

Nuclear War between the Court of Justice and Czech Constitutional Court (hopefully) averted

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There has been an incessant debate in the last decades which court holds the highest cards in the EU. Is it the Court of Justice or national courts, namely those of constitutional rank? It seems that the judges in Luxembourg argue for their primacy, while at least some of the national ones tend to disagree. Yet the judicial debate was all about dancing around with hints and threats and no direct conflict. No wonder theories such as constitutional pluralism began to dominate the academic discourse.

In January 2012 the Czech Constitutional Court ended the long truce when it declared in its decision [Pl. ÚS 5/12](#) the Court of Justice decision C-399/09 [Landtová ultra vires](#). The background and reasons for this judgment were summarized at this [blog](#) by Jan Komárek. For more detailed commentaries I could recommend case notes by Komárek in *European Constitutional Law Review* (2012, vol. 8, no. 2, pp. 323-337) or me in *Common Market Law Review* (2012, vol. 49, no. 4, pp. 1475-1492). To sum up analysis in CMLRev, I was highly critical of the Czech Constitutional Court argumentation and claimed that the attack on the Court of Justice was only a collateral damage in its war with the Supreme Administration Court over the Slovak pensions case-law. I however concluded that despite there were conceivable avenues how to further escalate the conflict, I hoped (and believed) all actors would calm down and try to mitigate the damage.

But as the Bible says, “A prophet has no honour in his own country”. I grossly underestimated the determination of Czech courts. On 9 May, the Supreme Administration Court in another case related to Slovak pensions decided to submit set of preliminary questions to the ECJ, reacting to the Constitutional Court’s decision ([6 Ads 18/2012](#)). For those who do not want to struggle with the elaborate language of the preliminary questions (Case [C-253/12](#), *JS*), the second and third one may be summarized as follows:

- 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 Constitutional Court? If yes:
- Has the Supreme Administrative Court the duty to follow the legal view of the Constitutional Court, if that view seems to be incompatible with the Court of Justice interpretation of EU law?

To comment on the submission very briefly, the second question seemed as a positive offer to the Court of Justice how to find a way to accommodate the wishes of Constitutional Court. Yet if we read *Landtová* carefully, the Court of Justice would have to overturn its previous position. If it was unwilling to do that, the third question

could indeed disrupt the whole European judicial system as we knew it, as the answer from Luxembourg would be hardly surprising.

The case and its possible consequences were hotly discussed both within Czech academia and various branches of government. While opinions were deeply divided as to who was right or wrong (dispute between the so-called Europeanists and national constitutionalists), all involved considered the developments undesirable and detrimental to the image of the Czech Republic in the EU. Because the courts were entrenched in their position, it was mainly up to the executive and administration to find the solution.

Now I come to the reason I am writing this post. There were recently silent rumours behind closed doors that the administration accepted the demands of the petitioner in the *JS* case and decided to pay her (even retrospectively) the pension she required. Obviously this should have led to the withdrawal of the original complaint submitted by *JS* to the Supreme Administrative Court. While it is not yet officially inserted into the database of the proceedings, the information about withdrawal was in the last days publicly mentioned (even if in brief and “if I am right” manner) in Czech newspapers and thus we can take it at face value.

This means the proceedings before the Supreme Administrative Court will be terminated. What happens with the case in Luxembourg? The logical answer is that the preliminary reference will be withdrawn by the referring court. Indeed, in *Zabala Erasun* (C-422/93) under a very similar factual situation (Spanish government wholly acquiesced to the claims of the petitioner), the referring national court retained the request for preliminary ruling as it considered it generally important, but the Court of Justice replied that “

As long as the court which made the reference has not found that in national law the fact that the claims have been acceded to has not so terminated the proceedings, the Court has no jurisdiction to give a ruling on the questions referred to it“ (para 30). The Court of Justice has consistently resisted answering hypothetical questions and if the original complaint by *JS* is withdrawn at the national court, then the questions submitted by Supreme Administrative Court are going to be dropped.

One noticeable development regarding the Slovak pensions saga has to be mentioned as well. During 2012, the Constitutional Court apparently altered its jurisprudence in the matter. Numerous complaints asking for equal pensions were rejected as evidently unfounded and when one of the cases was admitted for regular proceedings the second senate ([II. ÚS 2524/10](#)) rejected the arguments of petitioner and explained in detail how and why are some of the previous Slovak pensions’ decisions overturned. However, these changes do not mean the previous demands of the Constitutional Court in the matter are totally abandoned, as there have been many specific situations for different petitioners and the justification from one case is not unquestionably transferrable to others.

I still consider the January 2012 *ultra vires* attack on the Court of Justice as a very senseless move. To repeat the last sentence from my CLMRev case note, “It

belongs in the footnotes of EU law textbooks, as a reminder of the axiom ‘being the first is not always the best’”. Despite the attempt of the Supreme Administrative Court to raise the stakes further, the recent development should guarantee there would be no irreparable damage in the EU (meant as EU plus national ones) judicial system and the whole affair will be put to rest as historical curiosity.

