COMMON MARKET LAW REVIEW

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Aims
The Common Market Law Review is designed to function as a medium for the understanding and implementation of European Union Law within the Member States and elsewhere, and for the dissemination of legal thinking on European Union Law matters. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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COMMON MARKET LAW REVIEW

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The Common Market Law Review is designed to function as a medium for the understanding and analysis of European Union Law, and for the dissemination of legal thinking on all matters of European Union Law. It thus aims to meet the needs of both the academic and the practitioner. For practical reasons, English is used as the language of communication.

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B. NATIONAL COURTS

Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12.

A Legal revolution or negligible episode? Court of Justice decision proclaimed *ultra vires*

1. Introduction

The annulment of an EU act by a Member State's constitutional court because of *ultra vires* conduct of EU institutions might be compared to the yeti. Everybody has spoken of it, numerous respectable experts have exchanged their views on its form and classification, but so far no relevant authority has confirmed its existence. One of the most probable reasons behind this situation was famously described by Joseph Weiler's analogy, which compared the relationship between the Court of Justice and national constitutional courts to the Mutual Assured Destruction doctrine applied during the Cold War.[1]

It was thus surely a great surprise to every observer of EU affairs when, on a frosty Tuesday, 31 January 2012, the Czech Constitutional Court (CC) decided to take its briefcase with codes out of the cupboard and launch the missile (or documented yeti, if you are a supporter of the disarmament movement), the target located in Luxembourg. Even more astonishing is the fact that the decision was triggered by an issue which was until now completely unknown in the rest of Europe. This article aims to describe the decision and its background, analyse (or criticize?) the argumentation and motivation of the CC, and finally briefly speculate on the judgment's consequences. As the ink on the decision has not dried yet, the ambition is not to review the decision in a wider theoretical perspectives (e.g. constitutional pluralism) or make any comprehensive comparisons with attitudes of other courts.

1. Weiler, *The Constitution of Europe: "Do the new clothes have an emperor?" and other essays on European integration* (Cambridge University Press, 1999), pp. 320–321.

2. Factual and legal background

2.1. *The origins of the affair*

Throughout the Czechoslovakian period, the pension system used to be a competence of the federation, the republics fulfilled only some administrative functions in these matters. The dissolution of the federation obviously demanded partition of the task. Because Czechoslovakia used a pay-as-you-go pension system, there were no funds to be divided, the only issue was who will cover the pensions of existing and future pensioners.

In order to avoid possible negative consequences on citizens, which might have resulted from unilateral steps, both States negotiated a bilateral international treaty with the object to determine responsibility for covering part or whole of the pensions for the common Czechoslovak period (C-S Treaty).[2] For employees who had worked in that period, the decisive criterion for determining the State and authority responsible for their pension was the employer's place of residence or establishment on 31 December 1992, that being the federation's date of dissolution (see Art. 20(1) C-S Treaty).[3] After that, the periods for pensions are governed by the respective legislation of the two States (see Art. 11(1) C-S Treaty).

After 1993, economic development of the two States began to diverge substantially and this had consequences for the level of social benefits as well. Slovak pensions became noticeably lower than the Czech ones. Czech citizens who were forced to receive lower Slovak pensions, because their employer had a seat in Slovakia at the time of dissolution, began to express their dissatisfaction. The most "contentious" group consisted of Czech citizens, who in practice worked on the Czech soil for their whole life, but as the headquarters of their employer was formally located in Slovakia, they had a different pension from their next-door-neighbours even if their salaries had been similar.[4] In some of these cases, the Czech Social Security Administration (SSA) provided a compensatory supplement, but while Article

2. Smlouva mezi Českou republikou a Slovenskou republikou o sociálním zabezpečení [Agreement between the Czech Republic and Slovak Republic on social security], signed on 29 October 1992. Available at <http://www.mpsv.cz/files/clanky/1542/smlouva_slovensko.pdf> (last visited 20 March 2012), in the Czech Republic published as 22/1993 Coll.

3. Art. 20(1) of the C-S Treaty provides: "Periods of insurance completed before the date of dissolution of the Czech and Slovak Federal Republic shall be considered to be periods of insurance completed in the contracting State on whose territory the employer of the person concerned had its headquarters either on the day of the dissolution, or on the last day before that date."

4. The only difference between them being the nominal seat of employer.

26 C-S Treaty allowed this practice; it was issued on non-transparent and ad hoc basis.

Several people who either disagreed with the level of the supplement or were not awarded it fought the decisions of the SSA in administrative courts. Their applications were rejected by these courts, but when constitutional complaints were lodged to the CC, the result was different. The CC argued that the right to social security in old age together with the principle of equality guarantee similar pensions to Czech citizens[5] no matter where their employer had been established, because all of them were part of the same Czechoslovak pension system. A different interpretation would result in "unjust discrimination" of that group of citizens.[6] This was however only the beginning of the story. The position of the CC was not accepted by the Supreme Administrative Court (SAC), which tried to disprove it not only by interpretation of the C-S Treaty, but as in the meantime the Czech Republic had become a member of the EU, also by application of EU law. The basic objection in this respect was the incompatibility of any supplements with Council Regulation 1408/71 (Regulation).[7] A very nasty battle over "Slovak pensions"[8] commenced between the CC and the SAC, in which both sides mobilized their complete armies.[9] The latter court opened fire by totally disproving the CC's arguments;[10] the CC retaliated by quashing the judgment and accused the SAC, among other things, of not respecting the binding character of its decisions (see Art. 89(2) of Czech Constitution).[11]

Meanwhile, the number of actions had risen, and at the same time the situations of petitioners varied widely. They spread from the abovementioned "full Czech" scenario, where only the nominal seat of employer was in Slovakia, to almost "full Slovak" scenario, in which a person who lived and worked in Slovakia for all her active life and only after 1993 moved to the Czech Republic and obtained citizenship demanded supplement. The Ministry of Social Affairs and the SSA finally acquiesced to the CC's case law and issued instructions that would automatically compensate a certain group

5. Similar meaning within the group of equally earning citizens.

6. Argumentation used for the first time in II. ÚS 405/02, *Constitutional Court*, 3 June 2003.

7. Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community. O.J. 1971, L 149/2.

8. As the cases are informally called in the Czech Republic. The CC has ruled in 17 Slovak pensions cases since 2003, the last one being the one commented in this article.

9. That is the extended panel in case of SAC and full court (plenary) in case of CC.

10. See 3 Ads 2/2003 – 112, *Supreme Administrative Court*, 26 October 2005, paras. 36–41.

11. See namely Pl. ÚS 4/06, *Constitutional Court*, 20 March 2007, paras. 23–28.

of cases.[12] Still, not all applicants were satisfied and several disputes continued. The CC emphasized that any supplements are reserved only for the Czech citizens and rejected a complaint submitted by Slovak citizens.[13]

2.2. *The Court of Justice steps in: Case C-399/09 Landtová*

The SAC faced a very peculiar situation. On the one hand, there were several decisions of the CC that clearly overturned its view on the Slovak pensions and instructed it to follow the CC's case law, on the other hand the SAC still felt the truth was on its side. In brief, it claimed that the CC's solution was wrong as it had accounted the same insurance period twice, which contradicted Article 12 of Regulation 1408/71, and because the provision of the supplement was conditioned on Czech citizenship and residence, which was a breach of Articles 3 and 10 of the Regulation as well as of primary EU law. The selected escape from the dilemma was to refer a preliminary question to the ECJ with the intention of reviewing the correctness of the CC's argumentation in the light of EU law.

The reference contained two questions. The first asked if the Regulation precluded application of a national rule which required the Czech SSA to take account of periods of insurance already accounted for by the Slovak SSA. In the case of a negative answer, the second question inquired if primary law and Regulation permitted the limitation of the repeated account of the insurance period only to the citizens of the Czech Republic resident on its territory.

Few words are needed on the proceedings. The Czech Government played a very unusual role during the process, as it openly claimed that the case law of the CC infringed EU law.[14] Not surprisingly, there was criticism of the Government from some quarters for undermining its own CC. For example, the Committee for EU Affairs of the Senate adopted a resolution requesting the Government to retrieve its written contribution,[15] but the Czech agent at the ECJ explained to the senators that such a move was not possible, however the position of the Government evidently did not change during the oral

12. For details see Křepelka, "Československí důchodci v pasti práva Evropské unie" [Czechoslovak pensioners in the trap of EU law], 19 *Časopis pro právní vědu a praxi* (2011), 132–134.

13. I. ÚS 294/06, *Constitutional Court*, 24 June 2008, para 25, 33.

14. See Opinion of A.G. Cruz Villalón of 3 March 2011, in Case C-399/09*„ Landtová„*cited *infra* note 16, at paras. 34, 42.

15. 253. usnesení Výboru pro záležitosti Evropské unie [253rd Resolution of the Committee for EU Affairs], 1 April 2010; in para 2 of the resolution the Committee openly mentioned the threat of negative consequences of the possible divergence between the case law of the ECJ and the CC.

hearing.[16] The Slovak Republic considered the questions hypothetical and proposed their rejection.

The ECJ was well aware of the case's subtle background,[17] but that did not prevent it from providing firm answers. Firstly, the supplement as such was not incompatible with Regulation as it did not take into account the same insurance periods twice or disrupt the rules of coordination in other ways, its purpose was only to equalize the difference between two different benefits.[18] Answering the second question, the approach of the CC was labelled as both direct (requirement of citizenship) and indirect (requirement of residence) discrimination against those that have enjoyed their right of free movement.[19] But that was not the end of the decision, as the ECJ also considered the practical consequences of its answers. In order to observe the principle of equality, the disadvantaged persons within a certain category must be granted the same treatment as the favoured ones. In other words, it does not mean the supplement should not be awarded to Ms. Landtová (petitioner in the case) or be removed from those already awarded to, but it must be issued to all disadvantaged persons. Such a disadvantaged person is represented by a citizen from other Member State who worked in Czechoslovakia before 1993 and was (is) subject to pension insurance legislation of one or more Member States (see Art. 2 of Regulation).[20] This situation will have to last until some non-discriminatory solution is reinstated, which, indeed, might also lead to reduction of already awarded advantages.

2.3. *Consequences of the Court of Justice ruling*

The decision in *Landtová* caused a great uproar in the Czech media: it is probably the only time any decision of the ECJ has been discussed on the front pages of national newspapers. Even serious articles claimed that the decision opened an option for all Slovak pensioners that gained insurance period during the Czechoslovak times to obtain the supplement, leading to costs of tens of billion Czech crowns a year for the Czech pension system.[21] The Slovak media

16. Case C-399/09, *Landtová*, 22 June 2011, nyr, para 47.

17. A.G. Cruz Villalón stated that "the case . . . has arisen in an institutional context which is as controversial as it is delicate." Opinion, cited *supra* note 14, para 5.

18. *Landtová*, cited *supra* note 16, paras. 31–40.

19. Ibid, paras. 41–49.

20. Ibid, paras. 50–53.

21. E.g. Drchal, Česku hrozí, že bude platit desítky miliard slovenským důchodcům [There is a threat to Czechia it will pay tens of billions to Slovak pensioners]. Lidové noviny, 13 July 2011, p. 1.

also published information about the issue, with the undisguised hope that Slovak pensioners might enjoy the supplements.[22]

The ECJ action was so threatening that it even forced Czech politicians into swift reaction. With an express reference to the *Landtová* judgment,[23] the Parliament very quickly agreed on a law with only one article that forbids any new future awards of supplements from the Czech pension system to persons whose periods are considered Slovak according to the C-S Treaty.[24]

But even before that, the SAC ruled in the case concerning Ms. Landtová. The answer from the ECJ established the discriminatory character of the supplement, nonetheless at the same time clearly permitted the grant of it to Ms. Landtová. The SAC decided otherwise. It reasoned that the sole ground for the supplement was the jurisprudence of the CC, which was however based on the CC's interpretation of EU law which was not *acte claire* or *acte éclairé*. The ECJ proved that the legal viewpoint of the CC was incorrect, and because of that "the CC made a decision in a question outside its competence."[25] Therefore, the CC case law did not have a binding precedential character and the SAC refused the supplement to Ms. Landtová.[26] At the same time, the SAC explicitly mentioned the authority of the CC to review the issue again in light of its doctrine of relationship between the EU and Czech constitutional law, including the *ultima ratio* option to quash the EU act.[27] On the other hand, the SAC immediately cautioned against such an approach, because it would either result in enormous costs for the Czech Republic (all people from the group will have a right to supplement) or there would be a threat of EU infringement proceedings and numerous actions at the European Court of Human Rights.[28]

22. Krajanová, Daniela. Slovenským dôchodcom majú dorovnat' dôchodky na české [The pensions of Slovak pensioners will be equalized with the Czech ones]. 13 July 2011. Available at <http://ekonomika.sme.sk/c/5976005/slovenskym-dochodcom-maju-dorovnat-dochodky-na-ceske.html> (last visited 20 March 2012).

23. See the minutes of the Chamber of Deputies' session, 30 Aug. 2011. Available at <http://www.psp.cz/eknih/2010ps/stenprot/022schuz/s022029.htm>. (last visited 20 March 2011).

24. §106a of Law no. 155/1995 Coll., in light of Law no. 428/2011 Coll., the law came in force on 28 Dec. 2011.

25. The SAC supported the argument by the decision of the selfsame CC (II. ÚS 1009/08, *Czech Constitutional Court*, 8 Jan. 2009).

26. 3 Ads 130/2008-204, *Supreme Administrative Court*, 25 Aug. 2011, paras. 70–71, 78.

27. The situation might occur mainly in case of threat to the "material core" of the Czech constitution. The most relevant CC decisions are the following: Pl. ÚS 50/04 (*Sugar quotas III*), Pl. ÚS 66/04 (*European Arrest Warrant*), Pl. ÚS 19/08 (*Lisbon I.*), Pl. ÚS 29/09 (*Lisbon II.*). For analysis in English see Zemánek, "The Emerging Czech Constitutional Doctrine of European Law". 3 EuConst (2007), 424–435; Bříza, "The Czech Republic: The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008" 5 EuConst (2009), 151–156.

28. 3 Ads 130/2008-204, cited *supra* note 26, paras. 76–77.

The SAC decision was in my view controversial. It used the ECJ argumentation to placate the CC, and simultaneously (indirectly) incited the latter to test its determination against all odds. Nonetheless, one commentator at that point still (reasonably) concluded that open conflict of the CC with ECJ was "conceivable, but hardly acceptable".[29]

3. Judgment of the Constitutional Court (Pl. ÚS 5/12)

The CC had a chance to react in proceedings related to a constitutional complaint from Czech citizen Karel Holubec. He worked as an engineer for Czechoslovak Railways from 1964, between 1969 and 31 May 1993 in the Bratislava depot, and his employer was thus located in Slovakia. After the latter date Mr Holubec moved to the Czech Republic and worked for the Czech Railways. In the complaint, Mr Holubec claimed a breach of his basic rights caused by another judgment of SAC from August 2011 that, with similar arguments to those cited above, declined to award supplement to him.

The decision covers 17 pages;[30] part of the ruling entitled "Review of the case under European law" is about ten pages long, more than a quarter of it is dedicated to the summary of the ECJ *Landtová* case. Then the CC briefly outlines its doctrine of the relationship between Czech and European law based on its previous judgments.[31] It repeats its allegiance to the principle of Euro-conformity, confirming that all the Czech legal order including the Constitution should be interpreted in conformity with European integration and loyal cooperation between States and EU institutions. But at the same time the CC emphasized that the EU could not violate the basic principles of the Czech Constitution, nor could any European institution cross the competences transferred to the EU by the Czech State. As a protector of Czech constitutionality, the CC as *ultima ratio* actor reserved the right to review whether legal acts issued by EU institutions threaten the abovementioned limits. In the present case, the CC assigned itself a task to test the *Landtová* decision in light of that doctrine.

The argumentation of the CC starts with the review of Regulation 1408/71. The objective of the Regulation is to coordinate social security in order to uphold the principles of free movement of persons. Article 7(2)(c) of the

29. Komárek "Slovenské důchody: druhá válka soudů před Soudním dvorem EU" [Slovak pensions: second war of courts in front of the Court of Justice], 17 Soudní rozhledy (2011), p. 392.

30. The English version of the decision is available at <www.concourt.cz/soubor/6417> (last visited 20 March 2012) . As it is not paginated or paragraphed, I do not further refer to its concrete parts.

31. Cited *supra* note 27.

Regulation allows certain provisions of agreements between Member States to be applied outside the scope of the Regulation, save they are listed in its Annex III.[32] Articles 12, 20 and 33 of the C-S Treaty are part of Annex III, and thus Article 20 must be interpreted differently from the Regulation and in light of the related jurisprudence of the CC, which includes the additional supplement for Czech citizens.

The CC however further explored whether the Regulation is applicable at all, because in its view "the key factor for applying the Regulation is its object and the nature of the reviewed legal relationships, which must contain a 'foreign' element." The period of employment for an employer with the place of residence in Slovakia during the existence of the federation is not possible to consider retroactively as a period of employment abroad. As was already noted, social security was a competence of the federation and thus the territory of Slovakia was not comparable to foreign State. From all this the CC deduced that "social security and entitlements arising from them in this context do not contain a foreign element."

The situation discussed is different from entitlements due to reference periods obtained in different States. While Article 2(1) of the Regulation states that the Regulation shall apply to persons subject to the legislation of one or more Member States, it is necessary in light of the CC jurisprudence to subject all entitlements flowing from social security up to 31 December 1992 to the Czech legal order. "Failure to distinguish the legal relationships arising from the dissolution of a State with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable."

As a result, the entitlements of Czech citizens stemming from social security up to 31 December 1992 are outside the scope of European law and

> "based on the principles explicitly stated by the Constitutional Court in judgment file no. Pl. ÚS 18/09, we cannot do otherwise than state, in connection with the effects of ECJ judgment of 22 June 2011, C-399/09 on analogous cases, that in that case there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union under Article 10a of the Constitution; this exceeded the scope of the transferred powers, and was ultra vires."

But the wrongful application of EU law was not the only reason behind the excess of the ECJ. The CC was evidently grossly offended by the procedure

32. According to the mentioned provision, the exceptions must be either "more favourable to the beneficiaries" or "arise from specific historical circumstances."

during the ECJ proceedings. It heavily criticized the Czech Government (and agent) for not defending the position of the CC, which in its view made the comprehension of the issue difficult for the ECJ. In order to let its voice heard, the CC had sent a letter to the ECJ explaining the special situation of Czech pensioners and expected that "at least in order to preserve the appearance of objectivity", the ECJ would make itself acquainted with the arguments. Nevertheless, the registry returned the letter with an explanation that "members of the ECJ do not correspond with third persons". That shocked the CC judges, who argued with regular contributions of Commission to the preliminary question procedure. The CC considered the actions of the ECJ as a breach of the *audiatur et altera pars* principle, and generally also of its rights to fair trial in the *Landtová* case.

In a closing part of the ruling, the CC tackled the abovementioned new law forbidding any supplements. Because it was adopted as a reaction to the ECJ judgment, proclaiming that judgment *ultra vires* meant that the respective law became obsolete, as the reason for its adoption disappeared (*cesante ratione legis cessat lex ipsa*). The CC could not openly quash the law, because this issue was not part of the proceedings.[33] Still, it clearly indicated its attitude if the question comes back into its docket in the future.

4. Comments

4.1. *Mistaken application of EU law by the Constitutional Court*

To proclaim an action of the ECJ *ultra vires* is obviously a very serious step with unforeseen consequences. Although it is not *a priori* excluded, one would expect that the CC would support it with perfect and persuasive argumentation. If we summarize its reasoning regarding the (non)application of EU law explained in the previous section, the CC arguments are basically two: first, it claims that because Article 20 of the C-S Treaty is listed in Annex III of the Regulation, it might be given the interpretation pursued by the CC (and different from the general nature of Regulation). Second, it concluded the Regulation was not to be applied at all, as there was no foreign element in Slovak pensions matter.[34]

33. Therefore the respective part is titled "obiter dictum".

34. Inquiring readers may ask why the CC proceeded to overkill and presented two arguments when one would suffice. Also, it is hardly possible to have it both ways: either you apply the Regulation and argue with the Annex or do not apply the Regulation and then the Annex is irrelevant.

Closer inspection reveals flawed logic on both counts. Annex III of the Regulation is divided into two parts titled "A" and "B". Conventions in section A are valid notwithstanding the Regulation, but otherwise must comply with all basic principles of EU law, including the principle of non-discrimination. Conventions mentioned in part B however apply only to certain categories of persons and thus may discriminate. The C-S Treaty is located in part A of Annex III, which means the nature of relevant articles could not be interpreted totally outside the scope of Regulation and EU law generally. Of course, the Czech Government could have taken an opportunity to negotiate inclusion of the C-S Treaty in section B,[35] but given its stance on the issue there was probably never such an attempt. Be that as it may, either the CC did not explore the details of the Regulation closely enough or it simply intentionally overlooked certain points.

The argument of a lack of a foreign element is similarly unconvincing. The Regulation expressly defines its scope and there is no escape from the sentence "This regulation shall apply to . . . persons . . . who are . . . subject to the legislation of one or more Member States . . . " (Art. 2(1)). By its nature, pension law always has a long-term character, where some form of retroactivity is not excluded. Although the dissolution of Czechoslovakia was an exceptional event, it was certainly not the only special occasion in modern European history that happened before the application of the Regulation or even the existence of (or membership in) the EU. Not only is it untrue that the Regulation disrespects European history, it specifically addresses it in Article 7(2(c), stating that conventions arising "from specific historical circumstances" may remain valid, if listed in Annex III. For the record, it is here repeated for the umpteenth time: three articles of the C-S Treaty are included. It seems the circle is complete, but the CC somehow missed the chain of thought along the way.[36]

A highly critical evaluation of the CC's argumentation is also supported by some other aspects of its actions, which confirm its very poor knowledge of EU law. The first example is instantiated by its abovementioned rebuke of the ECJ's conduct during the proceedings. It was true the attitude of Czech Government left much to be desired, and the ECJ might possibly have sent more diplomatic and more accommodating answer, acknowledging respect of the CC's status. But these tactical issues notwithstanding, even university law students should know which parties are entitled to submit observations during

35. Two other conventions between the Czech Republic and other countries are listed. The CC's Slovak pensions jurisprudence did not yet exist during the accession negotiations, but the Government could open the issue even after accession.

36. Credit must be given to judge Jiří Nykodým, who as the sole dissenter in his contribution criticized the decision's interpretation of EU law.

the preliminary reference procedure: a third party is not one of them (see Art. 23 of the ECJ Statute).[37] A second example of an odd interpretation of EU law played a role in the dispute with the SAC. After the latter submitted the preliminary question in *Landtová*, it also suspended other similar proceedings until the answer from Luxembourg arrived. One of these parties fought this suspension at the CC, which decided to quash the decision of the SAC, reasoning that no preliminary question was necessary due to settled Slovak pensions case law of the CC.[38] This attitude is not only in direct contradiction to case law of the ECJ, recently unequivocally expressed in *Elchinov*,[39] but more surprisingly it also breached principles articulated in CC's own recent decision.[40]

4.2. *On the benefits of dialogue with Court of Justice and careful reading of German Constitutional Court jurisprudence*

If we review the case from a wider European perspective, one aspect of the whole affair must be startling for any observer. If the CC was so convinced about the correctness of its position and so insulted by the insufficient attention to it from the ECJ, why did it not simply submit preliminary question and try to justify its approach? By presenting the domestic constitutional concerns and unique historical circumstances, it would ask the Luxembourg court if the invoking those (for the CC) important principles based on the Czech Charter of Fundamental Rights might warrant an exception from the strict application of EU law. The Spanish Constitutional Tribunal has recently decided to proceed with a similar line of argumentation in relation to the EU Charter of Fundamental Rights.[41] It must be emphasized that this is also the first time the Spanish Constitutional Tribunal has "swallowed its pride" and submitted preliminary question.

Of course, there is no way to predict the answer of the ECJ to such a preliminary question. Unlike at the beginning of European integration,[42] one may speculate that the ECJ would be more accommodating to the CC's wishes, if only for strategic reasons. One of the possible avenues that might have been

37. The reasons behind the CC's jurisprudence might have been explained by the advocate of Ms. Landtová, but official documents do not mention his input. Of course, the sole idea that courts should enjoy the right to fair trial is very unconventional and would probably be rejected by the majority of the doctrine.

38. III. ÚS 1012/10, *Constitutional Court*, 12 Aug. 2010.

39. Case C-173/09, *Elchinov*, 5 Oct. 2010, nyr, paras. 24–25.

40. See II. ÚS 1009/08, *Constitutional Court*, 8 Jan. 2009, paras. 21–22; paradoxically the object of CC's critique for not submitting preliminary question in that case was . . . the SAC!

41. See its questions in O.J. 2011, C 290/5 (Case C-399/11,*Melloni*, pending).

42. See Case 11/70, *Internationale Handelsgesellschaft,* [1970] ECR 1125, para 3.

used in the ECJ reasoning would have been the national identity clause (Art. 4(2) TEU).[43] The ECJ has recently issued several decisions where the constitutional principles or rules of the Member States have allowed restrictions of obligations imposed by EU law.[44] Former Advocate General Poiares Maduro has tellingly stated: "The preservation of national constitutional identity can also enable a Member State to develop, within certain limits, its own definition of a legitimate interest . . . ";[45] and the majority of experts share the view that the national identity clause can protect mainly unique features of each constitutional systems.[46] The CC's highest position in the national judicial hierarchy could have helped as well. Commenting on the *Sayn-Wittgenstein* case, Besselink argues that the ECJ is more tolerant if the national constitutional courts have "pronounced on the matter".[47]On the other hand, in all cases decided so far the national exceptions have justified breaches of some exceptional issues related to free movement of services or persons, not a fundamental cornerstone of integration such as non-discrimination based on nationality.[48] One must also acknowledge that the case law of ECJ is far from settled on these issues.[49]

Regardless of the eventual result, the CC's decision to resort to *ultra vires* argumentation is a direct blow to the so lengthily developed notion of judicial dialogue between the EU and national courts. The CC has never disguised the fact that its case law on the relationship toward EU law has been heavily inspired by the German Constitutional Court (GCC), whose decisions were cited several times in the criticized judgment as well. But the CC clearly missed (or overlooked) important parts of one recent decision. In *Honeywell*, which was an answer to the very controversial *Mangold* judgment of the ECJ,[50] the GCC emphasized the necessity of openness of the German

43. There is no space to analyse the clause in detail, for a recent overview, including the jurisprudence of the ECJ, see Von Bogdandy and Schill "Overcoming absolute primacy: Respect for national identity under the Lisbon Treaty", 48 CML Rev. (2011), 1417–1454.

44. E.g. Case C-36/08, *Omega Spielhallen* [2004] ECR I-9609, para 39 or Case C-208/09, *Ilonka Sayn-Wittgenstein*, 22 Dec. 2010, nyr, paras. 92–95.

45. Opinion of A.G. Maduro in Case C-213/07, *Michaniki*, [2008] ECR I-9999, para 32.

46. See Von Bogdandy and Schill, op. cit. *supra* note 43, 1430–1431; Ponthoreau,"Interpretations of the National Identity Clause" in.Baroncelli (Ed.), *Back to Maastricht: Obstacles to Constitutional reform within the EU Treaty (1991-2007)*. (Cambridge Scholars Publishing, 2008), p. 58.

47. Besselink "Respecting Constitutional Identity in the European Union", annotation of *Sayn-Wittgenstein*. 49 CML Rev. (2012), 671–693.

48. On the other hand, the discrimination in social security matters is not forbidden absolutely, as part B of Regulation's Annex III witnesses.

49. See the extreme, *Internationale* like views the ECJ had in Case C-409/06, *Winner Wetten*, 8 Sept. 2010, nyr, namely paras. 54–61.

50. Case C-144/04, *Mangold* v. *Helm* [2005] ECR I-9981; the requests of numerous noticeable German scholars to proclaim this decision *ultra vires* are well known.

Constitution towards EU law (*Europafreundlichkeit*) and stated that to proclaim any act *ultra vires,* the breach of rules by EU institutions would have to be "drastic", "manifest, consistent and grievous"; the ECJ specifically has also the "right to a tolerance of error". Moreover, any *ultra vires* proclamation from the GCC would be preceded by an opportunity for the ECJ to interpret the issue in question.[51] The CC, however, not only applied a zero tolerance policy towards the Court in Luxembourg, but decided to act even without letting the ECJ review the CC's arguments. If we return to the initial analogy, it preferred opening fire to another round of peace talks.[52] Unfortunately, its action might again renew the already forgotten speculations about the immaturity of "new" Member States courts in relation to EU law.[53]

4.3. *Was the Court of Justice the real target?*

It is very difficult to explain why the CC acted so irrationally.[54] The probable answer would have its roots in deep resentment between the CC and SAC in the Slovak Pensions matter. As was stated above, this has developed into a nasty war where one side accuses the other of "excessive formalism"[55] or ignorance of written law.[56] The CC has been understandably exasperated by the SAC defiance in relation to its case law, since it threatens its position at the apex of the Czech judiciary. As the matter at both courts has been promoted mostly by individual "leading" judges, it seems the dispute has developed into personal feud as well. The mutual antagonism was documented in one of the CC's Slovak pensions decisions, where the CC threatened the SAC judges with disciplinary action for "decreasing trust in judiciary".[57]

51. 2 BvR 2661/06, *Honeywell*, paras. 60–66, for a commentary Pliakos and Anagnostaras, "Who is the ultimate arbiter? The battle over judicial supremacy in EU law" 36 EL Rev. (2011), especially 120–123.

52. For the importance of dialogue between the ECJ and constitutional courts and arguments for accommodation of the latter's wishes by the former see Bobek, "The impact of the European mandate of ordinary courts on the position of constitutional courts" in Visser and Van de Heyning (Eds.), *Constitutional Conversations in Europe.* (Intersentia, 2012), forthcoming.

53. The reasons behind worries at the time of accession are provided by Kühn, "The application of European law in the new Member States: Several (early) predictions" 6 *German Law Journal* (2005), 563–582.

54. For a critique of the decision taken from the game theory perspective (and again as a comparison to the GCC attitude) see Dyevre "The Czech Ultra Vires Revolution: Isolated accident or omen of judicial Armageddon?", 29 Feb. 2012. Available at <verfassungsblog.de/czech-ultra-vires-revolution-isolated-accident-omen-judicial-armageddon/> (last visited 20 March 2012).

55. I. ÚS 294/06, *Constitutional Court*, 24 June 2008, para 28.

56. The SAC to the CC, for examples see above.

57. III. ÚS 939/10, *Constitutional Court*, 3 Aug. 2010.

The absurdity of the dispute is most visible in the substantive circumstances of the case in question. The petitioner (Karel Holubec) currently receives his pension both from the Slovak (for the insurance period until 1992) and Czech (period after 1993) authorities. The total sum of the two pensions is in reality higher than the pension that would be calculated on the basis of the fiction that both his insurance periods are Czech. Surprisingly, this crucial information has not been mentioned in the CC decision at all and it was first leaked (including exact numbers) by one of the SAC judges in the framework of the discussion at the Czech law blog Jiné právo.[58] The result is that the CC expressed views on a problem that did not exist, and its argumentation about the defence of social rights of negatively affected Czech citizens was hypothetical, at least in the particular case.[59] It should also be pointed out, though, that while the SAC judge revealed this fact afterwards, it was blatantly missing in the SAC decision dealing with the same petitioner which was contested by constitutional complaint.[60]

In light of these details, one cannot help feeling that the CC's prime target was the SAC, and the ECJ was used as a mere accessory, whose exemplary rebuke was necessary in order to sentence the main culprit.[61] Certainly the CC was offended by its treatment in the ECJ proceedings in *Landtová*, but even more importantly it considered any further dialogue as a delay in executing justice on the SAC.[62] As the English saying goes, you cannot make an omelette without breaking eggs. Maybe the CC had not grasped the broader picture and, with the benefit of hindsight, would have decided to save the eggs for something more worthy.[63]

58. See the discussion (in Czech) under Komárek "V Joštově vybuchla atomová bomba"[Nuclear bomb exploded in Joštova street], 15 Feb. 2012. Available at <jinepravo.blogspot.com/2012/02/v-jostove-vybuchla-atomova-bomba.html> (last visited 20 March 2012).

59. Just the opposite: if the decision of the CC is to be fully implemented, the overall pension of the petitioner will be lowered! Fortunately for him, the Ministry for Social Affairs consequently announced it would not make any attempts in this direction. See its press release from 16 Feb. 2012. Available at <www.mpsv.cz/files/clanky/12417/tz_160212.pdf> (last visited 20 March 2012).

60. 6 Ads 52/2009-88, *Supreme Administrative Court*, 31 Aug. 2011.

61. Arthur Dyevre nicely analyses how the ECJ could become an object used in domestic judicial conflicts, see Dyevre "The Melki Way: The Melki case and everything you always wanted to know about French judicial politics (but were afraid to ask)", 18 Sept. 2011. Available from <papers.ssrn.com/sol3/papers.cfm?abstract_id=1929807> (last visited 20 March 2012).

62. See also below on the expiring mandate of numerous CC's judges. On the other hand, it should be recalled that the SAC expressly provoked the *ultra vires* scenario in one of its August 2011 decisions.

63. To drive the analogy home, I must add that the price of eggs in the Czech Republic almost tripled between the date of the decision and completion of my article. The initial impetus

4.4. *Where do we go from here?*

The closing part of this comment concentrates on future developments, and probably all readers expect (or wish for) an optimistic finish. As there is obviously no blueprint for solutions from past experiences, the following inferences are primarily based on guesswork. Let me consider the domestic impact of CC's decision first. The SAC (or administrative courts generally) is now in an even more problematic position than before, because its recourse to EU law (and the ECJ) ended in tatters. It might continue to resist and prefer the interpretation of ECJ to the CCs and thus basically put the former court higher in the hierarchy. But one should not forget that in its August 2011 judgment, the SAC itself expressly affirmed the right of CC to overturn the ECJ decision and the duty of national courts to observe the result. In the ongoing Slovak pensions proceedings the solution might be to award the supplement not only to Czech citizens (following the CC), but to all EU citizens (following the ECJ). If it is unwilling to facilitate the second group,[64] it has an opportunity to submit a preliminary question again and ask the ECJ whether the discrimination is justified by special circumstances of the matter.[65] No matter what the answer of the ECJ is, there is a chance that the number of ongoing cases is limited and therefore the impact on Czech budget will not be enormous.

All new applications for supplements should be considered according to Law No. 428/2011 Coll. and therefore declined. This is in conformity with the ECJ's decision in *Landtová*, but is contrary to the position of the CC which considered the law unconstitutional. However, the CC's view was expressed in *obiter dictum* and thus is not immediately binding. Of course, in administrative courts unsuccessful applicants may submit constitutional complaints and the CC will subsequently have the opportunity to "rightfully" annul the law. But here is the good news: by the end of 2013, the mandate of 11 (of 15) judges ends, and there is a good chance the composition of the CC will be noticeably different[66] and the position of the CC on Slovak pensions will change. Another positive option that will facilitate all interests would be to

for the hike was allegedly an EU regulation to increase the space for hens in coops – another candidate for an *ultra vires* act!

64. Which seems to be the case, the SAC already declined the supplement to a Bulgarian citizen with actual permanent residence in the Czech Republic who worked in Slovakia before 1993. See 3 Ads 14/2010 – 41, *Supreme Administrative Court*, 26 Aug. 2011.

65. The SAC would (paradoxically) play the role the CC was supposed to play.

66. The candidates for CC judges are proposed by the president and elected by the Senate. As the term of the current president Václav Klaus ends in March 2013, the majority of candidates will be already proposed by his successor. Some of the present judges also expressed their unwillingness to seek re-election.

negotiate inclusion of the C-S Treaty in part B of Annex III, but this might in reality prove quite challenging as clearly the trend has been to gradually remove the discriminatory conventions from the list.[67]

The escalation of the conflict at this point seems unlikely. Of course there are scenarios which do not exclude this possibility. One of them might by initiated by another preliminary question from the SAC, asking the ECJ what the *ultra vires* decision means for interpretation of EU law, followed by some harsh answers from Luxembourg. But hopefully the SAC will keep its promise from August, swallow the bitter pill and will not take the route that threatens to destabilize the whole judiciary in the Czech Republic. The Commission has an opportunity to start infringement proceedings,[68] however it may be doubted that it desires to start a process with uncertain consequences and which threatens to further destabilize the mutual respect between the national and EU levels. All in all, it is firmly hoped that the CC's decision will be taken for what it really was: a poorly written judgment whose objective was to cement the CC's position in the domestic judicial hierarchy rather than to declare all-out war on the EU. It belongs in the footnotes of EU law textbooks, as a reminder of the axiom "being the first is not always the best".

5. Addendum

The biblical verse says "A prophet has no honour in his own country".[69] When this annotation was written, in March 2012, I expected that the parties would try to contain the damage; this, however, grossly underestimated the determination of Czech courts. On 9 May, the SAC in another case related to Slovak pensions, decided to submit another set of preliminary questions to the ECJ, reacting to the CC's decision.[70] The questions may be summarized as follows:

1) Does the Regulation exclude from its personal scope a citizen of the Czech Republic, whose pension periods before 1993 are Slovak according to

67. See the changes made by each amendment of the Regulation in its consolidated form available at <eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1971R1408:20080707:EN:PDF> (last visited 20 March 2012).Currently only 11 such conventions remain out of initial several dozens.

68. For the latest review of ECJ case law and relevant literature on State liability for breach of EU law by national courts see Scherr, "Comparative aspects of the application of the principle of State liability for judicial breaches" 12 ERA Forum (2012), 565–588.

69. John 4:44.

70. 6 Ads 18/2012, *Supreme Administrative Court*, 9 May 2012; Case C-253/12, *JS*, pending.

the C-S Treaty and Czech according to the CC? The SAC hints at negative answer.

2) Does the EU law (including Arts. 18 TFEU and 4(2) TEU) preclude favourable treatment of Czech citizens under the specific circumstances invoked by the CC? If yes:

3) Has the SAC the duty to follow the legal view of the CC, if that view seems to be incompatible with the ECJ interpretation of EU law?

The SAC is clearly applying a double-edged strategy. It indeed asks the questions the CC itself should have asked (Nos. 1 and 2), but for some reason it also adds the third question which could hardly lead to anything positive and which the SAC itself expressly ruled out in its decision in August 2011. The ECJ has a wide array of options on how to deal with the questions: proclaim some of them hypothetical,[71] accept the CC's "special circumstances" approach, send a signal that it is the "highest" jurisdiction in the EU. The case has led to discussions both within Czech academia and various branches of government. While views are deeply divided as to who is right or wrong, they all consider the recent developments undesirable and detrimental to the image of the Czech Republic in the EU. It is obvious that many intelligent minds (mainly in the Czech executive) currently work overtime in order to mitigate the damage.

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71. Cf. the ECJ's refusal to answer question 1 in Case C-571/10, *Kamberaj*, judgment of 24 April 2012, nyr, as it was a request for "an advisory opinion on a general question."

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