

CONSTITUTIONAL REVIEW OF THE LISBON TREATY – A COMPLAINT LODGED TO THE CZECH CONSTITUTIONAL COURT

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The conformity of the Treaty of Lisbon (TL) with the Czech constitutional legal order has become a part of debates at the Czech political scene; this led the Senate to lodge a complaint to the Czech Constitutional Court.

In its complaint the Senate generally asserts that the TL brings fundamental amendments of the present state of law which touch the substantial features of the Czech statehood; it requires a general review of the constitutional conformity based on two reasons:

- whether the TL is in conformity with the constitutional characteristics of the Czech Republic – sovereign, unitary and democratic state governed by the rule of law (comp. art. 1/1 of the Czech Constitution), and
- whether the TL does not change the essential attributes of a democratic state governed by the rule of law (comp. art. 9 par. 2 of the Czech Constitution).

This general constitutional review is supported by several arguments which are presented as being of a demonstrative character.

First, the Senate reflects the wording of the art. 10a of the Czech Constitution, under which it is possible to limit and transfer only certain powers of the Czech state organs. The Senate points out that the TL brings explicit classification and division of competence and, in its opinion, such a division of competence is characteristic for federal states. The category of exclusive EU competence (explicitly enumerated in the new articles) constitutes complex areas in which the competence will be transferred from the Czech Republic organs to the EU. This could be in breach of the wording of art. 10a of the Czech Constitution which allows transfer of only certain powers to the EU.

The Senate challenges the new art. 2C TEU which deals with the competences shared between the EU and its Members States. According to this article the shared competence will exist in the enumerated principal areas (such as the internal market, social policy,

environment, consumer protection, etc.). The Senate alleges that the category is not a closed list but only a demonstrative as it talks about “principal” areas.

Second, the Senate specifically suggested a review of the constitutionality of the provision of revised art. 308 par. 1 Treaty on the Functioning of the EU (further TFEU) – so called suppletive legal basis. At present the application of art. 308 is limited to the adoption of rules in the course of the operation of the common market; newly this article could be used without specific limits in all policies defined in the treaties. The Senate asserts that this provision creates a blank norm which enables to adopt measures outside the EU competence – this being in breach of art. 10a of the Czech Constitution. This may touch areas of cooperation in criminal matters and, thus, bring these areas in the exclusive jurisdiction of the Court of Justice with the contested lack of procedural guarantees for the protection of fundamental rights.

Third, the Senate points out to the provision of new art. 48 par. 6 and 7. The art. 48 deals with the revision procedures of the founding treaties. Its paragraphs 6 suggests to introduce the simplified revision procedure (so called *passerelle*); paragraph 7 enables that in case the TFEU provides for legislative acts to be adopted unanimously, the European Council may unanimously decide that the acts will be adopted in an ordinary legislative procedure. Similarly, a shift from the special legislative procedure to the ordinary procedure is under specified conditions possible. The national parliaments must be notified and they may oppose; if they do it within the period of six months, the decision of the European Council referred to above will not be adopted.

Fourth, the Senate complains about the art. 216 of the TFEU which concerns the conclusion of international agreements by the EU. These agreements are concluded by qualified majority by the Council and are binding both to the EU and its Member States. According to the Senate conclusion of this agreement will not require the consent of the Czech Republic; there is no ratification process and the review of the constitutionality of the agreement according to the Czech constitutional rules is excluded.

Fifth and sixth, the Senate complains about the single legal personality of the European Union which would mean that the EU would gain legal personality also in the second and third pillar. In these areas the EU would adopt decisions also by qualified majority and thus potentially more conflicts between the EU and national standards on the protection of human rights would appear. Further it is noted that the status of the Charter of Fundamental Rights of the EU was changed and also its content is disputed. Human rights are also a basis of the last point mentioned by the Senate – that is the broadening of the scope of EU values

on which the EU is founded (art. 2 TEU) and its possible impact on the use of the procedure of art. 7 TEU.

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