THE QUEST OF THE LISBON TREATY IN THE CZECH REPUBLIC AND SOME OF THE CHANGES IT INTRODUCES IN EU PRIMARY LAW

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Abstract: This article describes the ratification process of the Treaty of Lisbon in the Czech Republic, analyses all three relevant judgements of the Czech Constitutional Court, and comments on some of the issues related to the Treaty of Lisbon, such as the "Irish Legal Guarantees" and request of the Czech Republic to accede to the Protocol concerning application of the Charter of Fundamental Rights of the EU in Poland and the United Kingdom. The process to the ratification of the Treaty of Lisbon was quite cumbersome in the Czech Republic, and after the first judgement of the Constitutional Court (Lisbon I) and amendment of the Rules of Procedure of the Parliament (to strengthen its control powers regarding certain acts of European Council and Council of Ministers), two further proceedings were initiated by a group of discontented Senators (challenge against the Rules of Procedure and finally Lisbon II case). As the judicial proceedings in Lisbon II case advanced, there was another interesting development when the President of the Czech Republic requested additional guarantees in the form of accession to the above mentioned Protocol concerning the application of the EU Charter, as a condition for the completion of ratification. In the second part, the article offers overview and analyses of the main changes introduced by the Treaty of Lisbon in the area of EU international agreements (EU legal personality, agreements in the areas of CFSP and JHA, external competence in the common commercial policy, domestic effects of EU agreements).

Resumé: Tento článek popisuje ratifikační proces Lisabonské smlouvy v ČR, analyzuje všechny tři související rozhodnutí Ústavního soudu ČR a komentuje některé otázky vztahující se k Lisabonské smlouvě, jako jsou tzv. „Irské právní záruky" a žádost ČR o přistoupení k Protokolu o uplatňování Listiny základních práv EU v Polsku a Spojeném království. Proces ratifikace Lisabonské smlouvy v ČR byl poměrně obtížný, a po prvním nálezu Ústavního soudu (Lisabon I) a změnách Jednacích řádů Parlamentu ČR (k posílení jeho kontrolních pravomocí ve vztahu k některým aktům Evropské rady a Rady ministrů) byla skupinou nespokojených senátorů zahájena dvě další řízení (napadení novel Jednacích řádů a konečně případ Lisabon

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II). S postupem řízení ve věci Lisabon II došlo k dalšímu zajímavému vývoji, když prezident republiky požádal o dodatečné záruky ve formě přistoupení ke shora uvedenému Protokolu o uplatňování Listiny EU v Polsku a Spojeném království jako podmínku pro dokončení ratifikace. Ve druhé části článek nabízí přehled a analýzu hlavních změn zavedených Lisabonskou smlouvou v oblasti mezinárodních smluv v rámci EU (právní subjektivita EU, smlouvy v oblasti SZBP a JHA, vnější pravomoc ve společné obchodní politice, vnitrostátní účinky smluv EU).

Key words: Treaty of Lisbon, European Union, ratification process, Constitutional Court, sovereignty, rule of law, transfer of competence, Charter of Fundamental Rights of the EU, EU international agreements, EU external competence, EU legal personality, common foreign and security policy, justice and home affairs, common commercial policy.

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I. Introduction

The Treaty of Lisbon[2] constitutes a major amendment to the legal framework[3] of the European Union and introduces some significant changes in the institutional structure, legal status and international treaties' practice of the Union. The road to Lisbon was quite arduous. Especially so in the Czech Republic, where the Treaty of Lisbon was challenged on two occasions before the Constitutional Court (and once indirectly), the act of ratification was postponed indefinitely and, as the last straw, in October 2009 the Czech President suddenly demanded an "opt-out" from the legally binding Charter of Fundamental Rights of the European Union (hereinafter the "EU Charter"), raising the issue of the potential for alleged claims for property that had been confiscated after the Second World War on the basis of the so-called "Presidential Decrees".[4]

[2] Treaty of Lisbon, amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Official Journal C 306 of 17 December 2007; hereinafter the "Treaty of Lisbon" or the "Treaty").

[3] Unless expressly stated otherwise, I am referring to the renumbered versions of the Treaty on EU (TEU) and the (renamed) Treaty on the Functioning of the EU (TFEU) as amended by the Treaty of Lisbon.

[4] Temporary executive acts issued by the then Czechoslovak president Edvard Beneš between 1940-1946,

In this article, I will comment on some of the issues related to the Treaty of Lisbon in the Czech Republic and offer some explanatory background. I will focus on the proceedings before the Constitutional Court, the debates and the approval of the Treaty that took place in the Parliament, the guarantees achieved by the Czech Republic regarding the EU Charter and the changes the Treaty of Lisbon introduces in the area of EU international agreements. I will not describe the whole substance of the Treaty of Lisbon in detail and will not elaborate on all of the significant legal and institutional changes it represents, since this has already been done by other distinguished academics and I could hardly bring anything new to their analysis.[5] Instead, I will try to offer a particular "Czech" perspective and describe some of the real problem areas, as well as some other purely artificial problem areas, from the point of view of the Czech legal order.

II. Signing the Treaty of Lisbon and sending it to Parliament – the quest begins

In the Czech Republic, the signing of the Treaty of Lisbon was approved by the government on 4 December 2007[6] and shortly thereafter, on 13 December 2007, it was signed by the then Prime Minister, Mr Mirek Topolánek, and the then Foreign Minister, Mr Karel Schwarzenberg, in Lisbon.[7] As the next step in the ratification procedure, on 28 January 2008 the government submitted the Treaty of Lisbon to the Senate and the Chamber of Deputies of the Parliament of the Czech Republic for assent to ratification. The Treaty of Lisbon represented a treaty within the meaning of Art. 10a(1) of the Constitution of the Czech Republic (hereinafter the "Constitution")[8]

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i.e., mainly during the Second World War period when the Czechoslovak government functioned in British exile and the non-existing National Assembly could not exercise its legislative functions. Contrary to popular belief, only a few of those decrees concerned the legal status and property ownership of the German and Hungarian population in Czechoslovakia, but all of those were issued between 1945-1946. Needless to say, these decrees are the most sensitive ones, although their effects were already "spent" in the past and they cannot produce any new legal effects.

5 For a comprehensive analysis of the Treaty of Lisbon, see P. Craig, *The Treaty of Lisbon, Process, Architecture and Substance*, E.L. Rev. 2008. 33 (2), pp. 137-166 or M. Dougan, *The Treaty of Lisbon 2007: Winning Minds, Not Hearts*, CMLR 2008. 45, pp. 617-703. A good analysis of the Treaty of Lisbon (series of detailed commentaries on its various parts / aspects) written by Steve Peers is also available on the website http://www.statewatch.org/euconstitution.htm. A brief overview of the main changes introduced by the Treaty of Lisbon can also be found on the website of the European Union: http://europa.eu/lisbon_treaty/glance/index_en.htm.

6 Resolution of the Government of the Czech Republic No. 1367/2007.

7 The Prime Minister and the Foreign Minister were authorised to perform the signing by Full Powers issued by the President of the Czech Republic, Mr Václav Klaus. Without his explicit consent, the signing would be in breach of the applicable legal requirements of the Czech legal order.

8 Act No. 1/1993 Coll., The Constitution of the Czech Republic, as amended. Art. 10a (1) of the Constitution stipulates: "*Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution.*" This provision is known as the so-called "integration clause", introduced by a constitutional amendment in 2001 (Constitutional Act No. 395/2001 Coll.), which enabled the Czech Republic to join a supranational organisation, such as the European Union, and share its sovereignty accordingly.

and required a qualified "constitutional" majority of 3/5 of all Deputies (120 out of 200 in the Chamber of Deputies) and 3/5 of the Senators in attendance (49 out of 81 in the Senate, if all Senators were present).

The procedure in the Chamber of Deputies consists of two readings, with a committee stage in-between. The first reading commenced on 19 March 2008 and then the Treaty was assigned to the following committees: Committee for European Affairs, Foreign Affairs Committee and Constitutional Committee. The Treaty of Lisbon was concurrently discussed in the Senate, where the procedure consists only of the committee stage and then a single reading. In the committee stage, the Treaty of Lisbon was discussed at the Committee for Foreign Affairs, Defence and Security (12 March 2008), the Committee for Affairs of the European Union (twice, on 2 April and 9 April 2008) and the Constitutional Committee (16 April 2008). The Treaty of Lisbon proved to be a politically controversial issue and attracted heavy criticism from the "euro-realist" or "euro-sceptic" members of the Senate, mainly for the alleged uncontrollable transfer of competencies to the EU, loss of national sovereignty, loss of veto power, expansion of qualified majority voting, harmonisation of criminal law etc. The Committee for Affairs of the EU adopted a resolution recommending that the Senate submit the Treaty of Lisbon to the Constitutional Court for a review of its compatibility with the Constitution. The plenary session of the Senate then discussed the proposal on 24 April 2008 and voted in favour of a constitutional review.[9] The "Lisbon I" proceedings could then begin.

III. Review by the Constitutional Court (Lisbon I)

The proceedings for the review of an international treaty before the Constitutional Court are governed by Sec. 71a *et seq*. of Act No. 182/1993 Coll., on the Constitutional Court (hereinafter the "Constitutional Court Act").[10] Pursuant to Sec. 71c of the Constitutional Court Act, apart from the petitioner, the parties to the proceedings are, in all cases, the Parliament, the President and the Government. This is due to their specific role in the process of negotiating and approving international treaties. In the case of Lisbon I, the Senate was the petitioner, and the other Chamber of the Parliament (Chamber of Deputies) limited itself predominantly to a description of the procedure for debating the Treaty of Lisbon in this Chamber.[11] Therefore, I will

[9] Resolution No. 379 of 24 April 2008. It is worthwhile mentioning in this context that the Senators for the Civic Democratic Party, the majority party in the ruling coalition government, voted in favour of the constitutional review of the Treaty. Among them was also the then Deputy Prime Minister for European Affairs, Mr Alexandr Vondra, who presented and supposedly should defend the Treaty in the Parliament (he was a government minister and a Senator at the same time, which the Constitution, curiously enough, allows). The then Foreign Minister, Mr Karel Schwarzenberg (nominated by the Green Party), also a Senator, voted against the proposal.

[10] This was the first review ever of an international treaty, before its ratification, by the Constitutional Court. Due to this fact there were a number of unclear legal issues which had to be addressed and clarified by the Court.

[11] The written observations of the Chamber of Deputies were submitted to the Court on 10 June 2009

focus only on the petition from the Senate, the position of the Government and the arguments of the President, and of course on the judgement of the Court and the manner in which it reflected the arguments presented by the parties.

(i) Petition from the Senate

By way of its Resolution No. 379 of 24 April 2008, the Senate resolved to petition the Constitutional Court to assess the conformity of the Treaty of Lisbon with the constitutional order of the Czech Republic pursuant to Art. 87 (2) of the Constitution.

The Senate requested the Constitutional Court to review whether the Treaty of Lisbon was in conformity with the constitutional character of the Czech Republic as a sovereign, unitary and democratic state under the rule of law according to Art. 1(1) of the Constitution and whether the Treaty would not lead to a change in the fundamental requisites of a democratic state under the rule of law, such change being prohibited under Art. 9 (2) of the Constitution.

In its brief petition (4 pages in total), the Senate drew attention to certain areas or provisions of the Treaty of Lisbon that could potentially be in conflict with the constitutional order of the Czech Republic, namely: the classification of competences, exclusive competences of the Union and indeterminate boundaries of shared competences; the "flexibility clause" in Art. 352 of the Treaty on the Functioning of the European Union (hereinafter the "TFEU")[12] and its application; the simplified revision procedure for adopting amendments to the Treaties contained in Art. 48 (6)-(7) of the Treaty on European Union (hereinafter the "TEU"), incl. the so-called bridging clause or *passerelle*;[13] the binding nature on the Czech Republic of international agreements concluded by the Union and the expansion of the legal grounds (competence) for their conclusion; the nature and impacts of the EU Charter; the principles on which the Union is founded (Art. 2 TEU) and the

and the Chamber informed the Court that, *inter alia*, the deadlines for discussion in the committees were extended and that the Committee for European Affairs decided to suspend the discussion of the Treaty of Lisbon pending the outcome of the proceedings.

[12] According to this provision, "*[i]f action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*"

[13] When proceeding according to Art. 48 (7) TEU (the so-called *passerelle* clause), a change in voting procedure (from unanimous voting to qualified majority voting) or a change in legislative procedure (from special to ordinary legislative procedure) may occur within the sphere of competencies already transferred to the level of the Union. The respective measure is adopted unanimously by the European Council after obtaining consent from the European Parliament. Before such measure can be adopted, national parliaments must be notified of such proposal. If any national parliament makes known its opposition to the proposal within six months of this notification, the measure is not adopted.

possibility of suspending the rights of a Member State for a violation of these principles (Art. 7 TEU).

(ii) Position of the Government

The Government intervened as a party in the proceedings and submitted its written observations.[14] The Government's statement addressed all of the issues highlighted by the Senate concerning the constitutional conformity of the Treaty of Lisbon and contained legal argumentation supporting the conclusion that all of the provisions of the Treaty of Lisbon referred to by the petitioner, as well as the Treaty of Lisbon in its entirety, conform with the constitutional order of the Czech Republic.

The Government's statement was based on its assumption that the Treaty of Lisbon conforms with the constitutional character of the Czech Republic as a sovereign, unitary, and democratic state under the rule of law based on respect for the rights and freedoms of persons and citizens pursuant to Art. 1(1) of the Constitution and that the ratification of the Treaty of Lisbon would in no way lead to changes in the fundamental requisites of a democratic state under the rule of law. Art. 2 TEU states that *"The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail."* In the Government's view, it was apparent in general terms that both the constitutional system of the Czech Republic and the Treaties' system of the EU are based on and draw from the same tenets and principles that are common to all EU Member States. **In other words, the EU is built on the same principles and values as the Czech Republic, and the Treaty of Lisbon does not alter this fact in any way.**

In relation to this starting point, the Government responded in detail to each argument and deliberation contained in the Senate's petition.

As to the issue of division and classification of competencies within the EU, the Government referred to the fundamental principle of conferral of competencies, i.e., the principle according to which the Union has only those competencies that were transferred to it by the will of the Member States. The power to decide on the competencies of the EU belongs to and will continue to belong to the Member States. The Government was of the opinion that the delimitation and classification of competencies introduced by the Treaty of Lisbon did not mean that the European Union would acquire the attributes of a federal state. The Government was certain

[14] As a party to the proceedings, the Government was entitled to submit a statement on the petition for the initiation of proceedings (Sec. 32 of the Constitutional Court Act). In response to a summons of the Constitutional Court dated 7 May 2008, in which the Court asked the Government to submit a statement on the petition filed by the Senate, a draft of the respective statement was presented to the Government for approval. The Government approved the statement by its Resolution No. 804 of 27 June 2008.

that the delimitation of competencies according to the Treaty of Lisbon conformed with Art. 10a of the Constitution, which allowed for certain competencies of the institutions of the Czech Republic to be transferred to an international organisation or institution.

The Government was of the opinion that the flexibility clause pursuant to Art. 352 TFEU, which makes it possible to overcome an absence of expressly stipulated competencies under circumstances where a certain action at the Union level is required to achieve the Union's objectives, was also in accordance with Art. 10a of the Constitution. The Government emphasised that such possibility already existed under the current Treaty establishing the European Community (hereinafter the "TEC").[15] Although the Treaty of Lisbon expands the scope of application of this concept, it also introduces significant control mechanisms that set out clear limits for the application of the flexibility clause and prevent it from being interpreted broadly.

The Government also found no conflict in the simplified revision procedure for adopting changes to the Treaties according to Art. 48 (7) TEU. In relation to this procedure, conformity with Art. 10a of the Constitution was ensured by the act of ratification of the Treaty of Lisbon itself. As a sovereign Member State, the Czech Republic expressed its consent to future modifications of the exercise of transferred competencies in the manner explicitly defined in Art. 48 (7) of the TEU. In this regard, the Government also emphasised the responsibility of national parliaments, as each of them possessed the right of veto that could prevent adoption of changes to the Treaty by the simplified revision procedure.

As regards the issue of negotiating and concluding international agreements on behalf of the Union, the Government stated that the Treaty of Lisbon preserved the existing concept of the conclusion of international agreements by the European Union with third countries. **It would still be necessary to differentiate between agreements concluded within the exclusive competence of the EU, which are not subject to the Member States' national procedures, and so-called mixed agreements, where the participation of the Member States is necessary to conclude such an agreement.** According to the Government's view, the legal entitlements (grounds) on the basis of which the EU will be authorised to conclude international agreements after the entry into force of the Treaty of Lisbon will not differ in any way from the current ones. The Treaty of Lisbon only codifies the hitherto established practice of the European Court of Justice (hereinafter the "ECJ") and thereby contributes to the greater legal certainty of parties that are subject to the legal norms contained in international agreements.

In its statement, the Government also addressed in detail the status of the EU Charter and its relationship to national catalogues of fundamental human rights and freedoms, as well as to the European Convention on Human Rights and Fundamental Freedoms (hereinafter the "ECHR"). The Government pointed out

[15] Art. 308 TEC.

that **the EU Charter did not extend the scope of the EU's powers as defined in the Treaties and that its provisions were addressed first and foremost to institutions, bodies and other Union entities.** Conversely, such provisions were addressed to Member States only when they were implementing Union law. The Government also pointed out that the EU Charter would exist alongside the catalogues of fundamental human rights and freedoms that are part of the constitutional laws of the Member States, without changing their content in any way in relation to strictly national matters. Due to the fact that the content of the catalogues of fundamental rights and freedoms of many of the EU Member States with a highly developed system of protection of constitutionality is similar to the EU Charter, and with regard to the common historical, social and cultural traditions of the Member States, and especially the long-standing membership in the Council of Europe, it was difficult, in the Government's opinion, to envision that the EU Charter and the human rights catalogues of Member States would ever find themselves in open conflict. Therefore, the Government was of the opinion that the EU's Charter of Fundamental Rights was in conformity with the constitutional order of the Czech Republic.

(iii) Position of the President

The written observations of the President were submitted to the Constitutional Court on 5 June 2008. In the introductory part, the President emphasized that he welcomed the Senate's petition and agreed with it, concurrently underlining the importance of the proceedings from a constitutional perspective, since in his view the Treaty of Lisbon fundamentally changed the status of the Czech Republic in the EU. The president's submission was divided into three sections marked A, B and C.

In Section A, the President addressed the essential procedural issues. He argued that in this type of proceeding, the Treaty of Lisbon should be reviewed in its entirety, and the point of reference should be the whole constitutional order. The President also stated that this type of proceeding was a non-adversarial proceeding, aimed at reviewing the treaty as a whole, and not only its selected provisions.[16] **Should this not be the case, after the judgement of the Court, another petitioner could initiate new proceedings, challenging other provisions of the treaty, which *"would not only be absurd, but also exceptionally impractical".*** Further in this section, the President outlined his view on the status and effects of international treaties in the Czech legal order. According to the President, the Constitution differentiates between treaties under Art. 10a of the Constitution, the ratification of which requires consent by both Chambers of Parliament by a constitutional majority (Art. 39 (4) of the Constitution), and treaties under Art. 49, the ratification of which requires consent by both Chambers by a simple majority of votes (Art. 39 (2) of the Constitution). He concluded that although the conditions for ratification differ, the subsequent legal status in the Czech legal order of treaties under Art. 10a and under Art. 49 of the

[16] This is probably the only point (of procedure) on which the President and the Government agreed. On all other points of substance they differed significantly.

Constitution must be the same. However, the President considered it impossible for ordinary international treaties under Art. 49 of the Constitution to have the force of a constitutional act, let alone to have precedence over a constitutional act. As part of the legal order, they have precedence over statutes, but the constitutional order is still above them and cannot be affected.

In Section B of his written observations, the President addressed the issues of sovereignty (the question of whether the Czech Republic will, even after the Treaty of Lisbon enters into force, remain a sovereign state and a full subject of the international community), direct effect of EU regulations, status of the EU Charter and its effects, the nature of EU competences and limits on their transfer from the state level, and the new decision- making procedures at EU institutions (namely the European Council). The President further expressed his doubts as to whether the EU would still remain an international organisation or whether it would acquire the characteristics of a "federal state". Consequently, he raised the issue of whether Art. 10a of the Constitution in fact even permitted a transfer of any powers of institutions of the Czech Republic to an entity that is undergoing such transformation.

Finally, in Section C of his submission, the President addressed the issue of the manner in which the Treaty of Lisbon should be ratified in the Czech Republic. He claimed that since the Treaty on Accession to the EU was subject to approval in a referendum,[17] and the Treaty of Lisbon fundamentally changes the terms under which the Czech Republic had acceded to the EU in 2004, it may be necessary to approve the Treaty of Lisbon in the same manner, i.e., in a referendum.

(iv) Judgement of the Constitutional Court

The judgement was delivered on 26 November 2009[18] and dealt in considerable detail with all six of the problem areas that had only been briefly outlined by the Senate. However, before getting to the merits of the case, the Constitutional Court had to deal with two significant procedural issues, raised both by the President and the Government. Firstly, the Court had to decide whether it would review only the challenged (or "highlighted")[19] provisions of the Treaty of Lisbon or whether it would review it in its entirety. Secondly, there was the question of defining the

[17] Constitutional Act No. 515/2002 Coll., on a Referendum on the Accession of the Czech Republic to the European Union.

[18] Judgement of 26 November 2008, Pl. ÚS 19/08 (No. 446/2008 Coll.).

[19] In fact, the Senate's petition did not openly challenge the unconstitutionality of the selected provisions of the Treaty of Lisbon by unequivocally stating that they were in conflict with the constitutional order and by supporting these claims with legal arguments, it merely expressed some doubts and concerns about their compliance with the Constitution, thus giving the petition a peculiar twist. The Senate asked the Court to declare whether the "*Treaty of Lisbon was* ***in compliance*** *with the Constitution*", rather than openly asserting any conflict of its provisions with the Constitution and asking for a declaration thereof from the Court, thereby seeking an assurance from the Court that would lift the shadow of a doubt surrounding the Treaty.

constitutional framework against which the provisions of the Lisbon Treaty would be reviewed.

◆ **Scope of review**

When dealing with the first procedural issue, the Court rejected the parties' arguments that the nature of the proceeding was non-adversarial,[20] stating that this is a concept from civil trials, not transferable to this altogether unique proceeding. Analogously to proceedings on the review of norms, **the Constitutional Court felt itself bound by the scope of the petition to open proceedings, which meant that it would focus its review only on those provisions of the international treaty whose consistency with the constitutional order the petitioner had expressly contested, and where, in an effort to meet the burden of proof, the petitioner had supported its claims with constitutional law arguments**.[21] The Court concurrently indicated that it would take a restrictive approach to addressing the issue of the impediment of *rei iudicatae*, established for the future by this judgment in relation to other potential petitions from other petitioners concerning a review of the Treaty of Lisbon.[22]

◆ **Point of reference – the constitutional order as a whole**

In determining the appropriate point of reference for reviewing the Treaty of Lisbon, **the Constitutional Court applied, as a point of reference, the constitutional order of the Czech Republic as a whole, not only its so-called "material core"**.[23] The Court went on to add, however, that the "material core" of the Constitution naturally played a primary and key role.[24] Further, the Court pointed out that the Constitution did not distinguish between "ordinary" international treaties under Art. 49 and international treaties "transferring competence" under Article 10a of the Constitution, and provided for the same procedure for reviews of both these categories, thereby supporting the conclusion of the "full-extent" review of the Treaty of Lisbon.[25] It is also relevant in this context that **the Court again subscribed to the**

[20] This was the position of both the President and the Government, implying that the Court had an obligation to review all provisions of an international treaty for consistency with the entire constitutional order, thus excluding any other future review due to the impediment of *rei iudicatae*.

[21] Pl. ÚS 19/08, paras. 74-75.

[22] Ibid., para. 78. The Court indeed fulfilled its promise and in the "Lisbon II" case it dismissed significant parts of the petition due to the impediment of *rei iudicatae*. Still, the original decision of the Court not to review the entire Treaty of Lisbon, although supported by legal arguments, seems questionable, *inter alia*, in the light of the exact wording of Sec. 71e (1)-(2) of the Constitutional Court Act, according to which the Constitutional Court should decide whether "**the international treaty** is in conflict with the constitutional order" or whether "**the international treaty** is not in conflict with the constitutional order" (which implies the whole treaty, not just its selected provisions).

[23] Ibid., para. 88. The "material core" of the Constitution is not explicitly and exhaustively defined, but Art. 9(2) of the Constitution is relevant in this context, stating that "*Any changes in* ***the essential requirements for a democratic state governed by the rule of law*** *are impermissible.*" (emphasis added).

[24] Ibid., paras. 89 and 93.

[25] Ibid., para. 90. This statement gave rise to complex discussions and criticism of the judgement among scholars and commentators as to the effects of international treaties under Art. 10a of the Constitution in the Czech legal order, and some inferred that the Court in fact rejected any privileged status of EU

principle of a Euro-conforming interpretation of Czech constitutional law, thus following its previous case-law according to which when interpreting domestic provisions, incl. those of the constitutional order, such interpretation as ensures compliance with EU law obligations must be chosen.[26] However, the Constitutional Court also noted that in the event of a clear conflict between the Constitution, especially its material core [Art. 9 (2)-(3) of the Constitution], and EU law that cannot be cured by a reasonable interpretation, the constitutional order of the Czech Republic, especially its material core, must take precedence.[27]

- **Limits on transfer of sovereign powers (competence)**

In this section, the Constitutional Court had to address the sensitive issue of state sovereignty and its possible limitations. The Court provided a thorough analysis of the concept of sovereignty,[28] highlighted the concept of "pooled sovereignty" in the EU and remarked, *inter alia*, that *"from a modern constitutional law viewpoint", sovereignty need not mean only "independence of the state power from any other power, both externally (in foreign relations), and in internal matters"*, adding that *"Sovereignty is (probably) no longer understood like this in any traditional democratic country, and stricto sensu no country, including the USA, would fulfil the elements of sovereignty."*[29] The Court concluded its analysis by stating that *"the transfer of certain state competences, that* ***arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation*** *in a manner that is agreed on in advance and that is reviewable,* ***is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole.*** *The EU's integration process is not taking place in a radical manner that would generally mean the 'loss' of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to increasing globalization in the world."*[30]

The Court went on to say that the limit on transfers of powers to an international organization under Art. 10a of the Constitution consists of the essential requirements of a sovereign, democratic state governed by the rule of law under Art. 9 (2) and Art. 1 (1) of the Constitution. However, the Court refused to become a participant in political disputes concerning transfers of competences by stating: *"These limits should be left primarily to the legislature to specify, because this is a priori a political question which provides the legislature with wide discretion;* ***interference by the Constitutional***

primary law (incl. its supremacy and primacy over conflicting domestic provisions) in the Czech legal order. I would not agree with these arguments, since the Constitutional Court dealt exclusively with a situation involving a review of the Treaty of Lisbon before its entry into force, and did not deal with such Treaty's effects on the legal order after it had become a valid and fully effective source of primary law. However, the issue remains somewhat opaque and a future clarification would be very welcome.

[26] Cf. namely the judgement of 3 May 2006, Pl. ÚS 66/04 (No. 434/2006 Coll., the "European Arrest Warrant" case).

[27] Ibid., para. 85.

[28] Ibid., paras. 98-108.

[29] Ibid., para. 107.

[30] Ibid., para. 108 (emphasis added).

Court should come into consideration as ultima ratio, i.e., in a situation where the scope of discretion was clearly exceeded."[31]

◆ **The nature and classification of EU powers (competence)**

As regards the first group of objections from the Senate (exclusive competence under Art. 2 (1) and shared competence under Art. 4 (2) TFEU), the Constitutional Court emphasized as a starting point that *"the Treaty of Lisbon itself confirms that legislative competence – i.e., the authority to amend fundamental regulations, remains with the Member States*", and also stressed **the principal of conferral enshrined in Art. 5 (2) TEU**.[32]

The Court went on to state that the category of the EU's exclusive powers is not a new invention, but was already present in the previous Treaties.[33] Further, the Treaty of Lisbon did not establish an unlimited competence clause in the area of shared competence, but only declared the main areas in which shared competence can be exercised, which must be read in conjunction with special Treaty provisions.[34] The Court then confirmed that in the context of other provisions of the Treaty of Lisbon [namely Art. 2 (6) TFEU, Art. 5 (2) TEU, Protocol on the application of the principles of subsidiarity and proportionality and Protocol on the exercise of shared competence], it is evident that the Treaty of Lisbon provides a sufficiently certain normative framework for determining the scope in which the Czech Republic will transfer certain of its powers to the EU.[35]

◆ **Flexibility clause in Art. 352 TFEU**

As regards Art. 352 (1) TFEU, in order to asses the petitioner's allegation that this provision enabled the Union to exceed its competence and constituted a "blanket norm", the Constitutional Court firstly explored the wider context of this provision and stated that a transfer of "constitutional" competence to an international organization would be impermissible. However, in the case of the Treaty of Lisbon this would not occur: amendment of the primary Treaties would still be possible only with the consent of all EU Member States, which thus remain "Masters of the Treaties"; moreover, the possibility of withdrawal from the EU is expressly established (Art. 50 TEU).[36]

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[31] Ibid., para. 109 (emphasis added).

[32] Ibid., para. 132. Art. 5 (2) TEU provides: *"Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States.*"

[33] Ibid., para. 133.

[34] Ibid., paras. 134-137.

[35] Ibid., paras. 136-140. The Court also reiterated at this point that "*in exceptional cases, it can function as an ultima ratio body and review whether an act of the Union has exceeded the limits [of powers] which the Czech Republic transferred to the EU under Art. 10a of the Constitution"* and openly admitted that it drew inspiration for this approach from the doctrine of German Constitutional Court, namely from its judgements of 22 October 1986 ("Solange II", BVerfGE 73, 339) and of 12 October 1993 ("Maastricht", BVerfGE 89, 155).

[36] Ibid., paras. 145-146.

The Court then stated that this was in no way altered by the "flexibility clause" under Art. 352 (1) TFEU; **the possibility of adopting such a measure was limited to the objectives defined in Art. 3 TEU and was also narrowed in view of Declarations No. 41 and No. 42 contained in the Final Act of the Intergovernmental Conference**.[37] Thus, **the flexibility clause was not to be regarded as a blanket norm that would make it possible to circumvent Art. 10a of the Constitution**;[38] in this regard the Constitutional Court also found the institutional framework for the review of transferred powers to be adequate as concerns the practice of EU institutions and the case-law of the ECJ.[39] The Constitutional Court also observed that the Treaty of Lisbon left it entirely up to the constitutional structures of Member States to ensure that the principle of subsidiarity was respected in decision-making under the flexibility clause. Consequently, the Czech legislature had room to pass an appropriate legal regulation that would be consistent with the constitutional order.[40]

- ***Simplified revision procedure of the Treaties***

Concerning the Senate's doubts regarding Art. 48 (6)-(7) TEU (simplified revision procedure), the Constitutional Court firstly pointed to Art. 48 (6) subparagraph 3 TEU, which expressly eliminated any doubts relating to Art. 10a of the Constitution, since this provision explicitly made it prohibited to "*increase the competences conferred on the Union in the Treaties*".[41]

As to the procedure under 48 (7) TEU, the Court bluntly stated that: "*conceptually we cannot even conceive of changes that would expand Union competences, because this concerns – as is obvious – only voting. However, a change to the voting procedure under Art. 48 par. 7, requiring the consent of all Heads of State at the European Council, can be blocked by a lack of consent from any parliament of a Member State.*"[42] The Court also pointed out that "*Decisions under these articles are also reviewable by the Court of Justice as regards their consistency with the Treaty itself,* ***which proves that they are not amendments to the Treaties, but, on the contrary, the Treaties retain a higher legal force over these acts.***"[43] However, the Constitutional Court then criticized (as *obiter dicta*) the absence of a statutory legislative framework that would implement

[37] Ibid., para. 149.

[38] Ibid., para. 150: *"The Constitutional Court agrees with the government's opinion, stated in its brief, that* ***the flexibility clause is not a blanket norm****; in order for the Union to be able to use Art. 352 par. 1 of the Treaty on the Functioning of the EU,* ***the following conditions must be cumulatively met for a proposed legislative act****: the need to achieve one of the objectives of the EU, adopting the act must be within the policies defined by the primary law of the EU, it must be unanimously approved by the Council, and the consent of the European Parliament must be obtained."* (emphasis added)

[39] Ibid., para. 151.

[40] Ibid., para. 153.

[41] Ibid., para. 160. Moreover, the Constitutional Court also added that such decision, before its entry into force, was to be "*approved by the Member States in accordance with their respective constitutional requirements*", which constitutes an additional constitutional safeguard.

[42] Ibid., para. 161.

[43] Ibid., para. 162.

decision-making procedures under Art. 48 TEU on a domestic level, and *de lege ferenda* named certain criteria that such procedures should meet.[44]

◆ **Minimum rules for the definition of crimes and penalties**

As regards Art. 83 (1) TFEU, providing for the possibility to adopt minimum rules for the definition of crimes and penalties in areas of exceptionally serious crime with a cross-border dimension, the Constitutional Court confirmed the constitutionality of this provision and pointed out that the Senate probably overlooked the safeguards embedded in Art. 83 (3) TFEU, which *"indicates that if a member of the Council believes that a draft directive would affect 'fundamental aspects of its criminal justice system,' it may ask the European Council to address the matter; the ordinary legislative procedure is then suspended, and if a consensus is subsequently reached … the suspension of the ordinary legislative procedure is terminated. Thus, it is basically not possible to apply Art. 83 par. 1, third subparagraph, to the Czech Republic's legal order without its consent."*[45]

◆ **Role of national parliaments and democratic legitimacy**

The Constitutional Court also rejected the petitioner's allegations concerning qualified majority voting and a diminishing role of national parliaments, which would render Art. 15 (1) of the Constitution meaningless.[46] The Court noted that the Treaty of Lisbon transferred powers to institutions whose regularly inspected legitimacy came from general elections in the individual Member States and underlined that the Treaty of Lisbon provided several avenues for the involvement of national parliaments.[47] The Constitutional Court concluded that "*the Treaty of Lisbon reserves an important role for national parliaments (including the Parliament of the Czech Republic), the consequence of which is to strengthen the role of individual Member States*", thus "*making the entire system more understandable and clear*".[48]

◆ **International agreements negotiated by the EU**

Regarding the international agreements negotiated by the EU, the Constitutional Court confirmed that Art. 216 TFEU represents a legal basis for concluding international agreements, but only within the limits of competence conferred on the EU by the founding Treaties and in accordance with the existing case-law of the ECJ.[49] The Court

[44] Ibid., paras. 165-167. This request made by the Court was met by the amendment to the Rules of Procedure of the Chamber of Deputies and the Senate (Act No. 162/2009 Coll.) – see Part IV. below.

[45] Ibid., para. 170 (emphasis added).

[46] Art. 15(1) states: "*The legislative power of the Czech Republic is vested in the Parliament.*"

[47] Pl. ÚS 19/08, para. 173.

[48] Ibid., para. 174.

[49] Ibid., para. 183: "*In this regard we can add that* ***Art. 216 cannot be interpreted as a competence norm that would extend the competences of the Union****; on the contrary, Article 216 only states that the Union, as part of its competences, simply concludes international treaties.* ***The competences are not defined by Art. 216 but by specific provisions, especially those of the Treaty on the Functioning of the EU.*** *Thus, there is no significant change compared to the existing legal state of affairs; the only more substantial difference is that the Union will also acquire the ability to conclude international treaties in the area of the "second" and "third" pillar introduced by the Maastricht Treaty.*" (emphasis added)

stated that the Treaty of Lisbon did not represent any radical departure form the existing concept of concluding EU international agreements and to a large extent only clarified and codified the results of long-term developments already previously elaborated on and settled in ECJ case-law.[50] Nonetheless, the Constitutional Court also noted that Art. 216 TFEU, due to its vagueness, was on the borderline of compatibility with the requirements of clarity and certainty that must be met by the text of a legal norm and the requirements that transfers of powers to the EU must be ascertainable. However, the Court concluded that this vagueness did not evidently reach a level that would make it necessary to declare Art. 216 TFEU inconsistent with the constitutional order.[51]

- **EU Charter of Fundamental Rights**

As regards the Senate's objections relating to the EU Charter and Art. 6 TEU, the Constitutional Court emphasized that **the EU Charter would primarily bind Union institutions, and would be binding on Czech institutions only when implementing Union law. The Court also pointed out that the EU Charter does not expand the area of application of Union law beyond the framework of the Union's powers.** [52] In addition, as a result of the EU's accession to the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), the institutions of the Union, including the ECJ, will become subject to review by the European Court of Human Rights, which will, in the Court's opinion, strengthen the mutual conformity of both systems for the protection of fundamental rights and freedoms.[53] The Constitutional Court also noted that the EU Charter recognizes the fundamental rights arising from the constitutional traditions common to the Member States, and must therefore be interpreted in accordance with these traditions.[54] It also emphasized that **protection of fundamental rights and freedoms is part of the "material core" of the Constitution**, where it is beyond the reach of legislature, and if the standard of protection ensured in the EU were unacceptable, the bodies of the Czech Republic would once again have to take back the transferred powers in order

[50] Ibid., para. 184.

[51] Ibid., para. 186. The Court clearly considered the fundamental difference in nature between domestic statutes and international treaties, by explicitly stating in the same paragraph that it *"recognizes that **the requirements for precision in an international treaty (obviously) can not be interpreted as strictly as a in the case of a statute**, it nevertheless concluded that an international treaty must also meet the fundamental elements of precision, definiteness and predictability of a legal regulation."* (emphasis added) This distinction was confirmed in the "Lisbon II" case, where the Court said: *"In this regard we must also emphasize that the subject of the review is an international treaty to which one cannot apply the requirements that the Constitutional Court applies to domestic legislation in accordance with constitutional principles. On the contrary, **a greater degree of generality, declaration, and indefiniteness is typical of international treaties**, as the Constitutional Court already stated in point 186 of judgment Pl. ÚS 19/08."* (Pl. ÚS 29/09, para. 133, emphasis added).

[52] Ibid., para. 191.

[53] Ibid., para. 193.

[54] Ibid., para. 195. Cf. Art. 52 (4) of the EU Charter.

to ensure protection of the standard. However, the Court has observed nothing of that sort at the present time.[55]

The Constitutional Court found that in the present situation the European institutional arrangement of the standard of protection for human rights and fundamental freedoms was compatible with the standard provided by the Czech constitutional order. In the event of a conflict between sources governing the rights and freedoms of individuals under the EU Charter and the (Czech) Charter, the applying institutions will naturally give precedence to the instrument that provides individuals with a higher standard of protection.[56]

- **EU values and suspension of rights under EU membership – Art. 7 TEU**

Concerning the last group of the Senate's objections, in which the Senate speculated on possible discrepancies between the values on which the Union was founded and the values inherent in the Czech constitutional order,[57] the Constitutional Court stated that **the values mentioned in Art. 2 and Art. 7 TEU were fundamentally consistent with the values on which the "material core" of the Czech Constitution rests** [cf. Art. 1 (1), Art. 5, Art. 6 of the Constitution, Art. 1, Art. 2 (1), Art. 3, Chapter IV of the Charter].[58] The Court stressed that *"it is entirely evident that in this regard the Treaty of Lisbon is consistent with the inviolable principles protected by the Czech constitutional order and that European law is based on fundamental human and democratic values, common to and shared by all EU states."* In this context, the Court also pointed out that despite the emphasis placed on the concept of state sovereignty by the Senate, **in a modern, democratic state, governed by the rule of law, state sovereignty was not an aim in itself, in isolation, but was a means for fulfilling the fundamental values** on which the constitutional state governed by the rule of law was founded.[59]

IV. Completion of the procedure in the Parliament

After the judgement of the Constitutional Court of 26 November 2008, there was no further legal obstacle for the Parliament to give its consent to the ratification of the Treaty of Lisbon. The debate on the Treaty continued, without substantial delays, in the Chamber of Deputies, where it went through second reading on the 3rd, 17th and 18th of February 2009. The Chamber of Deputies then expressed its consent to the ratification of the Treaty of Lisbon on 18 February 2009.[60] However,

[55] Ibid., para. 196.

[56] Ibid., para. 202.

[57] Of all the issues raised in the petition from the Senate, this artificial "problem" was probably the most fanciful one.

[58] Ibid., para. 208.

[59] Ibid., para. 209.

[60] Resolution No. 1072 of 18 January 2009 was approved by 125 votes in favour (120 were required), 61 votes were against (197 Deputies out of 200 were present). An accompanying Resolution No. 1072/1 contained a declaration of the Chamber of Deputies concerning the Charter of Fundamental Rights of the EU, which confirmed that the EU Charter did not have any retroactive effects and therefore could

it became clear that at least in the Senate, it would be difficult to secure the required 3/5 (constitutional) majority without adopting the appropriate amendment to the Rules of Procedure, which would enable the Parliament to exercise the enhanced control powers given by the Treaty of Lisbon.

The amendment to the Rules of Procedure of the Chamber of Deputies and the Senate was adopted first in the Chamber of Deputies on 19 March 2009[61] and then in the Senate on 6 May 2009[62] and published under No. 162/2009 Coll., with the entry into force corresponding to that of the Treaty of Lisbon itself.[63] The amendment reflects the modifications introduced by the Treaty of Lisbon in connection with the strengthening of the role of national parliaments within the EU decision-making process. As guardians of the principle of subsidiarity, the parliaments of the Member States have the right to bring an action to the ECJ for a violation of the principle of subsidiarity by an EU legislative act. National parliaments also have the right of veto with regard to initiatives of the European Council according to Art. 48 (7) TEU and proposals of the Council according to Art. 81 (3) TFEU. **Thus, the amendment lays down the conditions under which proceedings may be initiated before the ECJ by the Chamber of Deputies or the Senate on the grounds of an infringement of the principle of subsidiarity, as well as the conditions for the use of the veto with respect to a decision proposed for approval in the European Council or the Council.**

As far as an action for infringement of the principle of subsidiarity by an EU legislative act is concerned, both the Chamber of Deputies and the Senate shall each have the individual right to bring a case before the ECJ. A respective parliamentary committee or group of Deputies/Senators[64] shall be entitled to submit the proposal for initiating the whole proceedings (such a proposal shall already include the exact wording of the draft action). Having approved the proposal, the Chamber of Deputies or the Senate shall delegate a Deputy/Senator or any other appropriate person, as the case may be, to represent the Chamber before the ECJ. The delegation is not limited, if need be, by the expiry of the parliamentary mandate of the delegated person. The Government (i.e., the Agent before the ECJ) is subsequently obliged to forward the action to the ECJ. The role of the Agent is to render the delegated person any assistance that may be necessary in respect of the practicalities of the proceedings,

not interfere with property ownership titles originating in the legislation from 1940-1946 (i.e., the notorious "Presidential Decrees" issued by President Edvard Beneš). No matter how good and noble the intentions of the declaration may have been, it came dangerously close to bringing back grievances from the period of the war and post-war times, which is rather unfortunate in an integrated European Union, more than 60 years after the end of WW II.

[61] Resolution No. 1107 of 19 March 2009.

[62] Resolution No. 153 of 6 May 2009.

[63] Along with the Treaty of Lisbon it entered into force on 1 December 2009.

[64] The so-called "European" Committees of either Chamber of Parliament or a group of 17 Senators or 41 Deputies.

which is, however, without prejudice to his relationship to the Government and its opinion in the subject matter.

The amendment also introduces the so-called "conditional (or binding) mandate" of the Government in cases of certain decision-making at the Council or the European Council. In some cases the mandate of the representative of the Government to vote for a proposal of a decision in the Council or in the European Council will be conditioned on the granting of previous assent by both Chambers of the Parliament. Without the assent of the Chamber of Deputies and the Senate, the representative of the Government will not have the mandate to vote for the proposal concerned. This mechanism should apply primarily in cases involving the application of the *"passerelle clauses"*, which allow the voting procedure in the Council to be changed from a unanimous vote to a qualified majority vote or which allow the procedure for the adoption of legislative acts to be changed from a special legislative procedure to an ordinary legislative procedure, and also in cases of the application of the "*flexibility clause*" according to Art. 352 TFEU.

The Treaty of Lisbon was given assent in the Senate on 6 May 2009, immediately after the approval of the Amendment to the Rules of Procedure.[65] Now the Treaty was "cleared" for ratification by both Chambers of the Parliament and could be submitted to the Czech President, Mr Václav Klaus, for ratification. The Government submitted the instrument of ratification to the Office of the President on 22 May 2009 (by means of a letter from the Ministry of Foreign Affairs, which is the standard procedure). However, the ratification process was still far from complete, since a group of Senators who had voted against the Treaty announced already on 6 May 2009 that they intend to challenge the Treaty again before the Constitutional Court. The President therefore declared, after meeting with the group of Senators on the same day, that he intended to wait two months with his signature of the instrument of ratification, until the Senators have filed the petition with the Constitutional Court. In his letter to the Minister of Foreign Affairs, dated 27 May 2009, the President formally confirmed the information he had provided to the media on 6 May 2009 and the ratification was put on hold once again.

The intention of the President to provide the group of Senators with a certain time limit to file their petition was as such in conformity with the Constitution, since had he ratified the Treaty immediately after it has been submitted to him (which he could have done), he would have prevented the Senators from filing their petition. It is not admissible for a group of Deputies or Senators to challenge an international treaty after it has been ratified,[66] so an appropriate time limit provided by the

[65] Resolution No. 154 of 6 May 2009. Of the 79 Senators present (from a total of 81), 54 voted in favour, 20 against, and 5 abstained. The required 3/5 majority was 48 votes in favour.

[66] Art. 87 (2) of the Constitution clearly states that an international treaty can be reviewed by the Constitutional Court before its ratification; Sec. 71a (1) b) of the Constitutional Court Act explicitly stipulates that a group of Senators or Deputies may file a petition for the review of an international treaty from the time it has received consent from the Parliament until the time it has been ratified by the President.

President seems to be perfectly reasonable. However, from the initial two months, the time limit was gradually extended to almost five months, which seems to be more than is necessary or reasonable. Since both the Constitution and the Constitutional Court Act are silent on how long the period from the granting of consent by Parliament to ratification by the President should be, only the Constitutional Court could shed some light on this issue, which it did in its "Lisbon II" judgement (see Part VII. below).

V. Two "changes" to the Treaty of Lisbon

How can one provide additional legal guarantees without amending the legal text of the treaty concerned? In the dull, unimaginative and formalised legal world, this is usually not possible. Yet in the imaginative realm of European law, such miracles sometimes happen. And this was the case of both (i) the "Irish" legal guarantees; and (ii) the "opt-out" of the Czech Republic from the EU Charter (which was not really an opt-out, to make matters even more complicated).

(i) Legal Guarantees for Ireland (from the Czech constitutional perspective)

Following the referendum on the Treaty of Lisbon held in Ireland on 12 June 2008, in which Irish voters rejected the Treaty, the Irish Government identified the issues which were of particular concern to Irish citizens. At the European Council meeting held on 11-12 December 2009, a political agreement was reached that Ireland would be given guarantees concerning the sensitive issues of taxation policy, the right to life, education and family, and Ireland's traditional policy of military neutrality, which should in turn enable Ireland to hold another referendum on the Treaty.[67]

The legal text containing the guarantees for Ireland was prepared under the Czech Presidency of the EU in the first half of 2009 (in close cooperation with the Council Secretariat General and the Irish Government) and was submitted for approval to the European Council on 18-19 June 2009. The legal guarantees were contained in the *Decision of the Heads of State and Government of the 27 Member States of the EU, meeting within the European Council, on the concerns of the Irish people on the Treaty of Lisbon* (hereinafter the "Decision" or "Irish Guarantees"),[68] and constituted an international treaty concluded by the representatives of Member States in the European Council and binding on them under international law.[69] However, this

[67] Presidency Conclusions, Document No. 17271/08 CONCL 5, point I.3 (p. 2). Political agreement was also reached on the composition of the future European Commission, i.e., that it shall continue to include one national of each Member State. This was not to be included in the "Irish legal guarantees", however, but should be achieved by a decision "*in accordance with the necessary legal procedures*" (point I.2).

[68] Annex 1 to the Presidency Conclusions of European Council in Brussels on 18-19 June 2009, Document No. 11225/09 CONCL 2 of 19 June 2009.

[69] In a similar way, after rejection of the Treaty of Maastricht in Denmark in 1992, the so-called "Edinburgh Agreement" was concluded during the Edinburgh European Council in 1992 by Member States' representatives, which also constituted a binding instrument in international law having predominantly an interpretative function.

international treaty did not amend any provision of the Treaty of Lisbon, did not form part of EU primary law and had significance only as an interpretative instrument within the meaning of Art. 31 (3) (a) of the Vienna Convention on the Law of the Treaties.[70] To make matters even more complex, the European Council Conclusions also contained a political agreement that at the time of the conclusion of the next Accession Treaty, the provisions of the Decision shall be set out in a Protocol to be attached, in accordance with the respective constitutional requirements of Member States, to the TEU and the TFEU.[71]

In the Czech Republic, the Decision was classified as a "governmental" agreement,[72] due to its interpretative nature and the fact that it did not change any provision of the Treaty of Lisbon. It was described as such in the mandate submitted to the Government for approval before the June 2009 European Council, which was also sent for information to the President on 16 June 2009. What followed was probably one of the most rapid exchanges of letters that ever took place between the President and the Prime Minister. On the very same day, 16 June 2009, the President's letter was delivered to the Office of the Prime Minister. In the letter, the President stated that he considered the Decision to be a "political treaty" within the meaning of Art. 49 of the Constitution (i.e., a so-called "presidential" agreement), and that as such the Decision required the consent of the Parliament and could be signed only on the basis of Full Powers issued by the President. The President further asked the Prime Minister whether he intended to comply with the applicable constitutional procedures, and stated that he could not accept any other course of action.[73]

The Prime Minister's reply was drafted immediately and dispatched on 16 June 2009, in the late afternoon. In his letter, the Prime Minister thanked the President for his suggestion, but nevertheless expressed his disagreement with the Decision being a "political treaty" under Art. 49 of the Constitution and assured the President that the government had carried out a thorough legal analysis the outcome of which made it possible to classify the Decision as a "governmental" agreement. The President did not press his point further and the Government approved the mandate for the European Council and consequently also approved the "Irish Guarantees" at the European Council meeting held on 18-19 June 2009. However, the issue came to life again in the petition filed by the group of Senators in the "Lisbon II" case, where the petitioners claimed that the "Irish Guarantees" constituted an international treaty

[70] This approach was possible since none of the concerns of the Irish people were in fact substantiated by the content of the Treaty of Lisbon, so it was enough to clarify the interpretation of selected provisions for the avoidance of any doubt.

[71] Presidency Conclusions, Document No. 11225/09 CONCL 2, point I.5. (iv), p. 2. For a concise analysis of the "Irish Guarantees" and their legal status, see Peers, S.: *Lisbon Treaty guarantees for Ireland (Analysis)*, 19 June 2009, available at: http://www.statewatch.org/news/2009/jun/lisbon-ireland.pdf.

[72] Agreements which can be concluded solely by the Government and do not require consent of the Parliament and ratification by the President.

[73] Available in Czech on the President's personal website: http://www.klaus.cz/klaus2/asp/clanek.asp?id=F8UynvqgFDnE.

within the meaning of Art. 10a of the Constitution, and thus required consent in the Parliament by a constitutional majority. The Court rejected this part of the petition as inadmissible, stating that the "Irish Guarantees" did not constitute the part of the Treaty of Lisbon that was the subject of the review, and laid the matter to rest once and for all.

(ii) Czech Accession to Protocol on application of the EU Charter in Poland and the UK

As was apparent from the "Lisbon I" proceedings and their aftermath, the EU Charter has become a somewhat sensitive document in the internal political discourse conducted in the Czech Republic. To make matters worse, some politicians have purposefully misinterpreted it and presented it as an instrument which could have severe effects on the system of property ownership in the Czech Republic (this was directed solely at property ownership titles based on the presidential decrees of 1945-1946, still a very sensitive issue among the general public).

When the Constitutional Court declared that it would deal with the petition in the "Lisbon II" case with utmost priority and it seemed that only the awaited judgement prevented ratification in the Czech Republic, President Klaus suddenly came up with an additional request. In his statement of 9 October 2009, he claimed that the EU Charter "*will make it possible to bypass Czech courts and to raise property claims of, for example, parties displaced after WW2 directly before the Court of Justice of the EU. The Charter makes it possible to reexamine even those decisions of Czech courts that are legally binding*", and urged the Government to negotiate a similar "exemption" as the United Kingdom and Poland had done.[74] The President referred to the *Protocol (No. 30) on application of the Charter of Fundamental Rights of the EU to Poland and the United Kingdom* (hereinafter the "Protocol") attached to the Treaty of Lisbon.

The Government took this request seriously, although it did not share the President's concern and made it quite clear that the EU Charter cannot be applied retroactively and cannot have any effects on post-war property arrangements.[75] Nevertheless, the Government declared its willingness to start negotiations with its European partners, provided that the following conditions were met: (i) the ratification process of the Treaty of Lisbon may not be re-opened; (ii) the conduct of the Government will not be disputed in the Parliament, which had already given its consent to ratification; and (iii) the President will provide a definite and explicit guarantee that upon the fulfilment of his request and an affirmative judgement of the Constitutional Court, he will ratify the Treaty without delay.[76]

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[74] The statement is available in English on the President's personal website: http://www.klaus.cz/klaus2/asp/clanek.asp?id=4k7raOBtIort.

[75] For a thorough legal analysis of the EU Charter and its (non-existent) effects on post-war property arrangements, see Peers, S.: *Beneš Decrees and the EU Charter of Fundamental Rights*, 12 October 2009, available at: http://www.statewatch.org/news/2009/oct/lisbon-benes-decree.pdf.

[76] Statement by the Government of the Czech Republic on the ratification process of the Lisbon Treaty, available in English at: http://www.vlada.cz/en/media-centrum/aktualne/statement-by-the-government-of-the-czech-republic-on-the-ratification-process-of-the-lisbon-treaty-62966/.

As soon as it was clarified with the President that he would be satisfied with the possibility whereunder the Czech Republic would join the Protocol, the Government started intensive negotiations with the Swedish Presidency and the Council Secretariat General, and with their assistance a draft text was prepared for the European Council meeting scheduled for 29-30 October 2009. The text was included in the approved Presidency Conclusions, which stated that "*taking into account the position taken by the Czech Republic, the Heads of State or Government have agreed that they shall, at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements, attach the Protocol (in Annex I) to the Treaty on European Union and the Treaty on the Functioning of the European Union.*"[77]

A detailed legal analysis of the Protocol and its effects would go beyond the topic of this article, so I will confine myself to stating that the Protocol in no way constitutes an "opt-out" or "exemption" from the EU Charter, neither for Poland and the United Kingdom as the present contracting parties, nor for the Czech Republic as a future contracting party. Rather, it is an instrument which interprets the EU Charter and makes the scope of application of the rights and principles embedded therein more precise, thus providing a safeguard against a potential extensive interpretation by the ECJ. This understanding of the Protocol is confirmed, *inter alia*, by the House of Lords report on the implementation of the Treaty of Lisbon.[78]

As we have seen, neither the "Irish Guarantees" nor the (future) Czech accession to the Protocol constitute at this stage any amendment or change to the substance of the Treaty of Lisbon. However, they serve as interesting examples of legal creativity in search of a consensus and of the complexity of procedures at the EU level, as well as an illustration of how internal political sensitivities can end up being projected into European politics.

VI. "Diversionary" - challenge against the Rules of Procedure

Before the group of Senators filed its petition for the review of the Treaty of Lisbon as such, they decided to challenge the amended Rules of Procedure of the Parliament. Although they tried to link this petition to the legal challenge against the Treaty of Lisbon, this was a fairly feeble attempt, since there are two different and distinct procedures in the Constitution: (i) reviews of the legality of Acts of Parliament (or their individual provisions) – action for their annulment for alleged conflict with the

[77] Presidency Conclusions, Document No. 15265/09 CONCL 3, point I.2, p. 2. The draft Protocol on the application of the Charter of Fundamental Rights of the EU to the Czech Republic is attached in Annex I.

[78] *The Treaty of Lisbon: An Impact Assessment*, European Union Committee (House of Lords), 2008, pp. 101-107. Available at: http://www.parliament.the-stationery-office.co.uk/pa/ld200708/ldselect/ldeucom/62/62.pdf. Cf. also P. Šturma, Lisabonská smlouva a závaznost Listiny základních práv EU pro Českou republiku vzhledem k tzv. výjimce (opt-out) [The Treaty of Lisbon and the Binding Force of the Charter of Fundamental Rights for the Czech Republic Regarding the so-called Opt-out] (2009) 6 *Právní rozhledy* 191.

constitutional order;[79] and (ii) reviews of compliance of international treaties with the constitutional order.[80] Thus, this "diversionary" effort was probably motivated by an attempt to gain some additional time for the direct challenge against the Treaty of Lisbon, but it did not really work. The Constitutional Court would not have any of the delaying tactics and dismissed the petition as manifestly unfounded with a speed rarely seen in the judicial sphere (the word "supersonic" comes to mind), yet with persuasive legal reasoning.[81]

(i) Petition from the Senators

The petition from 17 Senators, filed with the Constitutional Court on 1 September 2009, related to the so-called "Lisbon Amendment" to the Rules of Procedure of the Parliament. The group of Senators was requesting the annulment of selected parts of the Rules of Procedure as unconstitutional. In Part A, the petitioners, amongst others, proposed that the Constitutional Court annul the provisions which prescribe the minimum number of Senators (17) or Members of the Chamber of Deputies (41) authorised to initiate, in their respective Chamber, the bringing of an action to the Court of Justice of the EU for a breach of the principle of subsidiarity. In Part B, the petitioners argued in several places that the "*fundamental flaw in the implementing law*" (as the Senators referred to the Amendment to the Rules of Procedure) "*are the provisions which it lacks*." Apart from requests to confirm their assertions as to the limits on transfers of competences, their concept of sovereignty and judicial means of controlling and limiting the effects of EU law (incl. having some EU legal acts declared inapplicable by the Constitutional Court), the petitioners also required that all of the "*passerelle clauses*" and also the "*flexibility clause*" (Art. 352 TFEU) were subject to approval by both Chambers of the Parliament by a constitutional (3/5) majority.

The petitioners also requested that the Constitutional Court rule that the adoption of the legal modifications outlined by the petitioners is a precondition for the completion of the ratification of the Treaty of Lisbon, thus effectively preventing its ratification for the entire period before these changes are adopted in the Parliament.

(ii) Position of the Government

On 29 September 2009, the Government approved its statement on the petition filed by the group of Senators.[82] In preparing its statement, the Government acted at the request of the Constitutional Court and played the role of an *amicus curiae*, not being formally a party to the proceedings.

On the basis of a thorough legal analysis of the complaint, the Government came to the conclusion that the complaint from the group of Senators was unsubstantiated as concerns its first part (Part A) and that the remaining part (Part B) contained

[79] Art. 87 (1) (a) of the Constitution.

[80] Art. 87 (2) of the Constitution.

[81] The petition was submitted on 1 September 2009 and the Constitutional Court's order dismissing the case was adopted on 6 October 2009 and published on its website on the same day.

[82] Resolution of the Government of the Czech Republic No. 1243/2009 of 29 September 2009.

requests which, in the opinion of the Government, did not fall within the scope of competence of the Constitutional Court in these proceedings.

Regarding Part A, the Government did not consider these provisions setting minimum numbers to be undemocratic, as the Senators had claimed. It is fully within the competence of the Parliament to set such limits. Moreover, such an initiative may also be presented to the Chamber by the respective "European" committees. In these committees a proposal may be initiated by each individual Member of the Chamber of Deputies or by a Senator. Consequently, the provisions in question definitely cannot be regarded as a "drastic limitation" of the right of initiative, as the petitioners had stated, let alone as an unconstitutional restriction.

In its response to Part B, the Government emphasized that in accordance with the established case-law of the Constitutional Court, seeking concrete legal modifications from the Constitutional Court, the role of which is only that of a so-called "negative lawmaker" (i.e., it may only annul legal regulations or their parts), is impermissible in these proceedings. It is solely within the competence of a legislative body (i.e., the Parliament) to introduce amendments to legal acts.

As regards the requested modifications being a precondition for the completion of the ratification of the Treaty of Lisbon, the Government rejected this argument. According to the Constitution, the ratification of an international treaty can be delayed only and exclusively in proceedings before the Constitutional Court in which the treaty's compliance with the Constitution is being reviewed. This was not the case of the proceedings conducted on the basis of the complaint of 1 September 2009, which dealt with the annulment of selected provisions of the "Lisbon Amendment" to the Rules of Procedure of the Parliament. These proceedings therefore had no legal connection with the ratification process and should not be linked to it.

(iii) Order of the Constitutional Court

The Constitutional Court dismissed the petition as manifestly unfounded pursuant to Sec. 43(2)(b) of the Constitutional Court Act, stating that the arguments presented *"do not attain a constitutional relevance; a conclusion confirming conflict with the constitutional order therefore cannot be made, and this is clear 'at first sight'."*[83] The Court completely disregarded the pleadings in Part B of the petition as clearly inadmissible in this type of proceedings, since in its view the petitioners *"regard the subject matter of the proceedings in an absolutely intolerable 'loose manner', as a place for academic or interpretative deliberations in their own self, disregarding the fact that proceedings before the Constitutional Court are still judicial proceedings."*[84] **The Court thus refused to issue any declaratory statements on the assertions made in the petition, since within the remit of these proceedings it was only entitled to annul an Act or its selected provisions for conflict with the constitutional order** – no more and no less.

[83] Order of 6 October 2009, Pl. ÚS 26/09, para. 24.

[84] Ibid., para. 14.

Regarding Part A, the Court did not find any persuasive arguments for annulling the provisions which prescribe the minimum number of Senators (17) or Members of the Chamber of Deputies (41) authorised to initiate an action before the ECJ.[85] It also rejected the claim that the requirements for a constitutional (3/5) majority should be incorporated into an (ordinary) Act, since this was clearly reserved for the Constitution.[86] And finally, **the Court explicitly rejected the petitioners' assertion that this type of proceedings, notwithstanding their outcome, could ever constitute a legal barrier preventing the ratification of the Treaty of Lisbon**.[87]

As this "diversionary" effort turned out to be a blind alley, the stage was set for the decisive proceedings on "Lisbon II".

VII. Second and final review by the Constitutional Court (Lisbon II)

The long awaited petition from the group of Senators was finally submitted on 29 September 2009. Taking into account some public statements from the Senators within the group,[88] it was difficult to see any other reasons behind this delayed submission other than an attempt to slow down the ratification process of the Treaty of Lisbon and prevent it from entering into force for as long as possible. Needless to say, European Union institutions and the EU Presidency became somewhat concerned about the unpredictable situation in the Czech Republic, as the institutional issues (particularly the expiration of the term of the European Commission on 31 October 2009) became rather pressing.

In the "Lisbon II" proceedings, the Parliament, the President and the Government were requested by the Court, as the parties according to Sec. 71c of the Constitutional Court Act, to present their written observations. We shall focus only on the submissions of the President and the Government, since the submissions from both the Chamber of Deputies and the Senate tended to focus on a description of the procedure for and the deliberations leading to the approval of the Treaty of Lisbon in both Chambers and did not really deal with the substance of the case in detail.[89]

(i) Petition from the Senators

The petition was divided into four parts. In Part I of the petition, the group of Senators challenged the compliance of both the Treaty of Lisbon and the other Treaties

[85] Ibid., para. 21.

[86] Ibid., para. 19.

[87] Ibid., para. 28.

[88] Cf. statement of Senator Jaroslav Kubera (Civic Democratic Party), who was quoted on 11 May 2009 on the website www.novinky.cz as saying the following about the timing of the petition: "*We are not hurrying and in private we are saying – let's give the Irish a chance. If it's going to be after the [summer] holidays, nothing will happen. At least the boys in Brussels will get a bit nervous.*" (Available in Czech on http://www.novinky.cz/domaci/168391-nechejme-kluky-v-bruselu-trochu-znervoznet-rikaji-odpurci-lisabonu.html.)

[89] The written submissions from the Chamber of Deputies were delivered to the Court on 8 October 2009, and the observations of the Senate on 14 October 2009.

amended by the Treaty of Lisbon (i.e., TEU and TFEU) with the constitutional order of the Czech Republic. They claimed that this contravened Art. 1 (1) of the Constitution[90] and Art. 2 (1) of the Charter of Fundamental Rights and Freedoms of the Czech Republic (an integral part of the constitutional order, hereinafter the "Charter").[91]

Part II related to the compliance of specific provisions of the TEU (as amended by the Treaty of Lisbon) with the constitutional order. The challenged provisions were as follows: Art. 7 TEU (suspension of certain rights of EU membership); Art. 8 TEU (special relationship with neighbouring countries); Art. 10 (1) TEU (representative democracy in the Union); Art. 17 (1) and (3) TEU (competences of the European Commission); Art. 20 TEU (enhanced cooperation); Art. 21 (2) (h) TEU (policies and actions of the Union and cooperation in international relations); Art. 42 (2) TEU (common defence policy); Art. 50 (2)-(4) TEU (withdrawal from the Union). In most of the cases, as a "catch-all" argument, the petitioners pointed out the excessive generality and lack of clarity of these provisions, which allegedly contravened the rule of law principles enshrined in the Constitution, or they claimed that some of those provisions were in conflict with the sovereignty of the Czech Republic.

Part III of the petition disputed specific provisions on asylum and immigration policy, namely Art. 78 (3) and 79 (1) TFEU. In this part, the group of senators also reserved the right to supplement the petition with other possible additional provisions, which they later did on 15 October 2009 and added Art. 3 TFEU (exclusive competences), Art. 4 TFEU (shared competence), Art. 83 TFEU (criminal law competence) and Art. 216 TFEU (EU treaty-making powers). During the oral hearing, the senators came forth with a second supplement, and added Art. 9 TEU (Union citizenship), Art. 13 (1) TEU (EU institutional framework), Art. 14 (2) TEU (composition of the European Parliament) and Art. 19 (1) TEU (competence of the ECJ in interpretation of Union law).

In Part IV, the final part of the petition, the Senators called on the Constitutional Court to find that the "Irish Guarantees" approved by Heads of State and Government at the June European Council constituted an international treaty according to

[90] Art. 1(1) of the Constitution states: "*The Czech Republic is a* ***sovereign****, unitary, and* ***democratic*** *state governed by the* ***rule of law****, founded on respect for the rights and freedoms of persons and citizens*." (emphasis added) The petitioners basically claimed (by a series of not always very persuasive arguments) that the Treaty of Lisbon deprived the Czech Republic of these essential characteristics, which would then conflict with the "eternity clause" contained in Art. 9(2) of the Constitution which reads: "*Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible.*"

[91] Art. 2 (1) of the Charter stipulates: "*The state is founded on democratic values and may not be bound neither by an exclusive ideology nor by religious conviction.*" The petitioners claimed that, *inter alia*, the objectives of the Union outlined in Art. 3 TFEU and the requirement for "European commitment" as one of the conditions for eligibility as a member of the European Commission conflict with the principle of "political neutrality" (the petitioners did not actually use the term "political ideology", which is in my view different from "political neutrality", since all states are by nature political units (cf. paras. 141-144 of the "Lisbon II" judgement of 3 November 2009, Pl. ÚS 29/09).

Art. 10a of the Constitution of the Czech Republic and as such required the consent of both Chambers of Parliament by a constitutional majority.

(ii) Position of the Government

The written observations of the Government were approved at its extraordinary session of 15 October 2009 and delivered to the Court on the same day.[92] In its statement, the Government firstly noted that the Constitutional Court had already assessed whether the Treaty of Lisbon (or, more specifically, some of its provisions) contravened the constitutional order of the Czech Republic, arriving at the conclusion that it did not.

In its response, the Government took the view that the Treaty of Lisbon, both as a whole and in its individual provisions, was compatible with the constitutional order of the Czech Republic. The Government believed that Part III of the Senators' petition was unfounded, and that the final Part IV was outside the jurisdiction of the Constitutional Court in these proceedings.

Part I, in the Government's view, lacked constitutionally relevant arguments and gave the impression that the petitioners were merely attempting to convince the Constitutional Court of their political opinions. Regarding the review of the treaties amended by the Treaty of Lisbon, the Government concluded that a constitutional review of older founding treaties currently in force was formally unacceptable, and that **as a whole only the provisions newly enshrined in the Treaty of Lisbon were reviewable.** The Government claimed that the Treaty of Lisbon was in conformity with the Czech constitutional order and did not conflict with the fundamental status of the Czech Republic as a sovereign state under the democratic rule of law.

Regarding Part II, the Government disagreed with the allegations regarding the supposedly excessive generality and lack of clarity of the challenged provisions and explained that the language used in the text of the Treaty of Lisbon fell into the category of "*indeterminate legal concepts*" and was commonly used in other international treaties. The Government also pointed out that the meaning of the disputed terms could be derived **through routine means of interpretation** which are set forth for the interpretation of international treaties in Art. 31 of the Vienna Convention on Law of the Treaties. Pursuant to that article, **the terms in an international treaty cannot be interpreted in isolation, but in conjunction with each other, they must be interpreted in good faith, and accorded their usual meaning, and, finally, the subject matter and purpose of the treaty must be taken into consideration so that the interpretation contributes to effective implementation of the treaty.** The Government then analysed in detail all of the specific provisions challenged in Part II and using the above outlined methods of interpretation it did not find

[92] Resolution of the Government of the Czech Republic No. 1295/2009. The written observations of the Government were prepared in less than 14 days, so as not to delay the proceedings and to comply with the Constitutional Court's request to submit the observations within the (shortened) period of 14 days from the receipt of the request (the standard period is 30 days).

any inconsistency between the contested provisions of the Treaty of Lisbon and the constitutional order of the Czech Republic.

Concerning Part III, the Government took the view that the Constitutional Court should consider whether the petitioners were restricted by the principle of concentration, and stressed that from the perspective of the parties' rights **it would be detrimental for the proceedings to be constantly protracted by the submission of more and more supplements.** As to the petition itself, the Government noted that the petitioners had omitted a systematic and comprehensive interpretation of the contested provisions, including those passages of the treaties which refuted their arguments. In light of the above, the Government was inclined towards the view that the petitioners' claims in this part were clearly unfounded.

Concerning Part IV, the Government observed that **the Constitutional Court did not have the relevant jurisdiction to adjudicate on such an issue.** It was impossible for the Constitutional Court to declare with any authority whether the petitioners' claims were true or false. In these proceedings, the court may only review the compliance of international treaties with the constitutional order of the Czech Republic. **The Government confirmed that the "Irish Guarantees" were an agreement of a governmental nature having an interpretive significance only, and did not change anything in the Treaty of Lisbon, as was clearly stipulated in the European Council Conclusions**.[93]

Finally, the government reiterated the previous responses it had made in proceedings before the Constitutional Court and stated that it considered the Treaty of Lisbon as a whole to be compatible with the constitutional order of the Czech Republic and that it negotiated the Treaty under this conviction.

(iii) Position of the President

The written observations of the President were delivered to the Court on 16 October 2009. They were divided into five parts, marked A to E.

In Part A, the President welcomed the petition of the Senators and stressed the important task of the Constitutional Court to review the Treaty of Lisbon in its entirety, not only its selected components.

In Part B, the President recapitulated his written observations from June 2008 (in the "Lisbon I" case) and boldly stated that he did not receive complete and convincing answers to the five questions he had raised. His first question concerned the sovereignty of the Czech Republic. In the President's view, the Court "*avoided answering directly, and raised a new theory of sovereignty shared jointly by the European Union and the Czech Republic (and other Member States)*". He further claimed that "***The term shared competence has been used relatively frequently recently, but only in non-rigorous debate. It is a contradiction in terms. Not only does our***

[93] Regarding this Decision, the Presidency Conclusions explicitly state that "*its content is fully compatible with the Treaty of Lisbon and will not necessitate any ratification of that Treaty*" [point 5 (ii), p. 3].

legal order not know the term 'shared sovereignty', but neither does the law of the European Union."[94]

The second question concerned the direct effect of EU legislation; the third question asked about the legal status of the EU Charter (according to the President, the Court provided only an indirect answer by stating that the EU Charter was indeed an international treaty); the fourth question asked about the nature of the Union after the Treaty of Lisbon, i.e., whether it would remain an international organisation, and finally the fifth question concerned the requirement of a referendum for the approval of the Treaty of Lisbon (here the President claimed that the Court had not understood the question he had presented in the "Lisbon I" case). The President concluded Part B by stating that: "*The Constitutional Court must give a direct answer to all these questions*".[95]

In Part C the President referred to the petition from the Senators and agreed with their objections. In the conclusion of this part, **the President welcomed their attempt "*to define in a final list the elements of the 'essential core' of the constitutional order, or, more precisely, of a sovereign democratic state governed by the rule of law*", which would in his opinion enhance legal certainty.**

In Part D, the President voiced his disappointment with the Court's dismissal of the petition from the Senators seeking the annulment of certain provisions of the Rules of Procedure of both Chambers of Parliament (file No. Pl. ÚS 26/09), and expressed his regret "*over this hasty step by the Constitutional Court, because these serious questions of Czech statehood thus remain unanswered, and can be subject to further disputes in the future*".

Finally, in Part E, the President urged the Court to decide "*clearly, specifically, and with detailed reasons on the conformity of the Treaty of Lisbon as a whole with Article 1 (1) of the Constitution, and with Article 2 (1) of the Charter of Fundamental Rights and Freedoms, and that it state whether the Czech Republic will remain, after the ratification of the Treaty of Lisbon, a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of persons and citizens*".

Following the popular fashion introduced by the Senators, the President's attorney, Mr Aleš Pejchal, submitted a supplement to the written observations on 23 October 2009. In it the President agreed with the supplement to the petition from the Senators, and then urged the Constitutional Court to take into account during its review of Treaty of Lisbon whether "*abandoning the principle of consensuality in*

[94] It is interesting to think about the President's concept of sovereignty, which he presented to the Court: *"The essence of sovereignty is the unrestricted exercise of power. Sovereignty rejects the sharing of power".* I am not entirely sure whether there is such a state in the contemporary international community that could boast of having *"the unrestricted exercise of power"*. Even the United States of America, the world's only superpower, has to accept some sharing of power, e.g., with its allies as a Member State of NATO.

[95] The Constitutional Court was by no means bound by the questions raised by the President. For example, his insistence on the issue of a referendum was not reflected anywhere in the petition from the Senators, and the purpose of written observations from other parties is to present their arguments on points raised by the principal party, i.e., the petitioners. Consequently, there is no legal reason why the Court should deal with new issues introduced by parties other than the petitioners.

the field including the area of freedom, security and justice, and introducing in that field the principle of majority voting by representatives of the executive branch of individual Member States of the European Union violates Article 10a of the Constitution, because in fact this is not a transfer of the powers of authorities of the Czech Republic to an international organization, but to a group of states which will outvote the Czech Republic in promoting their own interests". In the President's opinion, *"Article 10a of the Constitution does not permit a transfer of the powers of authorities of the Czech Republic to another state or group of states".*[96]

(iv) Judgement of the Constitutional Court

The Constitutional Court issued its long-awaited decision on 3 November 2009.[97] **In its judgement the Court declared that the Treaty of Lisbon, as a whole and in the individually contested articles, is not in conflict with the constitutional order.**

The judgement was divided into eight parts. In Part I, the submission of the petitioners was summarised, and Part II contained summaries of the submissions of other participants – the President, the Parliament and the Government. Part III summarised the oral hearings held on 27 October 2009, where the petitioners, rather unexpectedly, presented another supplement to their petition. This last minute submission was then mentioned in the judgement, and the Court was not very sympathetic to such attempts to submit supplements at the very last moment without any persuasive grounds. In Part IV, the Court elaborated on the **scope of the review from three basic perspectives: (i) whether the previous judgement ("Lisbon I") implied the impediment of *rei iudicatae*; (ii) whether the Treaty could be reviewed as a whole or only the parts explicitly challenged and supported by specific grounds, and (iii) whether the activities of the petitioners could amount to an obstruction of a procedure for constitutional review.** In Part V, the Court then dealt with some specific challenges raised by the petitioners, in Parts VI and VII the Court rejected some points from the petition as inadmissible and the final Part VIII summarised the judgement by reproducing the operative part and pointing out the sections of the text containing the Court's reasoning for each of its findings. Some of the most interesting parts of the judgement will be discussed in greater detail below.

The Constitutional Court did not fundamentally deviate from the opinion it had expressed in the "Lisbon I" judgement, and **reviewed only those parts of the Treaty of Lisbon that the petitioners had expressly contested and supported by grounds**. However, because this time the petitioners had also contested the Treaty of Lisbon

[96] This argument was completely disregarded by the Court, and rightly so, since apart from not being used in the petition of the Senators, such argument also completely ignored the fact that all decisions made by majority voting were adopted in the Council or in the European Council, i.e., at those institutions of the international organisation that exercised the transferred powers. The powers were thus transferred to the EU institutions, and not to the individual Member States, and the voting rights in the Council or in the European Council were allocated on the basis of EU primary law (TEU and TFEU).

[97] Judgement of 3 November 2009, Pl. ÚS 29/09 (No. 387/2009 Coll.).

as a whole, on the grounds that it was not comprehensible,[98] the Constitutional Court had to consider that objection as well, and found it to be unjustified. In a similar manner, **the Court also rejected the objections raised by the petitioners with regard to the potential for making retroactive amendments to the Treaty since linguistic corrections could be made to the Czech language version** after the Treaty was submitted to EU Member States for ratification.[99] In addition, the Constitutional Court **rejected as inadmissible (due to the impediment of *rei iudicatae*) the part of the petition that contested the sections of the Treaty of Lisbon that had already been reviewed in the "Lisbon I" case**. **It also rejected an objection seeking a review of the so-called "Irish guarantees."**[100] Finally, the Constitutional Court rejected, due to inadmissibility, objections seeking a review of the **Treaty of Rome** and the **Treaty of Maastricht** as a whole, because those parts of these treaties that are not affected by the Treaty of Lisbon have already been ratified and are fully in force and effect, **so the Constitutional Court did not have the jurisdiction to review them in proceedings concerning a review of an international treaty before its entry into force.**

Regarding the petitioners' request that it define the substantive limits of transferred competence and define "*the essential requirements of a democratic state governed by the rule of law*", the Constitutional Court stated that "***it does not consider it possible, in view of the role that it plays in the constitutional system of the Czech Republic, that it should create such a catalogue of non-transferable competences and authoritatively define 'the substantive limits for the transfer of competence' as the petitioner requests.***" It emphasized that "*responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they are actually made at the political level.*"[101] Further, the Court went on to state that "*The Constitutional Court believes* ***that it is specific cases that can provide it with a relevant framework in which it is possible, case by case, to interpret more precisely the meaning of the term "sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of persons and citizens"****. (…) This does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting*

[98] Due to the alleged excessive generality and lack of clarity of the challenged provisions of the Treaty of Lisbon, which in the petitioners' view contravened the rule of law principles as regards the clarity of legal texts and legal certainty.

[99] The petitioners claimed that the principle of non-retroactivity was infringed in view of "*the capacity of the EU authorities responsible for the publication of the Official Journal of the EU to make further additional changes to the Treaty of Lisbon during the process of its approval in order to correct errors 'which may come to light in the Treaty of Lisbon or in the prior Treaties*" (point 71 of the petition). However, such procedure is fully in accordance with international law. These are "errata" or "corrigenda", i.e., corrections of errors that arose during the translation of a text from the original language or languages to the other official languages of the Union, and are not changes of a substantive nature. This procedure is subject to the rules set forth in Art. 79 of the Vienna Convention on the Law of Treaties.

[100] Pl. ÚS 29/09, para. 177.

[101] Ibid., para. 111.

judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty (cf. especially Sunstein, C. R.: One Case at a Time: Judicial Minimalism on the Supreme Court, Cambridge, Harvard University Press, 1999, pp. 209-243, directly concerning the relationship between judicial minimalism and the requirement of legal certainty). ***The attempt to define the term "sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of persons and of citizens" once and for all (as the petitioners, supported by the president, request) would, by contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures.***"[102]

In Part IV, which is of special interest despite not directly dealing with the substance of the proceedings, the Constitutional Court considered, in light of the procedural steps taken by the petitioners, whether the "*broadly conceived participation in proceedings on the constitutionality of international treaties, which gives procedural opportunities to raise doubts about an as yet unratified international treaty progressively to individual potential petitioners, does not, on the other hand, create an intolerable risk of abuse of procedural mechanisms before the Constitutional Court, abuse that would contravene the very purpose of the proceeding.*"[103] The Court emphasised that **doubts regarding the constitutionality of a negotiated international treaty need to be removed without unnecessary delay**, in view of the **rule of good faith in international relations**, and in view of the **obligation of the President to ratify, without unnecessary delay, an international treaty that was duly negotiated by the President of the Republic or based on his authorization, and the ratification of which has been consented to by a democratically elected legislative assembly.** Based on its analysis, the Constitutional Court stated that "***the opening of proceedings*** *on the constitutionality of international treaties by groups of senators, groups of deputies, and the president of the republic, must be subject to the same deadline within which it is necessary to ratify an international treaty, i.e., a deadline stipulating* ***without unnecessary delay.***"[104] According to the Court this means within several weeks, not months, as was the case in this instance.[105]

In future cases, a late submission of the petition for review could be a reason for its dismissal.[106] The fact that the Constitutional Court explicitly underlined the reasonableness of the deadline for the submission of an application for the review of an international treaty's compliance with the constitutional order, and emphasized

[102] Ibid., para. 113 (emphasis added).

[103] Ibid., para. 115.

[104] Ibid., para. 119 (emphasis added).

[105] Ibid., para. 121.

[106] Ibid., para. 121. The Court excused the unreasonably delayed submission in this case and gave this explanation: "*However, the Constitutional Court did not deny the petition to open proceedings on those grounds, this time, because it does not wish to retroactively burden the petitioners with an interpretation of the procedural rules that regulate access to the Constitutional Court and the deadlines within which the Constitutional Court made a finding in this decision.*"

the requirement of ratification without undue delay, basically excluded the option of further applications for review. This corresponds with its conclusion about the Treaty of Lisbon's compliance, as a whole, with the constitutional order. Regarding the **objection of a democratic deficit in the European Union**, the Constitutional Court referred to the conclusions in its "Lisbon I" judgment. In the Constitutional Court's opinion, the contested article of the TEU, which provides that "*the functioning of the Union shall be founded on representative democracy*" is directed at processes both at the European and domestic level, not only at the European Parliament. The European parliament is not the exclusive source of democratic legitimacy for decisions adopted on the EU level. That legitimacy derives from a combination of structures existing both on the domestic and European level, and it is not possible to demand absolute equality among voters in individual Member States. That would be possible only if decisions in the European Union were adopted concurrently with a ruling out of legitimating connections to governments, and above all to legislative assemblies in the individual member states.[107] As regards **objections concerning the loss of the Czech Republic's sovereignty**, or objections alleging the non-existence of the concept of shared sovereignty, which the President raised in his written observations, the Constitutional Court stated that **the concept of shared sovereignty was already know to the Government of the then Prime Minister Václav Klaus in 1995, when the Czech Republic applied to join the European Union**.[108] According to the Constitutional Court, *"in a modern democratic state governed by the rule of law, state sovereignty is not an aim in and of itself, i.e., in isolation, but is a means for fulfilling the fundamental values on which the structure of a democratic state governed by the rule of law stands [...]* ***The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole.***"[109]

It should be stressed that the Constitutional Court treated the review of the Treaty of Lisbon as its utmost priority, giving the judgement in the "Lisbon II" case very expediently, approximately one month after the submission was filed. It also provided for maximum transparency of the proceedings, giving access to all submissions of the parties and related documents online on its website. This approach deserves praise

[107] Ibid., paras. 134-140 (emphasis added).

[108] Resolution of the Government of the Czech Republic No. 732/1995 of 13 December 1995, regarding the Czech Republic's application to join the European Union, which indeed explicitly mentioned the concept of "shared sovereignty". On 26 November 2009, one day before the oral hearing, the Government received a letter from the Chairman of the Constitutional Court, Mr Pavel Rychetský, in which he requested the government to produce a certified copy of the relevant resolution and all the accompanying documents. After a prompt search in the National Archives, the documents were produced and the Government's representative at the hearing, Minister for European Affairs Mr Štefan Füle, handed the documents over to the Court at the beginning of the hearing.

[109] Ibid., para. 147 (emphasis added).

and enhances the image of the Court as an accessible and open institution that communicates with the general public, thus making its work open to public scrutiny.

By the "Lisbon II" judgement, the gates for the constitutional review of the Treaty of Lisbon in the Czech Republic were firmly shut and locked for good. There was no further legal impediment to the ratification of the Treaty of Lisbon, as the Court expressly stated in the conclusion of the judgement: "*this judgment refutes the doubts concerning the consistency of the Treaty of Lisbon with the Czech constitutional order, and removes the formal obstacles to its ratification.*"[110] Consequently, the President signed the instrument of ratification on the same day as the judgement, on 3 November 2009 at 3 p.m. Nevertheless, at the same time he made a statement that although he respected the judgement of the Constitutional Court,[111] he fundamentally disagreed with its content and criticised the quality of its legal reasoning. He further declared that with the entry into force of the Treaty of Lisbon, the Czech Republic would cease to be a sovereign state. Finally, he added that he could not respect "*the duty of the President to ratify this (or any other international treaty) 'without undue delay'.*"[112] I humbly beg to differ on all those points addressed in the President's statement and consider the judgement of the Constitutional Court to be well argued and legally persuasive, as can be rightly expected from the highest judicial authority of a sovereign state (such as the Czech Republic, notwithstanding the entry into force of the Treaty of Lisbon).

VIII. Impacts of the Treaty of Lisbon on EU international agreements

The Treaty of Lisbon does not introduce any fundamental or radical changes in the area of treaty making powers and procedures in the EU. Nevertheless, there are a few changes worth mentioning which, to a large extent, stem from the change to the EU's structure.[113] It is significant that tthe EU gained international legal personality and would henceforth act in external relations as a single entity, without constantly making the distinction between the European Community and the European Union, as had been required until now. This should lead to a greater unification of procedures for negotiating EU international agreements as well as to more clarity and transparency.

(i) (International) legal personality of the EU

The explicit conferral of international legal personality can be found in Art. 47 TEU: *"The Union shall have legal personality."* This short and simple statement has,

[110] Ibid., para. 179.

[111] The President is by virtue of Art. 89(2) of the Constitution bound by decisions of the Constitutional Court, since these are "*binding on all institutions and persons*" (which naturally includes the President, who does not stand above the law).

[112] The statement of the President is available (only in Czech) on his personal website http://www.klaus.cz/klaus2/asp/clanek.asp?id=CF9ck3ExsEbC.

[113] The current structure of a temple with three pillars (1st European Community pillar, 2nd Common Foreign and Security Policy pillar and 3rd Justice and Home Affairs pillar) should be replaced by a modernist structure without supporting pillars, which presents a more coherent façade from the outside.

nevertheless, significant consequences for the EU's external affairs, especially as concerns, among other things, the negotiation of international agreements. It will no longer be necessary to make a distinction between the agreements concluded by the European Community (1st pillar), which already had legal personality under the TEC, [114] and agreements in the 2nd (CFSP) and 3rd (JHA) pillars, where special procedures were applicable.

The creation of a new legal personality – the newly established European Union – had to be duly notified to all countries and international organisations which are parties to past agreements concluded by the EC/EU. To this end, a document titled "*Draft notification to third parties before the entry into force of the Treaty of Lisbon*"[115] was submitted by the Swedish Presidency of the Council, which outlined two template notifications: (a) to a third state; (b) to an international organisation. The fundamental message in both types of notifications consisted of an announcement that the Treaty of Lisbon had entered into force and a statement that "*as from that date the European Union will exercise all rights and assume all obligations of the European Community whilst continuing to exercise existing rights and assume obligations of the European Union.*" The notifications will have to be communicated to the relevant parties in order to ensure continuity and transparency in legal obligations arising from the respective international agreements.

(ii) Provisions in the TFEU – Part Five, Title V International Agreements

The key provision on international agreements is Art. 216 TFEU, which represents the "material" provision / legal basis providing the conditions under which the Union has external competence, thus extending the EU's internal competences to legislate in areas provided for in the Treaties. This provision is a codification of the implied external powers doctrine, originating in the famous ECJ judgement in the *AETR case.*[116] Art. 216 TFEU reads:

"The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope."

Art. 216 TFEU is supplemented by Art. 3 (2) TFEU, which is included in Title I (Categories and Areas of Union Competence) and stipulates the exclusive external competence to conclude an international agreement as follows: "*The Union shall also have exclusive competence for the conclusion of an international agreement*

[114] Art. 281 TEC: *"The Community shall have legal personality."*

[115] Document of the Council No. 16654/1/09 REV 1 of 27 November 2009.

[116] ECJ judgement of 31 March 1971 in case 22/70 *AETR* [1971] ECR 263. In this judgement the ECJ stated that if there exists an internal Community competence to regulate the relevant field, it implies, in order to promote the aims stipulated by the founding Treaties, external competence to act on behalf of the Community in matters falling within this field with regard to third countries (theory of parallelism of internal and external powers, *implied powers*).

when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or insofar as its conclusion may affect common rules or alter their scope." This is a specific provision (*lex specialis*) in relation to Art. 216 TFEU; Art. 3 (2) TFEU states the conditions for the EU's exclusive competence, whereas the scope of Art. 216 TFEU is broader and includes all situations where a Union competence may be established, but not necessarily being of an exclusive nature. It also applies in the area of shared competence between the Union and its Member States, where these entities stand alongside one another as a single contracting party to the concluded agreement.

For the procedure for negotiating international agreements, the "procedural" provision of Art. 218 TFEU shall be used, containing a procedure taken to a large extent from the TEC. There are no significant changes in this area, apart from the greater involvement of the European Parliament, which corresponds to the overall increase in importance of this EU institution.

(iii) Internal (domestic) effects of EU international agreements

The binding nature of EU international agreements is stipulated in Art. 216 (2) TFEU: *„Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States".* At a first glance, this does not represent any change in comparison with the provision of Art. 300 (7) TEC, whose wording is almost identical. The only change is in the scope of this provision, since with the abolishment of the pillar structure and removal of the previous specific regime for agreements concluded pursuant Art. 24 and 38 TEU (before the Treaty of Lisbon), Art. 216 (2) applies also to treaties in the areas of CFSP and JHA and explicitly states their binding nature for both the Union and its Member States (for specific issues in these areas, please see below).

The agreements concluded by the Union, as was the case so far with agreements concluded by the Community, will become part of Union law and shall have, in principle, the same effects on domestic law as other EU legal acts. Their provisions will therefore have precedence in the event of conflict with national law and they will have direct effect if they fulfil the criteria of being clear, precise and unconditional (i.e., they will establish directly enforceable rights for individuals). In the Czech Republic, the effects of the agreements concluded by the Union are governed by Art. 10a of the Constitution, which according to part of the doctrine and case-law of the Constitutional Court represents the provision which translates the effects of Union law into the domestic legal order.[117]

For the category of the "mixed agreements", concluded jointly by the Union and its Member States, Art. 10 of the Constitution will still be relevant.[118] To the

[117] Judgement Pl. ÚS 50/04 of 8 March 2006 (No. 154/2006 Coll.); judgement Pl. ÚS 66/04 of 3 May 2006 (No. 434/2006 Coll.); judgement Pl. ÚS 36/05 of 16 January 2007 (No. 57/2007 Coll.); and judgement Pl. 19/08 of 26 November 2008 (No. 446/2008 Coll.).

[118] Art. 10 of the Constitution provides for the primacy of the so called "presidential" international agree-

extent that such mixed agreements are classified in the Czech Republic as agreements of the so called "presidential" category,[119] they will have the status of international agreements under Art. 10 of the Constitution, i.e., they will become an integral part of the domestic legal order and in the event of conflict they will have precedence over domestic statutes.[120]

(iv) Specifics in the area of Common Foreign and Security Policy (CFSP)

The legal basis is to be found in Art. 37 TEU, according to which the Union may conclude agreements in the area of CFSP. However, for negotiations the general procedural provision of Art. 218 TFEU shall be applied, which nevertheless contains the specifics for CFSP agreements (e.g., authorisation for negotiations is not submitted by the European Commission but by the High Representative of the Union for Foreign Affairs and Security Policy;[121] the European Parliament does not participate in decisions on signing and concluding the agreements;[122] the agreements are in most cases concluded unanimously, since unanimity is generally required for the adoption of acts under CFSP and the conclusion of agreements in the area of the CFSP reflects this fact[123]).

The issue of delimiting competence in the CFSP area is not entirely unambiguous and leaves certain room for speculations, nevertheless it seems clear that it is definitely not an exclusive competence, since this would contradict the nature of

ments (those which are subject to Parliament's consent) over all national laws (statutes) except for the Constitution: "*Promulgated international treaties, to the ratification of which the Parliament has given its consent and by which the Czech Republic is bound, form part of the legal order; if a treaty provides something other than a statute, the treaty shall apply.*"

[119] Agreements which are subject to the Parliament's consent (in both Chambers) and ratified by the President. These are agreements whose subject matter is outlined in Art. 49 of the Constitution, namely: (a) affecting the rights or duties of persons; (b) of alliance, peace, or other political nature; (c) by which the Czech Republic becomes a member of an international organization; (d) of a general economic nature; (e) concerning additional matters the regulation of which is reserved to statute. In other words, the involvement of the Parliament reflects the political and legal importance of the above mentioned types of agreements.

[120] Legal status under Art. 10 of the Constitution should *stricto sensu* apply only to those parts of mixed agreements which are within the competence of the Czech Republic, whereas other provisions within the exclusive competence of the Union should be incorporated by means of the "two-way" provision of Art. 10a of the Constitution. This dichotomy, which is not entirely satisfactory, is one of the reasons why some scholars, e.g., Prof. Jiří Malenovský, criticise the application of Art. 10a of the Constitution as an incorporative norm and argue that the effects of all international treaties in the Czech legal should be generally governed by Art. 10 of the Constitution, whereas EU primary law treaties and secondary law adopted on their basis, including EU international agreements, constitute only a specific (and privileged) subset of incorporated agreements. Cf. J. Malenovský, K nové doktríně Ústavního soudu ČR v otázce vztahů českého, komunitárního a mezinárodního práva [On the New Doctrine of the Constitutional Court Concerning the Relations of Czech, Community and International Law], *Právní rozhledy* [Legal Perspectives] No 21, 2006, p. 774-783.

[121] Art. 218 (3) TFEU.

[122] Art. 218 (6) subparagraph 1 TFEU.

[123] Art. 218 (8) subparagraph 2 TFEU.

CFSP, which is still based on intergovernmental cooperation of Member States. The CFSP competence is based on Art. 2 (4) TFEU: "*The Union shall have competence, in accordance with the provisions of the Treaty on European Union, to define and implement a common foreign and security policy, including the progressive framing of a common defence policy.*" This provision is complemented by Art. 24 (1) TEU: "*The Union's competence in matters of common foreign and security policy shall cover all areas of foreign policy and all questions relating to the Union's security, including the progressive framing of a common defence policy that might lead to a common defence.*" From other, related TEU provisions it becomes fairly clear which areas are covered by this competence, but we do not learn much about the nature of this competence, at least not explicitly. Nevertheless, taking into account the nature of cooperation between the Member States and the Union in CFSP, this competence could be described as a shared (parallel) competence, a competence which cannot become an exclusive one, and still enables the Member States to exercise their competence in parallel with the Union, provided they respect the principle of loyal cooperation and solidarity with the Union's activities, as stipulated in Art. 24 (3) TEU.

Further, in practice it will not always be easy to determine whether the agreement in question is a CFSP agreement subject to deviations from standards procedures. The reason consists of the wording of Art. 218 (3) TFEU, which provides the following criterion for determining whether an agreement falls under CFSP: *"where the agreement envisaged relates exclusively or principally to the common foreign and security policy (…)".* Disputes concerning the nature of some negotiated agreements can be expected, especially on the part of the European Parliament, which will naturally strive to strengthen its limited role under CFSP. There will no doubt arise an opportunity for an authoritative interpretation by the ECJ, which will be able to develop its previous case-law.[124]

In comparison with the previous situation, the Treaty of Lisbon does not retain the provision of Art. 24 (5) TEU, which enabled Member States, with regard to 2nd and 3rd Pillar agreements, to make a reservation of compliance with the requirements of domestic constitutional procedure. It seems to be a logical consequence of establishing the international legal personality of the Union, abolishing the pillar structure and transferring competence in these areas,[125] which represents a certain departure from intergovernmental cooperation. It is evident that in the area of the fully "communitarised" 3rd Pillar, a reservation of compliance with domestic

[124] Cf. ECJ judgement of 20 May 2008 in case C-91/05 *Commission v. Council* („*ECOWAS Small Arms Embargo*"). In future cases, however, the ECJ will not be able to use the criterion of the main purpose (aim) of the act concerned in order to determine whether such act (or negotiated agreement) falls under the CFSP, since the amended TEU now contains the common aims of the Union in external relations (see Art. 3 (5) and Art. 21 TEU).

[125] Nevertheless, Declarations No. 13 and 14 attached to the Final Act of the Intergovernmental Conference seem to confirm the *status quo* in the CFSP area, including the division of competence between the Member States and the Union, but without explicitly dealing with the nature and extent of the Union's competence to conclude international agreements.

constitutional provisions would contradict the notion of the negotiation of international agreements by the EU within the sphere of transferred competence, provided such competence is of an exclusive nature.[126] In the area of CFSP, in view of its specific nature, other control mechanisms from the Member States (especially their Parliaments) should be applied, which, however, must not prevent effective and flexible external action of the Union, e.g., in cases where conditions for sending a civil or military mission to a conflict area must be agreed with a third state.

(v) Agreements regarding police and judicial cooperation in criminal matters[127]

As a consequence of the abolition of the pillar structure – the 3rd Pillar was fully incorporated into the "Community" sphere – the general procedures under Art. 218 TFEU shall now be applied to police and judicial cooperation in criminal matters. Depending on the delimitation of competences, there will either be agreements within the EU's exclusive competence or "mixed" agreements, where the Union stands alongside its Member States as one party.

However, Declaration No. 36 attached to the Final Act of the Intergovernmental Conference and concerning Art. 218 TFEU[128] raises a certain question of interpretation: „*The Conference confirms that Member States may negotiate and conclude agreements with third countries or international organisations in the areas covered by Chapters 3, 4 and 5 of Title V of Part Three in so far as such agreements comply with Union law.*" In my view, the said Declaration constitutes a limitation on the implied powers doctrine, which would otherwise prevent Member States from concluding international agreements in parallel with the external actions of the Union. Is it then, in effect, a confirmation of the "parallel" nature of the shared competence of the EU and its Member States and a restriction of exclusive EU competences in this area, which to a large extent reflects the procedures under the 3rd Pillar that had been used so far. [129] In this area, until now, the notion of parallelism of external actions was used and the doctrine of "occupied fields", which would otherwise prevent Member States from acting autonomously in areas "covered" by the activities of the Union due to the exercised external competence of the EU, did not apply.[130]

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[126] Under the Treaty of Lisbon, Justice and Home Affairs will be subject to a uniform legislative procedure, as well as to a uniform procedure for the negotiation of international agreements. However, reservation of internal ratification will still be relevant with regard to those JHA agreements which will fall under the shared competence of the EU and its Member States (in the Czech Republic, ratification will be applicable only to the category of "presidential" agreements).

[127] Part Three, Title V, Chapter 4 and 5 TFEU.

[128] Declaration [No. 36] on Article 218 of the Treaty on the Functioning of the European Union concerning the negotiation and conclusion of international agreements by Member States relating to the area of freedom, security and justice.

[129] A similar concept of parallel competence is applicable in e.g., environmental policy [cf. Art. 191 (4) TFEU] or development cooperation policy [cf. Art. 209 (2) TFEU].

[130] The extent of the so called "pre-emption" or "occupied fields" is also restricted by Protocol (No. 25) on the exercise of shared competence, which stipulates: "With reference to Article 2 of the Treaty on

(vi) Specific procedures within the sphere of Common Commercial Policy

The delimitation of the Common Commercial Policy is outlined in Art. 207 (1) TFEU (trade in services, commercial aspects of intellectual property and direct foreign investments are now explicitly mentioned), whereas in conjunction with Art. 3 (1) (e) TFEU these fields should fall under the exclusive competence of the Union. [131] As regards the procedures for the negotiation and conclusion of international agreements, Art. 207 (3)-(6) TFEU contains deviations from the general regime under Art. 218 TFEU (e.g., unanimity in the fields of trade in services, the commercial aspects of intellectual property and direct foreign investments, where such agreements include provisions for which unanimity is required for the adoption of internal rules.)[132]

In comparison with the previous wording of Art. 133 TEC, a rather significant change has taken place, due to the fact that Art. 207 SFEU does not contain an explicit enumeration of the types (modes) of services which fall under the shared competence between the EU and its Member States. At first glance, one could conclude that all types of trade in services will from now on fall under the Union's exclusive competence, which would nevertheless be a false conclusion, in my opinion. Although the term "shared competence" does not appear in Art. 207, the provision of Art. 207 (6) TFEU must be duly taken into consideration, which stresses the general framework for the delimitation of competence: „*The exercise of the competences conferred by this Article in the field of the common commercial policy* ***shall not affect the delimitation of competences between the Union and the Member States,*** *and shall not lead to harmonisation of legislative or regulatory provisions of the Member States in so far as the Treaties exclude such harmonisation.*" (emphasis added)

Further, it is of significance that Art. 207 (4) TFEU contains under (a) trade in cultural and audiovisual services, and under (b) trade in social, education and health services, i.e., the fields of services previously covered by Art. 133 (6) subparagraph 2, as falling under the shared competence. None of the above fields (culture, social policy, education or health) fall under the exclusive competence of the Union within the meaning of Art. 3 (1) TFEU, they fall either under a shared competence or even under a merely supportive, coordinative or supplementary competence (see

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the Functioning of the European Union on shared competence, when the Union has taken action in a certain area, **the scope of this exercise of competence only covers those elements governed by the Union act in question** and therefore does not cover the whole area." (emphasis added)

[131] The same conclusion was also reached by Advocate General J. Kokott in her recent opinion in case C-13/07 concerning the competence to approve the accession of Vietnam to the WTO: „*However, no such competence was acquired by the Community under the rules created by Article 133 (5) EC. Rather, that step is completed only in the Treaty of Lisbon: Article 207 (1) TFEU henceforward* ***expressly places the 'new' fields of commercial policy on the same footing as the conventional fields, and the common commercial policy as a whole is expressly assigned to the exclusive competence of the Union [Article 3 (1) (e) TFEU].***" (Opinion of AG Kokott of 26 March 2009 in case C-13/07 *Commission v. Council*, para. 63, emphasis added).

[132] Art. 207(4) subparagraph 2 TFEU.

Art. 6 TFEU). Should the restriction stipulated in Art. 207 (6) TFEU be complied with, the above mentioned fields of trade in services should still fall under the shared competence of the Union and its Member States, and would thus be subject to the so-called "mixed agreements".[133]

[133] The delimitation of competence between the Community and its Member States in relation to Art. 133 (5)-(6) TEC was the subject matter of request for opinion 1/08 "*GATS compensation agreements*" (opinion 1/08 was delivered on 30 November 2009), as well as case C-13/07 *Commission v. Council* (still pending). Although the ECJ interpreted the wording of Art. 133 TEC and not the amended provisions of the TFEU, some of the Court's reasoning should still be relevant for the new arrangements under Art. 207 TFEU (see, e.g., para. 142, which makes it clear that the requirement of voting procedure (in this case unanimity) merely states the manner in which the competence is to be exercised, but does not prejudice whether it is an exclusive or shared competence). However, given the reasoning in the written and oral pleadings of the European Commission in the above mentioned cases, it can be expected that the Commission will consider all fields of trade in services as falling under the exclusive Union competence under the Treaty of Lisbon, and consequently it cannot be ruled out that there will be future proceedings before the ECJ in order to clarify these issues (especially due to the fact that 15 Member States, including the Czech Republic, supported the Council against the Commission, which demonstrates the importance and sensitivity of this area).

IX. Epilogue / Conclusion

The Lisbon Treaty ratification process was completed when the instruments of ratification were deposited by all EU Member States with the Government of the Italian Republic – the depositary of the Treaty of Lisbon as well as other international treaties that form the so-called primary EU law.[134] This long awaited moment took place in Rome on 13 November 2009 when the Czech Prime Minister Jan Fischer deposited the Czech Republic's instrument of ratification during his visit there. In accordance with its Art. 6 (2), the Treaty of Lisbon entered into force on 1 December 2009.

The Epilogue of the long ratification process marks a Prologue to a new phase in which the "upgraded" European Union will endeavour to secure its position during a period in international affairs characterized by political as well as economic turbulence. Now the important work of implementing the Treaty of Lisbon begins in earnest and it will no doubt shape the future role of the European Union as an actor on the international scene. The script is complete, the leading roles of the President of the European Council and the High Representative for Foreign Affairs and Security Policy have already been assigned.[135] Let us then hope the performance does not let our expectations down.

[134] The main "founding" treaties include the Treaty establishing the European Coal and Steel Community, the Treaty establishing the European Economic Community, the Single European Act, and the Treaty on European Union, as well as all accession treaties and amendments of primary law (such as the Treaty of Amsterdam and the Treaty of Nice).

[135] As of 1 December 2009, Mr Herman Van Rompuy (former Prime Minister of Belgium) was appointed as President of the European Council and Ms Catherine Ashton (former Commissioner for Trade in the European Commission) was appointed as High Representative of the Union for Foreign Affairs and Security Policy.