



ELECTIONS TO THE EUROPEAN PARLIAMENT AND THE CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

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- Almost one year after 2014 EP elections, the Czech Constitutional Court upheld the constitutionality of a 5% electoral threshold for elections to the European Parliament in the Czech Republic.
- The Court stressed the European dimension of Czech electoral rule and potential destabilisation effect of abolishing the 5% threshold for the European Parliament.

Abstract:

The Czech Constitutional Court upheld the constitutionality of a 5% electoral threshold for elections to the European Parliament in the Czech Republic. The Court's decision emphasised that by abolishing the 5% threshold the Czech Republic could contribute to the instability of the European Parliament. In the Court's opinion, the fact that only 21 MEPs are elected in the Czech Republic cannot justify the disregard for the stabilising effect of a reasonable electoral threshold in the EP elections since the Czech Republic shall not behave in the European institutions as an irresponsible "free-loader" that ignores the European dimension of its domestic electoral rules.

EU Rules and Member States' Discretion in EP Elections

The European Parliament (EP) has turned into an influential and ambitious institution of the European Union. While direct elections are central to legitimizing the EP's role, the EU treaties and legislation are surprisingly vague regarding the format of these elections. The EU Treaties establish the number of MEPs elected in individual EU states. They also guarantee both active and passive electoral rights for EU citizens residing outside the state of their citizenship.¹ For details

¹ Details of this right are elaborated by Council Directive 93/109/EC of 6 December 1993 which outlined arrangements for the exercise of the right to vote and stand as a candidate in elections to the European Parliament for citizens of the Union residing in a Member State of which they are not nationals (last amended in



of the electoral procedure, the Treaty on the Functioning of the European Union (TFEU) expects a uniform electoral procedure for the European Parliament to be established but the respective legislation² has not been adopted yet. Instead, the EP election procedure is governed by the member states' decision in the Council that was last modified in 2002.³ This decision requires the EP elections to be governed by the principle of proportional representation, permits member states to divide their territory into constituencies, and to establish a system of preferential votes or to limit candidates' campaign spending. Last but not least, EU law authorizes member states to establish a minimum threshold for the allocation of seats in the EP under condition that the threshold is not higher than 5% of votes cast in the particular EU state. All remaining issues of the EP elections shall be regulated by legislation adopted by individual member states.

The discretion left to EU states has resulted in a high level of heterogeneity in domestic rules governing elections to the EP. Only several EU states such as Belgium, France, Ireland, Italy, Poland, and the United Kingdom have divided their territories into constituencies for the purposes of the EP election. Electoral thresholds are used by 14 member states (Austria, Croatia, Cyprus, Czech Republic, France, Hungary, Italy, Latvia, Lithuania, Poland, Romania, Slovakia and Sweden) and their level has been set by individual countries ranging from 5% to 1.8%. Often, the electoral threshold, as well as territorial division into electoral constituencies, is a result of domestic political traditions and political bargaining in a particular country. In other cases, they were also influenced

by judicial intervention, such as in Germany where both 5% and 3% thresholds in the EP election were declared unconstitutional by the Federal Constitutional Court.

EP Elections in the Czech Republic

Czech legislation regulating the EP election was adopted between 2002-2003⁴ and with only minor modifications, governed all three EP elections (2004, 2009, 2014) held in the Czech Republic since its accession to the EU. On the basis of several aspects, the rules of EP elections differ from other elections in the Czech Republic. In contrast to the elections for the Assembly of Deputies, EP elections in the Czech Republic establishes only one constituency with single party candidate lists for the whole country. Another deviation from Czech electoral laws for the Assembly of Deputies is the absence of the possibility to vote from outside of the territory of the Czech Republic in the EP elections. EU citizens without Czech citizenship are permitted to vote and to stand as candidates under the condition of a minimum 45-day long residence in the Czech Republic at the moment of the EP elections; a privilege not guaranteed to citizens of other EU states in the elections to the Parliament of the Czech Republic.

The EP elections, the Assembly of Deputies and municipal assemblies all share the same threshold for the allocation of seats. Political parties or political movements, whose candidates receive at least 5% of votes cast, are eligible for the distribution of seats in the EP.⁵ The rules concerning public financing of electoral campaigns are less strict for EP elections. In order for a party to receive financial resources from the state, it is sufficient to overcome the 1% threshold in contrast to the 1.5% threshold in national parliamentary elections.

2013).

- 2 Article 223 of TFEU requires that uniform electoral procedure shall be adopted by special legislative procedure with unanimous vote in the Council and assented by the European Parliament. Further, the procedure must be approved by all member states in accordance with their respective constitutional requirement.
- 3 Council Decision of 25 June 2002 and 23 September 2002 amending the Act concerning the election of the representatives of the European Parliament by direct universal suffrage, annex to Decision 76/787/ECSC, EEC, Euratom.

- 4 Zákon č. 62/2003 Sb. ze dne 18. února 2003 o volbách do Evropského parlamentu a o změně některých zákon.
- 5 During a legislative debate in the Senate of the Parliament of the Czech Republic, a proposal to decrease the threshold level to 3% was debated but the respective amendment proposal has not received sufficient support in the chamber.



The results of EP elections in the Czech Republic have not significantly diverged from the general pattern in other member states. EP elections in the Czech Republic are consistent with the characterisation of the EP elections as a second order elections, both from the perspective of voter turnout (28.3% in 2004, 18.2% in 2014) and the prevalence of less senior candidates in the political parties' structure. The 2004 EP elections demonstrated its function as a form of protest when candidates from the opposition parties gained 20 out of a total number of 24 available seats. For the 2009 and 2014 EP elections, the comparable results as a form of protest were less clear as the government-opposition distinction was blurred due to the emergence of a caretaker government led by Jan Fischer in April 2009 and by voters' expectation vested in a political new-comer, the ANO movement, in the 2014 EP elections.

Another feature shared by all three EP elections in the Czech Republic has been the relative success, both in terms of mandates and votes, of minor political parties not represented in the Czech Parliament. In 2004, two non-parliamentary parties (European Democrats and Independent Movement) succeeded in entering the EP. In 2014, the Party of Free Citizens, traditionally unsuccessful in general parliamentary election, sent its leader Petr Mach, to the European Parliament.

Judicial Challenge to the EP Elections in 2014

In 2014, elections to the EP distributed "Czech" EP seats between representatives of seven political parties and movements, the highest number ever since Czech membership in the EU. Furthermore, two non-parliamentary parties, the Pirate Party and Greens, gained 4.78% and 3.77% of the total number of votes respectively, however, both parties failed to exceed the 5% threshold and were unable to gain a seat. Disregarding the 5% threshold, both the Pirates and Greens would have gained one seat in the EP at the expense of 1 MEP elected for Social Democrats and 1 for Christian

Democrats.

Both the Pirate Party and the Greens appealed to the Supreme Administrative Court (Nejvyšší správní soud) in Brno which has jurisdiction over electoral disputes in order to request the court to supersede mandates of one (least successful) Social Democratic and one Christian Democratic MEP. The applicants' central argument was that the 5% threshold in Czech legislation regulating the EP elections violates the principle of equal and proportional representation in the elections as well as the principle of equal access to elected offices, both of which are guaranteed by the Czech constitutional order. This complaint was complicated by the fact that the constitutionality of the 5% threshold in the parliamentary and municipal elections has previously been upheld by the Constitutional Court of the Czech Republic, however, in the opinion of Pirates and Greens, the role of the 5% threshold in the EP elections differs significantly from the 5% threshold applied in the elections to the Czech Parliament (Assembly of Deputies) or municipal elections. The applicants claimed that while the 5% threshold can, indeed, contribute to stability and efficiency of Czech elected institutions, the stabilization function of the 5% clause cannot be justified in case of the EP elections where 21 MEPs elected in the Czech Republic constitute only a marginal segment of the whole institution composed of 751 members.

The Czech Supreme Administrative Court lacked the authority to decide on the constitutionality of Czech legislation by itself. Instead, it referred the question to the Constitutional Court to tackle the constitutionality issue, however, not all judges of the Supreme Administrative Court agreed with this step as three of the judges formulated a dissenting opinion. The dissenting judges claimed that the referral to the Constitutional Court is superfluous because even if the Czech 5% clause is declared to be unconstitutional, the Supreme Administrative Court could not, with retroactive effect, alter the allocation of seats to the EP distributed in 2014; in the dissenting judges' opinion, this intervention would disrespect the will of voters



in the 2014 EP election even more than the 5% threshold clause.

Constitutional Court's Ruling

The Czech Constitutional Court delivered its decision on May 19, 2015.⁶ As the Constitutional Court stressed in its older case-law regarding Czech membership in the European Union, even if the Constitutional Court does not directly enforce the EU law during the constitutional review, the EU law may serve as an inspiration for interpretation of Czech constitutional rules. According to the Constitutional Court, the Council's decision in establishing key principles of the EP elections is "hard" EU law and has relevance for the Constitutional Court's interpretation of the Czech constitution. The same applies to the EU Charter of Fundamental Rights that guarantees "*direct universal suffrage in a free and secret ballot for EP elections.*"⁷ Hence, the Constitutional Court focused on Czech constitutional regime for the elections, interpreting it in light of the EU rules for the EP elections. Therefore, regardless of the fact that the dispute was about the EP elections, it was perceived by the Constitutional Court as an issue of Czech constitutional order, albeit with a strong European touch.

As previously mentioned, the Czech Constitutional Court declared that the 5% threshold can be compatible with the principle of proportional representation in domestic parliamentary elections because the threshold contributes to an efficient parliament and a stable government by limiting the number of political parties elected to the parliament. Regardless of the EP's limited powers in comparison to national parliaments of member states, the European Parliament is nevertheless perceived by the Constitutional Court as a "real" parliament for the purposes of evaluating of the electoral threshold. Therefore, the same argument

in favour of constitutional compatibility of the 5% threshold can be used for the EP elections as well as for the national ones, especially in regards to the fact that EU documents explicitly permit a threshold not exceeding 5%. The Czech constitutional text is silent regarding this problem in the elections to the Parliament of the Czech Republic. Unlike the Czech constitution, the corresponding EU legislation does not explicitly guarantee equal electoral rights to all EU citizens.⁸

The fact that only a small segment of all MEPs are elected in the Czech Republic does not, in the opinion of the Constitutional Court, provide the Czech Republic with an excuse to ignore the stabilisation effect of the 5% threshold. If all member states opted for such approach by arguing for the marginalization of "their" number of MEPs, the stability of the whole European Parliament would be endangered. In the Constitutional Court's opinion, this risk of fragmentation and paralysis of the EP was strengthened after the elections in 2014 when the heterogeneity of the EP increased significantly particularly as the incumbent Juncker's Commission is supported by a smaller number of the MEPs than the previous Barroso's Commission(s). The Constitutional Court de facto formulates a constitutional obligation for the Czech Republic to avoid being a "free loader" ("free rider") of the European integration project by not contributing to the stability of the EP.

Thus, the majority of the plenum⁹ of the Constitutional Court found no contradiction between the Czech constitutional order and the 5% threshold for the allocation of the seats in the EP elections, as applied in the Czech Republic. Therefore, the Constitutional Court found no reason to annul the respective part of Czech electoral law.

6 Pl.ÚS 14/14. Text available at <http://nalus.usoud.cz/Search/ResultDetail.aspx?id=88472&pos=1&cnt=1&typ=result> (accessed June 11, 2015).

7 Charter of Fundamental Rights of the European Union, Article 39 par. 2.

8 The reason EU law is silent regarding the equality of voting rights of EU citizens, is rooted in the system of allocation of seats in the EP to particular EU member states where smaller states and their citizens (such as the Czech Republic with 10 million citizens and 21 MEPs) are "over-represented" at the expense of larger countries (such as Germany with 80 million citizens and 96 MEPs).

9 Three constitutional judges, Vojtěch Šimíček, Kateřina Šimáčková and Milada Tomková, dissented and presented their own opinion to the case.



European Parliament As Seen by the Constitutional Court

Even if the Czech government does not have to rewrite rules on the EP elections, the Constitutional Court's decision provides an interesting insight into understanding the perspective of Czech constitutional judges regarding the European Parliament and European integration.

First, the Court expressed its respect to the European Parliament. Czech constitutional judges, including the dissenters, explicitly accepted the EP as a genuine parliament and also declared that the EP is essential for the democratic legitimacy of the EU. Hence, Czech constitutional judges differ from the opinion of their German colleagues that national parliaments should be the dominant actors in guaranteeing the democratic legitimacy of the European Union. Instead, Czech constitutional judges understand the European Parliament and national parliaments as interconnected and mutually interdependent actors which are both equally important for the democratic character of the European Union. This view means the elections to the EP must be taken seriously.

The second theme of the Constitutional Court's argument is loyalty of the Czech state to the EU project. The loyalty principle requires that member states "shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union" and EU countries "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives."¹⁰ In addition to other tasks,¹¹ the loyalty principle of the European integration does not permit, in the opinion of Czech constitutional judges, the Czech Republic to behave like a "free-loader" ("free rider") in the EU institutions and threaten their stability through unilateral decisions. In other words,

¹⁰ Treaty on European Union, Article 4 par. 3.

¹¹ For detailed analysis of the loyalty principle in the EU, see Marcus Klamert. *The Principle of Loyalty in EU Law*. Oxford University Press 2014.

Czechs shall consider their involvement in the EU seriously.

The last but perhaps the most visible element of the Court's ruling on the EP elections was the judicial restraint on the autonomy of politicians to establish details of the election process which were not specified in the Czech constitution. This does not mean that general election rules are immune from judicial and constitutional review, on the contrary, Czech Constitutional Court quashed the core of legislation regulating the election to the Assembly of Deputies adopted during the so called "opposition agreement" period of 1998-2002¹² and the national rules on the EP elections were successfully challenged both before the Federal Constitutional Court in Germany and the European Court for Human Rights. However, this was not the case with the 5% threshold in the EP elections in the Czech Republic. Czech constitutional judges believe that the 5% threshold in the EP elections does not threaten or diminish the democratic substance of the elections governed by the proportionality principle. Therefore, the political will of Czech politicians expressed by establishing a "reasonable" electoral threshold must be respected in the case of EP elections, as it is respected in the elections to the Assembly of Deputies and in the municipal elections. Furthermore, the same 5% threshold in all three types of elections can enhance, through the similarity of both electoral systems, voters' understanding of the role and possible outcome of the EP elections in the Czech Republic.

¹² The "opposition agreement", officially named "Agreement on Establishment of Stable Political Environment in the Czech Republic" („Smlouva o vytvoření stabilního politického prostředí v České republice"), was a political deal between the two most successful political parties in Czech parliamentary elections in 1998, the Social Democratic Party and the Civic Democratic Party. The agreement guaranteed the Social Democrats the right to form a single-party government for years 1998-2002 while the Civic Democrats were provided with key parliamentary post during this period. The "opposition agreement" also contained a plan to marginalise the role of smaller political parties by strengthening majoritarian elements in the electoral system but its legislative implementation was successfully challenged before the Constitutional Court.

Table 1: MEPs elected in 2004, 2009, 2014 EP elections

	2004	2009	2014
Social Democratic Party (Česká strana sociálně demokratická)	2 (Falbr, Rouček)	7 (Havel, Falbr, Rouček, Poc, Brzobohatá, Dušek, Sehnalová)	4 (Keller, Sehnalová, Poc, Poche)
Christian Democratic Party (Křesťanská a demokratická unie – Československá strana lidová)	2 (Roithová, Březina)	2 (Roithová, Březina)	3 (Svoboda, Šojdrová, Zdechovský)
Civic Democratic Party (Občanská demokratická strana)	9 (Zahradil, Cabrnch, Duchoň, Fajmon, Ouzký, Strejček, Škottová, Vlasák, Zvěřina)	9 (Tošenovský, Zahradil, Vlasák, Cabrnch, Strejček, Ouzký, Kožušník, Fajmon, Češková)	2 (Zahradil, Tošenovský)
European Democrats	3 (Zieleniec, Hybášková, Zatloukal)	-	-
Independents	2 (Bobošíková, Železný)	-	-
TOP09 (Tradition, Responsibility and Prosperity Party)	-	-	4 (Niedermayer, Pospíšil, Polčák, Štětina)
Communist Party	6 (Ransdorf, Remek, Flasarová, Kohlíček, Maštálka, Strož)	4 (Ransdorf, Remek, Maštálka, Kohlíček)	3 (Konečná, Maštálka, Ransdorf)
ANO 2011	-	-	4 (Telička, Ježek, Charanzová, Dlabajová)
Party of Free Citizens (Strana svobodných občanů)	-	-	1 (Mach)
Government total	4	11 ¹³	11
Opposition total	20	11	10
Total number of MEPs	24	22	21

¹³ At the moment of the 2009 EP election, the Czech Republic was ruled by a care-taker government without a clear political profile. The 11:11 ratio in the table reflects upon the electoral success of political parties forming the government (Civic Democrats, Christian Democrats, Greens) until April 2009.



Table 2: 2014 EP results with and without 5% threshold clause

Political Party	% of votes	Number of MEPs with 5% threshold clause (as applied in 2014 EP elections)	Number of MEPs without 5% threshold clause (as asked by Pirates and Greens)
ANO 2011	16.13	4	4
TOP 09	15.95	4	4
Social Democratic Party	14.17	4	3
Communist Party	10.98	3	3
Christian Democratic Party	9.95	3	2
Civic Democratic Party	7.67	2	2
Party of Free Citizens	5.24	1	1
Pirate Party	4.78	-	1
Green Party	3.77	-	1
Total	88,64	21	21

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