

Developments

Activation of the *Ultra Vires* Review: The *Slovak Pensions* Judgment of the Czech Constitutional Court

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A. Introduction

It is now almost two decades since the German Constitutional Court proclaimed in *Maastricht* its capacity to review whether the Union institutions respect the limits of their conferred competences and to pronounce inapplicable at national level all legal instruments adopted by them in transgression of these boundaries.¹ This *ultra vires* doctrine inspired the case law of several other constitutional courts, which announced their intention to operate in exceptional circumstances as an *ultima ratio* against the violation by the Union institutions of the principle of conferral.² The German Constitutional Court itself emphatically reaffirmed on various occasions its role as the ultimate protector of constitutionality against the *ultra vires* introduction and interpretation of Union law, most prominently in its eminent *Lisbon* ruling.³ Until recently though, there was no actual

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¹ Bundesverfassungsgericht [BVerfGE- Federal Constitutional Court], Case Nos. 2 BvR 2134/92 & 2159/92, BVerfGE 89 [hereinafter "*Brunner v European Union Treaty (Maastricht)*"], 1 COMMON MARKET LAW REPORTS (CMLR) 57 (2004).

² See particularly in this respect, annotated by Camilo Schutte, *Declaration 1/2004 of the Spanish Constitutional Court (European Constitution)*, *Tribunal Constitucional on the European Constitution*, 1 EUR. CONST. L. REV. 281 (2005), and Ricardo Alonso García, *The Spanish Constitution and the European Constitution: The Script for a Virtual Collision and Other Observations on the Principle of Primacy*, 6 GERM. L. J. 1001 (2005), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=609> (last accessed: 27 June 2013); Judgment K 18/04 of the Polish Constitutional Court (*Accession Treaty*), annotated by Krystyna Kowalik-Banczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, 6 GERM. L. J. (GLJ) 1355 (2005), available at: http://www.germanlawjournal.org/pdfs/Vol06No10/PDF_Vol_06_No_10_1355-1366_Developments_Kowalik%20final.pdf (last accessed: 27 June 2013); Decision Pl. ÚS 19/08 (*Treaty of Lisbon I*) of 26 November 2008 of the Czech Constitutional Court, annotated by Petr Bríza, *The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008*, 5 EUR. CONST. L. REV. 143 (2009).

³ BVerfGE, Case No. 2 BvE 2/08, *Gauweiler Die Linke v Act of Approval of the Lisbon Treaty (Lisbon)* of 30 June 2009, available at: http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html (last accessed: 27 June 2013). This ruling gave rise to an immense amount of academic literature. See amongst others, Dimitrios Doukas, *The Verdict of the German Federal Constitutional Court on the Lisbon Treaty: Not Guilty but Don't Do it Again*, 34 EUR. L. REV. 866 (2009); Jacques Ziller, *The German Constitutional Court's Friendliness Towards European law*, 16 EUR. PUB. L. 53 (2010); Daniel Thym, *In the Name of Sovereign Statehood: A Critical Introduction to the Lisbon Judgment of the German Constitutional Court*, 46 COMM. MKT. L. REV. 1795 (2009); Dieter Grimm, *Defending Sovereign Statehood Against Transforming the European Union into a State*, 5 EUR. CONST. L. REV. 353 (2009);

precedent of a national court proclaiming a Union act as *ultra vires*. Even when a constitutional court reviewed the contested act on *ultra vires* grounds, it eventually concluded that it complied with the principle of conferred powers.⁴

However, this is no longer the case following the recent *Slovak Pensions* ruling.⁵ This ruling was not given by the German Constitutional Court as one would probably be inclined to assume but rather by its Czech counterpart. The legal context in which this long awaited application of *ultra vires* took place was seemingly very ordinary. The contested issue was not one of central importance to the prospects of European integration. It rather involved a least celebrated preliminary ruling of the Court of Justice, concerning an allegedly illegal pension supplement.⁶ There was nevertheless one very important aspect involved in the proceedings. This preliminary ruling was being relied upon by another supreme court in order to contest the case law of the Constitutional Court, effectively undermining the binding authority of its judgments and its institutional position at the apex of the national judicial pyramid. While of very little interest in the other Member States, this ruling was caught thus accidentally in the middle of an open rivalry between two national supreme courts standing up ultimately for their own case law and judicial status.

This paper is structured as follows. After examining the legal and factual background that gave rise to the *Slovak Pensions* ruling, it purports to illustrate that the pronouncement of inapplicability on the particular circumstances of this case constitutes a politically unwise move which sits uncomfortably with the previous *ultra vires* case law. It then argues that for this reason the ruling is not likely to generate serious tensions in the institutional

Ronald Bieber, *An Association of Sovereign States*, 5 EUR. CON.ST. L. REV 391 (2009); Tobias Lock, *Why the European Union is not a State*, 5 EUR. CON.ST. L. REV 407 (2009); Christoph Schönberger, *Lisbon in Karlsruhe: Maastricht's Epigones at Sea*, 10 GERM. L. J. (2009), available at: <http://www.germanlawjournal.com/article.php?id=1155> (last accessed: 27 June 2013); Daniel Halberstam & Christoph Möllers, *The German Constitutional Court Says "Ja zu Deutschland!"*, 10 GERM. L. J. 1241 (2009), available at: <http://www.germanlawjournal.com/article.php?id=1157> (last accessed: 27 June 2013). Also see the ruling in BVerfGE, Case No. 2 BvR 2661/06, *Honeywell Bremsbelag GmbH (Honeywell)* of 6 July 2010, available at: http://www.bverfg.de/en/decisions/rs20100706_2bvr266106en.html (last accessed: 27 June 2013). For an annotation of this ruling, see Christoph Möllers, *Constitutional Review of European Acts Only Under Exceptional Circumstances*, 7 EUR. CON.ST. L. REV 161 (2011).

⁴ Very characteristic is Judgment SK 45/09 of 16 November 2011 of the Polish Constitutional Court, available at: http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf (last accessed: 27 June 2013).

⁵ Pl. ÚS 5/12 (*Slovak Pensions*) of 31 January 2012 of the Czech Constitutional Court, available at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=37&cHash=911a315c9c22ea1989d19a3a848724e2 (last accessed: 27 June 2013). For a comment, see Robert Zbíral, *A Legal Revolution or Negligible Episode? Court of Justice Decision Proclaimed Ultra vires*, 49 COMM. MKT. L. REV. 1475 (2012). Also see Jan Komárek, *Czech Constitutional Court Playing with Matches: The Czech Constitutional Court Declares a Judgment of the Court of Justice of the EU Ultra vires*, 8 EUR. CON.ST. L. REV 323 (2012).

⁶ Case C-399/09, *Marie Landtová v Česká správa sociálního zabezpečení*, judgment of 22 June 2011, not yet reported.

relations between national constitutional courts and the Court of Justice, even if the latter picks up the gauntlet and confirms its position on the illegality of the contested social security supplement.

B. Factual and Legal Background

Following the dissolution of Czechoslovakia, an international agreement was concluded between Slovakia and the Czech Republic with the intention to establish the State that would be responsible for the payment of pensions corresponding to periods of insurance completed under the previous legal regime. The agreement stipulated that these pensions would be covered by the State in which the employer kept its seat at the time of the dissolution. For some Czech citizens this meant that they would obtain at least a part of their pension from Slovakia, even if they were never actually employed there territorially. The practical consequence was to enjoy lower entitlements compared to pensioners covered entirely by the Czech social security system.

The Czech Constitutional Court concluded that this violated the right to social security at old age and the principle of equality.⁷ It ruled that when a Czech citizen satisfies the statutory conditions to receive a pension which is greater in amount than the one stipulated by the international agreement between Slovakia and the Czech Republic, the competent national authorities must order that the amount of the pension paid by the Slovak State be supplemented so as to reach the level of the social security entitlement provided under the Czech pension system. In addition to the condition of Czech nationality, the receipt of this supplement also presupposed that the pensioner was resident on the territory of the Czech Republic.

However, this interpretation was contested by the Czech Supreme Administrative Court. This gave rise to an open opposition between the two courts, which escalated when the Supreme Administrative Court made a preliminary request to the Court of Justice asking whether the award of the supplement was compatible with Union law. In its preliminary reference, the Supreme Administrative Court asked in essence whether the case law of its Constitutional Court violated the provisions of the Regulation on the application of social security schemes to employed persons moving within the Union.⁸ This constituted a blow to the authority of the Constitutional Court, which had considered it unnecessary to seek a

⁷ III. ÚS 252/04 (*Constitutionally Conforming Interpretation*) of 25 January 2005 of the Czech Constitutional Court, available at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=534&cHash=b5e5799a4b7db814f3956cf3975599f2 (last accessed: 27 June 2013).

⁸ Regulation (EEC) No 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, O.J. (1996) L 323/38.

preliminary reference on the matter when similar legal arguments were raised before it on an earlier occasion.⁹ The Constitutional Court answered back in another case, quashing the suspension of proceedings ordered by the Supreme Administrative Court in the await of the preliminary ruling sought by Court of Justice.¹⁰

In *Landtová*, the Court of Justice concluded that the case law of the Constitutional Court violated the provisions of Union law to the extent that the payment of the contested increment was reserved solely to Czech citizens residing on the territory of the Czech Republic. It amounted as such to both overt and covert discrimination against nationals from other Member States, availing themselves of their free movement rights.¹¹ Until the adoption of measures reinstating equal treatment, the competent national authorities could not lawfully refuse to extend entitlement to the supplement to these persons.¹² As concerns persons already receiving the special increment on the basis of the case law of the Constitutional Court, equality could be restored by removing the advantages enjoyed by them. Before such measures were actually adopted, there was no provision of Union law requiring that a category of persons benefiting from supplementary social protection should be deprived of it.¹³

When the case returned to the Supreme Administrative Court, this concluded that in the light of the *Landtová* ruling the relevant case law of the Constitutional Court was no longer binding on it. Given also that the creation of the pension supplement was based on an erroneous interpretation of Union law, its payment was illegal. Accordingly, this special increment could not be granted to anyone.¹⁴ Only a couple of months later, a new law came into force which completely banned the payment of any pension supplements corresponding to periods of insurance completed before the formation of the independent Czech Republic.¹⁵

However, this was only the beginning of the story. On the very first opportunity given to it, the Constitutional Court insisted on the correctness of its case law annulling the refusal of

⁹ Pl. ÚS 4/06 of 20 March 2007 of the Czech Constitutional Court, available at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=498&cHash=6412a8bc1cdf7cc62c9890066ef5ba80 (last accessed: 27 June 2013).

¹⁰ Judgment III, ÚS 1012/10 of 12 August 2010 of the Czech Constitutional Court.

¹¹ *Landtová*, *supra* note 6, at paras. 41-49.

¹² *Id.* at para. 51.

¹³ *Id.* at paras. 52-54.

¹⁴ Decision of the Supreme Administrative Court of 25th August 2011, File No. 3 Ads 130/2008-204. The ruling, in Czech, is available at: http://www.nssoud.cz/files/SOUDNI_VYKON/2008/0130_3Ads_08_20110831084552_prevedeno.pdf (last accessed: 27 June 2013).

¹⁵ §106a of Act No. 155/1995 Coll., as amended by Act No. 428/2011 Coll.

the Supreme Administrative Court to award the pension supplement on the ground that it was contrary to the provisions of Union law. The core of its argument was that Union law is not at all applicable as concerns the award of the contested increment, since there is no foreign element involved in the social security entitlements arising from periods of insurance completed when Slovakia and the Czech Republic were still constituent parts of the same State. According to the Constitutional Court, professional occupation with an employer registered in Slovakia at the time of the existence of Czechoslovakia cannot be retroactively considered as a period of employment abroad. Failure to acknowledge this idiosyncratic reality is synonymous to comparing things that are not actually comparable. Referring to its earlier case law, the Constitutional Court recalled that it is its obligation to review as an *ultima ratio* whether the Union institutions exceed the scope of their constitutionally entrusted competences. By applying Union law to the particular circumstances of the *Landtová* proceedings, the Court of Justice transgressed the limits of its conferred powers. Its ruling was accordingly *ultra vires*. This also implied that if the purpose of the national law which excluded the future award of pension increments was to comply with the consequences of this preliminary ruling, its statutory provisions were now obsolete.

C. Pronouncing *ultra vires*: Legally unconvincing and politically unwise?

In some circles, the ruling of the Czech Constitutional Court will be certainly saluted as a necessary and welcome activation of the emergency control mechanism against the expansionist interpretation of Union law by the Court of Justice. Others may also read it as a clear warning signal to the other Union institutions to take more seriously the limits posed by the principle of conferral. However, it is very contestable whether this was actually the proper occasion to apply in practice the *ultra vires* review. There are several reasons why this is indeed so. Some of them relate to the actual reasoning of the Constitutional Court and its ultimate conclusion that the case lacked the requisite foreign element to come within the scope of Union law. Others concern the timing of the ruling and the implementation of the *ultra vires* review in a patently more aggressive way than the one suggested by its very originator, the German Constitutional Court. Lastly, there also exists the problem that the application of *ultra vires* on the particular circumstances of this case can be interpreted as being principally motivated by judicial egoism coupled with the concern to protect established institutional prerogatives in the national legal order. All of the above will now be examined in turn.

I. The Contestable Legal Reasoning of the Czech Constitutional Court

In the opinion of the Constitutional Court, the pronouncement of the *Landtová* ruling as *ultra vires* was nothing more than the inescapable corollary of its previous case law. Ever since its two *Lisbon* rulings it was apparent that the Constitutional Court remained the

supreme protector and interpreter of constitutionality, including against potential excesses by the Union institutions.¹⁶ If European bodies interpreted Union law in a manner that would imperil the materially understood constitutionality and the essential requirements of a law based State, these instruments would not be binding at national level. Accordingly, the Constitutional Court could operate as an *ultima ratio* and review whether the Union institutions remain within the scope of their conferred competences. In *Landtová*, Union law was applied in a purely internal situation involving social security entitlements connected with employment periods completed within a single State. Inescapably, this interpretation exceeded the limits of the powers of the Court of Justice and constituted an *ultra vires* act.

However, the above judicial construction is based on the assumption that Union law is completely inapplicable to the legal relationships regulated by the international agreement between Slovakia and the Czech Republic. The principal objection to this is that the said bilateral agreement became a component of Union law, following the accession of the two countries to the European Union.¹⁷ Indeed, this agreement was listed in the third annex of the Regulation on the application of social security schemes to employed persons moving within the Union.¹⁸ That effectively allowed it to remain applicable, notwithstanding the provision that the Regulation would replace any social security conventions concluded between Member States.¹⁹ According to the Constitutional Court, this brought the agreement entirely outside the scope of the Regulation and of the basic principles of Union law. This in turn implied that its provisions could be given the interpretation arrived at by its relevant case law, even if this entailed favorable treatment of Czech citizens as compared to migrant nationals from other Member States.

The problem with this analysis is that the Regulation refers in its annex to two separate categories of social security conventions that remain applicable notwithstanding its provisions.²⁰ It is only conventions explicitly included in the second of these inventories that are not applicable to all persons covered by the scope of the Regulation. It is

¹⁶ Pl. ÚS 19/08 (*Treaty of Lisbon I*) of 26 November 2008 of the Czech Constitutional Court paras. 120 and 216, available at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=484&cHash=621d8068f5e20ecadd84e0bae0527552 (last accessed: 27 June 2013). Also see Pl. ÚS 29/09 (*Treaty of Lisbon II*) of 11 March 2009 of the Czech Constitutional Court para. 150, available at: http://www.usoud.cz/en/decisions/?tx_ttnews%5Btt_news%5D=466&cHash=eedba7ca14d226b879ccaf91a6dcb276 (last accessed: 27 June 2013).

¹⁷ See particularly in this respect the dissenting opinion of one of the constitutional judges in the *Slovak Pensions* ruling, *supra* note 5.

¹⁸ Annex III of Regulation (EEC) No 1408/71, *supra* note 8.

¹⁹ Articles 6 and 7 (2) of Regulation (EEC) No 1408/71, *supra* note 8.

²⁰ Part A and Part B of Annex III of Regulation (EEC) No 1408/71, *supra* note 8.

accordingly only these conventions that may introduce some measure of unequal treatment as concerns certain groups of people.²¹ The agreement between Slovakia and the Czech Republic is not mentioned in this list. This means that it may continue regulating the pension entitlements of persons claiming periods of insurance completed under the common Czechoslovakian regime, but its interpretation cannot ignore the core principles of Union law. That also includes the principle of equal treatment regardless of nationality enshrined in the Regulation. After all, the Regulation clarifies that the social security conventions that remain in force apply to all persons covered by its scope save as otherwise provided in its annex.²²

According to this interpretation, *Landtová* correctly relied on the provisions of Union law and the Court of Justice was actually entitled to review the case law of the Constitutional Court and to examine the legality of the contested supplementary benefit in the light of the provisions of the Regulation and of the principle of equality. Certainly, one cannot ignore the argument of the Constitutional Court that the payment of this increment related to an idiosyncratic occasion leading to the creation of two new independent States that acceded later to the Union. However, one cannot also overlook that the governments of these Member States considered it unnecessary at the time of the accession to negotiate the inclusion of the social security agreement concluded between them in the inventory of the conventions that apply only to some of the persons covered by the scope of the Regulation. Ultimately, the payment of the special increment was not caught by the principle of equality because a preliminary ruling extended arbitrarily the application of Union law to an internal situation. This rather occurred because the competent national governments made a bilateral social security convention a constituent part of this law, without introducing exceptions to its application.

II. The Aggressive Application of Ultra Vires by the Czech Constitutional Court

Hence, it was probably the Constitutional Court and not the Court of Justice that erred as concerns the application of Union law to the award of the contested social security benefits. But even if one were to assume that the Constitutional Court was actually correct in its interpretation of the *Landtová* ruling, it would still be contestable whether this case constituted the ideal candidate for an *ultra vires* pronouncement. The becomes particularly apparent when one examines it against the relevant case law of the German Constitutional

²¹ In the same line of reasoning, *Zbiral* (note 5) at p. 1484 and *Komárek*, *supra* note 8.

²² Article 3 (3) of Regulation (EEC) No 1408/71, *supra* note 8.

Court, which traditionally served as the primary source of inspiration of its Czech counterpart.²³

Following its famous *Lisbon* ruling, some commentators recalled the reputation of the German Constitutional Court as the dog that barks but does not bite.²⁴ Certain others saw in it an erratic nuisance source that might be eventually compelled to take aggressive action, merely to prove consistent with its previous pronouncements.²⁵ There were also those who strongly advised it to give practical force to its *ultra vires* case law, as an indispensable security control instrument against the increasingly occurring usurpation of legislative competencies by the Court of Justice.²⁶ These were certainly upset when the German Constitutional Court eventually adopted in *Honeywell* a very restrictive interpretation of *ultra vires*, which accepts in principle the interpretative authority of the Court of Justice and the importance of the preliminary reference procedure.²⁷

Honeywell involved a constitutional complaint against the ruling of the federal labor court, which concluded that the national legislation on fixed term contracts as concerns older employees constituted illegal discrimination on grounds of age and was thus inapplicable by virtue of the relevant Union case law.²⁸ The applicant claimed in essence that this ruling violated its contractual freedom of action under the national constitution, since it was based on an *ultra vires* interpretation of Union law by the Court of Justice that was invalid at national level and which was erroneously relied upon by the federal labor court.

Honeywell reiterated the competence of the German Constitutional Court to exercise *ultra vires* review over the acts of the Union institutions. However, it accepted that the principle of supremacy and the uniform application of Union law would be compromised if every

²³ Slovak Pensions, *supra* note 5, makes explicit reference to this case law in the sixth section of the ruling. The same was the case in Treaty of Lisbon I, *supra* note 16, at paras. 116-118, 139 and 216. Also see Treaty of Lisbon II, *supra* note 16, at para. 137.

²⁴ Joseph Weiler, *The Lisbon Urteil and the Fast Food Culture*, 20 EUR. J. OF INTL. L. 505 (2009).

²⁵ Christoph Schönberger, *supra* note 2, at 1216.

²⁶ Roman Herzog & Lüder Gerken, *Stop the European Court of Justice*, EU OBSERVER (10 SEPTEMBER 2008), available at: <http://euobserver.com/opinion/26714> (last accessed: 27 June 2013).

²⁷ *Honeywell*, *supra* note 3. For more information on this case, see Asteris Pliakos & Georgios Anagnostaras, *Who is the Ultimate Arbiter? The Battle over Judicial Supremacy in EU Law*, 36 EUR. L. REV. 109 (2011); Mehrdad Payandeh, *Constitutional Review of EU Law After Honeywell: Contextualising the Relationship Between the German Constitutional Court and the Court of Justice of the European Union*, 48 COMM. MKT. L. REV. 9 (2011); Matthias Mahlmann, *The Politics of Constitutional Identity and its Legal Frame – The Ultra vires Decision of the German Federal Constitutional Court*, 11 GERM. L. J. 1407 (2010), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1304> (last accessed: 27 June 2013).

²⁸ Case C-144/04 *Werner Mangold v Rüdiger Helm*, [2005] E.C.R. I-9981.

national court could claim the right to rule on the validity of these acts. It concluded thus that *ultra vires* must be exercised in accordance with the openness of the national Constitution towards Union law, that is in a European friendly way.²⁹ When reviewing the acts of the Union institutions, the German Constitutional Court must in principle comply with the rulings of the Court of Justice as providing a binding interpretation of Union law. Prior to the acceptance of an *ultra vires* act, it must also give the Court of Justice the opportunity to rule on the validity and interpretation of the contested measure.³⁰

The German Constitutional Court elaborated then on the notion of *ultra vires*. It asserted that the exercise of its capacity to rule on the invalidity of an act presupposes that the transgression of the Union competences is sufficiently serious. This in turn means that it must be manifest and that it must lead to a structurally significant alteration in the arrangement of competences between the Union and its Member States.³¹ Given that the *ultra vires* review also relates to the understanding of the law by the Court of Justice, it rests in principle to this latter Court to assure it. In addition, there must be some measure of tolerance to the mistakes that the Court of Justice may make in the performance of its duties. It is not thus for the German Constitutional Court to substitute its own appreciation of the law in circumstances where an acceptable interpretation of the legal rules by the Court of Justice can lead to diverse results.

Applying then the above principles to the circumstances of the case before it, the German Constitutional Court concluded that there was no *ultra vires* act involved in those proceedings. While implying that it was not totally convinced by the legal reasoning of the Court of Justice, the interpretation adopted by the latter could not limit the scope of action of the national government to such an extent as to give rise to a radical structural change in the allocation of competencies. This interpretation neither introduced a new Union competence to the expense of the Member States nor expanded the scope of an already existing one.³²

Seen in this perspective, the *Slovak Pensions* ruling contravenes in several respects the above reading of *ultra vires* suggested by the German Constitutional Court. For the Czech constitutional judges, resort to this judicial review is not confined to cases where the activity of the Union institutions leads to a structural reallocation of competences between the Union and its members States. *Ultra vires* is rather of a more general application, the limits of which will be assumingly ascertained on the basis of a concrete assessment of the particular circumstances of the case and of the seriousness of the transgression of powers

²⁹ Honeywell, *supra* note 3, at paras. 56-59.

³⁰ *Id.* at para. 60.

³¹ *Id.* at para. 61.

³² *Id.* at paras.75-79.

allegedly committed by the Union institution concerned. *Slovak Pensions* is much closer in this respect to the opinion of one of the constitutional judges in *Honeywell*, who considered that to require evidence of a structurally significant alteration in the arrangement of competences between the Union and its Member States would make it virtually impossible to succeed on *ultra vires* grounds.³³

The Czech Constitutional Court also seems to suggest that it will not tolerate any misinterpretation of the law on the part of the Court of Justice. In its press release on the *Slovak Pensions* case, the Constitutional Court stressed that the *Landtová* ruling was *ultra vires* because the Court of Justice accidentally overlooked critical facts that would otherwise lead it to the conclusion of inapplicability of Union law. According to the Constitutional Court, the wrong conclusions of the Court of Justice primarily resulted from the insufficient and erroneous information given to it by the government which stated in the proceedings before it that the national case law on the award of the special social security supplement violated the provisions of Union law.³⁴ For the German Constitutional Court, this would be probably understood as an excusable misinterpretation of the law that could not amount to an *ultra vires* act. Apparently, the Czech Constitutional Court believed otherwise. Even if the Court of Justice was essentially misled by the mistaken information given to it by the government, its preliminary ruling constituted a violation of the principle of conferral.

Even more remarkable is the complete absence in the *Slovak Pensions* ruling of any mention to the obligation to make a preliminary reference, before concluding that the *Landtová* case law gives rise to an *ultra vires* act. The Constitutional Court negates in essence to the Court of Justice the opportunity to reconsider its position in the light of an allegedly more accurate factual background and to correct its mistakes within the institutional context of Union law. The implication is once again clear. The respect by the Court of Justice of the limits of its conferred competences can only be examined in a constitutional context. This suggests that the Constitutional Court mistrusts the functionality of the current institutional procedures prescribed by Union law for ensuring the review of the principle of conferral, at least as concerns the acts of the Court of Justice.

Slovak Pensions amounts accordingly to a very aggressive application of *ultra vires*, which is not easily reconcilable with the relevant case law of the originator of this judicial review. This also implies an inclination to resort to it even in circumstances where the issue could be possibly resolved within the institutional context of Union law. It is nevertheless contestable whether this is actually consistent with earlier pronouncements of the

³³ *Id.* at paras. 101-103.

³⁴ Press release of 15 February 2012, available at: http://www.usoud.cz/en/current-affaires/?tx_ttnews%5Btt_news%5D=147&cHash=a41487790296bfadb85e535fac8945c (last accessed: 27 June 2013).

Constitutional Court that it intends to serve as an ultimate arbiter only in entirely exceptional occasions, otherwise entrusting the respect of the principle of conferral to the competent Union institutions.³⁵

III. The Contestable Motives of the Czech Constitutional Court

From a legal perspective, it would accordingly seem that the pronouncement of *ultra vires* in the *Slovak Pensions* case was probably unwarranted. However, the ruling is also contentious from a political point of view. This is because of the particular circumstances giving rise to it, which raise suspicions as to actual motives of the Constitutional Court and cast doubt on its capacity to operate in an impartial way when the interpretation of Union law impinges on its own institutional prerogatives.

Indeed, a possible explanation of the *Slovak Pensions* ruling could be that this was principally aimed at the Supreme Administrative Court and the reliance that this court was making on *Landtová* in order to contest the case law of the Constitutional Court on the award of the social security increment. It will also be recalled that in the proceedings before the Court of Justice the national government explicitly referred to this case law as violating the provisions of Union law. In the wake of *Landtová*, the Czech Parliament passed a new law excluding the future awards of supplementary social security benefits. By taking this step, it embraced in essence the position of the Supreme Administrative Court. Arguably, the Constitutional Court considered that all of the above undermined the binding authority of its rulings and its position in the national legal order. Its reaction was to turn against the source of this alleged institutional anomaly, by pronouncing *ultra vires* the interpretation of Union law made by the Court of Justice. According to this analysis, the *Landtová* ruling was not the primary target of the Constitutional Court. It was rather the incidental victim of an ongoing war at national level over the protection of legal status and institutional privileges.³⁶

Certainly, judicial rulings must be motivated by legal reason and are not the appropriate instrument to carry out the politics of the institution concerned. Notwithstanding this fact, the actual motives underlying the *Slovak Pensions* ruling would probably not concentrate much attention on them if the reasoning of the Constitutional Court was more accurate and compelling. As already explained above, the pronouncement of inapplicability on the circumstances of this case was very contestable for reasons that relate not only to the interpretation of Union law made by the Constitutional Court but also to its understanding of the purpose and the scope of the *ultra vires* review. The imperfections in the legal reasoning of the Constitutional Court are only accentuated by the obscurity of its motives in the *Slovak Pensions* ruling. Seen in this perspective, *Slovak Pensions* is not only legally

³⁵ *Treaty of Lisbon I* (note 16) paras. 120 and 139 and *Treaty of Lisbon II* (note 16) para. 150.

³⁶ Also see in the same respect, Zbiral, *supra* note 5, at 1487-1488.

unconvincing. It also seems to constitute a politically unwise move, which may generate opposite consequences than those aimed at by the Constitutional Court.

D. Potential consequences in terms of inter institutional relationships: Much ado about nothing?

How likely is it in practice that the *Slovak Pensions* ruling will adversely affect the inter institutional relationships between the Czech Constitutional Court and the Court of Justice and to what extent is it expected to inspire the case law of other constitutional courts?

The intentions of the Court of Justice could be revealed relatively soon, since the Supreme Administrative Court immediately reacted to the *Slovak Pensions* ruling by making a new preliminary reference on the matter.³⁷ In its preliminary request, it is asking in essence whether Czech citizens claiming insurance periods completed under the common Czechoslovakian regime are excluded from the personal scope of the Regulation on the application of social security schemes to employed persons moving within the Union. In case of a negative answer, it wishes to know whether the provisions of Union law preclude the preferential treatment of these citizens in relation to the award of supplementary social security benefits notwithstanding the relevant case law of the Constitutional Court and its interpretation of the right to social security in old age. Finally, it is specifically asking whether Union law prevents it from being bound by the legal assessment of the Constitutional Court when this assessment seems to contravene the provisions of Union law as interpreted by the Court of Justice.

Certainly, any attempt to speculate on the actual outcome of this important and politically sensitive preliminary reference would be extremely precarious. However, past experience suggests that the Court of Justice insists on its case law even when this is contested before the national constitutional courts. The ruling in *Kücükdeveci* is very illustrative in this respect.³⁸ In that case, it was categorically confirmed that there exists in Union law a general principle of equal treatment on grounds of age.³⁹ The ruling took no account in this respect of the widespread criticism voiced against the original introduction of this principle

³⁷ Case C-253/12 JS v Česká správa sociálního zabezpečení, O.J. 2012 C 273/2. This preliminary reference was lodged on 24 May 2012.

³⁸ Case C-555/07 Seda Küçükdeveci v Swedex GmbH & Co. KG, [2010] ECR I-365. For more on this ruling, see its annotation by Anja Wiesbrock, *Case Note – Case C-555/07, Küçükdeveci v. Swedex, Judgment of the Court (Grand Chamber) of 19 January 2010*, 11 GERM. L. J. 539-550 (2010), available at: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1255> (last accessed: 27 June 2013). Also see the case note by Gregor Thüsing & Sally Horler in 47 COMM. MKT. L. REV. 1161 (2010).

³⁹ *Id.* at paras. 18-27.

in the earlier *Mangold* case.⁴⁰ Even more importantly, it paid no attention to the legal proceedings that were pending at that time before the German Constitutional Court against the application of the *Mangold* case law at national level.⁴¹ The core of that constitutional complaint was that the interpretation of Union law by the Court of Justice amounted to the recognition of an imaginary general principle of equal treatment on grounds of age, which called into question the allocation of competences between the Union and its Member States as well as the attribution of powers under the Treaties in general. This constituted an *ultra vires* act that lacked legal validity and which could not be applied by the national courts in proceedings before them.

The ruling in *Kücükdeveci* was given only a few months after the eminent *Lisbon* ruling of the German Constitutional Court, in which the latter reaffirmed with particular vigor its capacity to review the validity of the acts of the Union institutions.⁴² However, even this categorical reiteration by the German Constitutional Court of its intention to scrutinize more closely the application of the principle of conferral and its actual involvement in a pending constitutional complaint alleging the invalidity of the *Mangold* case law proved of little practical impact to the Court of Justice. This insisted on the accuracy of its legal reasoning, sending a clear message with multiple recipients that it will continue to exercise its powers in the way that it considers appropriate regardless of any constitutional reactions at national level. Arguably, this message was well taken into account by the German Constitutional Court which ruled a couple of months later that the *Mangold* case law could not be considered as *ultra vires*.⁴³

Kücükdeveci suggests that the preliminary reference made by the Supreme Administrative Court will probably result in the confirmation of the *Landtová* case law, regardless of the position of the Czech Constitutional Court on this matter.⁴⁴ This may provisionally upset the institutional relationships between this latter court and the Court of Justice. Most

⁴⁰ *Mangold*, *supra* note 28, at paras. 74-78. Very interestingly, some of these critical comments came from the very Advocates General of the Court who warned it not to contest without the existence of an explicit legal basis the political choices made by the national legislatures within the limits of their retained powers. See in this respect the Opinion of Advocate General Geelhoed in Case C-13/05 *Sonia Chacón Navas v Eurest Colectividades SA*, [2006] E.C.R. I-6467 at paras. 52-55; the Opinion of Advocate General Mazák in Case C-411/05 *Felix Palacios de la Villa v Cortefiel Servicios SA*, [2007] E.C.R. I-8531 at paras. 58-59 and 89-97; and the Opinion of Advocate General Colomer in Cases C-55/07 & C-56/07 *Michaeler and others v Amt für sozialen Arbeitsschutz Autonome Provinz Bozen*, [2008] E.C.R. I-3135 at paras. 21-22.

⁴¹ *Honeywell*, *supra* note 3.

⁴² *Lisbon*, *supra* note 3.

⁴³ *Honeywell*, *supra* note 3.

⁴⁴ This presupposes of course that the reference will be considered admissible, notwithstanding the complete ban on the future award of the social security supplement currently imposed by Czech law. This law continues to be applicable, since the position of the Constitutional Court that its provisions became obsolete was *obiter dictum*.

likely, it will also give rise to a new round of rivalry at national level between the Constitutional Court and the Supreme Administrative Court which will be once again motivated more by the expediency of judicial politics than by legal reason. However, it is rather improbable that this tension will ever escalate to a large scale crisis that will permanently undermine the authority of the Court of Justice and cause an open war between it and the constitutional courts of the Member States. This is because the *Slovak Pensions* ruling is not expected to influence substantially the case law of these courts, although it will certainly be celebrated in certain eurosceptical circles as an important blow to the privileged status of the Court of Justice as the supreme arbiter of Union law.

There are two intertwined reasons to believe that the above assumption is actually correct. The one relates to the institutional confines of the Czech Constitutional Court.⁴⁵ This is not nearly as influential in European judicial politics as its German counterpart. Accordingly, it cannot provoke on its own a serious institutional crisis with the capacity to spread across the Union and to give rise to a generalized rebellion against the authority of the Court of Justice. Unfortunately for this Constitutional Court, the timing of its *Slovak Pensions* ruling could not be more inopportune. If this were given immediately after the *Lisbon* ruling of the German Constitutional Court, it could certainly gain momentum and support by it. *Honeywell* created a completely new legal setting. Following it, *Slovak Pensions* stands completely isolated and appears to be inconsistent with the openness of the national Constitution towards Union law and the resulting obligation to resort to the interpretative authority of the Court of Justice before the pronouncement of an *ultra vires* act.

The second reason relates to the apparent weaknesses of the *Slovak Pensions* ruling itself. As already explained, the legal reasoning of the Constitutional Court is not at all compelling and seems moreover to be principally motivated by judicial egoism aiming at the preservation of institutional prerogatives placed at peril by the case law of a rival national court. This case seems accordingly to lack the necessary legitimacy to serve as a reliable legal precedent, which could be validly invoked in the future by other constitutional courts. It is rather more likely that the Czech Constitutional Court will reassess at some point its position on the matter, sensing this was not the proper occasion to activate the *ultra vires* review. The preliminary reference that is currently pending before the Court of Justice may actually provide it with this opportunity.

E. Conclusion

⁴⁵ See particularly in this respect, Arthur Dyeve, *Judicial Non-Compliance in a Non-Hierarchical Legal Order: Isolated Accident or Omen of Judicial Armageddon?*, available at: <http://ssrn.com/abstract=2084639> or <http://dx.doi.org/10.2139/ssrn.2084639> (last accessed: 27 June 2013).

Historic as it may be, the *Slovak Pensions* ruling of the Czech Constitutional Court seems to amount to a legally contestable and politically inappropriate application of the *ultra vires* review. However, this case may actually illustrate the most likely scenario where a constitutional court may conclude that an act of the Union institutions violates the principle of conferral. This could occur in circumstances where a constitutional court which omits to make a timely preliminary reference in a case involving the application of Union law and proceeds to an interpretation of its own suddenly realizes that its institutional status is seriously imperiled, because another national supreme court seeks itself the necessary preliminary ruling and relies consequently on it in order to contest the authority of its constitutional court. Struggling over the protection of its prerogatives, the constitutional court may consider it then necessary to attack the source of this peril although its primary target is ultimately the rival national court.

This can only be avoided, if the national constitutional courts avail themselves more regularly of the preliminary reference procedure. In the *Slovak Pensions* case, the Czech Constitutional Court was given several opportunities to seek itself a preliminary reference on the award of the supplementary social security increment and to explain the reasons why it considered it legitimate. It arrogantly chose to ignore them all leaving the leeway to the Supreme Administrative Court to ask its own preliminary questions on the matter, only to complain later that its arguments were not taken into account by the Court of Justice.⁴⁶ It is certainly true that national constitutional courts are notoriously known for not making use of the preliminary reference procedure. There are nevertheless indications that their negative record is about to improve.⁴⁷ If these are confirmed, this will not only inaugurate a new era in their institutional relationships with the Court of Justice. It will also minimize the potential of an *ultra vires* pronouncement in cases with the particularities of the *Slovak Pensions* litigation.

⁴⁶ The Constitutional Court attempted to intervene in the *Landtová* proceedings, *supra* note 6, by a written statement, in which it expressed the expectation that in order to preserve the appearance of objectivity the Court of Justice would familiarize itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic. However, this statement was considered as inadmissible, as it came from a third party which was not officially involved in the proceedings. The Constitutional Court considered that this constituted a violation of the principle *audiatur et altera pars* ("hear the other party too.")

⁴⁷ Two preliminary references were made recently by the Spanish Constitutional Court in Case C-399/11 Criminal Proceedings against Stefano Melloni, O.J. 2011 C 290/5, and the Belgian Constitutional Court in Case C-197/2011 Eric Libert and Others v Flemish Government, O.J. 2011 C 211/13. Both cases are currently pending.