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RECEPTION OF EUROPEAN UNION LAW BY THE CZECH CONSTITUTIONAL COURT – A STRUGGLE FOR AUTHORITY?

Monika Kirova

The European Union project has expanded largely in territorial, legal, and democratic terms by its fifty-fifth anniversary. The founding fathers' ambition for 'ever closer union' has arguably become closer to accomplishment. The Eastern enlargement embodies one of the achievements of this idea. However, the territorial expansion of the Union also brought precarious challenges to European Union legal order. This article will consider the reception of European Union law in the Czech Republic revealed by the robustness of the Czech Constitutional Court. Court's ostensible openness towards European law is finely unfolded by its eager struggle for the last word. The Court has unequivocally underlined its authority of final arbiter by its continuous reluctance towards the preliminary ruling procedure, and its aggressive ultra vires review. This trend will be exemplified by the constitutional review of Data Retention Directive implementing legislation, and the Slovak Pension Saga. It will be argued that Court's caution towards European law has its roots in Czech Republic's history, and inherited Euroscepticism. This article will proceed in the following order: firstly, a short overview of European law principles will be presented. Secondly, the position of the Czech Constitutional Court in regards to these stands will be discussed. The article will then proceed with examination of Data Retention Directive adoption, and invalidation, and will conclude the section with analysis of Czech Constitutional Court's uneasiness with the preliminary ruling procedure. Furthermore, the Slovak Pension Saga will be discussed. The last section will be dedicated to possible explanations for Constitutional Court's approach.

INTRODUCTION

By its fifty-fifth anniversary, the European Union (EU) project had expanded largely in territorial, legal and democratic terms. The founding fathers' ambition for an 'ever closer union' have arguably come closer to accomplishment. The Eastern enlargement embodies one of the achievements of this idea. However, the territorial expansion of the Union also brought precarious subtle challenges to European Union legal order. This article will consider the reception of EU law in the Czech Republic illustrated through the robustness of the Czech Constitutional Court (the Court). The Court's ostensible openness towards European law is undermined by its eager struggle for the last word. The Court has unequivocally underlined its authority as final arbiter by its continuous reluctance regarding the preliminary ruling procedure and its aggressive ultra vires review. This trend will be demonstrated by the constitutional review of legislation implementing the Data Retention Directive and the *Slovak Pension Saga*.¹ It will be argued that the Court's caution towards EU law has its roots in the Czech Republic's history and inherited Euroscepticism. This article will proceed in the following order: firstly, a short overview of European Union law principles will be presented. Secondly, the position of the Czech Constitutional Court in regards to these principles will be discussed. The article will then proceed with an examination of the Data Retention Directive's adoption and invalidation and furthermore, will conclude the section with an analysis of the Czech Constitutional Court's uneasiness

¹ 2007/03/20 - Pl. ÚS 4/06: *Slovak Pensions*; 2012/01/31 - Pl. ÚS 5/12: *Slovak Pensions*

with the preliminary ruling procedure. Furthermore, the *Slovak Pension Saga* will be discussed. The last section will be dedicated to possible explanations for the Constitutional Court's approach.

EUROPEAN LAW PRINCIPLES

The Czech Republic, as a Member State of the EU, has had to adopt long-established EU law principles. The chief of these principles is perhaps the doctrine of EU law primacy established by the Court of Justice of the European Union (CJEU) in Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585,² and later extended in Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629.³ It is now also codified in the Lisbon Treaty.⁴ Although the current legal instrument is a declaration and is placed in the protocol, the declaration is legally binding and enforceable by the CJEU.⁵ The doctrine provides for unconditional primacy of Community law over conflicting domestic legislation, including constitutional principles. The rationale behind it is the full effectiveness of EU law across Member States. However, national Constitutional Courts are asked to do the unthinkable – “to refrain from enforcing the constitutional provisions that they have a sworn duty to uphold and protect, in favour of any act of Community law, whatever its rank or content.”⁶ The consequence of this primacy is to render incompatible national legislation inapplicable.⁷ Unlike primacy over ordinary legislation, which has been largely accepted by Member States' courts, primacy over constitutional principles proves to be problematic and is continuously opposed by Community Constitutional Courts.

In addition to EU law primacy, the preliminary ruling procedure puts Constitutional Courts in an intriguing position. Article 267 of the Treaty of the Functioning of the European Union⁸ accommodates the uniform interpretation of EU law across Member States by establishing the CJEU as the ultimate interpreter of EU legislation. In cases of doubt about the meaning of EU law, or suspicion about its validity, national courts are encouraged to submit a question to the CJEU. Moreover, Member States' courts of last instance, against whose decisions there is no remedy, have an obligation to engage with the preliminary ruling procedure.⁹ However, most Constitutional Courts demonstrate unwillingness to comply with this obligation. For instance, none of the Constitutional Courts in Poland, Hungary, Bulgaria, Romania, Estonia or Spain have referred a question to the CJEU yet.¹⁰ The German Federal Constitutional Court, a notable player in shaping EU law, has recently made use of the opportunity to open a direct dialogue with the CJEU.¹¹ The Czech Constitutional Court has not yet taken this opportunity, although it has been prompted on numerous occasions.

² Case 6/64 *Flaminio Costa v E.N.E.L.* [1964] ECR 585

³ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629, para 3

⁴ Declaration 17 concerning the provisions of the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU)

⁵ Gunnar Beck, ‘The Lisbon Judgment of the German Constitutional Court, the Primacy of EU Law and the Problem of Kompetenz-Kompetenz: A Conflict between Right and Right in Which There Is No Praetor1’ (2011) 17 *European Law Journal* 470, 2

⁶ Marise Cremona, *Compliance and the Enforcement of EU Law* (1st ed Oxford University Press, Oxford 2012), 133

⁷ Case 106/77 *Amministrazione delle Finanze dello Stato v Simmenthal SpA* [1978] ECR I-00629, para 3, 21

⁸ Consolidated Version of the Treaty on the Functioning of the European Union [2012] OJ C 326/01, art 267

⁹ Art 267 TFEU

¹⁰ Armin Von Bogdandy and Jürgen Bast, *Principles of European Constitutional Law* (2nd ed Beck/Hart Publishing, Oxford 2009), 406

¹¹ *Judgment of 24 January 2014 BVerfG 2 BvR 2728/13 OMT Ruling*

THE CZECH CONSTITUTIONAL COURT'S JURISPRUDENCE ON EUROPEAN UNION LAW

Since 2001, the Czech Republic has embraced a monist approach to all international treaties and therefore, they enjoy priority over ordinary domestic legislation.¹² Although the Constitution of the Czech Republic¹³ has undergone amendment to accommodate accession to the EU,¹⁴ none of its provisions explicitly refer to EU membership, but rather to participation in an international organisation. The Constitutional Court thus had to clarify that Article 10a of the Constitution opens the gate to EU law with regard to domestic legislation.¹⁵ The Court endeavours to interpret the Constitution in a manner facilitating the existence of the Community law in the Czech legal system. However, this does not mean that in cases of conflict between constitutional provisions and EU law, the Court will grant precedence of the latter over the former. It will rather leave it to the legislator to resolve the problem.¹⁶ The approach of the Constitutional Court towards primary and secondary legislation differs. Primary legislation, as exemplified by the Treaty of Lisbon review, is subject to a review of compatibility with the entire constitutional system.¹⁷ Consequently, the Treaty can be examined more than once and its constitutionality is not guaranteed even after ratification.¹⁸ However, this might mean that since the Treaty has already been ratified, the only possible outcome of pronouncing its unconstitutionality would be withdrawal from the EU. In regards to secondary legislation, the Court does not expressly state whether it will review the compatibility of directly applicable legislation with the Czech Constitution. However, in the case of implementing acts, it will conduct an all-encompassing review¹⁹ – national authorities have to comply with domestic constitutional principles, EU law general principles and fundamental rights.²⁰

The Court adopts a modern approach to sovereignty, by assessing it as a concept with dividable layers, or 'portions of sovereignty'.²¹ The urge to pursue absolute sovereignty is considered as out of date and impractical.²² It takes an even more advanced look at the concept by stating that the state's power to voluntarily determine the scope of its competences is an element of its sovereignty and thus, delegating competences to another entity in fact strengthens rather than weakens the state's sovereignty.²³ However, for the state to remain sovereign, the transfer of powers must be limited, specific and reviewable within a proper institutional framework²⁴ and must not alter the essence of the Republic as a democratic and sovereign state.²⁵ However, unlike the German Federal Constitutional Court, the Czech Court refuses to clarify the scope of the term 'certain powers',²⁶ and thereby also fails to declare which powers should never be transferred. Consequently, the conferral of powers to EU institutions is conditional,²⁷ and the Court will readily scrutinise European institutions for respecting those conditions in the form of ultra vires review.²⁸

¹² Maartje De Visser, *Constitutional Review in Europe: A Comparative Analysis* (1st ed Hart Publishing, Oxford 2013), 235

¹³ Constitution of the Czech Republic of December 16, 1992

¹⁴ Constitution of the Czech Republic of December 16, 1992; Amended by Act No. 515/2002 CoI

¹⁵ Ivo Slosardik, 'Czech Republic 2006-2008: On President, Judges and the Lisbon Treaty' (2010) 16 *European Public Law* 1, 3

¹⁶ 2008/11/26 - Pl. ÚS 19/08: *Treaty of Lisbon I*, para 113

¹⁷ 2009/11/03 - Pl. ÚS 29/09: *Treaty of Lisbon II*

¹⁸ Ivo Slosardik, 'Czech Republic 2006-2008: On President, Judges and the Lisbon Treaty' (2010) 16 *European Public Law* 1, 7

¹⁹ 2006/03/08 - Pl. ÚS 50/04: *Sugar Quotas III*, para 10

²⁰ 2006/03/08 - Pl. ÚS 50/04: *Sugar Quotas III*, para 10

²¹ 2006/03/08 - Pl. ÚS 50/04: *Sugar Quotas III*, para 10

²² 2009/11/03 - Pl. ÚS 29/09: *Treaty of Lisbon II*, para 147

²³ 2008/11/26 - Pl. ÚS 19/08: *Treaty of Lisbon I*, para 100

²⁴ The Czech Republic, Lisbon decision

²⁵ 2008/11/26 - Pl. ÚS 19/08: *Treaty of Lisbon I*, para 97

²⁶ Constitution of the Czech Republic of December 16, 1992, Article 10a

²⁷ 2006/03/08 - Pl. ÚS 50/04: *Sugar Quotas III*

²⁸ 2008/11/26 - Pl. ÚS 19/08: *Treaty of Lisbon I*, para 120

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This Court's battle to protect its authority is revealed most significantly in its reluctance to engage in open dialogue with the CJEU and its bravery in ultra vires review. The Constitutional Court remained ambiguous as to whether it classified itself as a 'court, or tribunal' in the meaning of Article 267 TFEU.²⁹ Its case-law, however, prominently demonstrates its refusal to refer questions to the CJEU. This practice will be illustrated by the challenge of transposing the Data Retention Directive³⁰ and the *Slovak Pension Saga*.³¹

DATA RETENTION DIRECTIVE BACKGROUND AND ADOPTION

9/11 was a significant date not only for politics and international relations, but also for legislation. A number of counter-terrorism measures have been adopted, in order to address the new understanding of terrorist threat. After the Madrid bombings in 2004 and the London attacks in 2005, a pressing need for anti-terrorist measures within EU law emerged. The fact that both attacks were coordinated over the phone and internet created a positive inclination towards mechanisms for data retention and access to this data. Although there were propositions for adoption of a framework decision under the Third Pillar, the Commission preferred legal measures under the Community scope, in order to guarantee adoption of the rules with qualified majority voting only.³²

The Data Retention Directive³³ was adopted on the basis of Article 95 of the European Community Treaty³⁴ with the aim of harmonising Member States' provisions concerning the obligations of the providers of publicly available electronic communications services or of public communications networks to retain data.³⁵ The considerable variety of domestic legislation regarding retention of data posed an obstacle to the internal market for electronic communications, since electronic providers operating in more than one Member State had to comply with country-specific rules.³⁶ The purpose of such retention was investigation, detection and prosecution of serious crime.³⁷ The Directive imposed an obligation to retain only traffic data, location data and related data necessary to identify the subscriber or user,³⁸ but not the content of data.³⁹ It also extended to unsuccessful call attempts.⁴⁰ Art. 5 outlined all categories of data to be collected, such as name and address of the communicating parties, telephone numbers, IP addresses, real date and time of the communication and the name of the service provider.⁴¹ The data was to be stored for no less than six months and no more than two years, as it was up to each Member State to determine the exact duration of storage.⁴² Member States were to ensure that access to data was provided only to competent authorities⁴³ and that measures were to be taken against the possibility of accidental or unlawful destruction, loss, or disclosure of data.⁴⁴ Data

²⁹ Ivo Slosardik, 'Czech Republic and the European Union Law in 2004-2006' (2007) 13 *European Public Law* 366, 371

³⁰ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*

³¹ 2012/01/31 - Pl. ÚS 5/12: *Slovak Pensions*

³² Pavel Molek, 'Czech Constitutional Court Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10' (2012) 8 *European Constitutional Law Review* 338 341

³³ Directive 2006/24/EC on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC [2006] *OJ L 105*, here and after referred as 'Directive'

³⁴ which is now Article 114 TFEU

³⁵ Directive, Article 1

³⁶ Directive, (6)

³⁷ Directive, Article 1

³⁸ Directive, Article 2 (a)

³⁹ Directive, Article 5 (2)

⁴⁰ Directive, Article 2(f)

⁴¹ Directive, Article 5

⁴² Directive, Article 6

⁴³ Directive, Article 4

⁴⁴ Directive, Article 7

had to be stored in such a way that it could be immediately transferred upon request of the competent authorities.⁴⁵

CRITICISM OF THE DIRECTIVE

The Directive has been largely criticised due to all-encompassing retention without differentiation,⁴⁶ which resembles a 'pervasive Orwellian "surveillance state" model'. Mere suspicion should not be a reason for collection of data, but rather for access to it.⁴⁷ Moreover, traffic data can reveal a substantive amount of information about people's lives. For instance, calls to anonymous AIDS help-lines almost certainly indicate an individual's health condition.⁴⁸ Furthermore, the definition of 'serious crimes' which data can be used for is too broad and in itself can cause an excessive burden to service providers in those Member States which classify more crimes as 'serious crimes'. Lastly, this method of counter-terrorism, namely data retention, has been condemned as ineffective and costly. Although it may assist law enforcement authorities, the benefit of such measures is disproportionate to their cost. It merely encourages criminals to be more creative in communicating with each other,⁴⁹ for instance by using non-European telecommunication services.⁵⁰ In addition to that, the more frequent and extensive the use of telecommunications is, the higher the amount of data to be retained and logically, the higher the burden for service providers.⁵¹

FIRST CHALLENGE TO THE DIRECTIVE

The Directive was first challenged by Ireland under Art. 230 of the European Community Treaty on the basis that the measure was wrongfully adopted under the First Pillar.⁵² It argued that the actual purpose of the Directive was the detection, prevention and prosecution of crime and not mitigation of market distortion, thus, it should have been based on Articles 31(1)(c) and 34(2)(b) of the Third Pillar. The CJEU rejected this challenge, confirming that the legislation was directed to the service providers and aimed at harmonisation of market rules. Ireland's contestation was not concerned with fundamental rights infringements, but with the legal basis of adoption and thus, it did not achieve timely invalidation.⁵³

⁴⁵ Directive, Article 8

⁴⁶ Theodore Konstadinides 'Destroying Democracy on the Ground of Defending It? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem' (2011) 36 *European Law Review* 722, 724

⁴⁷ Theodore Konstadinides 'Destroying Democracy on the Ground of Defending It? The Data Retention Directive, the Surveillance State and Our Constitutional Ecosystem' (2011) 36 *European Law Review* 722, 724

⁴⁸ Patrick Breyer, 'Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR' (2005) 11 *European Law Journal* 365, 369

⁴⁹ Patrick Breyer, 'Telecommunications Data Retention and Human Rights: The Compatibility of Blanket Traffic Data Retention with the ECHR' (2005) 11 *European Law Journal* 365, 369

⁵⁰ Marie-Helen Maras, 'The Economic Costs and Consequences of Mass Communications Data Retention: Is the Data Retention Directive a Proportionate Measure?' (2011) 33 *European Journal of Law and Economics* 447, 465

⁵¹ Marie-Helen Maras, 'The Economic Costs and Consequences of Mass Communications Data Retention: Is the Data Retention Directive a Proportionate Measure?' (2011) 33 *European Journal of Law and Economics* 447, 452

⁵² Case C-301/06 *Ireland v European Parliament* [2009] ECR I-593

⁵³ Mark Dawson and Ellise Muir, 'Hungary and the *Indirect* Protection of EU Fundamental Rights and the Rule of Law' (2013) 14 *German Law Journal* 1960, 20

THE COURT OF JUSTICE OF THE EUROPEAN UNION INVALIDATES THE DIRECTIVE

The controversial Directive finally met its end in the CJEU's decision on the 8th April 2014.⁵⁴ The Court found infringements of Articles 7 and 8, which were not justified by the proportionality review in terms of necessity. Preliminary references were made by the Irish High Court and the Austrian Verfassungsgerichtshof. Ireland finally won its battle with the controversial legislation. The CJEU undertook to answer their shared question, namely, whether the Directive was compatible with Articles 7, 8 and 11⁵⁵ of the Charter of Fundamental Rights of the European Union.⁵⁶ The Court acknowledged that collection of data amounted to a significant intrusion into Europeans' personal lives, even though data content was not revealed.⁵⁷ As such, this constituted infringements of Articles 7, 8 and 11. Thus, the Directive had to satisfy 'the data protection requirement arising from that article'.⁵⁸ The aspects that particularly constituted infringements of those articles were data storage, access to it and data processing.⁵⁹ After establishing infringements, the Court proceeded to examine justifications. It had to determine whether the limitations of these rights were provided by law, respectful to the essence of the rights, proportional by being necessary and appropriate to meet objectives of general interest.⁶⁰ Interestingly, the Court concluded that these infringements did not impair the essence of the rights set out in Article 8, due to the fact that "Member States are to ensure that appropriate technical and organisational measures are adopted against accidental or unlawful destruction, accidental loss or alteration of the data."⁶¹ However, the vagueness of the Directive's text about Member States' obligation became one of the reasons for criticism. Moreover, the court acknowledged the danger of imprecise data treatment by electronic providers due to economic concerns,⁶² and found that the safeguards were insufficient.⁶³ Furthermore, the CJEU declared that the maintaining of international peace and security constitutes an objective of general interest.⁶⁴ After discussing these issues, the Court proceeded to the next hurdle – proportionality. Considering the growing importance of electronic communication, the Court accepted the appropriateness of the measure to meet its objective.⁶⁵ However, the critical momentum of the Directive arose at the level of necessity.⁶⁶ What was particularly problematic was that all kinds of traffic data were automatically retained and thus every European is put under surveillance.⁶⁷ There was no differentiation of data, no selection of people, no need for any relationship between the collected data and the existence of public threat and no distinction of retention period on the basis of data type, or usefulness of data.⁶⁸ Moreover, the Court emphasised that there should be substantive and procedural conditions restricting the access to data to "the purpose of preventing precisely defined serious offences or of conducting criminal prosecutions."⁶⁹ As a result, the Court invalidated the Directive due to its failure to take necessary measures only.

⁵⁴ Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] OJ C 175

⁵⁵ Consequently, only Articles 7 and 8 were examined.

⁵⁶ Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014] OJ C 175, para 23

⁵⁷ *ibid* para 28

⁵⁸ *ibid* para 29

⁵⁹ *ibid* para 34, 35, 36

⁶⁰ *ibid* para 38

⁶¹ *ibid* para 40

⁶² *ibid* para 67

⁶³ *ibid* para 66

⁶⁴ *ibid* para 44

⁶⁵ *ibid* para 49

⁶⁶ *ibid* para 51

⁶⁷ *ibid* para 56

⁶⁸ *ibid* para 57, 58, 59, 63

⁶⁹ *ibid* para 61

ABSTRACT REVIEW OF LEGISLATION IMPLEMENTING THE DATA RETENTION DIRECTIVE BY THE CZECH CONSTITUTIONAL COURT

After examining the CJEU's judgment, this article will proceed to analyse the challenge to the Directive in the Czech Constitutional Court⁷⁰ previous to the CJEU's ruling. The application for abstract review was lodged by a group of fifty-one Deputies of the Chamber of Deputies of the Parliament, who were encouraged by a human rights watchdog NGO in the country. Taking into account that the domestic legislation was based on EU law measures, the applicants suggested asking a question to the CJEU about the potential invalidation of the Directive.⁷¹ Interestingly, the Court expressed its disapproval of the motion, because it was initiated by members of the majority party in the Parliament, which had other means of signifying its uneasiness with legislation, such as amending it. The Court emphasised that such abstract review should be reserved for minority parties.⁷² In fact, the Czech Republic was among the countries that already had data retention legislation and it only updated it with the obligations imposed by the Directive – it added the obligation to erase such data,⁷³ and to provide it without undue delay.⁷⁴ Arguably, Czech legislation went beyond the purpose of the Directive, because it required retention of information necessary to identify users of pre-paid SIM cards, SMS sent from the internet and authorised the use of encryption.⁷⁵ However, the essence of the Directive was transposed into national legislation and retention of the above-mentioned data simply extended the scope of sources of data. Consequently, the conflicting obligations later criticised by the CJEU, such as retention of data with absolutely no differentiation, were also present. The Constitutional Court claimed that the Directive provided sufficient discretion to Member States to implement the measures and thus, this abstract review concerned a review of domestic and not Community legislation. As a result, since there was no question of EU law being involved, preliminary reference was unnecessary.⁷⁶ Similar reasoning had been advanced by the German Federal Constitutional Court.⁷⁷ Furthermore, the Czech Court underlined its role as guardian of the Constitution and emphasised that national legislators had to comply with domestic constitutional principles when legislating, regardless of whether the essence of the measures originated from an external source.⁷⁸ The Court then proceeded with analysis of the attributes of the contested legislation. It found its unconstitutionality on a number of grounds. The requirements of certainty and clarity were disregarded due to the absence of a precise definition of 'competent authorities'.⁷⁹ Moreover, considering the overwhelming number of requests for access to data, there was a pressing need for outlining conditions for such access.⁸⁰ Lastly, the purpose for which data had to be transferred was vague.⁸¹ In sum, the measures were disproportionate and thus, unconstitutional. However, what is more significant is that the Court acknowledged in obiter dicta its reservations in regards to the validity of the Directive. It noted its suspicion regarding data retention as an appropriate and effective measure.⁸² Moreover, taking into account the excessive encroachment into individuals' personal

⁷⁰ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*

⁷¹ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 25

⁷² 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 2

⁷³ Pavel Molek, 'Czech Constitutional Court Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10' (2012) 8 *European Constitutional Law Review* 338, 348

⁷⁴ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 41

⁷⁵ Pavel Molek, 'Czech Constitutional Court Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10' (2012) 8 *European Constitutional Law Review* 338 347

⁷⁶ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*

⁷⁷ *Judgment of 02 March 2010 BVerfGE 1 BvR 256/08 Data Retention*

⁷⁸ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 25

⁷⁹ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 46

⁸⁰ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 49

⁸¹ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 47

⁸² 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 56

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spheres, it questioned the necessity of data retention.⁸³ These observations are crucial, because even though the Court was doubtful as to the proportionality of the Directive, it refused to make a preliminary reference. Perhaps the Court was concerned about the potential loss of its role as final arbiter. It did not want to surrender its prestige as the ultimate source of fundamental rights and Constitutional protection.⁸⁴ If it had chosen to refer, the CJEU might have imposed a specific interpretation of the Directive, thereby affecting the Court's complete independence in determining the issue. Alternatively, the CJEU might have invalidated the Directive and thereby stolen the trophy from the Constitutional Court.

As it turned out, the Directive itself was problematic and its controversy was inherited by the national transposing legislation. It is doubtful whether national authorities could have fulfilled their obligations without unjustifiably infringing fundamental rights.⁸⁵ The Constitutional Court's robustness in protecting the Constitution and citizens' fundamental rights has in fact produced the opposite effect. Individuals were exposed to mass surveillance for a longer time without proportional purpose. Had the Court overcome its arrogance and submitted a preliminary reference, the Directive would have been invalidated earlier and the Court would have fulfilled its role as a guardian of democracy more efficiently. By attacking only national legislation, the Czech Constitutional Court actually put the state under the threat of infringement proceedings by the Commission, because the obligation to implement the Directive was not eliminated.⁸⁶ Moreover, it created a legislative gap, which brought legal uncertainty and produced additional implementation costs to the state. Lastly, it should be borne in mind that the costs for storage and collection of data were to be covered by the Czech Republic government and not private service providers. Had the Directive been invalidated earlier, the state would have saved vast amounts of money, as it had been indicated that compliance with the Directive required millions of Euros.⁸⁷ In conclusion, the Constitutional Court's reservations towards the preliminary ruling procedure can be costly both for individuals and states. This situation perhaps should be used as an incentive for the Constitutional Court to engage directly with the CJEU.

THE SLOVAK PENSION SAGA

This section will examine the Czech Constitutional Court's unique decision on ultra vires review.⁸⁸ The problem originates from the time when the Czech Republic and Slovakia comprised one state - Czechoslovakia. After the dissolution of the state, some employees happened to live in the Czech Republic while their employers were based in Slovakia. Consequently, their pensions had to be paid according to the Slovak standard, which was considerably lower than the Czech Republic one.⁸⁹ This principle had been challenged in numerous cases and the Czech Constitutional Court concluded that it violated the right to social security in old age and the principle of equality.⁹⁰ As a result, an increment was to be paid to Czech nationals who received Slovak pensions. This gave rise to an open battle with the Czech Supreme Administrative Court, which severely disagreed with the reasoning.⁹¹

⁸³ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 55

⁸⁴ 2011/03/22 - Pl. ÚS 24/10: *Data Retention in Telecommunications Services*, 25

⁸⁵ Pavel Molek, 'Czech Constitutional Court Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10' (2012) 8 *European Constitutional Law Review* 338, 351

⁸⁶ Pavel Molek, 'Czech Constitutional Court Unconstitutionality of the Czech Implementation of the Data Retention Directive; Decision of 22 March 2011, Pl. ÚS 24/10' (2012) 8 *European Constitutional Law Review* 338, 351

⁸⁷ Simone Blakeney, 'The Data Retention Directive: Combating Terrorism or Invading Privacy?' (2007) 13 *Computer and Telecommunications Law Review* 153, 155

⁸⁸ 2012/01/31 - Pl. ÚS 5/12: *Slovak Pensions*

⁸⁹ Jan Komarek, 'Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8 *European Constitutional Law Review* 323, 325

⁹⁰ 2005/01/25 - III. ÚS 252/04: *Constitutionally Conforming Interpretation*

⁹¹ Georgios Anagnostaras, 'Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) 14 *German Law Journal* 959

Among its counter-arguments was that the special increment discriminated against non-Czech nationals.⁹² Its disapproval escalated to questioning on a preliminary reference the compatibility of the Constitutional Court's judgment with EU law.⁹³ It should be noted that the Constitutional Court did not miss the opportunity to reject preliminary ruling on the matter at previous judgment.⁹⁴ The CJEU took a rather soft approach, declaring that although the increment was discriminatory, this incompatibility could be remedied by paying such increments to all EU nationals.⁹⁵ However, the Czech legislator did not amend the conditions. As a result, the Supreme Administrative Court stated that it was not bound by the Constitutional Court's ruling due to the refusal to refer to the CJEU. This gave the opportunity to the Constitutional Court to fire its most powerful bullet against the CJEU – ultra vires review. It had previously declared its competence to conduct such review and since the CJEU is an EU institution, it is not saved from scrutiny.⁹⁶ The case itself did not relate to *Marie Landtová v Česká správa sociálního zabezpečení*,⁹⁷ so the Court was not obliged to comment on it, which affirms its demand for the last word.⁹⁸ It stated that the CJEU overstepped its jurisdiction by deciding this case, because the cross-border element was missing. The people who were affected by the Regulation were not nationals of different Member States, but of one state – Czechoslovakia. The Constitutional Court did not allow the CJEU to have the last word, but rather established its authority as the final decision-maker in the Czech Republic. It sent a clear warning to the CJEU not to oppose its rulings, because it still had in its hands the powerful tool of ultra vires review. Although the Czech Constitutional Court attempted to justify its ruling by the German ultra vires doctrine, it went far beyond it.⁹⁹ Firstly, it did not consider submitting a reference and thus, precluded the CJEU from mitigating its interpretation. The rejection of using the preliminary ruling in ultra vires cases is yet another illustration of the Constitutional Court's battle for the role of last arbiter. If it was to give an opportunity to the CJEU for consequent interpretation, it might have felt confined by this ruling and unable to exercise its full liberty as last decision-maker. Secondly, it is dubious whether CJEU's ruling lead to significant allocation of competences at the expenses of the Czech Republic.¹⁰⁰ Thirdly, it did not show tolerance towards potential CJEU mistakes.¹⁰¹ Finally, since the Czech threshold of ultra vires review seems much lower than the German one, this decision could easily be classified as aggressive.¹⁰² By conducting ultra vires review in such a manner, the Czech Constitutional Court unequivocally declared its primacy over the CJEU on constitutional matters and its absolute unwillingness to surrender any of its authority.

POSSIBLE EXPLANATIONS

As exemplified by the above decisions, the Czech Constitutional Court eagerly protects its authority as final arbiter on constitutional matters. Although aggressive, this approach perhaps should not be surprising due to the Czech Republic's history and well-known Euroscepticism. The Czech

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⁹² Jan Komarek, 'Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8 European Constitutional Law Review 323, 326

⁹³ Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* [2011] ECR I-05573

⁹⁴ 2007/03/20 - Pl. ÚS 4/06: *Slovak Pensions*

⁹⁵ Jan Komarek, 'Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8 European Constitutional Law Review 323, 326

⁹⁶ 2012/01/31 - Pl. ÚS 5/12: *Slovak Pensions*

⁹⁷ Case C-399/09 *Marie Landtová v Česká správa sociálního zabezpečení* [2011] ECR I-05573

⁹⁸ Jan Komarek, 'Playing With Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra Vires' (2012) 8 European Constitutional Law Review 323, 328

⁹⁹ Georgios Anagnostaras, 'Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) 14 German Law Journal 959, 967

¹⁰⁰ *Judgment of 6 July 2010 BVerfG, 2 BvR 2661/06 Honeywall*

¹⁰¹ Asterios Pliakos and Giorgios Anagnostaras, 'Who is the ultimate arbiter? The battle over judicial supremacy in EU law' (2011) 36 European Law Review 109, 121

¹⁰² Georgios Anagnostaras, 'Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court' (2013) 14 German Law Journal 959, 328

RECEPTION OF EUROPEAN UNION LAW BY THE CZECH CONSTITUTIONAL COURT – A STRUGGLE FOR AUTHORITY?

Constitutional Court in its present form came into existence less than three decades ago and as a newly created institution,¹⁰³ had to establish the full scope of its powers. More importantly, it had to meet the expectations of a whole nation plagued by the Communist regime. The Republic, similar to other states in transition, had difficulty establishing fully-democratic institutions all at once. This, however, should not be frowned upon, since democracy is a process and not a one-time event happening overnight. Since that time, the Constitutional Court has been the most trustworthy institution for citizens, as its function is exclusively to guard constitutional principles and therefore, to protect citizens from abuse of powers by the authorities. Although this court possesses competences similar to Western constitutional courts, the other branches of the state are weaker and less efficient than their Western counterparts. This lack of institutional balance accommodates the growth of the Court as an active and influential player in the demand for democracy.¹⁰⁴

Moreover, the general quest for sovereignty in the Czech Republic could be another reason for the Court's unwillingness to fully embrace the unquestionable precedence of EU law principles.¹⁰⁵ The long-lasting oppressive Soviet regime had left its unforgettable trace on Czechs' mentality by creating circumspection toward any infringement on sovereignty. EU membership has often been feared, especially by Eurosceptics, as impeding newly regained independence.¹⁰⁶ It is significant that the Czech Republic has not only experienced threats from the East in the form of the Soviet Union, but also from the West. Beneš decrees, issued during World War II authorised the loss of citizenship and expropriation of property of around three million Germans and Hungarians. These documents have been a pressing and controversial issue, which even threatened the Czech Republic's membership of the EU. The Republic refused to repeal them on the basis that this was an issue from the past, but, more importantly, that declaring their inapplicability might cause numerous claims for restitution. The Czech population living on the affected land was particularly concerned that accession to the EU would open up the issue. EU membership might have been perceived as jumping from one dominant power to another. Taking this historical background into account, it is unsurprising that the Czechs were the least enthusiastic about EU accession among all new member states.¹⁰⁷ Only 45% of Czechs thought membership was a good thing at the dawn of accession, whilst this result fell to 31% in 2011.¹⁰⁸ The mainstream party, the Civic Democratic Party, is often given as an example of a soft Eurosceptic party.¹⁰⁹ It should be noted that its members rather classify themselves as hard Eurosceptics,¹¹⁰ and pursue the model of the United Kingdom's Conservative Party. Former president Václav Klaus was clearly against any political integration of the EU and thereby his stance was reminiscent of Margaret Thatcher's well-known speech in Bruges.¹¹¹ Accession was certainly not driven by unquestionable affiliation with the West, but rather by lack of alternatives, particularly due to the Czech Republic's location. It has also been considered that the Czech Republic would better

¹⁰³ Czech Constitutional Court History (Czech Constitutional Court 2012) <<http://www.usoud.cz/en/history/>> accessed 13 Dec 2014

¹⁰⁴ Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (1st ed Oxford University Press, Oxford 2012), 100

¹⁰⁵ Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (1st ed Oxford University Press, Oxford 2012), 66

¹⁰⁶ Wojciech Sadurski, *Constitutionalism and the Enlargement of Europe* (1st ed Oxford University Press, Oxford 2012), 71

¹⁰⁷ Sean Hanley, 'A Nation of Sceptics? The Czech EU Accession Referendum of 13–14 June 2003' (2004) 27 *West European Politics* 691, 694

¹⁰⁸ Eurobarometer, 'Generally speaking, do you think that (your country's) membership of the European Community (Common Market) is...?' (Eurobarometer 2011) <http://ec.europa.eu/public_opinion/cf/step2.cfm?keyID=5> accessed 10 Dec 2014

¹⁰⁹ Simon Usherwood and Nick Startin, 'Euroscepticism as a Persistent Phenomenon' (2012) 51 *Journal of Common Market Studies* 1, 5

¹¹⁰ Cecile Leconte, 'Eurosceptics in the Rotating Presidency's Chair: Too Much Ado About Nothing?' (2012) 34 *Journal of European Integration* 133, 138

¹¹¹ Cecile Leconte, 'Eurosceptics in the Rotating Presidency's Chair: Too Much Ado About Nothing?' (2012) 34 *Journal of European Integration* 133, 140

pursue its interests by being a member, rather than an outsider.¹¹² As former President Václav Klaus has stated, it is a marriage of convenience, not love.¹¹³

CONCLUSION

This article aimed to provide an overview of the Czech Constitutional Court's treatment of EU law, with special emphasis on the preliminary ruling procedure. Similar to many Constitutional Courts, this court seems unwilling to initiate open conversation with the CJEU. This has been illustrated by its approach towards the Data Retention Directive. The Directive itself has been severely criticised for unlawfully infringing the fundamental rights of the entire EU population. The CJEU rightfully declared its invalidity. It happened that the Directive itself was problematic and it is doubtful whether the Czech legislator was capable of implementing it without failing the proportionality test. Nevertheless, the Czech Constitutional Court insisted on its own authority as final arbiter and bluntly disregarded the possibility for preliminary reference. It unintentionally risked its position as the most efficient guardian of individuals' rights by failing to prevent continuous surveillance for the sake of imposing precisely this position of ultimate guardian. Not only did it not abandon its arrogant stance towards the preliminary ruling procedure, but it also engaged in a robust conflict with the CJEU by declaring its decision ultra vires in the *Slovak Pension Saga*. It acted far more aggressively than its German counterpart and even raised doubts about the precedent power of its decision.¹¹⁴ It deliberately lowered the threshold of ultra vires review by not even considering the possibility of making a reference to the CJEU. Such behaviour could be classified as that discarded by the German Federal Constitutional Court, namely that allowing ultra vires review in a wide variety of cases will significantly impair the uniform application of EU law across the EU.¹¹⁵ This robust battle for the last word could be explained by the overall scepticism of the Czech Republic towards the EU. The Republic has recently re-gained its independence from a severe communist regime and perhaps did not have enough time to fully enjoy it. The geographic position of the state and its economic development presupposes that membership is dictated more by lack of alternatives than by distinguishable enthusiasm and identification with common European spirit. Taking these considerations into account, it should not be surprising that the Czech Constitutional Court is following the overall Eurosceptic pattern of its state.

¹¹² Sean Hanley, 'A Nation of Sceptics? The Czech EU Accession Referendum of 13–14 June 2003' (2004) 27 *West European Politics* 691, 702

¹¹³ Radio Prague2003c; RFE/RL Newline 2003c

¹¹⁴ Arthyr Dyevre, 'Domestic Judicial Non-Compliance in the European Union: A Political Economic Approach' (2013) LSE Law, Society and Economy Working Papers 2/2013, London School of Economics and Political Science, Law Department, 7

¹¹⁵ *Judgment of 6 July 2010 BVerfG, 2 BvR 2661/06 Honeywall*