municipal assembly), on the proof of data required for issuing an identity card, on business opportunities, if a person runs a business in the place of residence, and in other respects as well. For these reasons, the extended chamber concluded that the right to select the place of residence and the right to register in a place the citizen has chosen, is a public subjective right, and is thus not excluded from judicial review exercised by administrative courts.

The personal identification number as an original source of information on a natural person was discussed in case No. 4 As 4/2008-95[191]. In his application for a passport the

[189] Judgment of 6 February 2007, No. 1259/2007 Court Reports.
[190] Compare judgment of 23 February 2005, No. 6 As 33/2003-81, No. 1016/2007 Court Reports.
[191] Judgment of 21 January 2009, No. 1819/2009 Court Reports.

complainant filled in the personal identification number which was recorded in his birth certificate and in his current passport. However, the last figure of this number differed from the personal identification number which was recorded in the information system of the population register. As a result, a discrepancy appeared between content of the authentic instrument (official document) and the information in the register of the personal identification numbers.

The SAC held that the personal identification number can be verified merely in the register of personal identification numbers, and that the information in this register takes precedence over the data included in other sources, including the authentic documents. The personal identification number identifies a natural person who meets the conditions to be assigned a number. Everyone registered in the population register is assigned a unique number. The primary purpose of the number is to allow for tracing a person's identity by a single piece of information. The significance of the personal identification number stems from its uniqueness, which can be ensured only if the Act on Population Register determines a sole original database of personal identification numbers with an exclusive informative value. The Ministry of Interior is the only authority charged to verify the accuracy of personal identification numbers.

Personal identification number as a basic and specific instrument to identify a person also enjoys special protection. In its judgment No. 6 Aps 4/2007-65[192] the SAC dealt with a case of a complainant who had claimed protection against unlawful interference. She considered the communication from Ministry of Interior of 2007 informing her that her personal identification number changed in 1975 to be unlawful interference. Thereafter, she received a notice from the competent municipal authority that she could collect a new ID card and a new passport. The SAC first noted that in 1975 the complainant's personal identification number was indeed changed for reason of duplicity (the same personal identification number had been granted to a citizen of the Slovak Republic). Thereafter, the Court dealt with the question whether the change could in fact be implemented as late as in 2007, or whether such a change would amount to an unlawful interference pursuant to the Code of Administrative Justice. It emphasized the need to avoid interference in the legitimate interests of an individual to the extent greater than required by public interest, which is in this case to preserve the uniqueness of the personal identification number as an identifier, and an up-to-date character of the

[192] Judgment of 26 November 2008, No. 1793/2009 Court Reports.

information in the population register. Since the person with the same personal identification number as the complainant is a citizen of another state and does not reside in the Czech Republic on a long-term basis, by preserving the original personal identification number of the complainant the principle of uniqueness of the number shall not be violated. In this connection the Court remarked that the number is used as identification information not merely in relations with the state authorities but also in private relations. Therefore, in case of changing the personal identification number the person would have to take a number of measures. These "costs" cannot be born by the natural person, unless public interest is sufficiently substantiated to bring into effect the change of the personal identification number. In the instant case the interest to ensure up-to-date information in the population register is not sufficient to prevail over the interest of the person to be protected against unnecessary interference by the state.

Travel documents

In case No. 2 Aps 1/2005[193] the SAC addressed the issue of withdrawal of travel documents. The request for withdrawal was filed by an enforcement agent. The complainant received a call for the submission of documents referred to in Section 24 para. 2 of Act No. 329/1999 Coll., on Travel Documents. This provision rules that if it had been decided to withdraw a travel document or if a withdrawal could have been reasonably expected, the police or the administrative authority competent to issue the document can retain the travel documents. Upon challenge the complainant filed an action against unlawful interference. The SAC summarized the conditions for bringing such an action as follows: "*the plaintiff has to be directly (1st condition) prejudiced in her/his rights (2nd condition) by an unlawful (3rd condition) interference, instruction or coercion ('interference' in a broader sense) exercised by an administrative authority, which is not a decision (4th condition) and which is aimed directly against the person or which resulted in affecting the person consequently (5th condition), whereas 'interference' in a broader sense has to continue or its effects have to persist or there has to be a danger of repetition of 'interference' (6th condition). In order to provide for protection under Section 82 and the following Code of Administrative Justice all mentioned conditions have to be fulfilled.*" In the case of the complainant the SAC held the first two conditions had not been

[193] Judgment of 17 March 2005, No. 2 Aps 1/2005-65, No. 603/2005 Court Reports.

fulfilled, since although the call for submission of documents itself was an appealing act, it was directly unenforceable, and essentially did not violate any rights of the complainant. Should the call for the submission of passports not be abided, the complainant is at risk of forced removal, nevertheless the complainant's subjective public rights would not be interfered before the moment the documents are actually removed. As regards the complainant's request that the Court forbids the defendant to retain the complainant's passport or instructs the complainant to submit the passport, the action cannot be successful, as the 6th condition at least is not fulfilled. Removing the passport would prevent the complainant from travelling legally abroad (with the exception of the Member States of the European Union and some other countries, where travelling with an ID card is required), because he would not possess a document entitling him to cross the border. This would undoubtedly mean a direct infringement of his freedom of movement and residence guaranteed by Article 14 of the Charter of Fundamental Rights and Freedoms, which would represent a direct prejudice in his rights and which would be aimed directly against him (1st, 2nd, 4th and 5th condition). On the other hand, the complainant is protected against "interference" in a broader sense only in such a situation when the interference continues or its effects persist or when there is a danger of repetition of interference (6th condition). None of these alternatives was met in this case.

Freedom of assembly and freedom of association

Important political rights include **the right of assembly** and **the right of association** guaranteed by the Article 20 of the Charter of Fundamental Rights and Freedoms. The right of association is inter alia regulated by the Act No. 83/1990 Coll., on the Association of Citizens, and the right of assembly by the Act No. 84/1990 Coll., on the Right of Assembly.

Case No. 1 Ans 8/2005-165[194] addressed the issue of judicial protection against a failure of the Ministry of Interior to act when it did not mark a day of **registration** on a single copy of statutes of the **civil society association**. A civil society association is incorporated by a legal fiction of registration, unless the Ministry finds a reason for refusing registration under Section 9 para. 1 of the Act on Association of Citizens. The decision shall be issued only if the proposal is to be dismissed, but not if the opinion of the Ministry is positive. The date of registration is the

[194] Judgment of 29 March 2006, No. 981/2006 Court Reports.

day following the expiry of a forty-day period during which the Ministry should deliver a decision on the refusal of registration. If the Ministry refuses registration in cases when a civil society association was incorporated by legal fiction, this legal uncertainty is burdensome for newly emerging civil society associations and participants who are in legal contact with them. Thus, for reasons of legal certainty the incorporation of association is declared by a single copy of statutes with a clause for legal force. However, the denotation of the date of registration is by its nature a simple verification that such entity was registered as a civil society association; this certificate is still an official confirmation of the facts set out therein, and civil society associations can use it for proving their identity in relations with third parties, courts or authorities. According to the SAC failure to issue a certificate of incorporation of civil society association can be challenged by an action against a failure to act. Thus, Section 79 para. 1 Code of Administrative Justice cannot be applied, according to which this action cannot be filed to seek protection in a case "*a special law connects the failure of an administrative authority to act with the legal fiction that a decision with certain contents has been issued or with another legal consequence*". The Act on Association of Citizens on the one hand stipulates the legal fiction of registration in case of failure of the administrative authorities to act, but does not provide for a legal fiction in case of failure to issue a certificate of registration on the other. Therefore, judicial protection is possible.

As regards **dissolution of a civil society association**, in judgment No. 7 As 29/2008-104[195], the Court granted a cassation complaint of the civil society association *Communist Youth Union* (Komunistický svaz mládeže) against the judgment upholding the decision of the Ministry of Interior to dissolve this association. The Ministry dissolved this association in administrative proceedings on grounds of the content of its programme published on its websites. The programme encompassed ideas directed towards elimination of private ownership of the means of production and its replacement by social ownership. However, the Court held that the Ministry failed to sufficiently assess some of the criteria, which are necessary to be taken into account for dissolution of a civil society association. In particular, the criterion of necessity in the sense of the case-law of the European Court of Human Rights (i.e. whether the interference with the right of association and freedom of expression was proportionate and required by compelling social necessity) was not sufficiently reasoned. The right of association guarantees protection of opinions and freedom of expression. Even mere proclamation of certain thoughts

[195] Judgment of 28 August 2009, No. 1969/2010 Court Reports.

and propagation of certain ideas can be a sufficient reason to interfere with the right to association; however, in such cases it is necessary to insist on comprehensive grounds on the necessity to interfere. Administrative authorities cannot take action against extreme opinions and associations established for dissemination of such opinions till more than a mere hypothetical risk arises that these extreme opinions or their consequences can be really enforced and put into practice.

In judgment No. Pst 1/2008-66[196] the SAC dismissed the claim of the government to **dissolve the Workers Party** (Dělnická strana). The Court expressed in this judgment the opinion that political parties have insurmountable importance in the form of representative democracy and therefore enjoy high protection from interference with their activities by the state. The Court found that the opinion of the government that for dissolution of a political party *"it is not decisive to what extent the party or movement violates the law"* is untenable. The interference with the right of association in political parties is permissible only if it is prescribed by law and in the interests of national security or public safety, for the prevention of disorder or crime or for the protection of the rights and freedoms of others. Moreover, the interference must always be necessary in a democratic society. Thus, the reason for dissolution of a political party must be based on the cumulative fulfilment of the following conditions 1) the actions of the party are unlawful; 2) these actions are attributable to the party; 3) the actions represent a sufficiently immediate threat to the democratic state and rule of law; 4) the intended interference is proportionate to the aim pursued; i.e. the proportionality between the limitation to right of association in political parties on one hand and interests of the society to protect its values on the other hand is maintained. The burden of assertion as well as the burden of proof regarding these conditions rests upon the government in the proceedings seeking to dissolve a political party. Furthermore, the Court held that its decision is based on the factual state at the moment of adopting the decision. Therefore, dismissal of the claim to dissolve the political party in question does not exclude another claim for dissolution of the same party in future. In the instant case the government proved neither cooperation of the Workers Party with the movement National Resistance (Národní odpor; nor that this movement is an extremist neo-Nazis movement); nor radicalization of the activities of the Workers Party directed towards seizure of power through undemocratic means; nor breach of

[196] Judgment of 4 March 2009, No. 1841/2009 Court Reports.

the Act on Right of Assembly. To conclude, it was not proven in the course of the proceedings that the activities of the Workers Party in the extent alleged and proven by the government fulfilled the above mentioned conditions for dissolution of a political party.

It is necessary to distinguish a specific ground, different from the above mentioned grounds for **dissolution of a political party or movement**, leading to suspension of a political party or movement due to a breach of the duty to submit annual financial reports with legally defined elements to the Chamber of Deputies (House of Parliament). In case the reasons for suspension of a political party or movement still persist, the Court can subsequently dissolve them.

Especially nowadays the issue of permissibility of a **ban on public assemblies** is under discussion. The issues of proportionality of an assembly ban are of primary importance. In case No. 5 As 26/2007-86,[197] it was questionable whether an assembly can be banned because of the unproportional consequences it caused in transport and supply, and whether that reason could be subordinated under a legitimate reason that "*the assembly is to be held in the place where the inevitable traffic and supply reduction would be in serious conflict with the interests of inhabitants. Therefore, the assembly ban is only necessary if the traffic is to be reduced in an important place for a longer time and to a greater extent, because of the unproportional consequences it could cause in transport and supply*." The Court further held that the limitation of traffic cannot be anticipated from a possible future behaviour of a convener and that the fact that a number of people whose rights could be infringed upon by the assembly is larger than the number of participants in the assembly does not constitute a valid reason for an assembly ban; unless a serious traffic disruption of great intensity occurs. The objection of the administrative body which banned the assembly should be irrelevant when the reason for the ban was that the route of the assembly violated a hundred-meter protection zone from the seat of legislature. The administrative body could have proposed the convener another route, but had not done so. A similar issue was addressed in case No. 3 As 19/2007-55[198], in which the Court stated that a municipality acted unlawfully when it banned an assembly, which was to be held on 11 September 2006 in Prague, from 7 to 10 p. m. as a protest against military bases, terrorism, wars, armament and violence. Even in this case the SAC did not find conditions for an assembly ban to be fulfilled.

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[197] Judgment of 4 September 2007, No. 1385/2007 Court Reports.
[198] Judgment of 10 October 2007, www.nssoud.cz.

In case No. 8 As 51/2007-67[199] the SAC held that holding an assembly cannot be properly notified by a non-existent entity; if a decision on banning an assembly is already issued in such circumstances, it has to be considered unlawful. On 27 August 2007 the association *Mladí národní demokraté* (Young National Democrats) filed a notice of assembly which had to be held on the day of the so-called Crystal Night *("Křišťálová noc")*. Nevertheless, the association *Mladí národní demokraté* had not been registered until 13 September 2007, whereas only from this date the association was entitled to act as a legal person, including the notification of assembly. The Praha Municipality banned the assembly, while it should have suspended the notification and not have decided on the merits. The SAC added that every individual has, in principle, the right of assembly as a fundamental political right and the exercise of this right does not need prior permission. The Act on the Right of Assembly is very liberal: a timely notification of an assembly is sufficient. A notified assembly can be banned only for limited reasons, including, among other things, the conflict with constitutional rights of other individuals. However, in deciding such matters on infringement in fundamental human rights, including the right of assembly, it should be assessed with extreme caution and always in a way which would assure the avoidance of an exclusion of minorities from a public democratic debate. Nevertheless, in this case the assembly was not lawfully notified, so in spite of the unlawful ban, it should not have been held.

The SAC further elaborated upon these arguments in the judgment No. 8 As 7/2008-116[200]. The Court admitted that it might be possible for state authorities to ban a public assembly provided the real purpose of the assembly is divergent from the one announced and at the same time it can lead towards possible damage to the rights protected by the Act on the Right of Assembly and by constitutional order of the Czech Republic. However, there exists no general solution for a direct conflict between the right of assembly and other fundamental human rights; it will always depend on particular circumstances of the case and the principle of proportionality has to be taken into account. In the opinion of the Court, administrative authorities may ban an assembly only if they are able to prove beyond any doubt that the purpose of the assembly is such that it gives reasons for its ban. Furthermore, administrative authorities must reason their conclusion in detail and in a reviewable manner (i.e. stating the reasons and in a comprehensible manner). In the instant case, the Praha Municipality did not

[199] Judgment of 5 November 2007, No. 1468/2008 Court Reports.
[200] Judgment of 31 August 2009, No. 1953/2009 Court Reports.

sufficiently prove that the identified purpose of the assembly justifies its ban. The Court found the evidence on which the Municipality based its decision as only derivative and moreover, the municipality failed to review their validity. Although the evidence gathered led to some doubt about the announced purpose of the assembly, it did not prove the real purpose undoubtedly. Additionally, the municipality violated legitimate expectation and the principle of legal certainty of the plaintiff since it had recommended him one of the places for the assembly before, and subsequently banned it anyway.

In judgment No. 1 As 30/2009-70[201] the Court considered a case in which the municipal authority of Ústí nad Labem banned an assembly only with the reference that the limitation of the traffic caused by the assembly would be in serious contradiction with the public interest, whereas it was possible to hold the assembly at another place without much difficulty. The municipal authority did not explain thoroughly the ground for the ban in its grounds, it only stated that the density of traffic is high on some streets where the assembly should have taken place and that the traffic would have been impaired the whole day. The municipal authority did not explain why the announced assembly would be in contradiction with the public interest; to the contrary, without any further details it merely stated that the consequences of the assembly would contravene the indeterminate legal concept "public interest". The Court, furthermore, held that one-sided preference of fluency of traffic over the exercise of the right of assembly by means of a ban of the assembly would mean that the state, its authorities or self-government bodies are unable to guarantee realisation of one of the fundamental constitutional freedoms. Consequently, organisation of most of the activities connected with wide participation of public held at public places would be impaired regardless of their content (e.g. pilgrimages, sporting or cultural events, military parades or political meetings).

Electoral matters

Case-law on electoral matters can be divided into three thematic areas: registration of candidates and parties and preparation of elections; procedural aspects of judicial review in electoral matters made by the SAC; and review of in-merit issues related to elections, including an election campaign.

[201] Judgment of 15 April 2009, www.nssoud.cz.

In decision No. Vol 1/2004-46[202] the SAC addressed the question of **registration of candidates** nominated by the coalition *Za zájmy Moravy ve sjednocené Evropě* (For Interests of Moravia in Joined Europe) for elections to the European Parliament. The Ministry of Interior had refused to register three candidates nominated by the coalition because they had failed to prove to be citizens of the Czech Republic. The Ministry had called upon the coalition to produce the missing requirements with advice on ways in which citizenship can be proved, including presentation of an identity card or a travel document. The coalition sent legalized documents to the Ministry which should have proved citizenship of the candidates. Nonetheless in a case involving one of the candidates it provided only a photocopy of his identity card with the officially verified signature, stating that from 1 May 2004 notaries had lost their power to legalize a copy of an identity card. The coalition challenged the decision on the removal of a candidate from the candidate list in front of the SAC. The Court took into consideration the advice given by the Ministry to the coalition, which had stated various ways in which citizenship can be proved and upheld the decision of the Ministry.

In case No. Vol 11/2004-31[203] the SAC ruled on **registration of a political party** for elections to the Senate. The party *Sebeobrana voličů* (Voters' Self-defence) only completed the name of the candidate and paid the electoral deposit during the time limit for elimination of defects on applications. The registration of this candidate was challenged by another political movement *Nezávislí* (Independent) and by a citizen inscribed in the voters' list who sought a court decision on the invalidity of elections and voting. They argued that from the beginning the party *Sebeobrana voličů* had intended to stand as a candidate just in one constituency, but had postponed the decision to be able to better identify the constituency for its only candidate. The candidate nominated by the party *Sebeobrana voličů* advanced to the second round. Although he was not elected, the election results might have differed if another candidate had advanced to the second round. The SAC dismissed the application. The Court held that the registration of an application can be contested due to its defects only in proceedings relating to the protection in matters of registration. Unlike the proceedings on the validity of elections, in matters of registration there is a fairly short time limit of two days to challenge the decision on registration. The proposal may be brought forward by an independent candidate, a political

[202] Judgment of 5 May 2004, No. 278/2004 Court Reports.
[203] Judgment of 9 December 2004, No. 471/2005 Court Reports.

party, a political movement or a coalition which filed an application for registration. The political movement *Nezávislí* had had this standing, since it was a candidate within the same constituency, but the citizen, who herself had not applied for registration, had no standing in the matter of registration. The court added that "*in matters of registration the judicial protection is primarily focused on the decision concerning refusal of the application for registration, which could represent an unlawful barrier to free competition of political parties, or a barrier to political pluralism. If a candidate is registered, the election of this candidate further depends on the voters' free discretion*". However, even in the case of a judicial review of the registration, the SAC would find the registration of this political party legitimate. In cases of doubt law should be interpreted in favour of preserving the rights, here the right to vote and to be elected. The interpretation according to which the application for registration may have a blank form at the time of its submission is also accepted. It could be refused only if the requirements would not be properly completed within 49 days before the election.

The SAC dealt with the obligations of a hospital and of an institute of social assistance when drafting **the voters' lists** in its decision No. Vol 6/2009-22.[204] The plaintiff demanded that *"elections of all the candidates for European Parliament elected in the constituency Velké Meziříčí Mostiště are declared invalid*". Her mother, who has permanent residence in Bystřice nad Pernštejnem, was taken to hospital in this constituency. The hospital manager did not report this to the Municipal Authority in Bystřice nad Pernštejnem duly and in time, therefore she was not inscribed in the voters' list in Mostiště (town district of Velké Meziříčí), which prevented the plaintiff's mother, at 86 years of age permanently confined to bed, and other patients of the said hospital with no permanent residence in Velké Meziříčí from voting. According to the SAC it is an obligation of a hospital to inform duly and in time the voters who are placed in this facility and in cases when it can be presumed that their stay in the facility will last throughout the day of the elections concerning their possibility to take part in the elections in the respective constituency and to ask them whether they wish to be inscribed in the voters' list of the respective municipality. If the hospital did not do so in the case of the plaintiff's mother, it infringed the Act on Elections. However, the Court also concluded that with respect to the circumstances at stake this infringement could not affect the results of the elections of candidates to European Parliament.

[204] Judgment of 1 July 2009, No. 1922/2009 Court Reports.

The **responsibility of political parties for the selection of candidates** was addressed by the SAC in the decision No. Vol 65/2006-52[205]. The party *Strana zdravého rozumu* (The Party of Common Sense) protested against the TV program *Na vlastní oči* (See it yourself), where one of the independent candidates, a yoga teacher, was filmed "*doing his morning hygiene, which – for a person not interested in alternative ways of anti-consumerist life-style – is aesthetically repulsive*". The coverage was broadcast 48 hours before the election leaving the party with no opportunity to repeal this candidate or to come offer an appropriate reply to the situation. As a result of this reportage "*voting preferences of the plaintiff fell from a very promising 2% to almost zero*". The plaintiff considered that the media violated the Act on Elections by not treating small parties in the same way, especially in comparison with their approach to the four parliamentary parties and the party *"Strana zelených (Green Party)*." The SAC held that rather than the issue of liability of the TV broadcaster displaying the candidate of a political party a "*question of political accountability of the political party, which entered the name of this candidate on the list of candidates in any of the constituencies*" was fundamental. The plaintiff tried to distance itself from the candidate portrayed in the reportage. The question as to whether the candidate had been a member of the political party is irrelevant. By entering the name of the candidate on its list of candidates the applicant had freely decided that this candidate would be associated with the party. "*Deciding on which candidates are to be entered on the list of the candidates is one of the most fundamental decisions in an election contest; a political party or movement then has to be able to bear the consequences of this decision and it is part of its political responsibility to accept not only its positive but also its negative effects*."

Regarding the **procedural aspects in electoral matters**, in its decision No. Vol 5/2006-46[206] the SAC considered that making a conclusion on invalidity of the entire elections to the Assembly of Deputies is not possible. Judicial review of elections to the Assembly of Deputies is possible only under Section 87 para. 1 of the Act No. 247/1995 Coll., on Elections to the Parliament of the Czech Republic, and the Court has the capacity to rule only on invalidity of the election of individual candidates. Only a citizen registered in the permanent voters' list in the constituency where a deputy is elected has standing.

A political party, movement or coalition has the standing to challenge the validity of an election of a candidate, provided that its list of candidates was registered in such a constituency.

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[205] Judgment of 4 July 2006, www.nssoud.cz.

[206] Judgment of 26 June 2006, No. 944/2006 Court Reports.

In the case of larger parties this may pose a challenge to the election of *"all elected candidates in the entire country."* In such a situation a voter applied for an annulment of the elections to the Assembly of Deputies claiming that the activity of one political party (ODS, *Civic Democratic Party*) during the election campaign as the reason for invalidity and that this related to the entire territory. The SAC stated that a declaration of invalidity of the election of candidates nominated by the ODS in a given constituency and the appointment of substitutes, nominated by the same political party, in the case of an unfair election campaign of one political party would not represent a satisfactory solution. Another approach, however, is beyond the jurisdiction of the Court, and would even have an "*anti-constitutional dimension, because as a consequence of this approach the will of voters presented by voting for candidates would be replaced by a positive court decision upon which the candidate should be elected*." The task of the court "*cannot be a positive influence on election results in favour of the electoral bodies, since such a possibility defies by definition the elementary tasks of the judiciary*". The Court could annul the election of a candidate, in case the Act on Elections were violated and at the same time the situation could be resolved within the list of candidates of one political party or across parties. However, this would be possible "*only if a fundamental unlawfulness were discovered during voting or when scrutinizing election results (e.g. ballots were erroneously scrutinized or counted, and if the result was scrutinized correctly, the mandate would be gained by the other party)*".

Decision No. Vol 66/2006-105[207] ruled on a question of a possible unconstitutionality of Section 87 of the Act on Elections to the Parliament of the Czech Republic because of the impossibility of expressing the invalidity of the elections to the Assembly of Deputies (House of Parliament) in its entirety. The applicant, the political party *Nezávislí demokraté* (Independent Democrats), pleaded a conflict of this provision with Article 36 of the Charter of Fundamental Rights and Freedoms and compared regulations on elections to the Assembly of Deputies with the regulations on elections to the Senate under which invalidity of the elections to the Senate can be stated. The SAC once again held that a political party can challenge the election of all the candidates elected in the whole country. It ruled that "*under certain factual circumstances a proposal for the stipulation of invalidity of an election for all candidates can be successful. In fact, cases may occur where the breach of the Act on Elections is so flagrant and general that it cannot be remedied by a replacement of the elected candidates with substitutes, but it is necessary to invalidate the elections.*"

[207] Judgment of 4 July 2006, No. 948/2006 Court Reports.

Substantive issues related to elections, including election campaigns, were addressed by the SAC in several judgments of greater importance. Prerequisites for upholding electoral complaints specified the SAC in the decision No. Vol 6/2004-12[208], saying that in order to uphold this kind of electoral complaints it is necessary to meet three basic assumptions: (1) breach of electoral law, i.e. unlawfulness, (2) the relationship between unlawfulness and electing a candidate, whose election is challenged, (3) substantial intensity of the unlawfulness which at least calls into question the election of a candidate, i.e. which "*in any particular case has to achieve such a degree of intensity that it can be reasonably assumed that should the unlawfulness not occur, the candidate probably would not be elected at all. To put it simply, this intensity of unlawfulness causes 'blackout' of election results, i.e. calling them into question essentially*". The applicants objected that it had been obvious from the results of elections to the European Parliament published on the website www.volby.cz that in the constituency No. 34 no preferential vote had been given for the party *Národní koalice* (National Coalition), even though the applicants had given two preferential votes to three candidates nominated by the party. The SAC concluded that this objection did not meet the second and third condition of the test. The preferential votes are in fact counted if the party exceeds the closing clause of 5% of the total valid votes cast. However, in these elections the party *Národní koalice* had received 2,944 valid votes cast, which represented 0.12% of total votes cast. It is obvious that this party did exceed a threshold clause, so the preferential votes could not have been taken into consideration. The fact that the preferential votes had not been recorded at all indicated a mistake on behalf of the electoral commission; nevertheless this mistake could not have affected the lawfulness of an election of any of the candidates to the European Parliament.

The SAC followed the same principle also in the case of the breach of law during the election campaign. In ruling No. Vol 8/2004-35 the SAC dealt with the applicant's objection on invalidity of an election of a candidate in elections to the Senate of the Parliament of the Czech Republic. The applicant claimed that according to the Czech media, the candidate had been registered in the materials of the former third administration of the State Security Service (StB) and he concealed this fact when he entered the political party KDU-ČSL and when new Statutes were adopted. If the candidate's statement that he had been neither a member of nor a collaborator with the StB was false, his membership in the party would have ceased on the day

[208] Judgment of 2 July 2004, No. 354/2004 Court Reports.

of making the false statement. Therefore, the statement of the candidate in the election campaign that was a member of the party KDU-ČSL (*Christian Democratic Union – Czech People's Party*), was false as well. The Court examined the press articles relating to the alleged collaboration with the StB and concluded that they contain only allegations of the candidate's collaboration with the StB as a "confidant". The Court referred to decisions of the Constitutional Court, which ruled that individuals could have been recorded as "confidants" *"without their written consent to collaboration and without their knowledge"*. Placing and keeping file of these people was based on personal contact with selected candidates, and contact with such a person should have been made in such a way as not to uncover forms and methods of work of the secret service and the real reason for encounters. Since it was not possible to reliably determine the quality of a candidate's contact with the StB, not even the first condition of invalidity of an election of a candidate, i.e. a condition of unlawfulness, was fulfilled.

The objection against validity of the election of a candidate to the Senate of the Parliament of the Czech Republic was also considered by the Court in its judgment No. Vol 7/2008-13.[209] The plaintiff alleged that the prohibition of electioneering in an imminent neighbourhood of the polling station was violated. The plaintiff stated that a vehicle used for electioneering purposes, decorated with a drawing of the candidate's name, passed the entrance of a school in which a polling station was located, and a slogan asking voters to elect this candidate was broadcast from the speakers of the car. The slogan also resounded in the corridor in front of the polling station in the time when the plaintiff and his wife were preparing their ID cards. People arriving to the elections must have noted these loud slogans. According to the SAC this did not constitute a violation of law. Ruling out any influence on the voters in the surroundings of the buildings in which polling stations are located is not possible. It is not the purpose of Section 16 para. 6 of the Act on Elections to the Parliament of the Czech Republic to exclude the possibility that voters may come across, on their way to the polling station, a slogan or information related to the elections; the purpose is rather to prohibit such forms and placement of electioneering techniques that would directly affect the free will of a voter at his entry to the polling station or to the building in which the station is located. According to the Court, thus, such electioneering is prohibited if it is directly aimed at an imminent neighbourhood of the polling stations, is not one-shot or incidental, and is intensive enough

[209] Judgment of 19 November 2008, www.nssoud.cz.

to actually be capable of affecting the behaviour of a voter who had taken a decision on whom to vote for before entering the polling station.

When considering further complaints about elections to the Senate in 2008, in its judgment No. Vol 8/2008-23[210] the SAC held unfounded the objection of inappropriate election campaign; inappropriateness was alleged by the plaintiff with respect to the selection of topics for the campaign and with respect to the common efforts of the Czech Social Democratic Party (*Česká strana sociálně demokratická*) and the Communist Party of Bohemia and Moravia (*Komunistická strana Čech a Moravy*) to implement non-democratic goals. The SAC also dismissed[211] the petition filed by a candidate for the party Club of Committed Non-party Men (*Klub angažovaných nestraníků*) who objected that their election posters were covered up by posters of their political counterparties. The Court took into account that this could not affect the final election results, bearing in mind the difference between the number of votes in the first round of the elections for this candidate and the number of votes cast for the candidate of Civil Democratic Party (*Občanská demokratická strana*), who gained the second position.

In decision No. Vol 13/2004-91[212] the SAC made a comment on the secrecy of voting. Two members of an electoral commission arrived to a retirement home with a portable ballot box. There was a table with a ballot box and two heaps of ballots sorted by the names of candidates in a room of less than 4×4 meters, where the home's inhabitants with serious walking problems were expected to vote. In addition, there were two members of an electoral commission and a social worker in the room. The members of the electoral commission could see voters choosing a ballot with a candidate, who they wanted to elect; the voters put a ballot in an envelope in front of the commission members and threw it in the portable ballot box. In a few cases the voters had gone to the table in another part of the room, where they would enter the ballot into the envelope in privacy. In some cases a social worker assisted voters reading them the names of political parties and putting a ballot in the ballot box. The SAC examined whether any reason for invalidation of elections had occurred. The first of the conditions was fulfilled in this case. The members of the electoral commission did not fulfil their duty to act in a way which would preserve the secrecy of a voting. The Act on Elections did not provide any

[210] Judgment of 25 November 2008, www.nssoud.cz.
[211] Judgment of 25 November 2008, No. Vol 9/2008-33, www.nssoud.cz.
[212] Judgment of 31 December 2004, No. 472/2005 Court Reports.

means of achieving this goal (such as obligation to install a curtain or screen), nevertheless under the circumstances in this case the secrecy of voting could have been ensured by taking a ballot by voters from each of the heaps and by asking the voter to go to the table in the opposite corner of the room. The electoral commission should have enabled the voters, who had not been in condition to go to the table, to ask another voter to put the ballot into the envelope instead of them. On the other hand, the second and the third condition to annul elections were not met: the breach of law did not lead to the election of one candidate and to the electoral failure of the other. Voters could have chosen a ballot for a candidate to whom they wanted to give their vote. Even if they had taken only one ballot, it was always a ballot for a candidate who they wanted to support, and this ballot was counted. Regarding the third assumption, the intensity of infringement of the Act on Elections was not to such a degree as to lead to a "blackout" of election results. The respondent (one of the two candidates) gained 2,653 more votes, whereas only 56 voters voted in the retirement home.

Right to Information

The right to information represents a right guaranteed by the Constitution. The particular legislative regulation is incorporated in Act No. 106/1999 Coll. on Free Access to Information. The right to information about the environment is regulated by a special act and this area of the SAC adjudication will be presented below in subsection *The right to information on environmental protection*.

Pursuant to the Act on Free Access to Information, as was in force until 22 March 2006, in case the authority obliged to provide information (obliged entity) failed to comply with the request on information and at the same time failed to make any decision that the request is not granted, legal fiction stipulated that a decision was issued refusing to provide the information (referred to as 'fiction of a negative decision'). This model still applies e.g. in the area of providing information concerning the environment. However, according to the judgment of the extended chamber of the SAC No. 4 As 55/2007-84[213], if the subject responsible handed the relevant documents to post for delivery to the applicant for information within the time limit of 15 days, it complied with the obligation to provide the requested information or to issue the decision

[213] Judgment of 28 April 2009, No. 1879/2009 Court Reports.

refusing to grant the request in due time. Should the information or decision be delivered to the applicant after this 15 day period, the legal fiction of a negative decision did not occur.

The 1999 Act on Free Access to Information guarantees **the right of the public to information**. The term "information" must be interpreted in such a manner that it will not actually result in the restriction of the scope of rights granted by the Constitution. For instance, the internal instructions of administrative bodies laying down obligations for persons outside the administrative body or immediately of concern to these persons (e.g. the "D" and "DS" instructions issued by the Ministry of Finance of the Czech Republic) cannot be excluded from the right to information framework, with reference to their "internal" nature.

The right to be provided with information can be conditioned upon the **payment of indispensable expenses**. This payment may be required merely to cover expenses related to the retrieval of information directly requested by the applicant, not for expenses incurred in the process of determining whether or not the requested information may be provided.[214]

Any applicant may submit their request for information to **the obliged entities**, e.g. the entities under statutory duty to provide information relating to their jurisdiction. Among these entities, the SAC included (within the meaning of Section 2 para. 1 of the 1999 Act on Free Access to Information) inter alia the National Institute for the Heritage Preservation, which is an expert organisation established by law[215], the Office of the President of the Republic, [which is a budget organization and an organization unit of the state fulfilling the tasks connected with the exercise of the powers of the President of the Republic, both those wherein the President acts as an "administrative body sui generis" and those wherein he acts as a constitutional official (who as the Head of the State is not accountable for the acts resulting from the exercise of his office)][216], or the joint-stock company ČEZ (*Czech Energy Works*) (which manages public funds, is established by the State, and at the beginning was directly managed by the Ministry of National Property Administration and Privatization; ČEZ organs are created under the dominant influence of the State and the scope of its activities represents strategic, security and existential interests of the State; the SAC concluded that as a public

[214] Judgment of 10 October 2003, No. 5 A 119/2001-38, No. 74/2004 Court Reports.
[215] Judgment of 13 September 2007, No. 9 As 28/2007-77, No. 1402/2007 Court Reports.
[216] Judgment of 12 September 2007, No. 2 As 89/2006-107, No. 1367/2007 Court Reports.
[217] Judgment of 6 October 2009, No. 2 Ans 4/2009-93, www.nssoud.cz.

body ČEZ is an obliged entity).[217] The SAC also included among the obliged entities the Všeobecná zdravotní pojišťovna (*General Health Care Insurance Company*) which manages resources that are public and are used to cover public services, namely the service of health care.[218] In this decision, the SAC also further examined one of the grounds for restricting access to information, as stipulated by the 1999 Act on Free Access to Information. The General Health Care Insurance Company refused to provide an applicant with data on beneficiaries – the recipients of resources from the basic fund of health care insurance, and on the sums discharged from this fund, claiming that it cannot provide such information due to its mandatory confidentiality with respect to the property standing of any person who is not an obliged entity under the Act. However, as the Court held, even in the situation that the whole system of public health care insurance was premised on the existence of an exclusive health care insurance company, the information on payments issued to individual contractual parties would not represent information on property standing of these persons. This is due to the fact that payments issued to cover the costs of the received health care do not represent the sole source of income of the contractual health centres and do not predicate on the health centres' costs. To provide the actual information on property standing, income after deduction of expenditures in total would have to be known.

Protection of a business secret stands as another frequently used grounds for the restriction of information access. The given matter which should be protected as a part of the business secret must be designated as such explicitly and prior to an information request being submitted. Information related to the amount of money to be used (e.g. the prices to be paid) from the public funds cannot be withheld with reference to business secrets. The drawing of resources from public funds includes not only the direct payments, but also the waiver of payments which would otherwise represent the income of these public funds. The meaning of the provision is to enable public control of public funds management. Thus, as the information on price alone does not predicate on the way and quality of management, it is necessary to further provide at least general information on the subject-matter of a performance for which the given price is to be granted and to do so in a scope necessary to assess the economy and effectiveness of the public funds spending.[219]

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[218] Judgment of 16 May 2007, No. 3 Ads 33/2006-57, No. 1272/2007 Court Reports.
[219] Judgment of 9 December 2004, No. 7 A 118/2002-37, No. 654/2005 Court Reports.

Protection of classified information represents further grounds for restriction of access to information. In the proceedings in which the applicant requested that the text of the inter-governmental Treaty on the Discharge of the Russian Debt, entered into by the Russian Federation and the Czech Republic, is made accessible, the SAC held that the obliged entity cannot relinquish its duty to provide information claiming that the requested text of the treaty contains information delivered by the other contractual party. It is also impossible to relinquish the duty to provide information by including a clause in the treaty under which the contractual parties agreed to keep confidentiality of the contents and conditions of the treaty. Furthermore, it is even impossible to be relieved of the duty to provide information with reference to the potential breach of international commitments of the Czech Republic.[220]

Furthermore, it is also possible to refuse information in the event that **this information is disclosed on the basis of a special law and in regular predetermined periods** until the next period of such disclosure. The aim of this exception under the 1999 Act on Free Access to Information is to ensure that information which shall be made public pursuant to a special law in predetermined regular periods is not disclosed prematurely; and hence to secure equal and simultaneous access to such information for all persons interested. Thus, the obliged entity will not provide such information if it is obliged not to disclose information until the appointed time and the request for information is made before this time. After the disclosure of the given information, the legal exemption can no longer be applied and the obliged entity may refer the applicant to this disclosed information in case that the information requested falls within the definition of disclosed information at the moment when the request is being made. The 2000 Act on Municipalities cannot be regarded as a special law under this provision of the Act on Free Access to Information. Even though the Act on Municipalities stipulates the duty of municipalities to inform their citizens of activities of the municipality bodies at municipal assembly meetings, it does not impose "*an obligation of periodical disclosure*" of the minutes of the assembly meetings at the official board with respect to which obligation it would be possible to refuse access to such information.[221]

The right to information is frequently in conflict with **the right to the protection of personal data**. If an obliged entity provides the requested information, it is its duty to

[220] Judgment of 31 July 2006, No. A 2/2003-73, No. 1469/2008 Court Reports.
[221] Judgment of 27 June 2007, No. 6 As 79/2006-58, No. 1342/2007 Court Reports.

guarantee the lawful protection of rights and freedoms of other persons. In its decision No. 6 A 83/2001-39[222], the SAC held that personal data protection is provided to natural, not legal persons. Therefore, there is no reason to refuse the request of a copy of a decision rendered in a particular matter against a legal entity. The sufficient protection is provided via obliteration of the respective data in the authentic text. It is not possible to refuse to provide the whole part of the text containing such data.[223] However, information on the amount of remuneration disbursed to individual vacated officials of the municipality from the municipality budget represents personal data and its provision does not fall under the Act on Free Access to Information. Even in the event that the name and surname of the recipient of remuneration is provided in an anonymous manner, and merely the official function is stated with the remuneration, this information may represent protected personal data if such information on the office held makes it possible to identify the subject of the data, however indirectly.[224] Personal and sensitive data may also be included in the service evaluation of police members under Section 15 of Act No. 186/1992 Coll., on the Civil Service of the Police Members of the Czech Republic. However, the name and surname of a natural person in combination with the identity card's number are not considered to constitute personal data pursuant to the Act on Free Access to Information.[225]

Furthermore, the Act on Free Access to Information excludes providing information concerning **judicial decision-making of courts** except for final decisions [(Section 11 para. 4 letter b)]. In judgment No. 8 As 50/2008-75[226] the SAC dealt with a case in which the plaintiff asked for provision of specific final and not yet final judgments claiming that the cited provision does not concern the content of already rendered decisions and its aim is only to protect the activity of the court leading to a decision, but not the result of this activity. The SAC did not agree with the complainant. According to the SAC the judicial decision-making of the courts involves not only the procedure of the courts and the stages in proceedings undertaken to establish the facts of the case and to legal assessment of those facts, but also the judicial decision-making,

[222] Judgment of 13 October 2004, No. 651/2005 Court Reports.
[223] Judgment of 14 January 2004, No. 7 A 3/2002-46, www.nssoud.cz.
[224] Judgment of 10 August 2004, No. 2 As 6/2004-49, www.nssoud.cz
[225] Judgment of 29 July 2009, No. 1 As 98/2008-148, No. 1944/2009 Court Reports.
[226] Judgment of 29 April 2009, No. 8 As 50/2008-75 Court Reports.

consequently both the final and the not yet final judgments. The conclusion not to provide information concerning not yet final judgments is logical not only because these judgments, in some cases, can be reviewed and changed in crucial points, but also because there can be a strong interest of the parties on not making available the data concerning the judgments which are not final and conclusive or an interest on non-interference – in the interest of objectivity and impartiality of the assessment of each case – in the decision-making process of the courts. With reference to the same provision, the SAC dismissed by decision No. 2 As 5/2008 the cassation complaint of the complainant who insisted on being provided a copy of a liquidator's final report by the Municipal Court in Prague which was part of the file in a pending court case. The complainant argued that the Municipal Court itself temporarily released the requested information on its official notice board. Later, after the removal of the information from the official notice board, however, the court refused to provide a copy of the report.

The obliged entities further do not provide information on **ongoing criminal procedure** [Section 11 para. 4 letter a) of the Act on Free Access to Information]. According to the judgment No. 6 As 18/2009-63[227], the obliged entity shall not provide even such information that did not accrue in the course of the criminal procedure but is connected and related to the pending criminal procedure at a certain point of time. Only such information which does not relate to the criminal proceedings at all and cannot influence it at all can be provided, i.e. only information not included in the criminal file. In this case, the complainant was prosecuted in the criminal proceedings which was conducted in connection with certain information she requested, thus, the refusal to provide the requested information was justified. The Court also pointed out that the complainant, as a participant in the criminal proceedings, can gain the requested information by accessing the file according to Section 65 Criminal Procedure Code.

Education

Before 31 December 2002 some issues in the field of education were exempted from the judicial review under Annex A to the Code of Civil Justice (such as the decision of a school authority on an appeal against decisions of school principals or decisions of chancellors on appeal against decision on non-admission to a college). With effect from 1 January 2003, the Code of

[227] Judgment of 14 September 2009, No. 6 As 18/2009-63 Court Reports.

Administrative Justice abrogated Part Five of the Code of Civil Justice and its Annex A; at the same time an **exemption from the judicial review** was not replaced. This statement was confirmed by the SAC in its judgment No. 3 As 10/2003-58[228] even in the case of a distance student of a higher technical college, who had not been allowed by the school principal to repeat the first year. The student's appeal against this decision was unsuccessful; therefore, the student filed an action which was dismissed by the regional court as inadmissible with reference to the exemption from judicial review. The SAC quashed the decision of the regional court.

Nevertheless, an inspection report issued by the Czech School Inspectorate is exempted from judicial review. This conclusion was confirmed by the SAC in its decision No. 3 Aps 2/2005-44[229] issued in a case in which inspected secondary schools sought annulment of an inspection report and its non-proliferation. The report claimed that quality of teaching in these schools had been only satisfactory and the funds from the state budget were used inefficiently. The court concluded that the report "*cannot be considered as an act directly infringing upon the plaintiff's rights, since the act had not founded, changed, prohibited or imposed any rights or duties on the plaintiff*". Therefore, the school had no standing to bring an administrative action and could not seek protection against unlawful interference, instruction or coercion (see also subchapter *Administrative Proceedings* above).

The question of **reviewability of decisions**[230] in the field of education by administrative courts was addressed by SAC in decision No. 2 As 50/2004-64[231]. The Act No. 111/1998 Coll., on Universities, lists decisions that have to be in writing, must contain grounds and advice on remedies and have to be delivered to the addressee only. Until 1 January 2006 this list did not contain a decision on the **assessment of a fee** associated with the study. It was, therefore, questionable whether a notification of assessment of such a fee is reviewable by administrative courts. In the said decision the SAC concluded that this notification was reviewable, for it was an individual administrative act, "*whereby the defendant, as a legal person deciding on rights and obligations of individuals, decided about the obligation of the complainant. It is of no relevance for the*

[228] Judgment of 30 October 2003, No. 184/2004 Court Reports.
[229] Judgment of 22 February 2006, No. 860/2006 Court Reports.
[230] In order to be "reviewable" pursuant to the Code of Administrative Justice, decisions must not lack reasons and they must be comprehensible.
[231] Judgment of 30 March 2006, No. 907/2006 Court Reports.

conclusion that this is a decision under Section 65 para. 1 of the Code of Administrative Justice and that it does not meet all the formal requirements usual for a decision issued under Act No. 337/1992 Coll., on Administration of Taxes and Fees or under the Code of Administrative Procedure". These regulations are not applicable at all in the case of the contested decision, because their application is excluded by the Act on Universities.

Similarly, the chancellor's decision reviewing decisions on non-admission to a college is subjected to a judicial review. In addition, these decisions have to be properly justified, although this requirement is not expressly provided in Section 50 para. 7 of the Act on Universities (chancellor reviews a decision and changes it, should "*the issuance of a decision be inconsistent with a law, internal regulation of the university or its part or conditions under Section 49 paragraph 1 and 3*"). In judgment No. 2 As 37/2006-63[232] the SAC held that "*if the decision on appeal in administrative proceedings did not have to be properly justified and the administrative authority did not have to deal with the individual grounds given in the application for reviewing the chancellor's decision, this remedy would have no sense*". The Court at the same time referred to Section 1 letter b) of the Act on Universities, under which "*the universities as the top of the educational system provide access to higher education in accordance with democratic principles*." These democratic principles also include basic principles of administrative proceedings, such as the need to take into account the specific circumstances of a case and to make sure that when deciding identical or similar cases, making unjustified differences is avoided.

Religion and Churches

The SAC addressed the issue of a special obligation of clergy to keep the **confession secret** in connection with the performance of confession in case No. 5 As 25/2005-63[233]. The Ministry of Culture did not grant this special right to a religious community *Svědkové Jehovovi* (Jehovah's Witnesses) on the grounds that the community did not have clergy. The obligation to maintain confidentiality may in fact only bind the clergy. The basic document of the religious community in connection with the appointment and dismissal of clergy stated that the community had no clergy class. Congregations comprise the Council of Elders, which leads

[232] Judgment of 21 December 2006, No. 1112/2007 Court Reports.
[233] Judgment of 28 February 2006, No. 966/2006 Court Reports.

the activities of the congregation and carries out pastoral work. However, the complainant stated that although the community *Svědkové Jehovovi* had no clergy, so-called "elders" (men who are in congregations in charge of considering serious sins) are obliged to keep private matters confidential. From this the SAC deduced that granting this special right to the religious community would require adaptation of a part of its basic document on ways of appointment and dismissal of clergy, while state authorities cannot judge which persons in the religious community carry out clergy activities and may therefore benefit from this special right.

In case No. 5 As 17/2005-66[234] the SAC assessed whether the obligation to undergo a regular vaccination and the responsibility for ensuring a vaccination of a person under 15 years of age amounts to the **violation of freedom of thought, conscience and religious belief** and the right to manifest religion and faith (Articles 15 and 16 of the Charter of Fundamental Rights and Freedoms). Parents of minors consistently refused compulsory vaccination of their children referring to their religious belief. In such cases Act No. 258/2000 Coll., on the Protection of Public Health, allows that a decision is issued imposing the obligation to undergo vaccination. Parents argued that the statutory obligation is in conflict with Article 6 para. 2 of the Convention on Human Rights and Biomedicine (No. 96/2001 Coll. of International Treaties), providing that if a minor does not have the capacity to consent to an intervention, it cannot be carried out without authorization of his representative or an authority or a person or body provided for by law. The SAC stated that the Convention in its other part (Article 26) provides that no restrictions can be placed on the rights enshrined in the Convention *"other than such as are prescribed by law and are necessary in a democratic society in the interest of public safety, for the prevention of crime, for the protection of public health or for the protection of the rights and freedoms of others"*. In this case it was possible to subordinate the obligation to undergo the vaccination within the reason of protection of public health. The freedom of thought, conscience and religious belief and the right to manifest that religion were not violated, but performance of these rights was restricted according to law that pursues higher goals (Article 16 para. 4 of the Charter of Fundamental Rights and Freedoms), particularly the protection of public health, which is also in accordance with Article 31 of the Charter (right to protection of health).

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[234] Judgment of 28 February 2006, No. 969/2006 Court Reports. The judgment was challenged by a constitutional complaint on which the Constitutional Court has not decided until 31 December 2009. The proceedings before the Constitutional Court has reference No. III. ÚS 449/2006.

In case No. 5 A 35/2002 NSS[235] the SAC ruled on the nullity of a decision issued by the Minister of Culture which dissolved and ordered a wind-up of the ***Náboženská matice*** (public fund with a legal personality, its aim was the administration of the property of the Roman Catholic Church). The SAC held that neither the Ministry of Culture nor the Minister had powers to issue such a decision. The representatives of the Catholic Church and the Supervisory Board of the *Náboženská matice* filed an action against the Minister's decision twice. In 2004 the SAC dismissed the action as inadmissible because of lack of standing of the plaintiffs. The plaintiffs challenged this decision with a constitutional complaint. The Constitutional Court upheld the complaint[236], since the Supervisory Board of the *Náboženská matice* in its latest membership could have invoked its rights before court. In the subsequent decision[237] the SAC first examined the legal nature of the *Náboženská matice*. The Court concluded that "*it is a legal person of public law managed by the state. It is an independent subject administering part of the property of the Roman Catholic Church, for its purposes. It is a body distinct from both the Roman Catholic Church, as well as from the state.* (...) [S]*tate traditionally exercised a control over it and this usage, although it had not been fixed by law, also sustained after the year 1989*". The SAC rejected the plaintiff's argument that the emperor's decrees (which established the *Náboženská matice*) were laws by their nature, and therefore could only be nullified by a law. The SAC stated that in the era of existence of a democratic legal state based primarily on the separation of the executive, legislative and judiciary powers it was extremely difficult to compare acts issued by a monarch in an absolute monarchy, where the outlined separation of powers had not existed and all power was concentrated in the monarch's hands. Therefore, the Court based its assessment on the current rules on competencies of ministries. With regard to the legal nature of the *Náboženská matice*, which is neither a church nor a religious society, the Ministry of Culture had and has no powers to issue an act, which would dissolve the *Náboženská matice*. This procedure is not governed by any law.

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[235] Decision of 2 February 2004, No. 5 A 35/2002-29, No. 218/2004 Court Reports.

[236] Judgment of the Constitutional Court of 3 August 2002, No. II. ÚS 189/02, published on http://nalus.usoud.cz.

[237] Decision of 2 November 2006, No. 5 A 35/2002-73, No. 1060/2007 Court Reports.

International Protection (Asylum, subsidiary protection)

Decisions relating to international protection (formerly asylum law) represent a large portion of the SAC agenda. Since 1 September 2006 the grounds for providing protection by the Czech Republic have been broadened, and subsidiary protection was introduced alongside asylum.[238] The decreasing number of applicants for international protection has meant a decrease in submissions to administrative courts. In 2005, the decisions of SAC pursuant to the Asylum Act represented 57 per cent of the settled cases, in 2006, 46 per cent, and in 2007 there were only 32 per cent of such cases, and in 2008 and in 2008 the number dropped to 21 per cent.[239] Due to the large number of cassation complaints in these matters, varied case-laws have developed regarding the terms and concepts typical for international protection proceedings.

The asylum law is one of the rare areas of law in which the international element is closely linked with the domestic law. The SAC expressed its view on **the relation between international and domestic asylum law** in its judgment No. 9 Azs 23/2007-64[240]. The Ministry of Interior of the Czech Republic discontinued the asylum proceedings in the case of an asylum seeker who crossed the border irregularly. The asylum seeker objected to this decision claiming that he may be sentenced to death in Afghanistan as the investigation and search for his person was commenced in 1995 on grounds of his dissemination of non-Muslim thoughts and opinions, which he supported with evidence (warrant of arrest). The SAC clarified the relation of the domestic legal rules to the international commitment of the Czech Republic not to expel applicants for international protection to any country in which their lives or freedom might be threatened (**the non-refoulement principle**). The Court also restated that pursuant to Art. 10 of the Constitution, *"promulgated international agreements, the ratification of which has been approved by the Parliament and which are binding in the Czech Republic, shall constitute a part of the legal*

[238] This change occurred when Act No. 325/1999 Coll., on Asylum (hereinafter Asylum Act), was amended by Act No. 165/20006 Coll. This amendment served the purpose of transposing the "qualification directive" [Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ L 304, 30. 9. 2004)].

[239] Statistical overview of courts' agenda, Ministry of Justice, years 2006-2009, http://portal.justice.cz/ms/ms.aspx?j=33&o=23&k=3397&d=47145 (accessed 20. 1. 2010).

[240] Judgment of 14 June 2007, No. 1336/2007 Court Reports.

order; should an international agreement make provision contrary to a law, the international agreement shall be applied." The first part of the sentence levels the international treaties specified therein with the domestic law; the latter part of the provision imposes a duty upon the bodies applying law to act upon the international treaty when its provisions are in contradiction with the domestic rule, which otherwise should be applied in the given case. Thus, Art. 10 in conjunction with Art. 1 of the Constitution opens the Czech constitutional system to international law without violating the sovereignty of the Czech Republic. The Court highlighted that the non-refoulement principle is set in Art. 33 of the 1951 Convention relating to the Status of Refugees (no. 208/1993 Coll.), and furthermore it also arises from the rich case-law of the European Court of Human Rights with respect to Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (no. 209/1992 Coll.) (prohibition of torture, inhuman or degrading treatment or punishment). Should the domestic rules contravene this principle of international law, it is inevitable that the adjudicating body "*proceeds to the priority application of the treaty in question, and adverts from the instruction laid down by the domestic rule. Moreover, this priority of application of rules set forth in international treaties falling within the scope of Art. 10 of the Constitution also counteracts the cogent rules of the domestic law, both material and procedural.*"[241] In the given case, the domestic rule of law on termination of proceedings contravened the international commitment of the Czech Republic. Therefore, the "expulsion impediment" (predecessor of "subsidiary protection") should have been granted to the complainant (Section 91 Asylum Act[242]). Similar principles were followed in judgment No. 2 Azs 343/2004-56[243], wherein the Court held that the *non-refoulement* principle only applies to refugees, therefore not necessarily to every asylum seeker.

Due to gradual establishment of the Common European Asylum System, the SAC has often been encountered with the questions of the **relation between domestic asylum law and asylum law of the European Union**. Therefore, the Court repeatedly highlighted the requirement of interpretation in accordance with European law. In other words, the provisions of the Asylum Act have to be interpreted in accordance with "asylum directives"; this applies at the latest when the period for transposition of the directives has lapsed and regardless of any factual changes in

[241] See also judgment of 21 March 2006, No. 2 Azs 75/2005-75, www.nssoud.cz.
[242] Section 91 of the Asylum Act was revoked by the Act No. 165/20006 Coll., as of 1 September 2006.
[243] Judgment of 4 August 2005, No. 721/2005 Court Reports.

the text of those legal provisions due to the transposition[244]. This requirement has had impact on assessment of some elements of the definition of a refugee and some other notions connected with it. For instance, before the transposition of the qualification directive the adjudicator was not acknowledging the so-called "attributed" (imputed) political opinion as a ground for persecution. However, pursuant to Article 10 para. 2 of the qualification directive it is immaterial whether the applicant actually possesses the political opinion for which he or she was persecuted or has a well-founded fear of being persecuted[245]. Furthermore, in judgment No. 1 Azs 86/2008-101[246] the Court held that the decision not to grant asylum due to not fulfilling the conditions of Section 2 para. 7 of the Asylum Act contravenes the purpose of this provision provided it is based solely on the ground that the applicant failed to use the legal possibility to complain about the acts of the police in his case. Interpretation in accordance with Art. 6 and Art. 7 para. 2 of the qualification directive requires the adjudicator to gather sufficient information on the issue as to what extent the protection offered by state organs is effective in practice and whether the applicant could have had access to such protection. Additionally, the qualification directive served as a source of inspiration for the stipulation of the criteria which have to be fulfilled in order to apply the concept of the internal protection alternative[247].

In order to grant asylum seekers protection on the basis of their **refugee status** in terms of Art. 1 of the 1951 Convention relating to the Status of Refugees, it must be "reasonably likely" that in case of their re-entry to their country of origin they would be exposed to persecution for one of the grounds stated in this provision.[248] The Court further elaborated on this issue and stated that if an asylum seeker holds a significant position within a social group relevant for asylum, the adjudicator is obliged to take this fact into account and focus its inquiry in such a direction as to assess whether there exists the possibility of higher likelihood of persecution in his or her case (as opposed to ordinary members of that social group)[249].

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[244] Judgment of 13 August 2008, No. 2 Azs 45/2008-67, No. 1713/2008 Court Reports. Cf. judgment of 11 February 2009, No. 1 Azs 107/2008-78, www.nssoud.cz which stipulates the requirement of interpretation in accordance with the qualification directive also for subsidiary protection.

[245] See the above mentioned judgment No. 2 Azs 45/2008-67.

[246] Judgment of 18 December 2008, No. 1806/2009 Court Reports.

[247] Judgment of 28 July 2009, No. 5 Azs 40/2009-74, www.nssoud.cz.

[248] Judgment of 26 March 2008, No. 2 Azs 71/2006-82, www.nssoud.cz.

[249] Judgment of 30 September 2008, No. 5 Azs 66/2008-70, No. 1749/2009 Court Reports.

As indicated above, persecution must be related to the grounds of persecution; to fulfil this condition, it is not necessary that the race, sex, religion, nationality, membership of a particular social group or political opinion of the applicant form exclusive cause of persecution, it is sufficient that one of these grounds is predominant.[250] To this end, the Court stated in individual cases what can and cannot be grounds for persecution. To give a few examples, relevant grounds for asylum do not include Sharia law application per se in the case of Christian applicants fearing persecution in the Muslim part of Nigeria where the Sharia law was to be introduced,[251] nor did the environmental disaster caused by the nuclear power station accident in Chernobyl represent a relevant ground for asylum,[252] nor the lack of an exemption in the law of the country of origin from the obligatory military service should this conflict with a citizen's belief, if, apart from the lack of legislative regulation, the well-founded fear of persecution is not further substantiated with respect to the actual situation in the country.[253]

The SAC defined the membership of a particular social group as one of the grounds for international protection. In its judgment No. 5 Azs 63/2004-60[254], the Court stated that there were two practical approaches to this concept; the so-called "protected characteristics" approach and the "social perception" approach. "*The first approach emphasizes the role of an immutable characteristic which is so fundamental to any person that they should not be compelled to renounce it, such as an innate characteristic (e.g. sex, ethnicity) or a characteristic unchangeable for other reasons (e.g. the historical fact of a past association, occupation or status). In this way, particular social groups of families, women, homosexuals etc. were acknowledged. Similar results were achieved via the second approach, which examines whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large. These two approaches, however, may not reach the same conclusion where a social group is concerned which is not defined through an innate characteristic or a characteristic so fundamental to human dignity, such as, perhaps, a certain occupation or social class.*" A particular social group should not be defined by the fact itself that the group is persecuted.

[250] Judgment of 30 September 2008, No. 5 Azs 66/2008-70, No. 1749/2009 Court Reports.

[251] Judgment of 30 September 2004, No. 5 Azs 202/2004-59, No. 422/2005 Court Reports. In the given case the adjudicating body failed to assess the possibility of internal displacement of the applicants, thus the judgment quashed the decision.

[252] Judgment of 25 February 2004, No. 5 Azs 38/2003-58, No. 591/2005 Court Reports.

[253] Judgment of 10 October 2003, No. 2 Azs 15/2003-81, No. 77/2004 Court Reports.

[254] Judgment of 19 May 2004, No. 364/2004 Court Reports.

It is not necessary that the members of a particular social group know each other or associate with each other or form a cohesive group. While applying these criteria, the SAC held that "non-members of criminal structures" cannot be viewed as a particular social group.[255] On the contrary, the SAC identified a group of persons with different sexual orientation as belonging to a group with "immutable characteristics", despite the fact that in the given case the danger menacing to the applicant in his country of origin (Armenia) did not amount to persecution.[256]

In connection with the introduction of **subsidiary protection** the Court had to first solve to what extent former case-law regarding "expulsion impediment" (see above) is still applicable. Therefore, in judgment No. 1 Azs 107/2008-78[257] the SAC stated that "[a]*lthough former legislation on expulsion impediment and current legislation on subsidiary protection is alike and thus, there is no reason to refuse the conclusions of the former case-law and scholarly writing on expulsion impediment, a careful attention is necessary when interpreting subsidiary protection as regards all the nuances and partial changes which were made (e.g. repealing some grounds for expulsion impediment; different definition of the state in connection to which the threat of serious harm is assessed; definition of serious harm; absence of an exclusion clause)*".

While for granting of asylum meeting the "reasonable likelihood" standard of proof is required, for granting of subsidiary protection on grounds of prohibition of torture, inhuman or degrading treatment or punishment, the "real risk" standard of proof has to be fulfilled (i.e. there must be real risk that the applicant would face such treatment).

In judgment No. 6 Azs 307/2005-87 the Court reaffirmed that the definition of a refugee in the Convention relating to the Status of Refugees cannot be interpreted as providing direct protection for those fleeing their country of origin for reason of an **armed international conflict**. A different situation occurred after the introduction of subsidiary protection which encompasses serious harm represented by a "*serious threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict*"[258]. This issue was dealt with in judgment No. 5 Azs 28/2008-68[259] which further elaborated on the criteria set up by the judgment of the Court of Justice of the EC *Elgafaji*[260].

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[255] Judgment of 26 August 2004, No. 5 Azs 187/2004-49, No. 401/2004 Court Reports.
[256] Judgment of 5 October 2006, No. 2 Azs 66/2006-52, No. 1066/2007 Court Reports.
[257] Judgment of 11 February 2009, www.nssoud.cz.
[258] See Section 14a para. 2 letter c) of the Asylum Act.
[259] Judgment of 13 March 2009, No. 1840/2009 Court Reports.
[260] Judgment of 17 February 2009, *Elgafaji* (C-465/07, not yet published in the ECR).

There was an interesting sequel at the European Court for Human Rights to judgment No. 9 Aps 5/2007-59[261] in which the SAC *obiter dictum* expressed its view on the lawfulness of transfer and subsequent **detention** of an asylum seeker in the centre Velké Přílepy. This centre could not be, in the opinion of the SAC, considered as a detached extension of the reception centre placed in the transit zone of the international airport Praha-Ruzyně, but merely as an ordinary asylum centre of the Ministry of Interior in which persons enjoy all the rights and are subjected to all the duties resulting from this; this includes the right to leave the centre. The SAC considered the absence of acknowledgement of these rights to the asylum seeker as unlawful interference in the sense of Section 82 of the Code of Administrative Justice. Subsequently, this case was assessed by the ECtHR which held in the judgment *Rashed v. the Czech Republic*[262] that the detention of the applicant in the reception centre of the international airport and in the centre in Velké Přílepy with the aim of not allowing him to enter the territory of the Czech Republic was tantamount to deprivation of liberty in the sense of Article 5 para. 1 letter f) of the Convention for the Protection of Human Rights and Fundamental Freedoms. The Asylum Act lacked sufficient quality to be the basis for such a deprivation of liberty since it did not offer sufficient protection and legal certainty necessary for prevention of arbitrary interference by state authorities with the rights guaranteed by the Convention. Thus, Article 5 para. 1 of the Convention was violated.

Apart from the decisions presented above, the jurisprudence of the SAC has dealt with a wide range of **other matters** arising in the international protection field of law. The SAC expressed its opinion on the application of the exclusion clause (Section 15 of the Asylum Act)[263], the asylum for the purpose of family reunification[264], humanitarian asylum[265], the concept of a safe third country[266], the application of the Council Regulation No. 343/2003/EC

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[261] Judgment of 15 November 2007, No. 1459/2008 Court Reports.

[262] Judgment of the European Court for Human Rights of 27 November 2008, *Rashed v. the Czech Republic*, complaint No. 298/07.

[263] Judgment of 20 June 2007, No. 6 Azs 142/2006-58, No. 1337/2007 Court Reports.

[264] Judgments of 19 May 2004, No. 5 Azs 56/2004-56, No. 363/2004 Sb. NSS, and of 12 August 2004, No. 4 Azs 147/2004-81, No. 388/2004 Court Reports.

[265] Judgments of 17 September 2004, No. 4 Azs 6/2003-55, No. 28/2003 Sb. NSS, and of 19 July 2004, No. 5 Azs 105/2004-72, No. 375/2004 Court Reports.

[266] Judgments of 21 August 2003, No. 2 Azs 5/2003-46, No. 18/2003 Sb. NSS, and of 28 May 2004, No. 5 Azs 45/2004-51, No. 325/2004 Court Reports.

establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (so-called "Dublin Regulation")[267], and on a number of other questions.

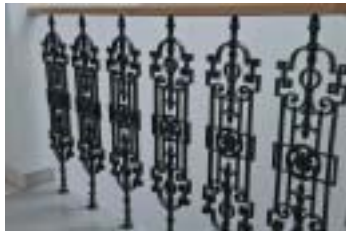
Residence of foreign nationals

Another field of law in which complainants approach the SAC and which partially mingles with international protection regards residence of foreign nationals. It is worth noting judgment No. 9 As 95/2008-45[268] in which the SAC pointed out that a foreign national does not enjoy a constitutional right to enter the territory and reside in the Czech Republic; therefore, the decision not to grant visa *per se* cannot violate his or her right for respecting private life. The refusal to allow the entry to the territory of the Czech Republic in the form of a decision not to grant visa for stay over 90 days for employment constitutes the exercise of the state's discretion; if the judicial protection is not guaranteed in such a case, it cannot be considered as contradictory with Article 36 para. 2 of the Charter of Fundamental Rights and Freedoms (right to access to courts).

[267] Judgment of 30 November 2006, No. 1 Azs 37/2006-64, No. 1125/2007 Court Reports.

[268] Judgment of 10 September 2009, No. 1955/2009 Court Reports; contrast also judgment of 22 February 2007, No. 2 Azs 156/2006-38, www.nssoud.cz.

Social Affairs, grievances and social peace



Restitution and rehabilitation

The case-law of SAC on restitution and rehabilitation mitigates the effects of the inconsistent legislation in this field. Decision No. 6 Ads 4/2006-32[269] may serve to illustrate this claim. In this case, the SAC had to deal with the fact that one and the same matter is governed by an administrative regulation as well as by law itself, while recognizing that these two do in fact often overlap. Section 33 para. 2 of Act No. 119/1990 Coll., on Judicial Rehabilitation, allows for rehabilitation of persons illegally deprived of liberty or of property in connection with the criminal offenses listed in Sections 2 and 4 of this Act. This provision, therefore, also concerns people who were taken into custody although the proceedings in their cases were later discontinued and they were never imprisoned. As to the persons who were actually imprisoned, the regulation confers on them a supplement to the pension from the moment it came into effect, i.e. 1 January 2005. Under an amendment to this regulation effective from 1 November 2005 persons listed in Section 33 of Act No. 119/1990 Coll. are also entitled to this supplement. The SAC found the inclusion of persons participating in rehabilitation under Section 33 para. 2 of Act No. 119/1990 Coll. within the ambit of persons who are entitled to a pension supplement as unequal treatment of persecuted persons, since they were entitled to such a supplement ten months later than persons who were imprisoned by the communist regime. Therefore, considering the case, the Court decided to disregard the administrative regulation in so far as this instrument does not guarantee equality for all persons participating in judicial rehabilitation, and to accept the retroactive application of standards in order to ensure the satisfactory fulfilment of the concept of justice.

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[269] Judgment of 7 March 2007, No. 1243/2007 Court Reports.
[270] Judgment of 29 June, No. 1340/2007 Court Reports.

In another case concerning the interpretation of legislation in the field of compensation, the SAC emphasized that the restitution and rehabilitation are areas where in particular ethical principles should interact with the legal principles. In judgment No. 4 Ads 49/2007-71, the Court ruled on compensation for a person whose father died in a car accident caused by a member of the Soviet troops. Under the Civil Code then in force the surviving family member was paid an amount of 2 800 Czech crowns as a recompense of his maintenance. The surviving family member also demanded compensation under Act No. 203/2005 Coll., on Compensation for Some Victims of Occupation of Czechoslovakia by Troops of the Union of Soviet Socialist Republics, German Democratic Republic, Polish People's Republic, Hungarian People's Republic and People's Republic of Bulgaria. His application was dismissed on the grounds that Act No. 203/2005 Coll. excludes any other kind of compensation if the applicant was already indemnified according to other legislation. The SAC based its reasoning on the fact that the decision making process also includes interpretation of legislation. If the administrative authority comes to different conclusions on the basis of legislative interpretation, the purpose of the law should be particularly taken into account. It was, therefore, necessary to consider whether "compensation" according to the other legislation, in this case the Civil Code, showed signs of a real compensation, i.e. compensation according the purpose of the above-mentioned law.

The SAC corrected the interpretation of conditions for granting one-time compensation to citizens who had to hide from state authorities during the Second World War on the grounds of racial discrimination (under Act No. 261/2001 Coll.). The complainant in matter No. 4 Ads 46/2007[271] stated that he and his parents and siblings had to escape from the Germans and the guards and had to hide in the forests of Slovakia. He evidenced his claims with a testimony from two people. The Czech Social Security Administration, however, did not grant him the one-time compensation. The SAC first held that the fact that Slovak Roma were victims of racial harassment during the Second World War need not be proven, as it is a fact of common knowledge, known at least historically. As to demonstrating the concept of "hiding", there is, particularly in the case of people of Roma origin, lack of evidence because people, with whom the Roma were hiding, are mostly not alive anymore. If the applicants' assertions are in accordance with the historical reality and possibilities, it is often not possible to rebut them and to exclude the possibility that the alleged situation occurred. If the complainant contended

[271] Judgment of 28 February 2008, No. 4 Ads 46/2007-69, No. 1585/2008 Court Reports.

that he was hiding in the years 1944–1945 on the grounds of racial discrimination, there is no reason not to believe it. The assessment of whether or not the applicant fulfilled the conditions of eligibility to the compensation should then be based on his assertions. In the mentioned judgment the SAC also considered *"the part of grounds of the decision in which the defendant informed the complainant that the testimonies of Mr. M. and Margita M., to which the complainant had referred, confirmed the hiding of complainant's parents and siblings, not the hiding of the complainant. As the complainant was born in 1941 and he was then 3–5 years old at the time, such reasoning seems irrational."* The defendant should deem as proven at least the duration of hiding which is not disputed even when corroborating the different data stated in the source materials.

Social security

It is also fairly common to assess the cassation complaints of people that feel aggrieved at a decision issued by a social security authority not granting them a pension or benefits of the state social support or social care, of which they subjectively feel entitled to.

In case No. 6 Ads 62/2003-31[272] the complainant argued that it was discriminatory that the citizens of Czech Republic who, during the existence of the Czech and Slovak Federative Republic (CSFR), worked for an employer with a seat in the territory of the Slovak Republic, were entitled to a lower old-age pension than those who at that time worked for employers with a seat in the Czech Republic. The SAC held that the difference between the levels of pensions granted by the two countries is due to their different approach to social issues and did not exist in the common past. Should the Czech Republic grant entitlement to compensation due to the division of the State, it would have to do so in the case of all those who participated in the pension scheme, who received any insurance period until 31 December 1992. It would in fact concern every such person, regardless of whether they were citizens of a third country, stateless persons, etc. The Czech Republic would voluntarily assume an additional responsibility beyond those commitments of CSFR, in which it succeeded. The Constitutional court, however, opposed this view and set aside the mentioned judgment of the SAC[273]. The so-called "Slovak pensions" are the subject of proceedings before the SAC quite often. Since the Czech Republic

[272] Judgment of 23 February 2005, No. 556/2005 Court Reports.
[273] Judgment of the Constitutional Court of 13 November 2007, No. IV. US 301/05, http://nalus.usoud.cz.

joined the European Union this issue now has to be viewed from European law point of view, and will be addressed by the Court of Justice of the European Union.[274]

In another case, concluded by judgment No. 3 Ads 88/2006-72, the Court dealt with the question as to whether or not the option the law offers to persons who reached the retirement age (i. e. to choose whether or not they will receive pension in concurrence with income from gainful employment for a definite period of time or whether or not they will keep on exercising the gainful activity for an indefinite period of time but without being at the same time entitled to the pension payment), amounted to undue regulation of the right to work and the right to adequate material security in old age. The SAC considered that it is socially equitable that persons who decide to keep on exercising the gainful activity without any time limitation are not entitled to payment of benefits. The legislation compensates such a situation subsequently, since the level of retirement pension of these people increases more rapidly, and in the end they are advantaged in this way. Moreover, there is not a conflict with the above-mentioned rights, as the law only regulates the condition under which the concurrence of a retirement pension with income from gainful employment is permissive.

In its judgment No. 6 Ads 8/2009-76[276] the SAC expressed its opinion relating to the grounds for providing financial compensation to mitigate some of the wrongs caused by the communist regime, which is implemented by form of a **premium to the pension**, and the only condition is that it is awarded to a recipient of an old-age or full disability pension. That is so especially because recipients of one of these types of pensions are thrown back on the allowances of pension insurance and in fact have no other possibility to acquire another regular income. Therefore, recipients of *partial* disability pension are not entitled to a premium to the pension.

The SAC further commented on the ability of the social assistance authorities to withdraw the **social assistance benefits** from job seekers on the grounds that they do not prove their inability to secure an increase of their income by their own work. In judgment No. 6 Ads 43/2005-51[277] the Court found the obligation of administrative authority to determine the

[274] The Supreme Administrative Court submitted a reference for preliminary ruling to the CJEU on 23 September 2009 within the proceedings registered under the reference No. 3 Ads 130/2008. The case at the CJEU is registered under the number C-399/09.

[275] Judgment of 28 February 2007, No. 1160/2007 Court Reports.

[276] Judgment of 12 December 2009, www.nssoud.cz.

[277] Judgment of 31 May 2006, No. 949/2006 Court Reports.

content of the concept "manifest the effort" taking into account all the circumstances of a complex social situation of the person who is receiving the benefits on a long-term basis. The Court emphasized that an individual whose income after paying all the living expenses amounts to 2,300 Czech crowns per month, can hardly do what he was advised by the social security authority, namely to buy regularly the daily press, to communicate via internet, etc. The Court ruled that the authorities should have provided the plaintiff primarily with professional consulting on how to address his complex life situations, which should be based on recognised methods of social work, and that they should also have taken into account the individual capabilities and skills of the plaintiff. As the authorities failed to act in such a way and thus withdrew the benefit from the plaintiff, they contributed to his social exclusion and breached the European Social Charter (No. 14/2000 Coll. of International Treaties).

In its judgment No. 6 Ads 22/2009-51[278] the SAC considered the issue of payment of **state social support benefit** in an amount higher than to which the recipient was entitled. The SAC noted that conditions for reimbursement of the benefit paid to the recipient without reason or in an incorrect amount are alternative, and therefore in order to issue a decision on reimbursement of unjustly received benefits (in this case accommodation benefit), it is sufficient if one of them is met. In this case the complainant did not meet her obligation of submitting a document proving her income from employment as an annex to her request for the accommodation benefit, therefore there was no more need to consider her good faith at receipt of the benefit or to consider whether, given the circumstances, she should have foreseen that the benefit was paid in higher amount than she was entitled to.

In one of the subsequent decisions[279], the Court concluded that the **advance payment of premiums** or contributions to the state employment policy in a particular month does not mean that a self-employed person really earned, in that period, the income eligible for the pension insurance. The SAC in this case assessed the conclusion of the regional court, which found that the period during which the insured was receiving health insurance benefits could not be excluded from the number of calendar days relevant for the calculation of the monthly income, since Section 47 para. 1 letter a) of Act No. 155/1995 Coll., on Pension Insurance, provides for the exclusion of the period during which the insured is receiving health insurance

[278] Judgment of 4 March 2009, No. 1902/2009 Court Reports.
[279] Judgment of 30 March 2005, No. 1 Ads 6/2003-35, No. 584/2005 Court Reports.

benefits that *replace the lost income*. In this case the insured person kept on paying advances for insurance and contributions to the state employment policy, which, according to the regional court, meant that in this period the insured person made an income eligible for the pension insurance. The SAC did not accept this view and concluded that if the insured person keeps on paying advances for insurance and contributions to the state employment policy, it does not necessarily mean that he or she reached an income eligible for pension insurance.

With the accession of the Czech Republic to the European Union the area of the **social security of migrant workers** came under the influence of the European law. The case-law of SAC reflected this fact, for instance, when ruling on the conversion of insurance periods completed in states in which these periods are calculated differently than in the Czech Republic (i.e. France in trimesters, Great Britain in weeks). In case No. 3 Ads 116/2007-81[280] the SAC held that the Czech pension authorities must recalculate only those periods of insurance of another member state which are listed in units other than units in which the insurance period is calculated in the Czech Republic. The extended chamber of the SAC considered whether nationals of a foreign country working for the employer in the Czech Republic pursuant to a contract concluded under foreign law and with no permanent residence in the Czech Republic were exempted from the participation in illness insurance by 31 December 2003, pursuant to Section 5 letter b) of the Act No. 54/1956 Coll., on Illness Insurance.[281] There was an international treaty on social security between the Czech Republic and the state of which the employee was a national (in this case with Switzerland) referring to the use of law of place of work under the same conditions as in the case of their own citizens.[282] An obligation to pay insurance premiums would follow from the participation in illness and the pension insurance system in the Czech Republic. The extended chamber concluded that Swiss employees working in the Czech Republic did not participate in the insurance system, and hence were not obliged to pay insurance premiums.

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[280] Judgment of 2 April 2008, No. 1609/2008 Court Reports.

[281] With effect as from 1 January 2009 replaced by Act No. 187/2006 Coll., on Illness Insurance.

[282] Judgment of extended chamber of the SAC of 21 July 2009, No. 6 Ads 88/2006-132, No. 1915/2009 Court Reports.

Healthcare

In the area of healthcare it is necessary to emphasize judgment No. 4 Ads 81/2005-125[283]. In this case, the SAC dealt with the question as to whether or not the decision by which the administrative authority dismisses an appeal against a medical statement rendered within the exercise of medical preventive care, by which the person was found permanently unable to perform any work, is subject to review by administrative courts. The Court concluded that the statement issued by a company preventive health care institution is solely an expert opinion. Such a doctor does not act as a person who has been entrusted to decide on the rights and obligations in the field of public administration. Such a professional opinion does not in itself interfere with the rights and freedoms of employees; it is intended only for the employers. However, the medical statement does not impose any obligation on the employer directly. It is the law that imposes an obligation on the employers not to conclude a contract with anyone who would be unable to perform some kind of work due to his health. However, the relationship between the employee and employer is a private law relationship. The medical statement cannot affect the public subjective rights of the employee. The SAC also noted that a court is only to deal with legal issues. Should judicial review of the medical statement be admitted, the court would not make any legal considerations. The review limited solely to the verification of the facts would be unprecedented in the field of administrative justice. This conclusion was accepted by the Constitutional court which dismissed the constitutional complaint against the mentioned judgment of the SAC.

Employment

The position of job seekers is frequently subject to litigation before the SAC in the field of employment. In this context, the SAC ruled, for instance, on the validity of the removal of a person from the register of persons seeking employment or assessed the conditions for entitlement to an unemployment grant.

In case No. 6 Ads 69/2004-54[284] the SAC came to the conclusion that the term "employment" used by law had to be interpreted in a broad sense. Not only those who worked in the

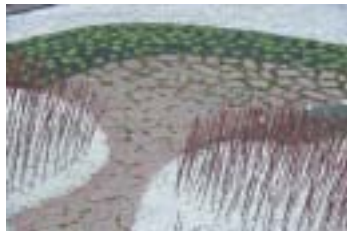
[283] Judgment of the extended chamber of 20 September 2007, No. 1554/2008 Court Reports.
[284] Judgment of 16 November 2005, No. 1091/2007 Court Reports.

employment relationship but also those working as a deputy or a judge, or even as a prisoner in prison, were entitled to an unemployment grant. The Court reached this conclusion i. a. because working prisoners pay the contribution to the state employment policy, as other employees do.

The matter of employing foreigners without residence permits was dealt with by the SAC in judgment No. 6 A 32/2001-74[285]. The plaintiff argued that he did not receive effective assistance from a job office in the sense of providing him with a labour force needed in the given time, as he was running a business in agriculture. For this reason he employed three foreigners, native Ukrainians, in spite of the fact they did not have a residence permit at their disposal. He contended that the necessity to avert crop damage is a circumstance which excludes illegality. The SAC did not agree that such an action might be a necessity and therefore non-punishable, as the prevention of one's own potential harm is not an interest protected by the employment law.

[285] Judgment of 15 October 2003, No. 211/2004 Court Reports.

Environment, national heritage protection and regional development



The field of environmental protection and its legal aspects have gone through rapid development in recent years. This is caused on the one hand by the increasing number of investments in the infrastructure, which usually involves interfering with the environment and, on the other hand, by the growing public interest in environmental issues represented, for example, by the activities of the non-governmental organizations. The legal framework has also gone through qualitative changes in relation to the Czech accession to the European Union and to the signing of some international treaties on environmental protection.

The right to information on environmental protection

The right to information on environmental protection, stipulated in Section 35 para. 2 of the Charter of Fundamental Rights and Freedoms and in Act No. 123/1998 Coll., on Access to Information on Environment, has been repeatedly interpreted by the SAC. The question at issue has been whether a subject is or is not obliged to provide information on the environment under the above-mentioned provisions. In judgment No. 5 As 46/2003-41[286] the SAC held that one of the subjects obliged to provide that information is the National Property Fund. It is actually a legal person controlled by the authority of state administration (Section 1 of Act No. 171/1991 Coll., on the Competence of Authorities of the Czech Republic in the Matters of Transfer of State Property to the Third Persons and on the National Property Fund), which is a subject obliged to provide information on environment under the Section 2 letter b) subpara. 3 of Act No. 123/1998 Coll. In decision No. 7 A 109/2001-52[287] it was held that the state company

[286] Judgment of 27 October 2004, No. 1106/2007 Court Reports.
[287] Decision of 13 April 2004, www.nssoud.cz.

Povodí Odry is neither a body of state administration, nor a body of territorial self-government, nor a legal person established, controlled or charged by these bodies under Section 2 letter b) subpara. 3 of the Act No. 123/1998 Coll. The state company Povodí Odry (*River-Basin Odra*) is, therefore, not obliged to deal with the applicants' requests to provide the information on the environment in the subject-matter.

The SAC also handled the issue of providing the information on environment by inspecting the administrative files created in the building proceedings. In judgment No. 1 As 33/2006-48[288] it ruled that the administrative authority must first handle the question whether or not the applicant was (or should have been) the participant of the building proceedings under Section 14 para. 2 of the Code of Administrative Procedure (no. 71/1967 Coll.) in conjunction with Section 70 of Act No. 114/1992 Coll., on the Conservation of Nature and Landscape. If not, thereafter the reasonableness of the request for the provision of information should have been considered under Acts No. 123/1998 Coll. or No. 106/1999 Coll. If the applicant lodges an appeal against a decision not to provide information and the appellate authority sets aside the decision to reject the provision of information, it should also simultaneously declare that it returns the matter back to the obliged authority for further proceedings (to provide the information). The appellate authority's decision on revoking the decision to reject the provision of information with the very conclusion that the applicant can submit the application anew would be unlawful.

Right to participate in decision-making in environmental matters

One of the significant aspects in connection with the right of the public to participate in the proceedings in environmental matters is the right of the civil society associations defending the interests of environmental protection to take part in the proceedings under Section 70 of the Act on the Conservation of Nature and Landscape. The SAC dealt with the exact delimitation of this authorisation. In judgment No. 3 As 8/2005-118[289] the Court held that the civil society association had a right to participate in the proceedings under Section 70 para. 2 of the Act on the Conservation of Nature and Landscape only in such proceedings capable to affect the

[288] Judgment of 31 January 2007, No. 1152/2007 Court Reports.
[289] Judgment from 7 December 2005, No. 825/2006 Court Reports.

interests defined in Section 2 para. 1 of the abovementioned Act. The participation of the civil society associations cannot be interpreted so widely that it could involve proceedings capable of affecting any part of the environment but only the parts of the environment protected by the Act on the Conservation of Nature and Landscape. The mentioned proceedings dealt with the building permission to structures sited within the enclosed spaces of the existing structures without altering the ground plan and altitudinal layout. The interests of the nature and landscape protection under Section 2 para. 1 of the Act on the Conservation of Nature and Landscape are herein defined as care for wild animals, wild plants and communities, minerals, rocks, paleontological finds and geological formations, ecological systems and landscape units, as well as of the appearance and accessibility of the landscape.

In judgment No. 7 As 29/2003-78[290] the Court ruled that the civil society associations on the basis of Section 70 of the Act on the Conservation of Nature and Landscape are not authorised to participate in the final inspection approval proceedings under the Building Act (No. 50/1976 Coll.). The judgment No. 2 As 12/2006-111[291] confirmed the previous opinion that the civil society associations are neither authorised to participate in the proceedings which would lead to granting a licence to operate a nuclear installation under Section 9 para. 1 letter d) of the Atomic Act (No. 18/1997 Coll.). At the same time the Court dismissed the objections concerning the violation of Article 6 of the Aarhus Convention (No. 124/2004 of Collection of International Treaties). In the Court's opinion the Czech Republic redeemed the commitments arising from the Convention by enabling the civil society associations to participate in the proceedings to site and approve the construction of a nuclear installation. The Court made the same conclusion previously in conjunction with the proceedings to establish the emergency planning zone under Section 3 para. 2 letter f) of the Atomic Act.[292]

The right to access to the courts in environmental matters

The question of the right of the public to access to the courts (especially of the civil society associations dealing with environmental protection) is of a great importance in the

[290] The judgment from 9 December 2004, No. 943/2006 Court Reports.
[291] Abovementioned, www.nssoud.cz.
[292] Judgment from 25 March 2004, No. 6 A 68/2000-53, č. 306/2004 Court Reports.

Court's decision-making process. Within this context the questions of so-called jurisdiction exclusions are frequented. Judgment No. 1 As 13/2007-63[293] the SAC held that the opinion on environmental impact assessment issued on the basis of Section 10 of Act No. 100/2001 Coll., on the Environmental Impact Assessment, is not a decision which could be a subject of judicial review under Section 65 of the Code of Administrative Justice. Whereas in judgment No. 7 A 198/2000-51[294] the Court stated that the binding opinion issued under Section 12 of the Act on the Conservation of Nature and Landscape is a decision which can be challenged in the court with the administrative action under Section 65 para. 1 and para. 2 of the Code of Administrative Justice. In judgment No. 8 As 47/2005-86[295] the Court held that the consent (or dissent) of the nature conservation authorities on placing the building issued on the basis of the Art. 44 of the Act on the Conservation of Nature and Landscape constitutes an administrative decision pursuant to the Section 65 para. 1 of the Code of Administrative Justice that is subject to judicial review in administrative justice.

The next question dealt with in this context was the scope of the review of administrative decision by the Court in case of an action filed by the civil society association. The SAC in judgment No. 7 A 139/2001-67[296] ruled that the plaintiff who's standing before the court was based on Section 65 para. 2 of the Code of Administrative Justice in conjunction with Section 70 of the Act on the Conservation of Nature and Landscape could only effectively object to the violation of procedural rights because the plaintiff had no subjective material rights which could be violated.

The SAC also expressed its opinion on the very question of standing to file an action involving environmental matters. According to judgment No. 5 As 19/2006-59[297] civil society associations dealing with environmental protection have the right to access the courts under Section 65 para. 2 of the Code of Administrative Justice for the purposes of judicial review of the administrative authorities' decisions in the proceedings that affect the interests of conservation of nature and landscape, but only when satisfying the conditions prescribed in Section 70 of the Act on the Conservation of Nature and Landscape (in particular they should

[293] Judgment from 29 August 2007, No. 1461/2008 Court Reports.
[294] Judgment from 13 August 2003, www.nssoud.cz.
[295] Judgment of extended chamber of 21 October 2008, No. 1764/2009 Court Reports.
[296] Judgment of 29 July 2007, No. 379/2004 Court Reports.
[297] Judgment of 19 June 2007, No. 1483/2008 Court Reports.

inform an administrative authority of their participation in the proceedings) and other conditions specified by the Code of Administrative Justice [more specifically, Section 68 letter a), i. e. exhaustion of ordinary remedies]. If the prescribed conditions are not satisfied civil society associations may not claim the judicial review of the administrative authorities under Section 66 para. 3 of the Code of Administrative Justice in conjunction with Article 9 para. 2 or para. 3 of the Aarhus Convention (No. 124/2004 Collection of International Treaties) or in conjunction with Section 10a of the Directive 85/337/EEC[298], because these provisions presume to satisfy the abovementioned conditions stipulated in the national legislation. In judgment No. 2 As 33/2007-99[299] the Court held that even the municipality concerned (or a city district of the capital city of Prague) had no access to judicial review concerning environmental matters, unless the right to participate in the administrative proceedings resulted from the respective provisions (especially from the Act on the Conservation of Nature and Landscape).

The conservation of nature and landscape

One of the possibilities on how to protect nature and landscape is to **restrict or close the activities** which could threaten them with undesired changes in general or in relation to specially protected parts of nature. The activities can be enjoined, for instance, in a situation of long-term uncontrolled offtake of water from the watercourse for running a small hydro-electric power plant[300]. The nature protection authorities are allowed to impose a prohibition of activities, regardless of whether or not the intimidation is caused by the closed or permitted activity or even by an activity ordered by an authority other than the nature conservation authority (e. g. permission for landscaping of the ground granted by the building office). The possible collision of decisions on the part of administrative authorities from different divisions of public administration must be resolved with regard to the principles of cooperation and mutual interaction of the administrative authorities.[301]

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[298] Council Directive on the assessment of the effects of certain public and private projects on the environment (OJ. L 175, 5. 7. 1985, p. 40; Special Edition 15/01, p. 248).

[299] Judgment of 12 December 2007, www.nssoud.cz

[300] Judgment of 23 July 2007, No. 7 A 28/2000-47, No. 767/2006 Court Reports.

[301] Judgment of 29 October 2008, No. 9 As 8/2008-80, No. 1765/2009 Court Reports.

In judgment No. 2 As 35/2007-75[302] the SAC dealt with the criteria for making decisions on the approval of the **interference to the landscape component** under Section 12 of the Act on the Conservation of Nature and Landscape: the interests in the economic benefit may not compensate the interests in the interference to the landscape character protection. It is, therefore, not necessary to inspect that the economic benefit of the building compensates the interference to the landscape character. When permitting the fell of the wood species outside a forest not only the aesthetic and functional significance of these wood species, but also the relevance of reasons for the felling, should be considered. The relevant reason for felling the wood species in the planned development is not given until after the planning permission on the location of the structure comes into effect. This decision shall explicitly delimitate the extent and situation of the structure and thus it must exactly determine which wood species should be felled during the realisation of the building[303].

The Court has also repeatedly dealt with the **protection of "specially protected animals"**. In judgment No. 8 As 62/2006-97[304] the Court, for example, confirmed that the origin of a specially protected animal kept in captivity [Section 3 para. 1 letter d) and Section 54 of the Act on the Conservation of Nature and Landscape] *is proven when the registered specimen is a descendant of parents who were legally kept*. Such proof (in this case made by the paternity DNA test) could not be replaced by the owner's declaration of the specimen of an animal species because that would violate the general interest in the wild fauna protection and prevention from illegal handling of it.

The protection of other components of the environment

In judgment No. 6 A 51/2001-30[305] the SAC inquired into the question of payments for **air pollution**. It held that the operator of the air pollution sources (who is a person having the right or actual possibility to operate the source) had the obligation to pay the air pollution charges due to running the large stationary source. There is no such possibility to transfer this obligation by contract onto another person.

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[302] Judgment of 9 November 2007, No. 1498/2008 Court Reports.
[303] Judgment of 21 August 2008, No. 4 As 20/2008-84, No. 1788/2009 Court Reports.
[304] Judgment of 27 September 2007, No. 1443/2008 Court Reports.
[305] Judgment of 18 March 2004, No. 494/2005 Court Reports.

In judgment No. 5 A 81/2001-46[306] the Court dealt with **water protection**. It ruled that if a water authority finds out that the surface water or groundwater was polluted or its quality was endangered by illegal drainage or use of harmful substances and the water authority identifies the causer of this detrimental situation, then it is obliged to impose corrective actions to rectify this situation without any consideration or discretion whether to impose it or not.

The waste

According to judgment No. 7 A 30/2002-98[307] **deposition** of materials, which come under the category of **waste,** in the location where only the environmental friendly scree should be deposited (under the valid planning permission) for the purposes of recultivation of a quarry, is a violation of the obligation stated in Section 3 para. 4 of the Act No. 125/1997 Coll., on Waste, stipulating that waste under this Act may be processed, recovered or disposed only in facilities, places and objects intended for such waste and, therefore, it is also an administrative offence under the mentioned act. In judgment No. 6 A 79/2001-53[308] the Court ruled that the waste producer is responsible for waste management until the waste is transferred to the entitled person, who is, among others, the owner of the landfill. If a legal person which is not an entitled person under the Act on Waste enables the waste producer to deposit the waste on land not determined to deposition of waste, the waste producer may not call for joint responsibility of this legal person. Judgment No. 5 A 73/2002-34[309] says that it is not possible to accept the statement of a person punished by a fine under Section 3 para. 4 of the Act on Waste, that the waste involved was left on the construction site by third persons without the person's awareness. It is also not possible to accept the allegation that this person disposes of the waste in a legal manner if local inspection of the premises and the "price-list of the deposited waste" for buying-out the waste proves that this waste was really taken on by this person, and if from the traces of incineration found it is not possible to exclude that the waste was disposed in an irregular way.

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[306] Judgment of 25 November 2003, No. 313/2004 Court Reports.
[307] Judgment of 25 May 2004, No. 667/2005 Court Reports.
[308] Judgment of 3 December 2003, No. 245/2004 Court Reports.
[309] Judgment of 20 November 2003, No. 296/2004 Court Reports.

Referring to the international **transport of waste**, the SAC in judgment No. 2 As 44/2007-212[310] clarified the difference between energy recovery and disposal of waste and the conditions related with the transport of waste between the member states of the EU in conformity with the case-law of the Court of Justice of the European Communities. The SAC ruled that the operation of waste management in a facility where the waste shall be transported to make the classification of the cross-border transport of waste – in cases where the transport of waste is determined for energy recovery – may concurrently fulfil four criteria: (1) the main purpose is to generate energy; (2) the energy generated and gained must be higher than the energy consumed and the part of the energy surplus must be effectively used for their own needs or for the needs of third persons; (3) the better part of the waste must be consumed and better part of energy must be processed and recovered; and (4) after ignition the waste does not need any auxiliary fuel to burn. When permitting the cross-border transportation of waste destined for energy recovery, it is also necessary to take into account the purpose of the facility which the operation would be managed in. If the facility meets at least one of the conditions for incineration of waste stipulated in Section 23 para. 1 of the Act No. 185/2001 Coll., on Waste, it represents a facility determined for the energy recovery of waste. In spite of comprehensive jurisprudence of the Court of Justice of the European Union and the abovementioned decision of the Court, this question still raises doubts. Therefore, the Court decided to refer the question for a preliminary ruling directly to the European Court of Justice[311].

In judgment No. 5 As 24/2008-92[312] the Court dealt with definition of participants of the cross-border waste transportation procedure under Section 55 para. 1 of the Act on Waste. The Court pointed out that the recipient of waste is not a participant of the procedure. The Court rejected the argument that the result of administrative procedure disallowing the recipient of waste to participate in the proceedings and, therefore, to demand the fulfilment of the contractual obligation constitutes an interference to his rights and lawful interests. In case of collision of Section 55 para. 1 of the Act on Waste and Section 14 para. 1 of the Code of Administrative Procedure, a special act should be given priority. The special act is the act with

[310] Judgment of 31 October 2008, No. 1768/2009 Court Reports.

[311] Decision of 8 July 2009, No. 5 As 49/2009-138. The case is registered at the Court of Justice of the European Union under No. C-299/09.

[312] Judgment of 26. 3 .2009, č. 1861/2009 Court Reports.

a stricter scope (whether substantial or personal), i.e. in this case Section 55 para. 1 of the Act on Waste.

Territorial Planning and Construction Law

In this area the SAC first of all had to deal with the new essential legal regulation, i.e. the Act No. 183/2006 Coll., on Territorial Planning and the Building Code (The Building Act) which came into force on 1 January 2007 replacing the "old" Building Act (No. 50/1976 Coll.).

The Court dealt with the territorial planning mainly in context of motions to quash the measures of general nature pursuant to Section 101a of the Code of Administrative Justice. Not only the acts issued directly in a form of measures of general nature under the new Building Act or territorial planning documentation issued under the old Building Act in a form of generally binding regulation are subject to judicial review under these provisions, but also building bans issued pursuant to the old Building Act in form of ordinance of the municipal council.[313] The jurisprudence has also dealt with the question regarding which persons are entitled to raise objections in the procedure of procurements of territorial plans. The objections can be raised not only by the real estate owners in the areas designed as areas with development potential, but also by owners of real estate directly neighbouring these areas and in specific circumstances even by owners of the more remote estate properties[314]. A person once entitled to raise objections may by raising objections express his or her disapproval even with procedure of procurement of the territorial plan or with those parts of the draft by which his or her real estate properties are not directly affected[315]. On the other hand, the representative of the public, despite his entitlement to raise objections against the draft of the territorial plan, is not entitled to submit an action to quash the territorial plan in the procedure pursuant to the Section 101a and the following of the Code of Administrative Justice[316] and the lessee of real estate is also not entitled to submit the petition in the area regulated by the territorial plan.[317] The territorial planning

[313] Judgment of 16 July 2009, No. 6 Ao 2/2009-86, www.nssoud.cz.
[314] Judgment of 24 October 2007, No. 2 Ao 2/2007-73, č. 1462/2008 Court Reports.
[315] Judgment of 23 September 2009, No. 1 Ao 1/2009-185, www.nssoud.cz.
[316] Decision of 25 June 2008, No. 5 Ao 3/2008-27, No. 1679/2008 Court Reports.
[317] Judgment of the extended chamber of 21 July 2009, No. 1 Ao 1/2009-120, No. 1910/2009 Court Reports.

documentation issued in the form of measures of general nature must contain grounds that satisfy the basic requirements on the substantiation of administrative decisions[318]. The content of the territorial planning documentation must be in line with the principles of transparency and comprehensibility.[319]

The Court also dealt with other provisions of the new Building Act. It made clear that building bans issued pursuant to the old Building Act in the form of ordinance of the municipal council did not lose their effect even after that new Building Act entered into force.[320] The municipality has no opportunity to issue a building ban based on discretion of its elected representatives, it must respect legally stipulated conditions of issuance.[321] The Court also settled the question of participation in building procedure (Section 109 of the new Building Act) and preserved the extensive interpretation of the term "neighbouring real estate property" and of "direct affecting of rights" in compliance with the case-law to the old Building Act.[322] Considerable attention was paid to the Court's conclusion that the planning approval issued pursuant to Section 96 of the new Building Act must be considered as an administrative decision in terms of Code of the Administrative Procedure and appeal against it is admissible, as well as bringing an administrative action against the appellate body's decision.[323] From the procedural point of view, the Court held that the developer's right to build the structure accrues by notification even if it is subject to the issuance of a permit, unless the building office stays the procedure by decision under the Section 105 of the new Building Act in the time limit of 40 days from notification of such structure.[324]

[318] Judgment of 16 December 2008, No. 1 Ao 3/2008-136, No. 1795/2009 Court Reports.
[319] Judgment of 30. October 2008, No. 9 Ao 2/2008-62, No. 1766/2009 Court Reports.
[320] Judgment of 20. June 2007, No. 1 Ao 3/2007-60, No. 1341/2007 Court Reports.
[321] ibid.
[322] Judgment of 17 December 2008, No. 1 As 80/2008-68, No. 1787/2009 Court Reports.
[323] Judgment of 22 January 2009, No. 1 As 92/2008-76, No. 1814/2009 Court Reports.
[324] Judgment of 25 July 2009, No. 7 As 10/2009-86, www.nssoud.cz.

Culture

In judgment No. 5 A 48/2002-40[325] the Court expressed its opinion concerning the nature of the decision on proclamation of work as a national heritage monument. Such a decision constitutes the limitation of the property right in public interest that shall be reimbursed to the owner.

In judgment No. 1 As 93/2008-95[326] the Court held that the state company which has a right to manage the land, at which castle ruins proclaimed as the cultural monument are located, also has a duty to care for these ruins. The castle ruins without cognizable arrangement of the first floor are not a structure (building) but a component part of the land (Section 120 of the Civil Code).

Regarding the **intellectual property law** in case No. 5 As 38/2008[327] the Court referred a question for a preliminary ruling to the European Court of Justice. The SAC asked if the graphical user interface or part of it, for the purposes of the copyright protection of a computer program as a work under the Council Directive 91/250/EEC[328], can be considered as an "*expression in any form of a computer program*".

[325] Judgment of 12 May 2004, No. 733/2005 Court Reports.
[326] Judgment of 22. 1. 2009, č. 1828/2009 Court Reports.
[327] Resolution of 16 September 2009, No. 5 As 38/2008-182; The Court of Justice of the European Union, case No. is C-393/09.
[328] Council Directive of 14 May 1991 on the legal protection of computer programs (OJ 1991 L 122, p. 42).