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Czech Constitutional Court

Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU *Ultra Vires*; Judgment of 31 January 2012, Pl. ÚS 5/12, *Slovak Pensions XVII*

Jan Komárek*

Introduction

On 14 February 2012, the Czech Constitutional Court declared[1] the decision of the Court of Justice of the European Union in *Landtová*[2] an *ultra vires* act. In what might otherwise look like a mundane case about the pension rights of workers from the former Czechoslovakia, the Czech constitutional judges, sitting in full court, concluded that the Court of Justice had wrongly applied an EU regulation on the coordination of social security schemes (Coordination Regulation)[3] to facts devoid of any cross-border dimension.

At a closer look, however, one can see that the Court of Justice's authority (and the authority of EU law as a whole) was just collateral damage in a judicial war that had been raging between the Czech Constitutional Court and the Czech Supreme Administrative Court for several years. Seen in this context, the Constitutional Court's decision appears to be an unmeasured response to the continuing

* I have developed many ideas presented in this article in various discussions with many people, some of them directly involved in the case, either from the Czech Constitutional Court and Supreme Administrative Court, or from the Government. Since some would prefer to remain anonymous, I wanted to thank all of them at least in this way. All errors remain of course mine.

[1] Judgment of 31 Jan., Pl. ÚS 5/12, *Slovak Pensions XVII*. The English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/6342>. In the following text, however, I use my own translations. When we quote from specific passages of the judgment, we refer to the pages of the translation.

[2] Judgment of the ECJ (Fourth Chamber) of 22 June 2011 in Case C-399/09 *Landtová*, not yet officially reported.

[3] Council Regulation (EEC) No. 1408/71 of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community, English special edition of the *OJ*: Series I, ch. 1971(II), p. 416.

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undermining of the authority of national highest judicial bodies[4] by incorporating courts at lower levels of national judicial echelons into the system of the EU judiciary and giving them a 'European mandate'. With this mandate lower courts can choose who their superior is: either their traditional superiors, or the Court of Justice, which invites them to disregard decisions of national highest courts if they believe that these decisions are contrary to EU law.[5] It is no surprise that national courts sometimes use their 'European mandate' instrumentally: to circumvent the limitations of their own judicial system and judicial hierarchies established within it, as the example of the French Cour de cassation's challenge to the 2008 constitutional reform, or an avalanche of preliminary references questioning the priority of constitutional review in Belgium, showed.[6]

However, even if the Czech Constitutional Court's judgment is an isolated accident rather than a calculated strategy of the CCC,[7] one must ask whether it is not a symptom of a larger crisis concerning the authority of EU law within the member states, especially since only few months ago the Polish Constitutional Tribunal reviewed[8] of one of the foundational measures of European civil justice cooperation, the Brussels Regulation.[9]

In this case note I first explain the background to the dispute which led to the Czech Constitutional Court's *ultra vires* decision. Then I briefly discuss the decision of the Court of Justice in *Landtová* and the reaction of the Czech executive and Parliament to it, together with the ruling of the Supreme Administrative Court, which was where the preliminary reference to the Court of Justice originated. I subsequently turn to the Constitutional Court's '*ultra vires*' decision itself, and put it into a wider political context of the Czech Republic and the EU.

[4] By this I mean both constitutional and supreme courts. On this issue *see* Michal Bobek, 'The Impact of the European Mandate of Ordinary Courts on the Position of Constitutional Courts', in M de Visser and C Van De Heyning (eds.), *Constitutional Conversations in Europe* (Cambridge: Intersentia forthcoming), available at SSRN: <ssrn.com/abstract=1958866>.

[5] Cf. especially judgment of the CJEU (Grand Chamber) of 16 Dec. 2008 in Case C-210/06 *Cartesio* [2008] *ECR* I-09641, where the CJEU invites lower courts to draw their own conclusions from a decision of their superior courts quashing the lower courts' decision to refer a preliminary reference to the CJEU; and judgment of the CJEU (Grand Chamber) of 5 Oct. 2010 in Case C-173/09 *Elchinov*, not yet officially reported.

[6] *See* Marc Bossuyt and Willem Verrijdt, 'The Full Effect of EU Law and of Constitutional Review in Belgium and France after the *Melki* Judgment', 7 *EuConst* (2011) p. 355.

[7] Arthur Dyevre explains why the Czech Constitutional Court's decision cannot reflect any rational strategy of the Court towards the ECJ, in 'Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?' (forthcoming), where parts of this case note are reproduced.

[8] Judgment of 16 Nov. 2011, SK 45/09. The English translation is available at <www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf>.

[9] Council Regulation (EC) No. 44/2001 of 22 Dec. 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, *OJ* [2001] L 12/1.

Finally I discuss the place of the decision in theoretical debates concerning the role of national constitutional courts in the EU.

The background to the pension dispute

After the dissolution of Czechoslovakia at the end of 1992, the two succeeding countries had to establish which state would be responsible for paying the pensions of (now former) Czechoslovak citizens. The two countries concluded a special agreement (the C-S Agreement) for this purpose. Its Article 20 stipulated that the applicable scheme and the authority with competence to grant pensions would be determined by the State of residence of the employer at the time of the dissolution. While objective on the face of it, this criterion nevertheless meant that some people, who may not have moved from the Czech part of the former federation in their entire lives (except for holidays, perhaps), but whose employer resided in the Slovak part, obtained their pension (or a proportion of it) from Slovakia. Throughout the 1990s Slovak pensions were significantly lower than those paid in the Czech Republic. This led to a series of disputes, culminating before the Czech Constitutional Court, which found Article 20 of the C-S Agreement to violate the right to adequate material security in old age.[10] The Constitutional Court ordered the Czech authorities to pay a 'special increment' to Czech citizens in order to compensate them for their lower pensions from Slovakia.

The Supreme Administrative Court never accepted the Constitutional Court's interpretation and initiated a protracted conflict: the decision commented on here is in fact the 17th in the line. The Supreme Administrative Court argued, among other things, that the special increment was incompatible with EU law. Once the Supreme Administrative Court had a chance to raise the issue before the Court of Justice by means of a preliminary reference, it seized the opportunity – the case arrived at the Court of Justice on 16 October 2009 as C-399/09 *Landtová*.[11]

In its reference, the Supreme Administrative Court first argued that the C-S Agreement became part of the Coordination Regulation, which contains in its Annex III provisions of social security conventions that remain applicable notwithstanding the general rule according to which the regulation replaces such conventions. Article 20 of the C-S Agreement was included in this Annex, and in the Administrative Court's view the Constitutional Court's interpretation changed the meaning of this provision – now part of the regulation – and affected the way in which pensions were calculated according to it.

[10] Judgment of 3 June 2003, II. ÚS 405/02, *Slovak Pensions I.*

[11] The Slovak government raised doubts about the admissibility of the reference which were rejected by the CJEU: *see Landtová*, *supra* n. 2, paras. 26-30.

The Supreme Administrative Court's second argument concerning the incompatibility with EU law of these decisions was based on discrimination: in general, by virtue of the Coordination Regulation (and its Annex III), Article 20 of the C-S Agreement applies not only to Czech and Slovak citizens, but to any EU citizen who retires after the Czech Republic's accession to the EU and who before the dissolution of Czechoslovakia had worked there. The Czech Constitutional Court's judgments have, however, limited the special increment to Czech citizens only – excluding all others. This was due to the fact that the right to adequate material security in old age is limited to the citizens of the Czech Republic only.[12]

The Constitutional Court had remained deaf to these arguments. Before the Supreme Administrative Court referred the matter to the Court of Justice, the Constitutional Court had rejected them explicitly in 2007.[13] Although the Constitutional Court was by necessity interpreting the Coordination Regulation, it did not even consider sending a preliminary reference to the Court of Justice. To make things worse, in a later judgment[14] the Court quashed the Supreme Administrative Court's decision to suspend the proceedings in another Slovak pensions case and to await the Court of Justice's ruling in the *Landtová* case. The Constitutional Court ruled that it 'has already dealt with the Supreme Administrative Court's interpretation and application of European law in the matter, which constituted *ratio decidendi* of the judgment'. In other words, the Constitutional Court stated that its interpretation of the regulation should have prevailed regardless of the outcome of the Court of Justice's ruling; to await its results violated the right to a fair trial of the petitioner in question.

The Court of Justice's ruling in the *Landtová* case

In *Landtová* the Court of Justice ruled that while the special increment did not violate the Coordination Regulation as such, 'the documents before the Court show[ed] incontrovertibly that the [Czech Constitutional Court's] judgment discriminate[d], on the ground of nationality, between Czech nationals and the nationals of other Member States'.[15] It added that 'no evidence capable of justify-

[12] Art. 30(1) of the Charter of Fundamental Rights and Freedoms (the English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/czech_charter>. This was explicitly confirmed by judgment of 24 June 2008, I. ÚS 294/06, paras. 25 and 33, where the Court rejected a constitutional complaint against the rejection of the special increment explicitly on the basis of the complainant's lack of Czech citizenship.

[13] Judgment of 20 March 2007, Pl. 4/06, *Slovak Pensions V*. The English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/pl-04-06>.

[14] Judgment of of 12 Aug. 2010, III. ÚS 1012/10, *Slovak Pensions XVI*.

[15] *Landtová*, *supra* n. 2, para. 43.

ing such discrimination has been adduced before the Court'.[16] The Court of Justice's conclusion reflects the fact that the Czech Government submitted observations which openly admitted that the Czech Constitutional Court's case-law was contrary to EU law, which was rightly criticized by the Constitutional Court as 'unprecedented'.

However, the Court of Justice apparently wanted to 'soften' the consequences of its ruling: the special increment could be maintained, but must be paid to all EU citizens. At the same time, the Court of Justice observed that 'EU law does not, provided that the general principles of EU law are respected, preclude measures to re-establish equal treatment by reducing the advantages of the persons previously favoured'.[17] It added that 'before such measures are adopted, there is no provision of EU law which requires that a category of persons who already benefit from supplementary social protection, such as that at issue in the main proceedings, should be deprived of it',[18] stressing once again that the Czech Republic could adopt a solution that would satisfy both the requirements of EU law and the Czech Charter of Fundamental Rights as interpreted by the Czech Constitutional Court.

The reaction to the *Landtová* ruling in the Czech Republic

The reaction of the Czech authorities to *Landtová*, however, did not please the Czech Constitutional Court. First, with specific reference to the Court of Justice's decision in *Landtová*, the Parliament adopted an act which prospectively ruled out the possibility of paying the special increment to everyone, Czech citizens and the citizens of other states alike.[19] The political branches thus took full advantage of the opportunity opened up by the Court of Justice's judgment, which is rather understandable when one takes into account the additional costs arising from the duty to pay the special increment to all EU citizens. They did not, therefore, seek to accommodate the requirements of EU law and the Czech Constitution (as interpreted by the Constitutional Court) in a more conciliatory way.

For the Supreme Administrative Court, the response of the Court of Justice was somewhat problematic. While the Court of Justice confirmed that the Administrative Court was right in considering the special increment to be unlawful, in the concrete case at hand the Supreme Administrative Court was supposed to grant the increment to Mrs Landtová – or at least EU law did not prevent granting it. Instead, the Supreme Administrative Court came up with a different inter-

[16] Ibid., para. 47.
[17] Ibid., para. 53.
[18] Ibid.
[19] Act No. 428/2011 Coll. *See Slovak Pensions XVII, supra* n. 1, part IX.

pretation and raised the stakes. It ruled that because the Constitutional Court had created the special increment in violation of EU law – and in particular in violation of its duty to refer a preliminary question to the Court of Justice – its case-law could not be binding on the Supreme Administrative Court.[20] In an ironic twist, the Supreme Administrative Court relied on the Constitutional Court's own ruling which found that such a violation would qualify as a breach of the constitutional right to a lawful judge (another irony lies in the fact that this ruling concerned a violation by the Supreme Administrative Court …).[21]

The Supreme Administrative Court challenged the Constitutional Court even further, stating that it of course did not want to undermine the Constitutional Court's role as the final arbiter of constitutionality. But at the same time the Supreme Administrative Court stressed that the only way for the Constitutional Court to uphold its earlier rulings would be to find that the relevant provisions of EU law violated the material core of the Constitution. The Supreme Administrative Court therefore provoked the Constitutional Court to declare a revolution if it wanted to uphold its case-law. And that is precisely what the Constitutional Court Constitutional Court Constitutional Court eventually did.

The Czech Constitutional Court's *ultra vires* ruling

The *ultra vires* decision of the Czech Constitutional Court did not concern the *Landtová* case itself, but a constitutional complaint in another case concerning a Czech citizen who was to obtain part of his pension from Slovakia.[22] The Czech Constitutional Court was therefore not forced into the conflict with the Court of Justice, since it could simply insist on the Court of Justice's finding that the special increment could continue to be paid under the condition that it would not be denied to citizens of other EU member states – which was not the question in this case. It could therefore use the helping hand of the Court of Justice to reaffirm its authority over the Supreme Administrative Court. Instead, it decided to attack the Court of Justice.

The core argument put forward by the Constitutional Court was that the Court of Justice had applied the Coordination Regulation to the legal relationships regulated by the C-S Agreement. In the Constitutional Court's view, the Annex to the regulation lists the provisions of social security conventions which remain

[20] Judgment of 25 Aug. 2011, 3 Ads 130/2008-204.

[21] Judgment of 1 Aug. 2009, II. ÚS 1009/08, the English translation is available at <www.usoud.cz/view/2-1009-08>.

[22] Ironically, as the Press Release from the Ministry of Labour and Social Affairs of 16 Feb. 2012 stated, the person in question was in fact entitled to a higher pension than the one he would have obtained if he had not been affected by the C-S Agreement.

applicable despite the general regime established by the regulation. The Constitutional Court's case-law creating the special pension increment based on Art. 20 of the C-S Agreement was, in the Court's view, among those provisions, and the regulation itself, again in the Court's view, provided for such differentiated treatment.

However, the regulation emphasizes that 'save as provided in Annex III, the provisions of social security conventions which remain in force … shall apply to all persons to whom this Regulation applies'.[23] Annex III then contains *two lists* of social security conventions and *only* those contained in part B of the Annex can provide for a differentiated treatment of certain categories of people. Article 20 of the C-S Agreement is not among them; it cannot, therefore, establish differentiated treatment for certain categories of people, such as Czech citizens affected by the dissolution of Czechoslovakia.

Moreover, the Coordination Regulation must not violate the provisions of the Treaties, including the prohibition on discrimination on the basis of nationality. Thus Regulation No. 647/2005,[24] which amended Annex III of the Coordination Regulation, stresses in the fourth recital of its Preamble:

> On the basis of the case-law relating to the relationships between Regulation (EEC) No 1408/71 and the provisions of bilateral social security agreements, it is necessary to review Annex III to that Regulation. … In addition, it is not appropriate to accept entries in part B except where exceptional and objective situations justify a derogation from Article 3(1) of that Regulation and from Articles 12, 39 and 42 of the Treaty.

This only confirms that the discrimination found by the Court of Justice could hardly be justified if the relevant provision was not expressly mentioned in part B of Annex III (although the Court of Justice hinted at such a possibility, as mentioned above).[25]

However, the Constitutional Court found the very application of the Coordination Regulation inappropriate. In its view, 'the provisions of Annex III are from the point of view of EU law of a declaratory nature only, they are not constitutive; the key consideration for the application of the Regulation is the nature of the

[23] Art. 3(3) of the Coordination Regulation.

[24] Regulation (EC) No. 647/2005 of the European Parliament and of the Council of 13 April 2005 amending Council Regulations (EEC) No. 1408/71 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community and (EEC) No. 574/72 laying down the procedure for implementing Regulation (EEC) No. 1408/71, *OJ* [2005] L 117/1.

[25] *See* the text to *supra* n. 15.

legal relationships concerned, which must contain the so-called foreign element'.[26] This foreign element was lacking, according to the Czech Constitutional Court, since 'the periods of employment during the existence of Czechoslovakia cannot be viewed, retroactively, as periods of employment abroad'.[27]

The key passage of the judgment trying to explain why the Constitutional Court considered the Court of Justice's ruling *ultra vires* is the following:

> The failure to distinguish legal relationships arising from the dissolution of a state with a uniform social security system from legal relationships arising from the free movement of persons in the European Communities, or the European Union, for social security systems of the Member States, is a failure to respect European history; it is comparing matters that are not comparable. For this reason it is not possible to apply European law, ie. the regulation, to the Czech citizens' claims stemming from social security. Following the principle explicitly stated in its judgment [*Lisbon Treaty I*[28]], it is not possible to do otherwise than to find in relation to the consequences of the [Court of Justice's judgment in *Landtová*] for similar cases that in its [the Court of Justice's] case the situation where an act of an institution of the EU exceeded the competences transferred to the EU by virtue of Article 10a of the Czech Constitution occurred, that an act *ultra vires* has occurred.[29]

The Constitutional Court's assertion that 'the provisions of Annex III are from the point of view of EU law of declaratory nature only' is plainly wrong. In fact the Constitutional Court implies that the content of those provisions is to be determined autonomously from EU law – so that they can, e.g., be 'amended' by a ruling of a national constitutional court, such as the decisions of the Czech Constitutional Court ordering the payment of a special increment to Czech citizens negatively affected by the application of Article 20 of the C-S agreement. The truth is that those provisions became part of the Regulation – providing for a special regime *within* the Regulation – and their interpretation thus became a matter of EU law, where the final word lies with the Court of Justice, not the Czech Constitutional Court. This relates to the second argument, already mentioned: that the Czech Constitutional Court's decisions, creating the special increment, estab-

[26] *Slovak Pensions XVII, supra* n. 1, p. 11.

[27] Ibid., p. 11.

[28] Judgment of 26 Nov. 2008, Pl. ÚS 19/08, *Lisbon Treaty I*, The English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/pl-19-08>. For an analysis of the judgment, *see* the Case Comment by Petr Bříza, 5 *European Constitutional Law Review* (2009) p. 143.

[29] *Slovak Pensions XVII, supra* n. 1, p. 12-13. Despite my best efforts to improve the English translation of the decision, this part is hardly comprehensible in Czech too.

lished unequal treatment. As such, they would have to be listed in another part of Annex III – but they were not.[30]

Such a misunderstanding could be perhaps understandable if it did not lead to the finding of an *ultra vires* ruling allegedly having been delivered by the Court of Justice. While the Constitutional Court ornamentally refers to the German Federal Constitutional Court's rulings concerning the possibilities of its intervention,[31] everybody who has ever looked at these decisions would know that they are quite different – if only because the German Constitutional Court has decided that that it would first send a preliminary reference to the Court of Justice before finding its ruling *ultra vires*.

Instead, the Czech Constitutional Court wanted to invent its own way of talking to the Court of Justice. Rather than submitting a preliminary reference to the European Court, the Czech Constitutional Court sent it a letter in which it wanted to explain its case-law, as it saw that it was not going to be properly defended by the Czech Government. The Registry, however, sent the letter back to the Constitutional Court, explaining that 'according to what is established practice, the members of the Court of Justice do not exchange correspondence with third parties concerning the cases submitted to the Court of Justice'.[32]

This apparently insulted the judges in Brno. The Czech Constitutional Court 'pointed to the deficits concerning the guarantees of the fair trial in the procedure in [the *Landtová* Case]'.[33] In relation to its rejected letter the Czech Constitutional Court

> recalled that the Court of Justice regularly uses the institution of *amici curiae* in the preliminary ruling procedure, in particular in relation to the Commission. In the situation when the ECJ was aware that the Czech Republic was a party to the proceedings, acting through its government, which rejected the Czech Constitutional Court's opinion, which was the object of the Court of Justice's assessment, it is impossible to see the Court of Justice's finding that the Czech Constitutional Court was a 'third party' in the case otherwise than as a violation of the principle of *audiatur et altera pars*.[34]

Leaving aside a truly groundbreaking finding – that constitutional courts also enjoy the guarantees of a fair trial! – the Constitutional Court demonstrated that

[30] The Czech Constitutional Court's majority did not find it important to respond to the only dissent raised by Judge Jiří Nykodým, who seemed then to be the only one to realize what the correct interpretation of the Coordination Regulation was. The dissent did not concern the *ultra vires* declaration by the Court, however.

[31] *Slovak Pensions XVII*, p. 10.

[32] Quoted from the judgment of the Czech Constitutional Court, *Slovak Pensions XVII*, p. 14.

[33] Ibid., p. 13.

[34] Ibid., p. 14.

it knew rather little about the relevant rules concerning the preliminary ruling procedure, whereby the Commission (and the Member States' Governments together with other institutions and also the parties to the case before the referring court) is invited to submit observations (Article 23 of the Court's Statute);[35] no such provision is made for national courts and other institutions. Thus the CJEU's rejection was fully in line with the rules which govern the procedure before it.

But there is another mystery: why did the Czech Constitutional Court want to reduce itself to itself into the position of a party before the Court of Justice and why did it complain about the latter's rejection of its letter, if it had numerous opportunities to send the reference to the Court of Justice, including in this case?

The decision in a wider context

As was already mentioned in the introduction to this case note, the Czech Constitutional Court's decision is most probably not a result of some calculated strategy; rather it stems from the frustration of the Court over the apparent loss of its control over the ordinary courts, which can now take advantage of their cooperation with the Court of Justice and use it as a shield against the Constitutional Court's authority. Still, the contrast with a very cautious approach by other constitutional courts, and the German Constitutional Court in particular,[36] is very striking.

A few factors can explain this. The first relates to the prevailing culture of 'disobedience' towards the EU in the Czech Republic. Different political actors assure themselves (and the general public alike) that the Czech Republic has remained sovereign even after its accession to the EU, which largely means that it can act 'independently', i.e., without taking into account the wider interests of the Union. This culture of membership is apparent from the removal of the Government by a vote of no confidence during the Czech presidency of the EU in March 2009 (largely believed to have been orchestrated by President Klaus), President Klaus' obstructions to the ratification of the Treaty of Lisbon (which was found to be unconstitutional by the Constitutional Court in its *Lisbon Treaty II* judgment),[37] and by the more recent manoeuvring of the Czech government concerning the Agreement on a Reinforced Economic Union (which the Czech Prime Minister could not initially explain otherwise then by his fear of President

[35] *OJ* [2010] C 83/210.

[36] On this, *see* Mehrdad Payandeh, 'Constitutional Review of EU Law after Honeywell: Contextualizing the Relationship between the German Constitutional Court and the EU Court of Justice', 48 *CML Rev* (2011) p. 9.

[37] Judgment of 3 Nov. 2009, Pl. ÚS 29/09, paras. 120 and 121. The English translation is available at <www.usoud.cz/view/pl-29-09>.

Klaus' possible rejection of its ultimate ratification). Seen in this context the Czech Constitutional Court only joined the other branches of government (which on other occasions does not hesitate to criticize).

This is not to suggest that other states (including Germany) do not pursue their own interests in the EU;[38] still, the need to present national policies as also taking the EU into account makes an important difference in what particular actors can ultimately do and what kind of constraints they face.[39] So, for example, when the Czech government submitted its observations in *Landtová*, the Government Agent was called before the Senate Committee for EU Affairs to explain (and justify) why the government defied the authority of the Czech Constitutional Court and did not defend its jurisprudence before the Court of Justice, even if it believed that it was contrary to EU law.

Almost no public attention was paid to the European law aspect of the Constitutional Court's judgment in the Czech Republic. The general media focused on the substantive issue, i.e. the right to the special increment of the person concerned in the case. The only critical commentary concerning the disregard of the authority of EU law which was published in newspapers was authored by a lawyer specializing in EU law.[40]

Furthermore, the failure to take the long-term consequences of the ruling into account could also arise from the fact that most judges' terms of office are due to end in 2012 and 2013. Since most of them were appointed by President Klaus, whose term of office ends in 2013 too, it is widely believed that they will not be reappointed (which would otherwise be possible).

Finally, the Czech Constitutional Court is a very junior member of the community of European (constitutional) courts. It enjoyed its 'minute of fame' when the whole EU awaited its verdict on the Lisbon Treaty, as the Czech Republic was the last EU member to ratify it, but otherwise its judgments go largely unnoticed, contrary to those of the German Constitutional Court, which are closely followed also beyond the German borders.

The general dissatisfaction of the political branches with (and their possible disobedience of) the Czech Constitutional Court's ruling therefore do stem not

[38] *See* A. Moravcsik, *The Choice for Europe: Social Purpose and State Power from Messina to Maastricht* (Ithaca: Cornell University Press 1998) or A. Milward, *The European Rescue of the Nation-State* (London: Routledge 1992).

[39] On the constraints that the *Bundesverfassungsgericht* faces in this context, *see* Arthur Dyevre, 'The German Federal Constitutional Court and European Judicial Politics', 34 *West European Politics* (2011) p. 346.

[40] Michal Bobek, '... a Ústavní soud skočil', Lidové noviny 20 Feb. 2012. A more heated debate occurred at a lawblog *Jiné práv*o (<http://jinepravo.blogspot.com>), which appears to be widely read in the Czech Republic (it gets around 1200 unique visitors every day and is regularly cited by general newspapers.

from the Court's defiance of the Court of Justice's authority, but from the economic consequences of having to pay the special increment to all EU citizens concerned.[41] The consequences for the Czech Republic within the EU would be highly conditional upon the possible reaction by the EU. It could be comparatively much easier for the Commission to initiate infringement proceedings against the Czech Republic for its Constitutional Court's open rebellion against the basic premises of the authority of EU law (and the Court of Justice), than it would be in the case of Germany. Only then, perhaps, would the political branches try to 'discipline' the Constitutional Court in order to avoid sanctions – although these remain rather illusory anyway.

Jurisprudence of constitutional conflict or of mutual ignorance?

Some see the Czech Constitutional Court's judgment as an expected consequence of the constant undermining of the authority of EU law, represented most recently by the 'constitutional pluralism movement'.[42] However, if pluralism presupposes mutual engagement (not necessarily in the form of a direct dialogue,[43] structured in the EU legal order through the preliminary ruling procedure), the Czech Constitutional Court's decision fails on all fronts.

As mentioned above, although the decision refers to the three famous decisions of the German Constitutional Court, it does not take them seriously in any way. It just mentions that

> '[a] certain parallel to the decisions by the German Court, "Solange I," "Solange II," and "Maastricht-Urteil" can be found in [judgment of Pl. ÚS 50/04[44]], defining the grounds for the evaluation of the relationship between the Constitution of the Czech Republic and European law'.[45]

[41] In the press communication of 25 July 2012 issued by the Ministry of Labour and Social Affairs after the CJEU had delivered its *Landtová* judgment the Ministry estimated such costs at CZK 100 billion (approximately EUR 4 billion).

[42] As the recent collection, M. Avbelj and J. Komárek (eds.), *Constitutional Pluralism in Europe and Beyond* (Oxford: Hart 2012), shows, there is hardly any unity among those who either subscribe to constitutional pluralism (however defined), or criticize it. For an early and very thoughtful critique of constitutional pluralism, *see* Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement', 14 *European Law Journal* (2008) p. 389.

[43] As, for example, Miguel Poiares Maduro's rendering of the theory has it (*see* particularly 'Contrapunctual Law: Europe's Constitutional Pluralism in Action', in N. Walker (ed.), *Sovereignty in Transition* (Oxford: Hart 2003).

[44] Judgment of 8 March 2006, Pl. ÚS 50/04, *Sugar Quotas III*. The English translation is available at the Czech Constitutional Court's website, <www.usoud.cz/view/pl-50-04>.

[45] *Slovak Pensions XVII*, p. 10. The decisions are, respectively, Judgment of 12 Oct. 1993, 2 BvR 2134, 2159/92, *Maastricht*, [1993] BVerfGE 89, 155; [1994] 1 CMLR 57; Judgment of 29 May

However, in the Czech Constitutional Court's judgment, there are no requirements concerning the structural failure of the EU to safeguard fundamental rights or the EU's competences, which lie at the heart of the German Court's judgments,[46] nor there is a concession made in the form of a reference to the Court of Justice before an act of the EU (the Court of Justice's judgments included) is declared *ultra vires*.[47]

But the same kind of superficial parallels instead of observations made on the basis of a serious legal analysis can be seen in the remarks by the President of the German Constitutional Court, Andreas Vosskuhle, in his lecture to the Hessen Regional Parliament given shortly after the Czech Constitutional Court's decision.[48] Vosskuhle praises both the Czech and Polish constitutional courts for their decisions, which he said 'followed' the German example, while the Czech Constitutional Court, as we have seen, challenged the Court of Justice without any prior warning or engagement through preliminary reference or establishing any standard of deference inherent in the 'Solange' jurisprudence (and applied by the Polish court).

The latter point was recently picked up by Damian Chalmers in his harsh critique of the Court of Justice.[49] Chalmers observes that while the Court of Justice's

> dialogue with constitutional courts is much vaunted in the literature about it, ... in the last two years its central interventions have been to refuse to take submissions from one country's constitutional court and to deny the French Constitutional Council its traditional role of assessing whether French laws violate the French Constitution, if such an assessment in any way touches upon EU law.

In my view, however, it is misleading: leaving aside how 'traditional' the French Constitutional Council's role established as recently as in 2008 (and put into operation only in 2010) was, the preliminary procedure has its rules, which aim,

1974, BvL 52/71, *Internationale Handelsgesellschaft (Solange I)*, [1974] BVerfGE 37, 271; [1974] 2 CMLR 540; judgment of 22 Oct. 1986, 2 BvR 197/83, *Wünsche Handelsgesellschaft (Solange II)* [1986] BVerfGE 73, 339.

[46] Just to refer to both *Solange I* and *Solange II* in support of the same argument shows certain liberty, which the Czech Constitutional Court takes with these two judgments – whereas, as all EU lawyers know, *Solange II* explicitly overturns *Solange I*.

[47] As required by the *Bundesverfassungsgericht* in its *Honeywell* decision, judgment of 6 July 2010, Case 2 BvR 2661/06. The English translation is available at the, <www.bundesverfassungsgericht.de/entscheidungen/rs20100706_2bvr266106en.html>.

[48] 'Bewahrung und Erneuerung des Nationalstaats im Lichte der Europäischen Einigung', 1 March 2012, Hessen Regional Parliament *(Landtag)*, Wiesbaden.

[49] 'The European Court of Justice has taken on huge new powers as "enforcer" of last week's Treaty on Stability, Coordination and Governance. Yet its record as a judicial institution has been little scrutinized', EUROPP Blog 7 March 2012, <blogs.lse.ac.uk/europpblog/2012/03/07/european-court-of-justice-enforcer/>, last visited on 12 July 2012.

among other things, at the fairness of the whole process. We can of course debate whether the protection of individual rights is among the procedure's objectives;[50] however, it is also in the interest of the limitation of the judicial power (something Chalmers would no doubt subscribe to) that courts follow procedural rules strictly.[51] In this respect, as much as the Court of Justice rejected the intervention of the European Data Protection Office in a case where the Statute did not allow its participation,[52] or submissions by UEFA in another case,[53] the same should apply to any other body, including national constitutional courts. This is even more true as the Czech Constitutional Court had plenty of opportunities to enter into direct dialogue with the Court of Justice, but instead decided to ignore it and wanted to play it hard, among other things by threatening the disobedient judge of the Supreme Administrative Court with disciplinary proceedings.[54]

Conclusion

When I spread the news about the Czech Constitutional Court's judgment among my colleagues interested in European constitutional law, one of them asked, rather excitingly, whether there was any reference to the 'constitutional identity clause' of the Treaty on the European Union,[55] or to other constitutional courts' jurisprudence concerning 'constitutional conflicts'. The expectations of the European legal community are high when it comes to the performance of constitutional courts. The Constitutional Court's judgment failed utterly in this respect. As I wanted to show in this case comment, the reasons do not lie at the theoretical level; constitutional pluralism (in whatever form) has little to do with the Constitutional Court's defiance. I hope to have illuminated the real motivations of the Czech judges, no matter how unflattering they were. Let us hope it was an exception limited to the context of the Czech Republic and not a symptom of a wider crisis concerning the Court of Justice's authority. In this respect, the comments by the President of the Court of Justice Skouris, given in a response to the direct question of a Czech journalist on Skouris's visit to the Czech Republic shortly after the Constitutional Court's decision, are rather indicative:

[50] And I emphatically argued that it is not in '"In the Court(S) We Trust?" On the Need for Hierarchy and Differentiation in the Preliminary Ruling Procedure', 32 *European Law Rev* (2007) p. 467.

[51] Again, it is a separate issue whether the CJEU does so, where an obvious answer is in my view 'no'.

[52] Order of the President of the Court of 12 Sept. 2007 in Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2007] ECR I-7075.

[53] Order of the President of the Court of 16 December 2009 in Joined Cases C-403/08 and C-429/08 *Football Association Premier League and Others*, not yet officially reported.

[54] Judgment of 3 Aug. 2010, III.ÚS 939/10, *Slovak Pensions XV*.

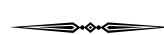
[55] Art. 4(2) TEU.

> In this case the Supreme Administrative Court received an answer [from the ECJ] and followed it in its own decision. The Constitutional Court reviewed the case and decided differently. So it is primarily a problem on the level of Czech courts. The ECJ did what it was supposed to and answered the questions submitted. If there are some problems in the Czech Republic, it is not our task to solve them. And I would not like to comment on them further. The responsibility for the final decision in the case always rests solely with the national court.[56]

Surely the declaration by a national constitutional court that the Court of Justice's decision was *ultra vires* is not 'primarily a problem on the level of [national] courts', is it?

Post scriptum

After this comment was submitted to the Review, the Supreme Administrative Court decided to request another preliminary ruling from the Court of Justice.[57] The reference contains three questions. The first two concern the interpretation of the Regulation, particularly the possibility to justify the discrimination found by the Court of Justice in *Landtová*. The third explicitly asks whether EU law prevents the Supreme Administrative Court to be bound by the determinations of law made by the Constitutional Court, if they appear to contradict EU law as interpreted by the Court of Justice. The answer to that question seems to be clear to the Supreme Administrative Court, as it refers to the relevant decisions of the Court of Justice in its reasoning. The Luxembourg court will have a hard time finding the conciliatory approach it took in the judgment that provoked such a fierce reaction from the Constitutional Court.



[56] 'Vliv států na evropské právo se podceňuje' ['The Influence of States on European Law is Underestimated'], *Hospodářské noviny*, 27 March 2012.

[57] Order of 9 May 2012, 6 Ads 18/2012-82.