

## Factual Summary of the Content of the Legal Action Brought by the Czech Republic against the European Parliament and the European Council

1) The Czech Republic is taking legal steps against the European Parliament and the European Council for the annulment of the Directive of the European Parliament and of the Council from May 17th 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons.

2) The Czech Republic is also applying for suspension of implementation of the Directive of the European Parliament and of the Council from May 17th 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons.

### I. The basis of the action and a summary of the pleas in law.

The Czech Republic is requesting an annulment of the Directive of the European Parliament and of the Council from May 17th 2017 amending Council Directive 91/477/EEC on control of the acquisition and possession of weapons through legal means by asking the court to declare this directive invalid according to article 263 of the Treaty on the Functioning of the European Union (further referred to as “TFEU”).

1. The Czech Republic suggests annulling the directive in question, because the Union legislature infringed the principle of conferral by adopting the directive. The adoption of the directive in question was based upon article 114 TFEU, even though it does not pursue the objective of removing obstacles to the Single market, but only the aim of preventing crime and terrorism. The Union has, however, no authority to adopt harmonizing measures in this particular area.

2. In addition the Czech Republic states that the directive must be annulled for infringing the principle of proportionality. The Union legislature did not take into account at all the question of proportionality of the measures being taken and was fully aware of not having gathered enough information to make a reasonable assessment of compliance with this principle. The absence of such an assessment led to the adoption of such measures by the Union legislature which are evidently disproportionate when considering the pursued objectives.

3. The third plea in law supporting the annulment is made on the basis of the infringement of the principle of legal certainty. A vast number of provisions of the directive are not adequately clear or precise enough to allow the concerned bodies to positively identify their rights and obligations.

4. The fourth plea in law exclusively concerns article 1 point 6 of the directive in question, in which it adds article 6 paragraph 6 second subparagraph to the directive 91/477/EEC, and this reasoning is based on presumption of the infringement of the principle of non-discrimination. Even though the included exception makes, on the one hand, the impression of a neutral measure, it actually is, on the other hand, made exclusively for Switzerland, and the application conditions lack any objective reasoning at all when considering the objectives of the directive in question.

Above all the Czech Republic suggests the General Court annuls the directive in question as a whole. Only if the General Court concludes that annulling of the directive in question based upon the above mentioned pleas in law is impossible, the Czech Republic is requesting an annulment of just some controversial provisions of the directive.

### II. Recapitulation of the adoption process of the directive

The introductory part of the claim of the Czech Republic is focused on a thorough description of the

controversial aspects of the adoption process of the directive in question. The main purpose of this part of the claim primarily is to demonstrate the lack of carrying out of sufficiently thorough preparations and discussions of the directive in question as well as the significant controversy of changes being implemented by the directive in question even at the time of the directive adoption process.

First, in this context the Czech Republic emphasizes the fact that the proposal of the directive was accepted in reaction on the terrorist attacks in Paris in the 13th of November 2014 just three working days after these attacks. In addition, no evaluation of effects of the directive proposal was made even though it was going to bring radical changes of the current regime of control of the acquisition and possession of weapons within the EU as well as to influence the security situation in the member states.

Second, the Czech Republic is pointing out the controversy of the proposed legislation and is also underlining the fact that the original proposal of the European Commission was strongly criticized either in the European Parliament or within the working groups of the European Council. Even though removing of some controversial provisions was achieved there are some other controversial provisions still remaining.

### III. Factual summary of individual pleas in law

The first plea in law: An infringement of the principle of conferral

The Czech Republic is introducing an infringement of the principle of conferral as the first plea in law for having chosen wrong legal base by the Union for adopting the directive in question.

In support for this plea in law the Czech Republic is referring to the settled case law of the Court of Justice according to which the choice of the legal base of any measure must rest on objective factors which also include the aim and the content of the given measure<sup>1</sup>, where „if an examination of an act of the Union reveals that it pursues a twofold aim, or that it has a twofold component, and if one of those is identifiable as the main one, and the other is merely incidental, the measure must be based on a single legal basis, namely that required by the main aim or component.“ In this context the Czech Republic is also referring to the measure of the EU legislature previously annulled by the Court of Justice, because they were, as well as the directive in question, based upon article 114 TFEU (or its predecessor in the primary law at the time), even though they were primarily pursuing different objectives.<sup>2</sup>

The Czech republic considers it essential that the directive in question is not justified by existing or imminent obstacles to the Single market<sup>3</sup>, but solely by the need to ensure a higher level of public security in connection with terrorism or other criminal activities. Neither the justification part of the directive in question nor its reason report declares any serious existing or imminent differences in regulations throughout the member states, which would, for the time being, represent obstacles to the Single market. Consequently, though the adoption of the directive in question was based upon article 114 TFEU, its main objective is the harmonization of the member states' laws dealing with the prevention of crime and terrorism. The Union legislature, however, has no authority to adopt such harmonizing measures, which is explicitly determined in article 84 TFEU. This approach fully corresponds with article 4 paragraph 2 TEU, according to which the member states have an exclusive responsibility to ensure national security within their borders and must therefore be allowed to ensure public order maintenance in their territory.

The second plea in law: infringement of the principle of proportionality

The second plea in law put forward by the Czech Republic is based on the statement that the directive in question is in total discrepancy with the principle of proportionality. This principle requires the legal measures adopted by the Union bodies to be competent to achieve pursued objectives by the affected legislation and, at the same time, not to overreach the limits of what is appropriate and necessary to achieve the objectives.

The Czech Republic identifies the infringement of the principle of proportionality in the two following aspects:

1. The Union legislature did not take into account at all the question of proportionality and was fully aware of not having gathered enough information to make a reasonable assessment of compliance with this principle.
2. The above mentioned absence of the assessment of proportionality eventually led to the adoption of such legal measures which are evidently disproportionate when considering the pursued objectives of the directive in question.

The Union legislature did not take into account at all the question of proportionality of the measures being taken

This plea in law is based upon the statement that the Union legislature adopted the directive in question though they evidently did not have enough information on possible effects of the measures being taken. The Czech Republic states that the Union legislature could not fulfill their obligation to thoroughly consider the compliance of the measures being taken with the principle of proportionality.

Though the case law of the General Court in general accepts that the Union legislature can use a wide range of options when choosing measures to achieve an intended objective, the court, on the other hand, does not take away the obligation to make a complex assessment of the economical, political and social aspects and to choose such a solution which is eligible, necessary and proportionate when considering the persuaded objectives (in other words to make an informed choice).<sup>5</sup> The Czech Republic documents the above mentioned statement, among other things, by citing the case in which the General Court annulled some provisions of secondary legislation adopted by the Union legislature without, among other things, any consideration of its proportionality.<sup>6</sup>

Within the claim the Czech Republic emphasizes the fact that in the case of the directive in question the Union legislature totally abandoned the assessment of proportionality of the measures being taken. Neither the justification part of the directive in question nor the specific parts of its reason report content concrete consideration of the proportionality of some measures of the directive in question from the perspective of their most essential and problematic effects (e.g. the prohibition of semi-automatic firearms, the factual prohibition of possession of specific magazines or stricter regulations of historical firearm replicas).

Moreover, the Czech Republic is convinced that the essential prerequisite for making an informed decision is an effect assessment of the legislation proposal. If the legislature does not have enough relevant information about the being-taken-legislation impact on the personal rights and obligations, they can hardly fulfill their duty to pass such a solution, which is eligible to achieve the intended objectives but, at the same time, essential and proportional.

In case of the directive in question there was no such assessment, though the impacts of the

directive in question will be quite significant throughout the member states involving even the essential personal rights (the right to possess property).

The Czech Republic states it results from the above mentioned that the Union legislature totally abandoned their obligation to gather all relevant information so that they could assess the proportionality of the specific measures and, in fact, did not make such an assessment at all.

The Union legislature adopted evidently disproportionate measures

Concerning the objective to increase the public security

Within this plea on law the Czech Republic states and documents the measures being adopted by the directive in question are not eligible to achieve the pursued objective to increase the public security. In the Czech Republic's opinion it is impossible to effectively achieve by further regulation of legal possession of firearms.

As for the prohibition of some semi-automatic firearms, the Czech Republic points out in the claim that, concerning the territory of EU, the crime committed with such legally possessed firearms plays an entirely marginal role. Prohibition of the acquisition and possession of those firearms can hardly prevent terrorist attacks such as those having been committed within the territory of EU in the last few years, which were the impulse to adopt the directive in question.

Moreover, the directive in question also applies stricter regulation of some types of firearms though those firearms are almost impossible to misuse to commit crime or terrorist attacks. Thus the directive in question, for example, introduces the obligation to register irreversibly deactivated firearms or replicas of historical firearms. This regulation will quite disproportionately affect, among others, collectors of historical firearms, historical re-enactors or even those who have a deactivated firearm as a decoration on the wall. Furthermore, these restrictions cannot, in the opinion of the Czech Republic, contribute to achieving higher level of security.

On the contrary, the real risk to public security is represented by possible transfer of so far legally possessed firearms to the illegal sphere as a consequence of their prohibition or their stricter regulation. The Czech Republic documents this statement by its own historical experience as well as such similar experience of Belgium, France and Sweden.

The Czech Republic states that the adopted measures are not essential to achieve the pursued objectives. It is evident there are significantly less restricting measures which can lead to the achievement of the objective to increase public security much more effectively without overall intervention in the rights of decent firearm owners who represent very small or almost no risk of committing crime. Among such measures can be named, for example, the strict fight against illegal firearms, strengthening the cooperation in investigating serious crime, improving the information exchange between the member states etc.

Last but not least, the Czech republic is convinced that the taken measures are in conflict with the principle of proportionality in the narrower sense as it is without any doubt that the newly implemented measures will have significant impacts on the vast number of the decent firearm owners. The impact level of these measures is enormous in its intensity as well as in the number of affected persons.

Having regard to the above mentioned the Czech Republic reckons the measures being implemented by the directive in question are disproportionate to the objective to increase the public security.

## Concerning the objective to remove obstacles to the Single market

The Czech Republic is also convinced the directive in question actually can not achieve the objective to remove obstacles to the Single market, because it brings a variety of unclear and practically inapplicable rules.

In this regard, the most problematic measure is the new ban of semi-automatic firearms, which there is a magazine exceeding the given capacity inserted into (category A7 as referred to in the directive in question). As a matter of fact, the directive in question considers the specific firearm with a concrete magazine (exceeding the given limit of rounds and inserted into the firearm) a prohibited firearm of category A in one case, while in another the directive considers the same firearm legal of category B (the magazine with a capacity exceeding the given limit of rounds is not inserted into it). Thus, changing the category of a firearm can in reality be just a matter of seconds, for this is approximately the time which it takes to change a magazine. As for the category of a firearm, the Union legislature further excludes the determination to classify the firearm into a specific category based just on the mere possibility of fitting a magazine with a capacity exceeding the given limit of rounds. Nevertheless, the mere possession of such a magazine (and, consequently, the possibility to insert it into a firearm) should be sanctioned by withdrawing the authorization to acquire and possess a firearm classified in category B.

Similarly unclear is the approach of the Union legislature to the semi-automatic firearms originally intended to be fired from the shoulder that can be reduced to a length of less than 60 cm without losing functionality by means of a folding or telescoping stock. The directive in question newly classifies those firearms in the prohibited category A8. The way, however, how to identify such firearms remains unclear, for almost all such firearms equipped with a folding or telescoping stock do not lose functionality for the very reason they are either intended to be fired from the shoulder or, when folded, to be fired from the instinctive pose or from the vehicle or from just „free hand“. Concerning those firearms there is no way how to identify what they were originally intended to be fired from. It is also unclear, how to determine the length of such firearms e.g. whether muzzle devices (compensators, silencers, muzzle brakes) or various extensions (e.g. rifle stock extensions) should also be taken into account or not.

The above documented provisions of the directive in question are thus unclear and open to a variety of different interpretations, while all such interpretations seem to be practically impossible to realize in practice. It is expectable each member state will take a totally different approach to the interpretation and the following implementation of those provisions. Such provisions cannot, therefore, be eligible to harmonize the conditions on acquisition and possession of weapons within the Single market.

In addition, the impossibility to achieve the objective to remove obstacles to the Single market is underlined by the fact that together with its most underlying measure (transferring some firearms into prohibited categories) the directive in question by article 7 paragraph 4a of Directive 91/477/EEC, as amended by the directive in question, allows the member states to choose a different approach towards current holders of the above mentioned firearms. This, in fact, means that some member states are likely to allow quite a significant number of current firearm holders to keep their weapons while, at the same time, other member states will prohibit such firearms completely. This state, however, is in the direct conflict with the objective to remove obstacles to the Single market for it actually creates new obstacles.

Having regard to the above mentioned the Czech Republic reckons the measures being implemented by the directive in question are disproportionate to the objective to remove obstacles to the Single market.

The third plea in law: Infringement of the principle of legal certainty

The third plea in law is made on the basis of the infringement of the principle of legal certainty. A vast number of provisions of the directive are not adequately clear or precise enough to allow the concerned bodies to positively identify their rights and obligations.

In this context the Czech Republic invokes the principle of legal certainty which, according to the case law of the General Court, requires every legislation being clear and exact so that the concerned bodies could positively identify their rights and obligations.<sup>8</sup>

As mentioned earlier, the directive in question implements a variety of unclear rules which, beside being incapable to achieve the intended objective to remove obstacles to the Single market, do not even comply with the above documented requests for clarity and exaction of the legislation.

The fourth plea in law: Infringement of the principle of non-discrimination

The fourth plea in law exclusively concerns the exemption defined in article 6 paragraph 6 second subparagraph to the directive 91/477/EEC, as amended by the directive in question, which gives the impression of being an apparently neutral measure and which, in fact, is made only for Switzerland and, furthermore, its application conditions lack any justification with regard to the objectives of the directive in question. The Czech Republic is convinced this exemption, at least in its current form, represent a discriminatory measure and must be annulled.

Compliance with the principle of non-discrimination requires that comparable situations must not be treated differently and that different situations must not be treated in the same way unless such treatment is objectively justified. Even an apparently neutral measure, criteria or practice, which can result in putting a concerned body either at an advantage or a disadvantage, can be discriminatory.<sup>10</sup> A difference of treatment can only by justified if it would enable the objectives of the given legislation to be better achieved.<sup>11</sup>

Article 6 paragraph 6 second subparagraph to the directive 91/477/EEC, as amended by the directive in question, allows the member states, that run the military system based on conscription and which have also been applying for at least 50 years the system of transferring firearms to the persons leaving the military forces, to allow such persons, as target shooters, to possess firearms classified in category A6 supposing that, besides other conditions, such firearms are converted into semi-automatic firearms.

A general exemption allowing the member states to authorize soldiers leaving the military service to possess, as target shooters“ some of the firearms being newly banned can, with regard to the objectives of the directive in question, be justified. It can, for example, be pointed out that those persons have passed a necessary training, the state is usually well informed about their physical and psychical conditions and there is a high probability they will use their firearms for legitimate purposes only. The problem, therefore, is not the exemption as such, but the conditions set by the Union legislature of its application.

The exemption defined in article 6 paragraph 6 second subparagraph to the directive 91/477/EEC, as amended by the directive in question, was intendedly designed in a way that only the Swiss system of transferring firearms to the ex-soldiers after leaving the military service can comply with. This exemption was included into the directive exclusively on the request of Switzerland. The condition of having the system for at least 50 years as well as the condition of considering firearms

of category A6 only cannot be justified with regard to any objective of the directive in question.

The wording of the given exemption is such that it cannot be applied in other member states, though those states can have a legitimate interest in such a regime in context with their systems of conscription, but they cannot for historical reasons fulfill the 50 year limit. The given provision of the directive in question thus implements a different treatment of the member states (and eventually, in fact, of firearms owners in those states) while this different treatment cannot be objectively justified when considering the subject and objectives of the directive in question. Those states and firearms owners respectively are, when considering the purpose of this exemption, in exactly the same situation.

Having regard to the above mentioned the Czech Republic reckons the conditions for application of the above mentioned exemption are in the direct conflict with the principle of non-discrimination.

- 
- 1) See also the judgement of 10<sup>th</sup> December 2002, British American Tobacco, C-491/01, EU:C:2002:741, p. 94 and cited case law
  - 2) See also the judgement of 5<sup>th</sup> October 2000, Germany vs. the Parliament and the Council, C-376/98, EU:C:2000:544 or the judgement of 22<sup>nd</sup> October 2013, the Commission and the Parliament vs. the Council, C-137/12, EU:C:2013:675
  - 3) See also the judgement of 4<sup>th</sup> May 2016, Poland vs. the Parliament and the Council, C-358/14, EU:C:2016:323, p. 33
  - 4) See also the judgement of 4<sup>th</sup> May 2016, Phillip Morris Brands and others, C-547/14, EU:C:2016:325, p. 165 and cited case law
  - 5) See also the judgement of 16<sup>th</sup> December 2008, Accelor Atlantique and Lorraine and others, C-127/07, EU:C:2008:728, p. 58
  - 6) See also the judgement of 9<sup>th</sup> November 2010, Volker und Markus Shecke and Eifert, C-92/09 and C-93/09, EU:C:2010:662, p. 80 et seq.
  - 7) namely the firearms deactivated according to the Implementing act #2015/2403, which therefore must be, according to this act, considered as irreversibly incapable of firing
  - 8) See also the judgement of 14<sup>th</sup> April 2005, Belgium vs. the Commission, C-110/03, EU:C:2005:223, p.30
  - 9) See also the judgement of 17<sup>th</sup> March 2011, AJD Tuna, C-221/09, EU:C:2011:153, p. 88 and cited case law
  - 10) See also the judgement of 14<sup>th</sup> March 2017, Bougnaoui and ADDH, C-188/15, EU:C:2017:204, p. 32
  - 11) See also the judgement of 17<sup>th</sup> March 2011, AJD Tuna, C-221/09, EU:C:2011:153, p. 96