

## THE JUDGMENT OF THE CZECH CONSTITUTIONAL COURT IN THE “SLOVAK PENSIONS” CASE AND ITS POSSIBLE CONSEQUENCES (IN LIGHT OF THE FORTITER IN RE SUAVITER IN MODO PRINCIPLE)

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**Abstract:** *As a consequence of a unique historical fact – the dissolution of Czechoslovakia – the divergence between the two social systems of the successor states occurred and caused unequal treatment of those old-age pensioners, previous citizens of the federal state, whose employer had had, by chance, its seat in the territory of the other successor state. The subsequent decision-making over the pension claims of these citizens resulted in controversial judgments not only at the national but also at the Union level. The article focuses on the recent evolution in European Union Court of Justice case “Landtova” (C-399-09) as reflected in the Czech Constitutional Court’s judgement (Pl. ÚS 5/12) stating that EU law is inapplicable in these cases and therefore the above mentioned decision of CJEU is ultra vires. In this context the article deals with relationship of national and EU law in light of the principle of conferral, division of powers and cooperation between the national and European Union courts.*

**Keywords:** *Court of Justice of the European Union, Constitutional Court of the Czech Republic, dissolution of Czechoslovakia, old-age pensions, transnational social security, competences of the European Union Court of Justice, ultra vires decision, principle of conferral, principle of co-operation*

### 1. INTRODUCTION

The judgment of the plenary session of the Constitutional Court of the Czech Republic, announced on January 31, 2012 in the “Slovak Pensions” case (file no. Pl. ÚS 5/12) has caused a fierce reaction among legal scholars and experts in the Czech Republic and abroad. In this judgment, the Constitutional Court concluded that the Court of Justice of the European Union (hereinafter “CJEU”) had overlooked important facts when deciding the Landtová case (C-399/09)<sup>1</sup>. According to the Constitutional Court, EU law is not even applicable to the facts and therefore, the decision of the CJEU, which had proceeded to apply EU law to the situation, was **an excess of an EU institution and an ultra vires decision**. This is the first time that a national constitutional court of an EU Member State has applied, in its judgment, the doctrine of the so-called *ultra vires* legal act (*ausbrechender Rechtsakt*) in declaring an act of an EU institution (in this case, the judgment of the CJEU) to be an act exceeding the scope of conferred powers and therefore declaring it to be inapplicable in the Member State. The relevant cases (i.e. the judgment of the Constitutional Court and of the CJEU) arose in connection with a very unique historical fact – the dissolution of Czechoslovakia and the question of pension claims made by citizens of the successor states (i.e. citizens who had been employed in Czechoslovakia prior to dissolution of the state, but whose retirement pension was to be paid after dissolution by the successor states).<sup>2</sup>

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<sup>1</sup> The judgment of the CJEU in case C-399/09, Landtová, not yet published in the European Court Report.

## 2. FACTS AND PROGRESS TO DATE

The case at issue is the result of a number of individual disputes regarding decisions on the pension claims made by persons whose right to a pension arose after January 1, 1993 – i.e. after the dissolution of the Czechoslovak state and prior to the accession of both successor states to the EU – and who had had an employer prior to dissolution whose domicile had been in Slovakia or had been economically active in Slovakia prior to dissolution. The specific case of pension claims in successor states after the dissolution of the former Czech and Slovak Federal Republic has been solved according to this key and based on the rules in the Agreement between the Czech Republic and the Slovak Republic on Social Security of 1992 (hereinafter only as the “Agreement”)<sup>3</sup>, concluded “*with the wish to regulate mutual relations in the area of social security*”.<sup>4</sup> The Agreement resolves the question of which successor state will be responsible for paying out the old-age pension and the amount of such pension for claims which arose during the functioning of the Czechoslovak state; it thus regulates pension payment competence (Art. 33 which operates with the term permanent residence) and also the method of determination of the insurance system competence for inclusion of periods gained prior to the state’s dissolution – i.e. before 31st December 1992 (Art. 20 of the Agreement). The selected criterion for the insurance system competence is the domicile of the citizen’s employer on the date of the dissolution or the last one known prior to this date,<sup>5</sup> regardless of whether the employment in the other state’s territory lasted for the whole time or only for a short period. The selected method was based on the presumption that the solution was fair and administratively undemanding and at the time the agreement was concluded, the subsequent economic and pension system developments in both states could not have been anticipated.

The difficulties with the application of Art. 20 of the Agreement became apparent only as a consequence of the adoption of (Czech) Act No. 155/1995 Coll., on Social Security, as subsequently amended.<sup>6</sup> The differences between pensions calculated according to the Czech and Slovak laws began to be quite significant. The beneficiaries of pensions falling within the category in question (i.e. who had worked, prior to dissolution, for an employer domiciled in the territory of Slovakia) and who lived in the territory of the Czech Republic, regarded the rule for ascertaining the insurance system competence as discriminatory. As a consequence of the aforementioned rule, a situation may arise, where such persons will receive a lower pension than those persons whose employer had been domiciled in the territory of the Czech Republic prior to dissolution of Czechoslovakia. The Czech Consti-

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<sup>2</sup> The Constitutional Court based its judgment on its constant jurisprudence regarding the application of the Agreement between the Czech Republic and the Slovak Republic on Social Security; see e.g. judgment file no. II. ÚS 405/02, IV. ÚS 158/04 or III. ÚS 252/04 and the judgment of the Constitutional Court of 29<sup>th</sup> March 2007 Pl. ÚS 4/06 of 26<sup>th</sup> October, when the matter had been discussed and decided by the plenary of the Constitutional Court.

<sup>3</sup> The treaty had been applied temporarily from January 1, 1993. On May 3, 1993 it was published in the Collection of Laws as an announcement of the Czech Ministry of Foreign Affairs No. 228/1993 Coll.

<sup>4</sup> See e.g. BREJCHA, A., ŠANTRUČEK, V. *Právo důchodového pojištění*. Praha: Linde, 1998.

<sup>5</sup> The term employer’s domicile is defined in the Administrative Arrangement for the Implementation of the Agreement in Arts. 15 and 16.

<sup>6</sup> Until December 31, 1995, the pension system in both states had been regulated by the Act No. 100/1988 Coll., on Social Security, as amended.

tutional Court repeatedly dealt with these cases based on individual constitutional complaints.<sup>7</sup> The Court concluded in its judgments that “citizens of the Czech Republic who were employed by an employer with its registered office in the territory of the present-day Slovak Republic in the period until 31 December 1992, **are entitled to a supplementary payment** to the aggregate of their (partial) old age pension granted by the Czech insurer and their (partial) old age pension granted by the Slovak insurer, up to the amount of the expected (theoretical) pension that would have been granted if all the insurance periods from the time of the joint state were considered to be Czech periods.”

Upon the accession of the Czech Republic to the EU, this issue was also addressed by the CJEU (based on preliminary questions raised by the Supreme Administrative Court of the Czech Republic<sup>8</sup>), in its decision C-399/09 of June 22, 2011, *Landtova v. Česká správa sociálního zabezpečení (CSSA)*. The CJEU came to the conclusion that the established jurisprudence of the Czech Constitutional Court in the matter of Slovak pensions is **in conflict with the EU principle of non-discrimination based on nationality; however, it would be acceptable if the supplementary payment rule applied not only to Czech citizens, but also to all migrant citizens of other EU Member States**. According to the CJEU, compliance with the principle of equality can only be ensured “by granting to persons within the disadvantaged category the same advantages as those enjoyed by persons within the favoured category” (para 51). However, it is not absolutely clear from the judgment, who exactly are those “persons placed at a disadvantage” by the application of the contested rule (para 50) or “migrating citizens of other EU Member States” concerned. The relationships between the Czech and Slovak citizens during the functioning of the Czechoslovak state can be seen through the Union optics as completely domestic relationships<sup>9</sup> and the prohibition of discrimination therefore could apply to other citizens than the citizens of the former common Czechoslovak state (this is also pointed out by R. Král in his analysis of the case<sup>10</sup>). Moreover, the fact that the CJEU in its judgment explicitly stated that the judgments of the Czech Constitutional Court are of *a discriminatory nature (para. 42–43)*

<sup>7</sup> Judgments of the Constitutional Court File No. III. ÚS 252/04, Pl. ÚS 4/06, File No. IV. ÚS 301/05, File No. I. 1375/07.

<sup>8</sup> The Supreme Administrative Court in the proceedings File No. 3 Ads 130/2008 – 107 referred 2 preliminary questions to the CJEU: *1. Must point 6 of Annex III(A) to Council Regulation (EC) No 1408/71 ... read in conjunction with Article 7(2)(c) [thereof], according to which the criterion for determining the successor state competent to determine the value of periods of insurance completed by employed persons before 31 December 1992 under the social security scheme of the Czech and Slovak Federal Republic is to remain applicable, be interpreted as precluding the application of a rule of national law which provides that the Czech social security institution is to take into account, with regard to entitlement to a benefit and setting the amount thereof, the entire period of insurance completed in the territory of the Czech and Slovak Federal Republic before 31 December 1992, even though, according to the abovementioned criterion, it is the social security institution of the Slovak Republic which is competent to determine the value of that period of insurance? 2. If the first question is answered in the negative, must Article 12 EC in conjunction with Articles 3(1), 10 and 46 of Regulation (EC) No 1408/71 ... be interpreted as meaning that the period of insurance completed under the social security scheme of the Czech and Slovak Federal Republic before 31 December 1992, which has already been taken into account once to the same extent for benefit purposes under the social security scheme of the Slovak Republic, cannot, pursuant to the abovementioned national rule, be taken into account in its entirety only in respect of nationals of the Czech Republic resident in the territory of the Czech Republic for the purposes of entitlement to old age benefit and setting the amount thereof?*

<sup>9</sup> See CJEU judgment in the case C-212/06 *Government of the French Community and Walloon Government v. Flemish Government*.

certainly did not contribute to the spirit of cooperative relationships which should be maintained between the CJEU and the constitutional courts of the Member States.<sup>11</sup> The CJEU had also rejected, through formal channels, a brief that had been filed with the CJEU by the Constitutional Court in the case – this brief had been sent to the CJEU by letter from the president of the Constitutional Court, after the Constitutional Court had learned that the opinion of the Czech Government, filed with the CJEU, had not taken into account the jurisprudence of the Constitutional Court which had developed in analogous cases; in fact, in its statement filed with the CJEU, the Czech Government had basically agreed with one of the parties involved in the dispute – namely the CSSA.<sup>12</sup> The Czech Government, in its statement, also did not point out to the CJEU that the question referred by the Czech Supreme Administrative Court was a purely hypothetical question, as there was no discrimination based on nationality in the given proceeding. In its judgment, the CJEU only stated laconically that no evidence had been given which would justify the application of this rule, which in its opinion is discriminatory. In comparison, in its opinion filed with the CJEU, the Slovak Government (aware of the uniqueness of this case) had argued that the CJEU was not competent to resolve this issue, which the Slovak Government had described as purely hypothetical.<sup>13</sup>

The unclear effects *ratione personae* of the judgment from the CJEU, i.e. uncertainty about which group of persons should be granted the supplementary payment in a “Euro-consistent” way gave rise to fears in the Czech executive of huge financial expenses related to the application of an extensive interpretation of this CJEU judgment. The Czech legislator also reacted to these fears by amending Act No. 155/1995 Coll., on Pension Insurance, as amended, and inserting Section 106a into the Act, which imposed a ban on any kind of balancing settlement or top-up payments for pension insurance periods gained prior to 1<sup>st</sup> January 1993 according to the Czechoslovak laws, which according to the Agreement are considered pension insurance periods of the Slovak Republic. By doing this, it actually denied the existing case-law of the Czech Constitutional Court.

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<sup>10</sup> KRÁL, R. Otázky nad posledním nálezem Ústavního soudu ČR týkajícím se tzv. slovenských důchodů *Jurisprudence*. 2012, roč. 21, č. 4, pp. 28–33.

<sup>11</sup> See C-399/09, para 43 : “The documents before the Court show incontrovertibly that the Ústavní soud judgment discriminates, on the ground of nationality, between Czech nationals and the nationals of other Member States.”

<sup>12</sup> As has been stated in the opinion of the Advocate-General: In its written observations in relation to the present reference for a preliminary ruling, the Czech Government submits that that case-law of the Constitutional Court infringes European Union law (‘EU law’). First, the Czech Government considers that the effect of that case-law is that the same contribution period is taken into account twice, which is contrary to Regulation No 1408/71. (2) Secondly, the Czech Government takes the view that the supplement to which Czech recipients of a pension are entitled is granted selectively, by reference to a cumulative criterion based on nationality and residence, thereby infringing Articles 3 and 10 of Regulation No 1408/71, interpreted in the light of Article 39 EC (now Article 45 TFEU).

<sup>13</sup> The Slovak Republic submits that the reference for a preliminary ruling is inadmissible because the questions dealt with are hypothetical. In so far as the present case concerns the compatibility of the Czech legal system with the principle of EU law that discrimination on grounds of nationality is prohibited, the Slovak Republic is of the opinion that Marie Landtová is not the victim of the alleged discrimination but rather the beneficiary. The case-law of the Constitutional Court guarantees the supplementary payment to the retirement benefit for Czech nationals like the claimant. Accordingly, in the view of the Slovak Government, the issue raised in the instant case would be useful only in proceedings brought by an individual who is *not* entitled to receive the supplementary payment to which individuals in the same situation as Marie Landtová are currently entitled.

In its judgment issued on January 31, 2012 (Pl. ÚS 5/12), the Constitutional Court annulled the previous decision of the Czech Supreme Administrative Court, of the Hradec Králové Regional Court as well as the decision of the CSSA, which had all decided on the question of the claimant's pension claim without taking into account the previous jurisprudence of the Constitutional Court in the matter of the so-called Slovak pensions. The plaintiff in this case, a Czech citizen, had been an employee of the Czechoslovak National Railways Company with his place of work first on the territory of what is today the Czech Republic and then, during the period from 1969 to 1993 in the territory of what is today the Slovak Republic. The CSSA had awarded the plaintiff a pension at a value corresponding to the time he had worked in the Czech territory; however, it didn't take into account the Constitutional Court's prior jurisprudence regarding the proper interpretation of the Agreement between the Czech Republic and the Slovak Republic on Social Security of 29<sup>th</sup> October 1992, having regard to the principle of equality of citizens and application of Art. 30 par. 1 of the Charter of Fundamental Rights of the Czech Republic, i.e. the right to adequate material security in old age as a fundamental right tied to citizenship of the Czech Republic. This prior jurisprudence had clearly inferred from this principle the obligation of the Czech Republic to pay a so-called supplementary payment in addition to the pension (a top-up payment), up to the amount which would equal the pension the person would have received, if all the time worked in the former Czechoslovak Federation territory had been evaluated according to Czech legislation and in the Czech pension system.<sup>14</sup>

In its judgment rendered on January 31, 2012, the Constitutional Court first commented on the conclusion resulting from the CJEU judgment in the aforementioned Landtová case. In its introduction, the Constitutional Court recapitulated all of its own previous decisions, in which it had ruled on the question of the relationship between national law and EU law, particularly accenting the rule (resulting also from the doctrine of the German Federal Constitutional Court), that even in the context of EU membership, the national constitutional courts remain the supreme protectors of national constitutionality, even as against eventual excesses of the EU bodies. In this regard, the Constitutional Court **stated that the European regulation regarding the coordination of pension systems between the Member States cannot be applied to the very unique situation of the dissolution of the Czechoslovak federal state** and its consequences, particularly in respect of the fact that **time worked for an employer with domicile in the territory of today's Slovak Republic prior to dissolution cannot be, retrospectively from today's perspective, considered to be time worked abroad** (moreover, social security fell under federal authority during the whole existence of the Czechoslovak federal state). The Constitutional Court therefore expressed its belief that such **social security relations and claims resulting from them do not include a cross-border element in the case of the so-called Slovak pensions, this being a condition for the application of the Coordination Regulation**. This issue is not comparable with evaluation of social security claims regarding the inclusion of periods gained in various States, but is an issue of the consequences of the Federation's dissolution and the division of social security costs among the successor states.

<sup>14</sup> See file no. II. ÚS 405/02, III. ÚS 252/04, IV. ÚS 158/04, IV. ÚS 301/05, IV. ÚS 298/06, I. ÚS 365/05, II. ÚS 156/06, IV. ÚS 228/06, I. ÚS 366/05, I. ÚS 257/06, I. ÚS 1375/07, III. ÚS 939/10 and Pl. ÚS 4/06.

According to the Constitutional Court, the CJEU overlooked these facts, which leads to the conclusion that EU law cannot be applied to this situation. As a consequence of having overlooked these facts, the CJEU's judgment may be considered to be an **excess of an EU institution which has acted *ultra vires***. The Constitutional Court expressed its belief that the CJEU came to the wrong conclusion also because of the insufficient, incorrect and in this regard also unprecedented opinion which had been filed with the CJEU by the Czech Government: the Czech Government had stated during the proceedings before the CJEU that the prior jurisprudence of the Constitutional Court in the matter of the so-called Slovak pensions violates EU law.

As for the aforementioned amendment of Act No. 155/1995 Coll., which prohibits the granting of a supplementary payment to anyone, the Constitutional Court stated that its purpose was the implementation of the CJEU judgment, which, however, is incorrect in itself and therefore, any such domestic legal provision is obsolete (based on the classical legal principle by which on the termination of the law's purpose, the law itself ceases to exist<sup>15</sup>). One can therefore expect *pro futuro* that in a similar case the Constitutional Court will incidentally annul this amendment.

### 3. THE APPLICATION OF THE MECHANISM OF INCLUSION AND THE FICTION OF "EMPLOYMENT ABROAD" TO THE UNIQUE SITUATION OF THE DISSOLUTION OF CZECHOSLOVAKIA

To evaluate the legal reasoning of the Czech Constitutional Court and to answer the question of whether the CJEU is competent to rule on this issue, it is possible to present the following line of reasoning. The determination of the *amount* of pension claims falls into the exclusive power of the Member States. This area **is not an area where powers are conferred by the Member States to the EU institutions**. According to Art. 4 (2) (b) of the Treaty on the Functioning of the EU, social policy falls into the area of shared competence between the EU and Member States only if it concerns aspects defined in the founding treaties. In the area of social security, the EU only has coordinating or supplementary powers.<sup>16</sup> The CJEU, therefore, is not competent to rule on these matters. In my opinion, one could conclude, that in the same way, the CJEU is not competent to decide on the eventual granting of supplementary payments and their amount for a given category of persons. In this sense, it is also possible to understand the answer of the CJEU to the question referred by the Supreme Administrative Court "*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.*" (para. 53 of the CJEU ruling). EU law may not even demand this, something the CJEU should have stated regarding the principle of conferral, and should have declined to the answer this question. EU law only regulates the mechanism of the inclusion of individual pension claims gained during movement within the Union in other Member States. Therefore, it cannot be applied to a purely domestic situation.

<sup>15</sup> The rule in question is *cessante razione legis cessat ipsa lex*.

<sup>16</sup> See also recent CJEU case-law confirming the powers of the Member States in the social security area, in particular, C-503/09, L. Stewart, 2011, NYP, para 75–77.

The Czech Republic and the Slovak Republic were created on January 1, 1993, upon dissolution of their common predecessor state. This common state was characterized by a single pension system and, in light of contemporary law, it was therefore **legally irrelevant, in which part of the Czechoslovak state the citizen had been employed or where, within the common territory of the state, his employer's domicile was located.** The Czech Republic accepted at the constitutional level the principle of continuity of the legal system. Therefore, time worked for an employer whose domicile happened to be located the Slovak part of the Czechoslovak state cannot be viewed as “employment abroad”. Any differentiation between (pensions) of Czech citizens **based on the fiction that employment in the Slovak part of the former common Czechoslovak state (or the employer's domicile in the Slovak part of the state) is supposed to be considered as being “employment abroad”**, has been held to be discriminatory by the Czech Constitutional Court in its well established jurisprudence, since it is not based on “objective” and “reasonable” reasons.<sup>17</sup>

EU legislation in the form of Council Regulation No. 1408/71<sup>18</sup> (hereinafter only the “Coordination Regulation”) concerns employed persons and their families **moving within the EU**, while the present rule of interpretation from the Constitutional Court concerns the specific case of the dissolution of the former Czech and Slovak Federal Republic, where the persons concerned did not migrate to work in another State, did not have in mind the use of “freedom of movement”, but were working at the time in a common state. It is, therefore, quite disputable whether Regulation No. 1408/71 is applicable to this and similar cases. In March 2009, the Constitutional Court itself in its judgment in a similar case stated that the *“situation created by the dissolution of the Czech and Slovak Federal Republic was so unique, that the conclusion of the Agreement had been necessary regarding the legal security of the citizens in the area of social security. The conclusions made regarding the case under review therefore understandably do not have an impact on the pension claims of other migrating persons.”*<sup>19</sup>

The Constitutional Court also explicitly cited the principle recognized in international law, according to which **the ratification of international agreements does not affect more advantageous rights, protection and conditions granted and guaranteed by domestic legislation.**<sup>20</sup>

In this regard, it is also possible to point out that the Art. 28 of the Vienna Convention on the Law of Treaties signed on 23 May 1969 stipulates: “Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.” From the CJEU case-law, it also follows that, within the preliminary ruling procedure under Art. 267 TFEU, the Court of Justice can interpret EU law only within the limits of the powers conferred on the EU<sup>21</sup> and has no competence to decide on the interpretation of the provisions of international law, which are binding for Member States outside the EU legal framework.<sup>22</sup>

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<sup>17</sup> Compare with the opinion of Otakar Motejl, the Public Ombudsman, on the judgments of the Constitutional Court of 29<sup>th</sup> March 2007 File No.: Pl. ÚS 4/06.

<sup>18</sup> Council Regulation (EEC) No 1408/71 of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community and Regulation (EC) No 883/2004 of the European Parliament and of the Council of 29 April 2004 on the coordination of social security systems.

<sup>19</sup> Judgments of the Constitutional Court File No. I. 1375/07.

For the aforementioned reasons, the **conclusion of the Constitutional Court that the European regulation governing the coordination of pension systems between Member States cannot be applied to the very unique situation of the dissolution of the Czechoslovak Federation** and its consequences is completely justified, particularly in view of the fact that the period of employment with an employer with domicile in the territory of today's Slovak Republic cannot be retrospectively considered to be employment abroad (moreover, social security during the whole existence of the Federation fell into Federal competence).

Even if we were to concede that the Coordination Regulation applies to the given cases, does EU law also apply to the provision of the supplementary payment? If we neglect the fact that in the case in question this is only a hypothetical question, the Supreme Administrative Court actually asked whether, as a result of EU law, the supplementary payment would have to be granted also in the cases of other persons who find themselves in a similar situation, if these persons did not meet all the conditions set by the domestic law (or the Constitutional Court's case-law). Is it possible to consider it as being applicable to citizens of other Member States, who prior to the dissolution of the Federation, i.e. prior to 1st January 1993, worked in the former Czechoslovakia for an employer with his domicile in Slovakia (as of the date of the dissolution or most recently prior to this day) and who after this date (more precisely after 31<sup>st</sup> December 1992) worked in other Member States distinct from the Czech Republic, i.e. who did not establish any connection to the Czech Republic or its social security system after this date, persons in a similar situation (disadvantaged persons)? Such an interpretation would surely be absurd and its financial impact on the state budget would be huge. These persons would have to at least have a connection to the Czech social security system and the competence of the Czech social security authorities would have to be established. In cases where these persons after the dissolution of Czechoslovakia were subject only to the social security system of the Slovak Republic, their situation lacks the cross-border element necessary for the application of the EU regulation and such persons are awarded a pension for all their insurance or employment periods gained during their working career by only one Member State – that being the Slovak Republic. Therefore, if

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<sup>20</sup> File No. ÚS 405/02. It is fully in accordance with the principle generally recognized by the law of the EU that individuals can be granted by the Member States an even higher level of rights than that which ensues from the EU legislation. This principle is also projected in Art. 46 (4) of Council Regulation No. 1408/71, according to which in connection to Art. 6 an exemption is created from the cited Regulation in cases, where the existing agreements on social security provided a higher standard than that ensuing from this Regulation. This is the situation that occurred related to the interpretation of Art. 20 of the Czech-Slovak Agreement by the Constitutional Court, which establishes such a higher standard and therefore an exemption from the cited Regulation. The reasoning objected by the Supreme Administrative Court and the government is based on the existing judicature of the CJEU, which explicitly rules out such a higher standard for a certain group of persons, which would be in conflict with the Community law (the latest being the CJEU ruling C-507/06 Klöppel). In this regard however there emerges the question of whether the regulation included in the judicature of the Constitutional Court really is in conflict with EU law. This eventual conflict undoubtedly is not caused by the difference of the regulation of the pension calculation for a certain group of persons (which is allowed), but by an eventual collision of the method of determination if this group with the general principle of non-discrimination.

<sup>21</sup> See judgment of 5<sup>th</sup> October 2010, *McB.*, C-400/10 PPU, not yet published in the European Court Report, point 51 and order of 14<sup>th</sup> December 201, *Boncea and other and Budan*, C-483/11 and C-484/11, point 32.

<sup>22</sup> Judgment of 27<sup>th</sup> November 1973, *Vandeweghe and others*, 130/73, *Recueil*, page 1329, point 2.

the domestic regulations of the Member State<sup>23</sup> in question are used exclusively, then there is no room for the application of the Coordination Regulation for the purpose of calculation of its value. (The group of authorized persons would be restricted to persons of other Member States, who after 31<sup>st</sup> December 1992 gained an appropriate connection to the Czech social system – i.e. became eligible for a partial Czech pension). The fact, that the jurisprudence of the Constitutional Court regarding the application of the Czech Charter of Fundamental Rights mentions citizens of the Czech Republic<sup>24</sup> does not mean that in a specific case this supplementary payment would not be granted to citizens of other Member States who meet the listed criteria.

#### 4. THE RELATIONSHIP BETWEEN CONSTITUTIONAL COURTS OF THE MEMBER STATES AND THE CJEU AND THE DOCTRINE OF THE LEGAL INSTRUMENT EXCEEDING THE SCOPE OF THE CONFERRED POWERS

At the general level, it is necessary to see that behind all the aforementioned jurisprudence, there is also an effort to shift the interpretation of the relationship between the CJEU and the constitutional courts of the Member States. Neither EU primary law nor the Charter of the Fundamental Rights of the EU resolve a possible conflict with a national standard of protection of fundamental rights; however, the constitutional courts of the Member States have given their opinion on this subject either during their review of the constitutionality of the Lisbon Treaty or, incidentally, during the review of the constitutionality of implementation norms (see, for example, the development of the *Solange-II* doctrine in the judgments of the German Federal Constitutional Court). The relationship between the EU and national courts is based fundamentally on the **principle of cooperation**; however the national constitutional courts, at the same time, have more or less stressed the possibility of review of an EU legal instrument or act exceeding the scope of conferred powers (the *ultra vires* test) as well as the standard of protection of constitutional identity and of fundamental human and civil rights. The Czech Constitutional Court has also unequivocally commented on the possibility of conflict between the standard of protection of human rights and fundamental freedoms ensured by the constitutional order of the Czech Republic and the standard provided within the EU. It has also observed that protection of fundamental rights and freedoms falls in the area of the “material core” of the Constitution, which is beyond the reach of the constitutional framers (cf. Pl. ÚS 50/04). If, from this point of view, the standard of protection ensured in the European Union were unsuitable, the bodies of the Czech Republic would have to again take over the transferred

<sup>23</sup> Compare in this regard the judgment of the CJEU in case C-212/06 *Gouvernement de la Communauté française a Gouvernement wallon*, European Court Report 2008 p. I-1683, judgment of the CJEU in case C-20/87 *Gauchard*, European Court Report 1987, p. 4879, points 12 and 13, judgment of the CJEU in case C-18/95 *Terhoeve*, European Court Report 1999 p. I-345, point 26, also the judgment of the CJEU in case C-153/91 *Petit*, European Court Report p. I-4973, point 10 and the judgment of the CJEU in joint cases C-95/99 – C-98/99 and C-180/99 *Khalil and others*, European Court Report 2001, p. I-7413, point 70.

<sup>24</sup> Art. 30 (1) of the Charter of Fundamental Rights and Freedoms (promulgated by the Resolution of the Presidium of the Czech National Council No. 2/1993 Coll., of 16<sup>th</sup> December 1992 on promulgation of the Charter of Fundamental Rights and Freedoms as a part of the constitutional order of the Czech Republic, as amended by Constitutional Act No. 162/1998 Coll.).

powers, in order to ensure that it was observed (see the *Lisbon I judgment*, file no. Pl. ÚS 19/08, para. 196)<sup>25</sup>.

**The principle of cooperation** that should apply as between the national constitutional courts and the CJEU should be understood as a **dialogue**. In an extreme case, part of this dialogue can also involve the use of the doctrine of protection of constitutional identity or the decision of a national constitutional court that a legal instrument has exceeded the scope of powers conferred on the EU. In its judgments, the Czech Constitutional Court does not dispute the basic power of the CJEU to interpret EU law and its principles; however, it also refers to the doctrine of the legal instrument exceeding the scope of the conferred powers employed by the German Federal Constitutional Court (Federal Constitutional Court decision in the Maastricht case<sup>26</sup>), which it partially projected onto the declared task of the Czech Constitutional Court (see judgment Pl. ÚS 19/08 point 110). According to this doctrine, the constitutional court can, in exceptional cases, act as the *ultima ratio* and investigate whether an EU act has exceeded the scope of conferred powers which the Czech Republic had transferred to the EU pursuant to art. 10a of the Czech Constitution. It is also possible to point to the jurisprudence of the CJEU itself in relation to the question of deviation from the limits of transferred powers (see C-376/98, *Germany v. the Parliament and the Council*). According to the German doctrine, the ruling of the CJEU could itself be such act capable of being *ultra vires*; the Polish Constitutional Tribunal explicitly excluded the competence of the CJEU to adjudicate on the limits of transfer of powers to the EU, as according to this Tribunal this is a case of interpretation of national constitutional law. Although in light of the dogmatism of national constitutional law, it is possible to agree to some extent with this conclusion, it is a question of whether it is necessary to formulate it as strongly as the Polish Constitutional Tribunal has done.<sup>27</sup>

The German Federal Constitutional Court reserved for itself the power to have the last say on the question of whether any EU act transgressed the limits set by the German law for the EU and thus on the question of which EU acts are already *ultra vires*, i.e. outside the limits of powers transferred on EU bodies. It is, therefore, theoretically possible, not only from the German law perspective, that the CJEU itself transgresses EU powers (e.g. its interpretation would no longer be the interpretation of the Founding Treaties, but on the contrary would present unacceptable lawmaking). Should the German Federal Constitutional Court come to the conclusion that these acts are *ultra vires*, then it establishes their non-applicability (not invalidity or nullity) on German territory. The Maastricht decision thus meant a qualitative shift compared to the existing state of interpretation of the law; the Maastricht doctrine was projected also into the subsequent Lisbon judgments of the German Federal Constitutional Court and also influenced both Lisbon judgments of the Czech Constitutional Court. The generally shared opinion is that the Maastricht doctrine of the German Federal Constitutional Court, based on the principle of the limited specific empowerment (*begrenzte Einzelermächtigung*), has the nature of a potential warn-

<sup>25</sup> See PÍTROVÁ, L. Lisabonská smlouva pod lupou Ústavního soudu ČR. In: *Acta universitatis Carolinae, Iuridica* No. 3, Univerzita Karlova, Praha 2010, pp. 51–74.

<sup>26</sup> BVerfGE No. 89/155 of 12<sup>th</sup> October 1993.

<sup>27</sup> See judgments of the Polish Constitutional Tribunal K 18/04 (esp. para 8) and K 32/09.

ing, but may not ever have to be used in practice. The prerequisite for the cooperation between national constitutional courts and the CJEU is, therefore, also the application of the principle of *judicial self-restraint* even in the context of the rulings of the CJEU.<sup>28</sup> The fact that the procedure under the above mentioned Maastricht doctrine should be an extreme solution *ultima ratio* became evident in the decisions of the constitutional courts of Member States, who even when in doubt, have been unwilling to qualify acts of EU bodies as acts that exceed the scope of conferred powers.<sup>29</sup>

It was, in fact, the Czech Constitutional Court which, in 2012, in the aforementioned judgment in the case of the Slovak pensions, first referred to a decision of the CJEU as being a legal act exceeding the scope of the conferred powers. It reasoned that the European regulation concerning the coordination of pension systems between Member States **cannot be** applied to the very unique situation of the dissolution of the Czechoslovak Federation (Pl. ÚS 57/12). If the Constitutional Court has intentionally adopted such a decision, which diverges from the CJEU interpretation of EU law, it is necessary to interpret it in accordance with Constitutional Court own jurisprudence as a **consequence of its belief that the mentioned CJEU ruling is outside the limits of conferred powers**, because in any other situation, the Constitutional Court would accept the primacy of application of EU law. At the same time, it is true that if the Constitutional Court diverges from the EU regulation, such divergence cannot, in the Czech constitutional system, be reviewed by any other body, and there is no way of finding out whether the Constitutional Court's application of the Maastricht doctrine was justified or whether its decision not to apply a European norm had been motivated by another reason, including a possible mistake on its part.

**However, it is necessary to stress that the specific case of the “Slovak pensions” is not a typical case of conflict between EU and national law. It is a specific situation connected to the dissolution of a state, which is unique and restricted to a determinate group of non-repeatable cases.**<sup>30</sup>

It is evident that when assessing findings of the Constitutional Court on one side and EU legal acts on the other, that there is a risk that the national system of constitutional law will come into conflict with the system of EU law. It is necessary to remember that EU law and national law represent, as the Czech Constitutional Court stated, two autonomous legal systems. If in the case of a common conflict of national and EU law, the primacy of application of the EU legal regulation is to be applied; however, in the case of a conflict of such an EU act with some parts of the constitutional order and the necessity to judge the

<sup>28</sup> Further see contributions in KUST, Jan. *Evropská inspirace z Karlsruhe*. OEZ, Praha 2009.

<sup>29</sup> The German Federal Constitutional Court also, in its decision in the Honeywell case (2 BvR 2661/06 of 6<sup>th</sup> July 2010) reacting to the previous dispute in the Mangold case.

<sup>30</sup> That is also why I do not fully share critical comments of the Constitutional Court ruling as published recently which unanimously reject the reasoning of the Czech Constitutional Court and view consequences of the ruling as revolutionary, in particular, Molek, P. The Court That Roared: The Czech Constitutional Court Declaring War of Independence against the ECJ, 2012, No. 6, p. 162–170 and ZBÍRAL, R. Czech Constitutional Court, judgment of 31 January 2012, Pl. ÚS 5/12, *Common Market Law Review*, 2012, No. 4, pp. 1475–1491.

scope of transferred powers, the Czech Constitutional Court has reserved for itself the right to make the final decision.<sup>31</sup> While the jurisprudence of the CJEU does not rule out the reviewability of even those decisions of national constitutional courts by the CJEU, the constitutional systems of the majority of States explicitly rule out such a possibility. **However, as for the question which body has the competence of making the final decision in such a “conflict of courts”, it is absolutely necessary to answer that when applying the principle of derived legitimacy of the EU bodies and the character of Member States as the masters of the Treaties, it is the Constitutional Court.**<sup>32</sup> This also explicitly follows from the Czech Constitutional Court’s jurisprudence, which is binding for the Government. If any other body made an attempt to decide on the applicability of constitutional law in case of its conflict with another legal system, the Czech constitutional order would view this as an illegitimate act. In the event that national state institutions were to accept such decisions or even initiate them, it would be a flagrant disregard of the constitutional order.

## 5. SCENARIOS FOR FUTURE DEVELOPMENT

### The raising of another preliminary question

With regard to further development and given the strong reactions in the present case, it is necessary to state that the Czech Supreme Administrative Court has again referred new questions to the CJEU in case C-253/12 (see resolution of the Supreme Administrative Court 6 Ads 18/2012 – 82). It is possible to speculate whether this *de facto* does not constitute an abuse of the preliminary ruling procedure for reasons other than the decision in the specific case. The reference for a preliminary ruling is not necessary in cases where the question referred is similar to a question which has already been the subject of a CJEU preliminary ruling in a similar case (28-30/62 *Da Costa*, 283/81 *CILFIT*, C-337/95 *Parfums Christian Dior*) and also in a case when the CJEU has dealt with a similar legal question, although under a different procedure (283/81 *CILFIT*). After all, these are cases, when according to the *acte clair* doctrine the correct interpretation of Community (EU) law is so clear that there is no room for reasonable doubt about the answer to a question which arose during the proceedings (283/81 *CILFIT*). These criteria should prevent the abuse of the preliminary

<sup>31</sup> In accordance with the mentioned constant jurisprudence of EU member state constitutional courts, it is also possible to refer to the already mentioned difference between the primacy of the EU law and supremacy of constitutional law. Further also STREINZ, R., HERMANN, CH. *Der Anwendungsvorrang des Gemeinschaftsrechts und die “Normverwerfung” durch deutsche Behörden*. Bayrische Verwaltungsblätter, 2008, pp. 1–11; FUNKE, A. *Anwendungsvorrang des Gemeinschaftsrechts*. DÖV 2007, pp. 733–740 and lastly also HUMMEL, D. *Die Mißachtung des parlamentarischen Gesetzgebers durch die Fachgerichte unter dem Deckmantel des Anwendungsvorrangs des europäischen Rechts*. NVwZ 2008, pp. 36–41.

<sup>32</sup> Compare the German point of view on this question KIRCHHOF, P. *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht*. In: KIRCHHOF, P. – EHLERMANN, C., D. *Deutsches Verfassungsrecht und Europäisches Gemeinschaftsrecht, Europarecht*. Beiheft 1/1991, Baden-Baden 1991, pp. 1–11; Siegfried Broß, *Verhältnis des Gerichtshofs der Europäischen Union zu den nationalen Verfassungsgerichten - dargestellt am Beispiel des Bundesverfassungsgerichts der Bundesrepublik Deutschland*, presentation at the conference “Consequence of the adoption of the European constitution treaty for the domestic legal system”, Prague, 4<sup>th</sup> June 2004; regarding the labor law area GRIMM, D. *Europäischer Gerichtshof und nationale Arbeitsgerichte aus verfassungsrechtlicher Sicht*. *Recht der Arbeit*. 1996, Heft 2, pp. 66–71.

ruling procedure by national courts; however, muting these criteria does not relieve the courts of their responsibility for fulfilling the obligation to refer questions for a preliminary ruling. These courts must act *bona fide* and must not circumvent EU law. In addition, the question regarding discrimination based on nationality is just theoretical in this case.<sup>33</sup> Such a question would be justified if the provision of the pension supplement were to be denied to a person who didn't meet the criteria of Czech nationality and residence.

It would also be necessary to clarify who are those “persons belonging to the disadvantaged category”, to whom the supplement should also be granted due to non-discrimination in the sense of the aforementioned CJEU judgment in case C-399/09, Landtová.

Completely unprecedented even in a comparative context is the third preliminary question (see below), referred by the Supreme Administrative Court in the proceedings mentioned, in essence, calling on the CJEU to interpret the constitutional obligation to respect the decision of the Czech Constitutional Court contained in Art. 89 of the Czech Constitution.

*Does European Union law prevent the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?*

The Supreme Administrative Court, led according to the President of the appropriate senate by an effort to express “loyalty both to the Czech Constitutional Court and the CJEU as a body of the Community, which the Czech Republic is an integral part of and the principles of which it is bound to respect, thus, basically, declined to accept the judgments of the Czech Constitutional Court, in a manner which is contrary to Art. 89 of the Czech Constitution. Also in this case, the preliminary question is apparently hypothetical and its solution *prima facie* is not related to the dispute in question.<sup>34</sup> For the Supreme Administrative Court's defense, it is necessary to state, that in these particular proceedings it extended its reasoning by reasons which could lead to the justification of more favorable treatment of Czech citizens in the area of pensions with reference to respect for national identity, non-violation of the right of workers to free movement and also regarding possible costs significantly threatening the financial stability of the Czech pension system.

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<sup>33</sup> The prohibition of referring hypothetical questions arises from the primary law as well as the CJEU judicature, e.g. judgment C-430 and 431/99 *Sea-Land Service*, or C-36/99 *Idéal tourisme* [2000] ECR I-6049, paragraph 20.

<sup>34</sup> Let's leave aside the fact that the Constitutional Court in the case of the so-called Slovak pensions dealt in its judgments File No. I. ÚS 1375/07 also with the “procedural decision” of the Supreme Administrative Court whether to stay the proceedings in case of a reference for a preliminary ruling. According to this judgment in case that the Constitutional Court found the procedure of the Supreme Administrative Court to be unconstitutional and the Supreme Administrative Court in dispute with this conclusion issued the contested decision on the staying of the proceedings and referred for a preliminary ruling to the CJEU, it is necessary to declare this procedural decision unconstitutional as well. Even if this isn't a decision on the merits of the case in cassation complaint proceedings, it is an effort to change the judicature of the Constitutional Court in the same case (conflict with Art. 89 (2) of the Constitution) and in the opinion of the Constitutional Court such stay of the proceedings presents a violation of the right to a fair trial by unnecessary delays (conflict with the requirement of finality) and as a consequence also the violation of the prohibition of discrimination and the right to adequate material security in old age.

In this regard, it is possible to refer to the CJEU jurisprudence, which assigns significant importance to the financial stability of the Member States' social systems. This stability is considered to be a legitimate goal, which can justify even an exemption from the principle of equality<sup>35</sup> as well as the restriction of the right to free movement of persons.<sup>36</sup>

### Decisions of national courts in accordance with the judgments and jurisprudence of the Constitutional Court

If a national court (e.g. the Supreme Administrative Court) were to decide in a specific case, which is analogous to the Landtová case, in accordance with the cited judgments of the Constitutional Court and, therefore, in contradiction with the CJEU ruling in the Landtová case, the claimants in the Czech legal system do not have any means to bring the case before the CJEU in other proceedings. The only course of action that would be possible is a constitutional complaint, but the Constitutional Court has excluded itself from the obligation to refer for preliminary rulings to the CJEU. Moreover, a claimant who would be successful in his case apparently would not file a constitutional complaint against a favourable decision. It is possible to imagine a situation where the complaint of a claimant who does not meet the criteria of nationality and permanent residence stipulated by the Constitutional Court would be rejected. In such a case the Constitutional Court would probably confirm its judgments in the individual complaint proceedings. Although the case-law of the CJEU implies (ruling C-224/01 *Köbler*, para 38 and 39) that EU law can be breached even by a decision of the national supreme court, the CJEU itself stated that it is not a superior instance to the national highest instance courts and is in no position to annul such a decision. In such a case, the principle of legal certainty and the principle of *res judicata* cannot be disputed. In any event, recognition of the principle of State liability inherent in the EU legal order requires reparation of the damage incurred but not necessarily revision of the judicial decision which was responsible for the damage. (in the same way it is, for example, in proceedings before the European Court of Human Rights).

### Amendment of the Coordination Regulation

To clarify the relationship between national and EU law, it would be possible to consider amending the applicable EU regulation in question. A reference to the Czech-Slovak Agreement, specifically to its Art. 20, had been included during the negotiations of the Czech Republic's accession to the EU in Appendix III part A of the Council Regulation (EC) No. 1408/71. However, this Regulation did not make it possible for this or any other international agreement on social security contained therein to be applied in a manner which implied different treatment of citizens of various member states. At present, Council Regulation (EC) No. 1408/1971 has been replaced by a newer Regulation of the Parliament and the Council (EC) No. 883/2004. Theoretically, it would be possible to consider incorporating an appropriate rule, as stipulated by the jurisprudence of the Czech Constitution Court, into the Appendix XI of this Regulation ("Special provisions for the application of the legislation of member

<sup>35</sup> Compare e.g. the CJEU judgment in case C-341/08 *Petersen*, European Court Report 2010, pp. 1–47.

<sup>36</sup> Compare e.g. the CJEU judgment in case C-503/09 *Stewart*, not yet published in the European Court Report.

states”). The possibility of such a solution should be further analyzed. However, due to the fact that the CJEU found the rule applied in the Czech Republic to be discriminatory, it would be necessary to persuade the European Commission to submit the appropriate draft legislation, and since the Commission has the monopoly in this regard, this option seems unlikely.

In the current legislation, the relations between Regulation EC No. 883/2004 and other coordination instruments are regulated by Art. 8 of this Regulation; however, only regarding its competence, which according to the judgments of the Constitutional Court is at the very least disputable in the group of cases in question. In the current legal state, the reference to the Agreement (its articles 12, 20 and 33) is listed in Annex II of the Regulation, which states that *“the provisions of bilateral conventions which do not fall within the scope of this Regulation and which remain in force between Member States are not listed in this Annex.”* Further, according to this provision *“This Regulation shall replace any social security convention applicable between member states falling under its scope. Certain provisions of social security conventions entered into by the Member States before the date of application of this Regulation shall, however, continue to apply provided that they are more favourable to the beneficiaries or if they arise from specific historical circumstances and their effect is limited in time. For these provisions to continue to remain applicable, they shall be included in Annex II. If, on objective grounds, it is not possible to extend some of these provisions to all persons to whom the Regulation applies this shall be specified”*. It is also interesting to discuss the question of why the cited rule had not at least been announced in accordance with the Art. 6 of the Coordination Regulation as a substantial change in interpretation of the given Agreement. According to this provision, *“the member states shall notify the Commission of the European Communities in writing ... the conventions entered into as referred to in Art. 8 (2)... as well as substantive amendments made subsequently. Such notifications shall indicate the date of entry into force of the laws and schemes in question.... These notifications shall be submitted to the Commission of the European Communities every year and published in the Official Journal of the European Union”*.

### Various possible solutions to similar cases

Following the judgment of the Constitutional Court of January 31, 2012 (Pl. ÚS 5/12), citizens whose claim for old age pension arose after the January 1, 1993, who, as of this date, had an employer whose domicile was in Slovakia and who feel that they have been aggrieved with regard to their pension claims by the application of the Agreement, can apply to the Czech insurance system (CSSA) to change the decision according to the provision of section 56 of Act No. 155/1995 Coll., on Social Security, as amended. The current legal regulation in section 106a of the No. 155/1995 does not allow for the provision of the supplementary payment, as had been possible in the past. Although the validity of this regulation has been put in question by the aforementioned judgments of the Constitutional Court, it was not (nor could it have been, in the given case) annulled by the court. Therefore, it is currently only possible to proceed in individual cases in the same manner as in similar cases in the 1990s. On the basis of an **application within hardship proceedings** in accordance with section 4 (3) of Act No. 582/1991 Coll., on Social Security Organization and Implementation, as amended. The application then serves as the basis for a decision based on the merits of the case, which is then issued by the insurance system. The Minister may also charge the social security administrations to alleviate hardship in individual cases. In this way, it will be necessary to proceed very thoroughly, otherwise there is a risk that a similar situation will reap-

pear as a referred question before the CJEU. This state, which opens social security law as well as the bases of functioning of the Member States' social systems to the influence of European law interpreted by EU bodies, cannot be viewed as desirable. It is possible to imagine other proceedings at the Constitutional Court, where the constitutionality of section 106a of Act No. 155/1995 Coll., could also be incidentally contested. The solution of these cases through the institution of hardship alleviation so as to prevent other litigation (especially at the EU level) would be very difficult as each of these cases is unique and, therefore, it is not possible to resolve them across the board. It is, however, also possible to imagine draft legislation which could be a "Euroconsistent" regulation and, basically, would enable the provision of the supplement based on an entirely domestic regulation, which would be based on a sufficiently strong connection to the Czech social system. This would remove the reason for proceedings before the CJEU in this and similar cases.

## 6. CONCLUSION

The conflict described above between the judgments of the Czech Constitutional Court in the case of the so-called "Slovak pensions" (Pl. ÚS 5/12) and the decision of the CJEU in the case of Landtová (C-399/09) is the result of a non-cooperative attitude of the actors responsible at the national level and an expression of the misunderstanding of the relationship between the national judicial system and the EU courts, as well as an effort to establish hierarchy in this relationship.<sup>37</sup> In order to alleviate this conflict, it is necessary to always point out the uniqueness of the issue of pension claims associated with the dissolution of the Czechoslovak state and the need to resolve it within bilateral Czech-Slovak relations. It is also necessary that, in the future, the Czech state administration must respect the norms of the constitutional order and the binding character of the interpretation of the latter by the Czech Constitutional Court, and to operate within this framework. A prudent application of the institute of hardship alleviation and satisfying the claimant after lodging a claim before administrative courts should lead up to this goal. There is also a possibility of a legislative solution in the form of the heretofore outlined "Euroconsistent" regulation. The transfer of the dispute to the EU level cannot be considered appropriate or efficient for a number of reasons (constitutional as well as purely practical). So is it necessary to eat humble pie? A similar conflict between national courts and a national constitutional court has already taken place at the EU level (see the ruling of the CJEU in case C-188 and 189/10., Melki and Abdeli)<sup>38</sup> – however not with such vigor that a national court would basically ask whether it should rule out the application of the Constitution. The principle *fortiter in re suaviter in modo* apparently does not apply to us, the Czechs.<sup>39</sup>

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<sup>37</sup> The misunderstanding of the relationship between the autonomous systems of the Union and national law is documented by the third question referred by the Supreme Administrative Court in the Resolution 6 Ads 18/2012-82 - *Does European Union law prevent the national court, which is the highest court in the State in the field of administrative law and against whose decision there is no right of appeal, from being, in accordance with national law, bound by the legal assessment of the Constitutional Court of the Czech Republic where that assessment seems not to be in accordance with Union law as interpreted by the Court of Justice of the European Union?*

<sup>38</sup> See MALÍŘ, J. Francouzská ústavní revoluce. *Právník*. roč. 150, č. 9, pp. 821–850.

<sup>39</sup> At the time of publication of this article the reference for preliminary ruling by the Supreme Administrative Court in rem C-253/12 has been withdrawn from the CJEU Register and an amendment to the Act. No. 153/1995 Coll. has been adopted to find euro-conform and constitution-conform solution.