

Korektura

Procedure of Preventive Review of the Lisbon Treaty in the Czech Republic

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In 2001, the Czech Republic adopted the so-called Euro-amendment to the Constitution of the Czech Republic (Constitutional Act No. 395/2001 Sb.),¹ introducing a number of significant changes in the constitutional order from the points of view of international and domestic law (Art. 1 para. 2 and Art. 10 of the Constitution of the Czech Republic – hereinafter “the Constitution”). At the same time, the amendment provided for the possibility of transferring some of the powers of state authorities to international organizations or institutions (cf. Article 10a para. 1), thereby setting the constitutional prerequisites for the accession of the country to the European Union. It also vested the Constitutional Court with the power of preventive review of the constitutionality of international treaties, which had previously not been regulated in the Czech legal system.² In this connection, a new part II (Art. s 71a-71e) was included in Act No. 182/1993 Sb. on the Constitutional Court on the basis of its amendment No. 48/2002 Sb.,³ which regulated the procedure to be followed by the Constitutional Court during its preventive review.

However, this possibility of judicial review, which thus became available for authorized subjects from 1 June 2002, remained unexercised for a long time. It took six years⁴ before the Senate decided in April 2008 – after the complicated discussions over the government proposal to approve the ratification of the Lisbon Treaty, amending the Treaty on the European Union and the Treaty establishing the European Community – to file a motion to the Constitutional Court to assess the conformity of the Lisbon Treaty with the constitutional order. Thus, this proposal, submitted to the Constitutional Court on 30 April 2008, became the very first motion for the preventive review of an international treaty to be admitted to the Constitutional Court, and it will be heard. Owing to the progress of the ratification of this treaty in the other EU states, the future decision of the Constitutional Court is eagerly anticipated, not only by Czech authorities, politicians, and the public, but also EU bodies and those states where the process of ratification has not been finished yet and where it is hoped that the Lisbon Treaty will not come into effect as a result of this decision. This study aims to point out certain procedural issues which the Constitutional Court will have to address in this

¹ The following abbreviations in this study will be used: „Sb.“ as Collection of Laws, the Czech official journal for promulgation of legal enactments, “TEU” as “the Treaty on European Union”, “TFEU” as the Treaty on the Functioning of the European Union, “the Constitution of the Czech Republic” as “the Constitution”.

² The legal system of the Czech Republic does not allow for a subsequent constitutional review of international treaties. However, the decisions of the Constitutional Court have already shown that this should not obstruct the protection of fundamental rights of individuals by means of constitutional complaints. Cf. the finding II. ÚS 405/02 of 2003 (available at nalus.usoud.cz in Czech or at www.usoud.cz in English) on the issue of Slovak pensions paid to Czech citizens.

³ The English versions of the Constitution of the Czech Republic, the Act on the Constitutional Court and other regulations are available online at: <http://www.psp.cz/cgi-bin/eng/sqw/hp.sqw?k=31>.

⁴ In actual practice, there has only been one petition filed for reviewing the conformity of the international treaty on the accession of the Czech Republic to the EU. This, however, could not be heard (Pl. ÚS 1/04, cf. nalus.usoud.cz) because it was filed ~~too late~~ after the deadline for its submission. In the case of the “European constitution,” the expected proposal could not even be filed because of the failure of the proposal in the national referenda in France and the Netherlands. The attempt of the President to start proceedings on the “European constitution” was dealt with by the Constitutional Court “in front of the gates”: informally, in the form of a letter, which is a suitable manner of responding to a letter.

connection. Issues related to the content are disregarded on purpose, since they are beyond the scope of the present text.

1. Formulation of the text of the Lisbon Treaty and the Constitutional Court

The future groundbreaking decision by the Constitutional Court will have to address a whole range of issues. As indicated by the declarations of the Chairman in the media, what is problematic is not only the actual decision of correspondence or non-correspondence of the Lisbon Treaty with the Czech constitutional order, but also the manner in which the decision is to be arrived at. Prior to the decision itself, the Constitutional Court will have to adopt a position on the interpretation of the 2nd part (Art. 71a-71e) of the Act on the Constitutional Court.

The current situation is similar to the referendum on the Accession Treaty in 2003. During that referendum, Czech citizens had the first opportunity to vote in a referendum on a question that was rather difficult – with respect to how extensive the text of the treaty was. The same holds true now for the Constitutional Court, which is to apply the provision on the preventive review of an international treaty for the first time. Its task is to assess the amended text which is, as regards its formulation, rather complex and unclear, requiring a difficult reconstruction because it is impossible to understand it without the texts of the existing treaties on the EU and EC.⁵ In fact, should the task of the Constitutional Court be to assess the constitutionality of an amendment or a revision of a law that would be drafted in a form similar to the Lisbon Treaty, then it should – in accordance with the past declarations of the same court on the formation of clear, intelligible, certain and unequivocal texts of legal regulations in a state governed by the rule of law – arrive at the conclusion that the text is in conflict with such principles. What is needed to solve such a puzzle (as it was expressed by the Austrian Constitutional Court in one of its findings)⁶ is diligence and patience.

In the case of the Lisbon Treaty, however, there is a “mitigating circumstance.” The authors of this puzzle⁷ were so nice that they at least provided us with clues at the end.⁸ Thanks to this and our knowledge of the previous numbering systems, we are able to find where the relevant provision is currently located, how it is identified and where it will be placed under the new numbering system. Any failure to do so will result in a confusion of terms. What is also bizarre is that, owing to the special numbering system, the petitioner and the Constitutional Court will have to agree which of the three versions to use in order to be able to understand each other at all.⁹ However, this is not the end: in addition, there are 13 protocols and 65

⁵ It seems as if this unintelligible form was meant to cover up the fact that the Lisbon Treaty takes over a significant part of the “European constitution” and should simultaneously serve as a prevention against holding referenda on a text which cannot be grasped without the consolidated texts of both treaties.

⁶ This is the so-called Denksporterkenntnis from 1994 (G 135/93 VfGH), which concluded that a legal regulation is in conflict with the principle of the legal state if “In order to find out its sense, extensive knowledge of constitutional law, qualified legal expertise and experience, as well as archivists’ diligence are needed” or where the understanding depends on “exceptional methodological abilities and a certain pleasure of solving puzzles.”

⁷ T. Oppermann: Die Europäische Union von Lissabon. DVBl., 2008, vol. 8, p. 476 uses the fitting description as “an unreadable monster” (ein unlesbares Monstrum).

⁸ However, if common people read Article 5 of the Treaty, which explains the secrets of the numbering system, the changes in referencing, etc., they will not be really encouraged to read on, especially if they encounter the “horizontal changes” specified in Article 2 which further obfuscate the text.

⁹ Otherwise it might review the constitutionality of provisions identified differently from the petitioner. It will be only the official, i.e., the “consolidated,” text of both new treaties that will make the primary EU law again user-

declarations of the contracting parties in which they assure each other that they are serious about the whole issue and that they do not have any other intentions.

In the case of the EU, this is not just about the frequency of words such “democracy,” “values,” etc., in the text of the Lisbon Treaty, but is also about the form by which this text makes such values accessible to EU citizens. What is even more significant, however, is the fact that the so-called “European constitutional agreement” of 2004 (the Treaty establishing a Constitution for Europe), which had been turned down, is resubmitted for adoption again, merely cleared of any indications of a future super-state.¹⁰ This is further evidence that the “D plan”, i.e., dialogue and democracy is not meant quite seriously in actual reality. But, the warning contained in the Maastricht judgment of the Federal Constitutional Court¹¹ is still valid: this stated that democracy is not just a formal principle of accountability of decisions (“Zurechnungsprinzip”); by contrast, it should stem from the competition of social forces, interests, and ideas, making the decision-making process of bodies exercising their supreme power and the current political aims clearly visible and intelligible, and the fact that voters can communicate with such a power in their own mother tongues.

2. Formulation of the Senate’s proposal

However, the proposal by the Senate of the Parliament of the Czech Republic did not make the role of the Constitutional Court any easier. The extent of the motion was merely three pages,¹² which mostly consisted not of statements or evidence supporting such statements but questions and notes of interrogation. Something like that has been unheard of in the previous experience of the Constitutional Court.¹³ The formulation of the statement of the ruling (i.e. the very proposal how the Court should decide)¹⁴ raises doubts – in light of the doctrine of the

friendly for EU citizens. This version, however, was published in the *Official Journal of EU* only on 9 May 2008 (208/C 115/01), i.e., at a time when the Senate’s petition had already been submitted to the Constitutional Court.

¹⁰ For a detailed analysis, see: House of Lords. European Union Committee. The Treaty of Lisbon: an impact assessment. HL Paper 62-I (The Report) a 62-II (Evidence). The literature states that 95 to 99 per cent of the content of the European constitutional treaty has been taken over (“saved”). For more details, see e.g., Terhechte, J. Ph.: Der Vertrag von Lissabon: Grundlegende Verfassungsurkunde der europäischen Rechtsgemeinschaft oder technischer Änderungsvertrag? *EuR*, 2008, No. 2, p. 189, which gives the figure as 95 per cent. J. P. Bonde, in the electronic version of his study, *New name – Same content. The Lisbon Treaty – is it also an EU Constitution?* 2nd ed. 2007, p. 8 (http://www.j.dk/exp/images/bondes/BOOK_New_name_-_same_content_EN.pdf), offers the opinion of A. Stubb, a Finnish representative at inter-governmental conferences for the preparation of the treaty, that the commonality of both texts is 99 per cent. Cf. also Bergmann, J.: Bericht aus Europa: Vertrag von Lisabon und aktuelle Rechtsprechung. *DÖV*, 2008, No. 8, p. 305-309. It may basically be said that analyses agree in numbers. What they differ in is just the conclusion whether this constitutes a success (the saving of the European constitutional treaty) or a failure to respect the opinions of EU citizens.

¹¹ Detailed description and documentation is provided in Winkelmann, I.: *Das Maastricht-Urteil des Bundesverfassungsgerichts vom 12. Oktober 1993*. Berlin 1994.

¹² Its text was included in the annex to the decision No. 257 from the 33rd meeting of the Senate’s Committee for EU affairs. The senate approved this proposal during its meeting on 24 April 2008, with the majority of 48 votes, with 4 votes against (out of 70 senators present).

¹³ An example of how thorough a proposal in such a serious matter may be can be provided by the situation in Germany: the motion by MP P. Gauweiler (this includes other issues in addition to the constitutional complaint) has over 300 pages; S. Hassel-Reusing’s constitutional complaint has 114 pages; D. Dehma’s complaint has 63 pages; the motion by Die Linke has 61 pages. Not intending to criticize that honorable institution, the extent of the proposal of the Senate is surprising, especially with a view to what excellent experts the Senate has, what attention was paid to this Treaty in its bodies, and what the level of the plenary debate was.

¹⁴ The formulation of the statement of the ruling (terms of the judgement) is called „petit“ in Czech. The Czech theory of procedural law traditionally distinguishes between such a „petit“ and the giving reasons for it. The

Constitutional Court on being bound by the formulation of the proposal of the statement – whether it satisfies at all the requirements of the provisions in Art. 71e para. 1 and 2 of the Act on the Constitutional Court, specifying the requirements on proposal on statements of ruling in motions to be decided by the Constitutional Court. The Senate’s motion is evidently based on Art. 71a of the Act, which, however, merely describes the subject matter of the proceedings. In the form of a question rather than a statement of alleged unconstitutionality, the Senate merely demands that the Constitutional Court decides on the conformity of the Lisbon Treaty with the constitutional order, without unequivocally pointing out the direction in which a decision should be made.¹⁵ The contrary formulation of the proposal of the statement of the ruling (i.e., the expression of conformity with the constitutional order) is hardly conceivable with respect to the purpose of the proceedings, i.e., to prevent the ratification of an unconstitutional obligation.¹⁶ This kind of formulation is possible only in the statement of a Constitutional Court finding (the ratification of a treaty is not in conflict) in which the court expresses its disagreement that an international treaty is not in conformity with the constitutional order. The Senate, however, included various – and quite diverse – versions of the statement in the proposal of its petition. There is no doubt about what a reporting judge would do after receiving a constitutional complaint whose proposal of the statement of ruling would request that the Constitutional Court should decide, in the sense of Art. 87 para. 1 of the Constitution or Art. 82 para. 1 of the Act on the Constitutional Court, about the conformity of an action of public authority with the constitutionally guaranteed rights of the complainant.¹⁷ Either the complainant will have to cure defects of such proposal of the statement by the deadline designated by the reporting judge or the complaint shall be rejected on procedural grounds.

The actual petition gives the impression that the Senate does not consider the Constitutional Court as a court but as to be some kind of constitutional council – a sort of advisory body.¹⁸ Further evidence of the attitude of politicians towards the Constitutional Court is provided by the statement by a member of the Government on TV, demanding that the Constitutional Court “hurry up” so that the ratification process could be continued in September, as well as a statement by another government official that the Constitutional Court “begged” the government for a ~~position~~ opinion on the Lisbon Treaty. Let me just add that this matter does not concern a direct politicisation of the Constitutional Court, as, for instance, in the case of its decision-making on public budget reforms. The incursion of the judiciary into the area of

Senate requests in its proposal of the statement of the ruling (petit) that the Constitutional Court should decide “in the sense of Art. 87 para. 2 of the Constitution, as amended by the constitutional acts No. 395/2001 Sb., and Art. 71e of the Act No. 182/1993 Sb., on the Constitutional Court, as amended by the Act No. 48/2002 Sb., on the conformity of the Treaty with the constitutional order.”

¹⁵ The Constitutional Court is not the state’s notary; therefore, any proposal may only request the court to declare non-correspondence. In the opposite case, the Constitutional Court will not turn down anything (just as it will not cancel anything in the event of granting the motion), it will simply – with a view to the nature of the preventive nature of the review – declare correspondence, thereby dismissing the motion. For more details, see Filip/Holländer/Šimíček: *Zákon o Ústavním soudu. Komentář [Commentary to the Act on Constitutional Court]*. 2nd ed. C.H.Beck, Praha 2007, pp. 485-487. It will therefore be interesting to observe how the Constitutional Court will deal with this formulation.

¹⁶ Of course, one may come across this in the practice of constitutional courts, e.g., where someone wants to convince someone else about the constitutionality of, for instance, a law. However, a constitutional court will be requested to cancel such a law as unconstitutional, although it will be expected that such a petition will be turned down, thereby confirming the constitutionality of such an act.

¹⁷ I.e., being asked to choose himself whether to agree with the petition in full or in part, or whether to dismiss it in full or in part. By all means, the proposal of the statement shall be definite and unequivocal. Its formulation in such a form is the most important task of the petitioner.

¹⁸ In the case of treaties, the government may, in pursuance to Article 24 of the EU Treaty and Article 300 of the EC Treaty, ask for an opinion from the European Court of Justice.

foreign policy is quite in place: this is also because of the nature of the EU and the obligations which arise for the Czech Republic on account of its membership in this (at least so far) supra-national organization.¹⁹ The reason why the title of the present article mentions the procedure of preventive review – as opposed to the petition for review of the accession treaty (Pl. ÚS 1/04) that had been denied entry into the “gates” of the Constitutional Court (being dismissed *a limine fori*, i.e., literally “from the court’s threshold”) – is that, if the Constitutional Court had adopted a stricter attitude, the petition could already have been relegated into the archives of the Court for reasons stated in the previous paragraph. However, it is questionable whether this might not give rise to suspicions that the Constitutional Court is playing its own game in the form of a delaying tactic, thereby lending support to opponents of the ratification of the Lisbon Treaty. On the other hand, the objection might be raised that the Court’s decision may be on account of the fact that the petition is easier to process in comparison with the high level of debate on the Lisbon Treaty in the Senate.

As a result, a whole range of procedural issues arise in this connection, even prior to the actual decision on the petition itself. These issues deserve to be addressed here, while it is necessary to point out certain new circumstances which – as is usual – are likely to surface during the practical realization of a legal rule. The positions expressed in the commentaries to the Act on the Constitutional Court²⁰ are, understandably, still considerations *de interpretatione ferenda*. The final word in the contested points will rest on the Constitutional Court, which has decided in this connection not to decide any other issues in the plenary before issuing its decision on this matter. Yet, there is a whole range of issues that need to be pointed out. They include, above all, the issue of the extent of the review, its criteria, procedures for discussion, and the majority vote necessary to adopt a decision. The actual matter of the petition is directly relevant, but the mere description of the individual issues would go beyond the scope of this article, regardless of the fact that certain issues, such as the assessment of a possible intervention into the sovereignty of a state, are basically insoluble with respect to the changes in the understanding of this concept since 1576, when it was introduced in the theory of the state by J. Bodin.²¹ The same holds for trying to answer whether, in connection with the acquisition of legal subjectivity, the EU is not, after all, gradually becoming a state body which is ~~prevented~~ prohibited from being delegated some powers on the basis of Article 10a of the Constitution.

3. The extent of the review – the entire Lisbon Treaty or selected provisions only?

It appears from the Senate’s petition that the Constitutional Court should adopt a position concerning the Lisbon Treaty as a whole, because it causes a conflict with the characterization of the Czech Republic as a supreme, unified, and democratic legal country, as well as a change in some of its essential elements defined in Article 9(2) of the Constitution.²² At the

¹⁹ On the other hand, one cannot fail to see the application of the possibility to defer the ratification of the Lisbon Treaty by means of a petition to the Constitutional Court. Unlike the so-called concordat with the Vatican, which was “removed” by a decision of the Chamber of the Representatives, the majority of Senators did not refuse to give their approval but referred the matter to the Constitutional Court.

²⁰ Cf. Filip/Holländer/Šimíček: op. cit., pp. 457-489 and Wagnerová, E. a kol.: Zákon o Ústavním soudu s komentářem [The Act on Constitutional Court with a Commentary] ASPI, Praha 2007, pp. 298-315.

²¹ Bodin, J.: Six Books of the Commonwealth. Oxford 1955. Cf. mainly chapter 10 of the first book on the properties of sovereignty (p. 40n).

²² To be correct, the Senate does not claim this (see above); it actually just asks the question whether this is not the case, although the relevant section of the petition does not finish with a question mark. The possible ratification of the Lisbon Treaty is challenged but not explicitly.

same time, the Senate's petition raises several specific doubts about some provisions of the TEU and TFEU. According to the Senate:

- 1) TFEU establishes a classification of powers that is more characteristic for division of jurisdiction in federal states, by introducing a category of powers exclusive to the Union, which includes entire comprehensive areas of legal regulation (Art. 2a par. 1 of the TFEU). In conjunction with those facts, in the sphere of shared competences (Art. 4 of the TFEU) there is, from the point of view of Art. 10a of the Constitution, a transfer of competences to the Union in a scope that can not be fully determined in advance,
- 2) the Art. 352 par. 1 of the TFEU, which is not limited to regulation of the internal market, and is thus a blanket norm that permits enacting measures beyond the scope of Union competences, i.e. beyond the scope of transferred powers under Art. 10a of the Constitution,
- 3) application of a general transitional clause (*passerelle*) for purposes of changing unanimous decision making to decision making by a qualified majority in a particular area or replacing a special legislative procedure by an ordinary legislative procedure under Art. 48 par. 7 of the TEU is a change of powers under Art. 10a of the Constitution, without that change being accompanied by ratification of an international treaty or the active consent of Parliament. As regards Art. 83 par. 1 of the TFEU, there is no opportunity at all for Parliament to express lack of consent; thus, this can de facto render Art. 15 par. 1 of the Constitution meaningless,
- 4) international treaties negotiated and approved by a qualified majority in the Council (not unanimously) under Art. 216 of the TFEU would also be binding on member states that did not consent to them, even though the standard ratification process would not take place in these states, and, in the case of the Czech Republic, the opportunity for preliminary judicial review as to whether such treaties are consistent with the constitutional order would also disappear. Therefore, the Senate expressed doubts as to whether this process is compatible with Art. 49 and Art. 63 par. 1 let. b) of the Constitution, and whether there is room to apply these treaties based on Art. 10 of the Constitution,
- 5) the indirect reference to the Charter of Fundamental Rights of the EU, together with the future accession of the EU to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Art. 6 par. 1 and 2 of the TEU) can lead to lack of clarity about the status of the Charter of Fundamental Rights of the EU (the "CFREU"), and it is not clear whether this construction will strengthen or, on the contrary, lower the standard of domestic protection of human rights enshrined in the Czech Charter of Fundamental Rights and Freedoms (the "CFRF"),
- 6) there is a question whether Art. 2 of the TEU is consistent with Art. 1 par. 1 and Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people), in view of the fact that it expands the values on which the Union is established, which could, through a mechanism of suspending membership rights, be used to create political pressure to change domestic legal orders concerning such fundamental issues against the will of the sovereign, i.e. the people.²³

²³ President Václav Klaus, as a party to the proceeding according to art. 71c of the Constitutional Court Act supported the Senate's arguments. According to his opinion, the Lisbon Treaty is at variance with the spirit of the Constitution and its "material core" and will push the EU closer to a federative state. The remaining parties party to the proceedings, i.e. the Chamber of Deputies of the Parliament represented by its Chairman Milošlav Vlček took rather neutral position. In contrast to the President's argumentation, the Government rejected the Senate's objections and tried to give reasons for conformity of the Lisbon Treaty with the constitutional order.

A double problem has, thus, been created for the Constitutional Court.²⁴ If it assessed the constitutionality of the entire treaty, it could constitute a barrier *rei iudicatae* for other potential petitioners. This is because Art. 71a of the Act on the Constitutional Court contains a construction under which the right to file a petition to the Constitutional Court arises gradually to the individual petitioners in relation to the actual stage of the procedure of giving the consent for ratification (Art. 71a para. 1 of the Act on the Constitutional Court). It appears from previous judicial decisions that this is not possible. Examples may be given of decisions (so far only in the case of legal rules) where the Constitutional Court decided on an overall petition for the cancellation of an entire legal regulation in such a way that it granted the petition with respect to several provisions, not refusing but dismissing the remaining parts of the petition.²⁵ In this way, the impression might be created of causing an obstacle *rei iudicatae*. However, the position by the Constitutional Court must respect the interconnectedness between the statement and its reasoning (otherwise even a decision by the Constitutional Court might be void). In this case, however, such a problem should not arise because – with a view to the specificity of the statement concerning preventive review under Art. 71e para. 1 and para. 2 of the Act on the Constitutional Court – the Constitutional Court should deal with insubstantial (and even more so with unsubstantiated) allegations in the reasoning of its finding, not in the statement. This should not prevent other potential petitioners from challenging some other provisions of the treaty or even (in my opinion) the same provisions but substantiated with some other, new arguments. The idea that the Constitutional Court will deal in detail with such an extensive and incomprehensible text – once and for all, even without the petition for review meeting the requirements of Art. 34 of the Act on the Constitutional Court – is totally out of the question.²⁶ This is not a parallel to the criminal notice (complaint) of suspected unconstitutionality; in addition, there is a whole range of other arguments against, mainly the actual *raison-d'être* of preventive review.²⁷ The fact that other potential petitioners are *ex lege* parties to the proceedings (except for the government and groups of MPs or Senators) does not deprive such petitioners of the possibility of filing an independent petition once it is their turn, under Art. 71 para. 1 of the Act on the Constitutional Court, within the process of expressing one's approval.²⁸

4. What parts of the text of the Lisbon Treaty should the Constitutional Court review?

There are EU-wide discussions on what is new in the Lisbon Treaty in comparison with the current state. The Constitutional Court is unlikely to be spared such considerations, although

²⁴ Regardless of the fact that the entire petition would have to be divided among several reporting judges, just as in the case of judicial review of the constitutionality of the Act No. 261/2007 Sb. on Reform of Public Budgets.

²⁵ This was the case in a few findings as e.g., the finding No. 131/1994 Sb. (concerning the Act No. 229/1991 Sb., on Land, as subsequently amended), the finding No. 410/2001 Sb. (concerning the sugar quotas) as well as the finding No. 2/2008 Sb. (concerning the Act No. 261/2007 Sb., on Reform of Public Budgets).

²⁶ The Constitutional Court uses the following formulation: "Where the petitioner in the proceedings on the review of norms cannot bear the burden of alleged unconstitutionality, such a petition must be considered as in conflict with Art. 34(1) of the Act No. 182/1993 Sb., and thus as incapable of being discussed with respect to the issue in the matter" (finding No. 512/2004 Sb.). One can object to the transfer of terms from civil proceedings (i.e., "contested" and "uncontested" proceedings) into the abstract review of an international treaty which has not yet been ratified."

²⁷ Cf. Filip/Holländer/Šimiček: op. cit. p. 483. Wagnerová, E. a kol.: op. cit., p. 312, tentatively admits that the Constitutional Court could carry out a "remaining" review with the result of creating the situation *rei iudicatae*.

²⁸ In this case, this concerns mainly the President of the Czech Republic, whose position on the Senate's petition (available online at www.hrad.cz) specifies the significant problems of the subject matter of the proceedings. This would be possible if the Constitutional Court decided that the Lisbon Treaty is in conformity with the constitutional order and if the process of approval of the ratification was successful in both the Senate and the Chamber of Deputies.

these will be engaged from a different standpoint. The preventive review of an international treaty should not be a pretext for a subsequent review of, e.g., the contents of the Accession Treaty of 2003. It will therefore have to be decided what the limits of the preventive review are (i.e., the new situation), separating out the previously agreed or formed legal situation (*acqui communautaire*), in which there would be, from the substantive standpoint, no preventive review. However, the Constitutional Court cannot be required to stake out those areas in EU primary law which – from the position of the Lisbon Treaty – already work, and separate them from new developments introduced under this treaty. This is a rather complex issue, and its critics are typically put down by being told that such specificities are not yet explicitly mentioned in the primary law but are contained in the judicial decisions of the European Court of Justice.²⁹ Since even similar provisions may obtain quite different contents in new contexts, none of them may be ruled out from the review, save perhaps for derogatory and operative provisions. It generally holds that the challenged provisions are not subject to review.³⁰ The Constitutional Court will not likewise assess those parts of the Lisbon Treaty (comprising also dozens of protocols and declarations of a general and special nature) which do not concern the Czech Republic. In this connection, the general principle needs to be stated that where a member state gives a free hand to the future European Court of Justice to modify or even create new law, then the question needs to be asked whether it makes sense to engage in an abstract dispute over something that will obtain its specific shape only in its judicial decisions on thousands of pages of complicated texts of primary law. The current ECJ does not ask the question of whether the EU is a state; it behaves as if it were, although what is missing is the proverbial competence exclusivity (*Kompetenz-Kompetenz*) referred to by Kelsen.

Thus, the Constitutional Court finds itself for the first time in a situation quite different from reviewing the constitutionality of amendments of acts as a subsequent control of the constitutionality of legal regulations. In that area, the court has established quite a consistent doctrine according to which it reviews the content of the original text as modified by the amendment, which does not have an independent existence. In the case of amendments, the court assesses only the formal aspects, such as the observance of the procedure of its adoption and publication (cf. for instance, findings Nos. 30/1998 Sb. and 476/2002 Sb.). The use of this doctrine, however, turns out to be entirely impractical with respect to preventive review, simply on account of the nature of the matter itself.

The form of the Lisbon Treaty as the subject matter of review is related to the provision of Art. 71d para. 3 of the Act on the Constitutional Court, under which the Constitutional Court is not limited to the assessment of the content of an international treaty with respect to the constitutional order. Here, unlike Art. 68 para. 1 of the Act on the Constitutional Court, no assessment is required about whether an international treaty has been concluded by a body which was authorised to do so and whether the process of its conclusion was in conformity with the national constitutional law. I have expressed my opinion on this matter several times, also by raising an objection to the possible conflict between Art. 71d para. 3 of the Act on the

²⁹ A suitable example consists of the development of judicial decisions of the US Supreme Court and its doctrines of *residual powers* of states and, above all, *implied powers* of the federation. The latter provided inspiration for the European Court of Justice as early as 1956 (cf. the decision in *Fédération Charbonnière de Belgique v High Authority of the European Coal and Steel Community*. – Case 8-55 – derivation of the competence to conclude international treaties from the competence to regulate a certain issue within the EC).

³⁰ Unlike Poland and Great Britain, the Czech Republic did not negotiate any exceptions. Its declarations concerning **the Charter of Fundamental Rights of the EU** are merely parts of the textual organization of the Lisbon Treaty, with individual states confirming that they have understood the text properly.

Constitutional Court and Art. 87 para. 2 and Article 88 para. 1 of the Constitution.³¹ In this connection, let me mention another aspect and formulate a conclusion in the form of a question. ~~At~~ Some proponents of the ratification of the Lisbon Treaty claim that it does not contain any possibility of a transfer of new competencies from the Czech Republic to the EU. The exclusion of the review of procedural issues therefore hides another problem. In the event that both houses of the Parliament will approve the ratification according to the procedure in Article 49 of the Constitution, i.e., under the conditions of Art. 39 para. 1 and para. 2 of the Constitution (i.e., the majority of the members present) and the President of the Czech Republic subsequently proves to the Constitutional Court that such a transfer happens, would the Constitutional Court be able to state that it may not deal with the breach of the procedure specified in Article 10a para 2 and Article 39 para. 4 of the Constitutional Court (the qualified majority)?³² In such a case, this will concern not only the self-limitation of the Constitutional Court, which should not review whether the transfer of competencies is or is not in conformity with the interests of the Czech Republic (this is a typical problem in the sense of a “political question doctrine”) but also the problem of procedure which does not, in this case, encroach upon the area of international law.

Another issue consists in deciding what benchmark should be used for assessing an authentic international treaty. This will be the first time that the Constitutional Court will apply the provisions on the reference criterion for review, which are not formulated in a uniform manner. The prescribed criterion for the assessment of conformity is, under Art. 71a of the Act on the Constitutional Court, a constitutional law, while Article 87 para. 2 of the Constitution (to which Art. 71a para. 1 refers) stipulates that this should be the constitutional order. The same ~~conclusion about~~ notion (“the constitutional order”) is mentioned in Art. 71e of the Act on the Constitutional Court. This cannot be considered just as a technical mistake; it would be insignificant if the Constitutional Court was not striving to extend the interpretation of the notion of “constitutional order” (cf. the finding No. 403/2002 Sb.).³³ However, it is hardly conceivable that the criterion for the review of an international treaty by the Constitutional Court should consist in another international treaty, be it a treaty on human rights. Since the constitutional order is made up, according to Article 112 para. 1 of the Constitution, of constitutional acts and the Charter, then this particular case will call for the assessment of conformity with a specific constitutional act and its provision, rather than the constitutional order as a whole – unless the Constitutional Court decides to reopen this issue once again. The constitutional order does not have any provisions, as a part of the imprecise formulation in Art. 71e para. 1 of the Act on the Constitutional Court. Should a possible conflict be found, then it does not matter what constitutional provision it conflicts with.³⁴ The review cannot be limited only to Article 9 para. 2 of the Constitution (so-called “material core” of the Constitution) or Article 1 of the Charter, as it might be possible in the event of an

³¹ Cf. Filip/Holländer/Šimíček: op. cit. p. 481n.

³² In this connection, I emphasize the procedural aspect rather than the content. One cannot, however, fail to consider the Protocol on the application of the Charter of Fundamental Rights of the EU in Poland and Great Britain, the role of the future Court of Justice of the EU as an engine for integration, and the well-known doctrine of the Czech Constitutional Court, which deals not with individual issues but with everything “in aggregate” (cf. the finding No. 64/2001 Sb. on the election reform). This (i.e., the rule of “what is too numerous becomes excessive”) is what the extensive argumentation of MP Gauweiler is clearly based on (cf. his petition to the German Constitutional Court).

³³ Cf. Filip, J.: Nález č. 403/2002 Sb. jako rukavice hozená ústavodárci Ústavním soudem. Právní zpravodaj, roč. 2002, No. 11.

³⁴ The term “conformity” (or “accordance”) is not suitable for this kind of relation, because international treaties do not constitute executive instruments for the constitution. For the purpose of preserving constitutionality, it is sufficient that an international treaty is not in conflict with the constitutional order. Some other construction is not, because of the nature of the matter, even conceivable.

already valid EC and EU law in the sense of the findings of the Constitutional Court concerning constitutionality of the sugar quotas (No. 154/2006 Sb.) and the European arrest warrant (No. 434/2006 Sb.).

5. The effect of the Irish referendum on the procedure of the Czech Constitutional Court

Decision-making in the field of international politics necessarily leads to the necessity of reacting to other contracting parties, which is not customary in other areas of the jurisdiction of the Constitutional Court. In this case, this concerns the issue of the Irish referendum, which turned the Lisbon Treaty down. As a consequence, the Constitutional Court might have found itself facing a new question, arising to it, just as in the case of some other constitutional courts in connection with the previous³⁵ European constitutional treaty, which was turned down in referenda in France and the Netherlands. However, in this case, the situation is different,³⁶ and the Constitutional Court did not have reason to discontinue or stop the proceedings because the contractual process still continues. Apart from that, discussions constantly tend to overlook the provision in Article 48 para. 5 of the new numbering of the EU treaty, which anticipates such a situation.³⁷ This provides that, if the Lisbon Treaty is ratified by four fifths of member states within two years after its conclusion, and if one or more member states meet obstacles while ratifying it, the issue will be dealt with by the European Council. It is, therefore, anticipated that, in order to assess the situation, the process will have to be concluded in all of the 28 contracting parties of the ratification process (the EU itself and its member states), because without this, the European Council cannot look for possible solutions.

6. What will the Constitutional Court decide and by what majority

It is not quite clear from the prayer of the Senate's petition what statement the Senate actually requests. This does not unequivocally arise even from the special provision in Art. 71e of the Act on the Constitutional Court. This proceeding is different from judicial review of legal regulations because it essentially concerns the pronouncement of an authoritative position on the constitutionality of an international treaty. Its aim is to block the potential ratification (Art. 87 para. 2 of the Constitution), not the process of ratification. The question the Constitutional Court is addressing in this case is not how many and which provisions, but whether the ratification is possible or not. This is one of the reasons why the second division (Art. 71a – 71e) does not contain an explicit reference to the first division (Art. 64 – 71) of the special part of the Act on Constitutional Court (control of constitutionality and legality of enactments). Approval is given to an international treaty as a whole because it may be ratified only in its entirety.³⁸ Should even a single provision of this treaty be found unconstitutional, this will not change the result in any way. There is a parallel with the two houses of the Parliament: just as they can only approve or dismiss the ratification of a treaty (Art. 108 para. 6 of the Rules of Procedure of the Chamber of Deputies and Art. 117b para. 5 of the Rules

³⁵ This is, however, relative, since the vast majority of its provisions form a part of the Lisbon Treaty.

³⁶ Not only according to the famous dictum that, in the case of disapproval by such a big member state as France (moreover, prior to national elections), it is bad luck for the treaty, while in the case of disapproval by a small member state, it is bad luck for such a member state.

³⁷ It is literally taken over from No. IV-443 of the past European Constitutional Treaty. The commentary (Note No. 4, p. 621), however, expresses doubts about the meaning of such a provision. Now we know it: identical content is submitted again under a new and camouflaged label.

³⁸ The ratification cannot take the form of a proposal of the statement of the ruling in the Senate's petition, from which it is not clear whether the treaty is, in the Senate's opinion, problematic or not.

of Procedure of the Senate), the Constitutional Court may only decide in its finding that an international treaty (i.e., not its individual provisions) may not be ratified.³⁹

The issue is about the prevention of a possible unconstitutional situation and not about repression, i.e., about the removal of an unconstitutional situation. A conflict with other law is not a problem with respect to the place of such treaties within the application hierarchy of Czech law (pursuant to Art. 10 of the Constitution *conventio derogat legi*). The provision of Art. 71e of the Act on the Constitutional Court does not require the Constitutional Court to state in its finding which provision(s) of an international treaty are considered to be in conflict with the constitutional order; it does, however, require the listing of the specific constitutional provisions with which a conflict is found. In this way, the unconstitutional elements of an international treaty will be indirectly identified (unless this occurs in the statement). It is not, however, impossible (the practice of delivering statements is still developing) that the general statement under Art. 71e(1) of the Act on the Constitutional Court will combine with an enumeration of the problematic provisions of a treaty or, by contrast, an enumeration of those provisions which are found to be constitutionally all right.

It appears (so far only in the literature) that another contested issue is what majority is necessary to carry the decision of the Constitutional Court in this matter. According to one of the opinions,⁴⁰ the principle *in favorem conventionis* should be applied,⁴¹ similarly to judicial review of laws. This is based on the prerequisite that the President and the government will be signing treaties that conform to the Constitution and that the contrary needs to be proved. This is based, under Art. 13 of the Act on the Constitutional Court, on the qualified majority (i.e., nine votes). An interesting position is taken by another commentary,⁴² which probably favours the standpoint that the qualified majority must be reached in order to express the conformity (or – better – the incontestability) of an international treaty with the constitutional order.⁴³ In theory, the ratification of the Lisbon Treaty could be blocked by two votes if the quorum is 10 judges or by 7 votes if the quorum is 15 judges. The decision would, thus, be made by the notorious and egregious “relevant minority.”⁴⁴ It will, therefore, also be important how this issue is clarified.

7. Addendum

During the author’s proof of this study the Constitutional Court delivered its judgment. Hitherto it is not at the disposal its full wording.⁴⁵ On the basis of the announced parts of the ruling⁴⁶ we can state that the most of the procedural questions treated in this study were

³⁹ For more details, see Filip/Holländer/Šimíček: op. cit. p. 484-489.

⁴⁰ Filip/Holländer/Šimíček: op. cit. p. 72.

⁴¹ Pursuant to Art. 10 of the Constitution if an international treaty provides something other than that which a statute provides, the treaty shall apply.

⁴² I. Pospíšil in Wagnerová, E. a kol.: op. cit. p. 314.

⁴³ This is the logical consequence of the opinion that the Constitutional Court may review not only the contested parts of a treaty but also the rest. Wagnerová, E. a kol.: op. cit. p. 312.

⁴⁴ Cf. the finding of the Constitutional Court 3/96 of 1996 (available online at <http://nalus.usoud.cz>) on electoral deposits and the various opinions in this matter. If the required qualified majority of 9 votes is not reached, the over-voted minority is giving the reasoning of the ruling of the Court.

⁴⁵ The abstract of the ruling has been published yet on the web of the Constitutional Court (http://angl.concourt.cz/angl_verze/doc/pl-19-08.php).

⁴⁶ According to the tradition originated from the period of the Austro-Hungarian monarchy, the judgments of the Constitutional Court are called „nálezy“ in Czech, what is matching to the term „finding“ in English or “das Erkenntnis” in German.

answered in the first part of the ruling.⁴⁷ In this respect, the Court especially pointed out, that it concentrates its review only on those provisions of the international treaty whose accordance with the constitutional order the petitioner expressly contested, and where, in an effort to meet the burden of allegation, it supported its claims with constitutional law arguments. The Constitutional Court also stated more precisely that in this review it did not intend, for a number of reasons, to distinguish between the provisions of the Treaty of Lisbon described as “normatively” old or new, i.e. it reviewed all those provisions of the Treaty of Lisbon that the petitioner properly contested. Important is an additional statement of the Constitutional Court, that it can review whether an act by bodies of the Union exceed the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution, however only in utterly exceptional cases.

Thus, the findings (in a narrow sense) sounds as follows: The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community in Art. 2 par. 1 (originally Art. 2a par. 1), Art. 4 par. 2 (originally Art. 2c), Art. 352 par. 1 (originally Art. 308 par. 1), Art. 83 (originally Art. 69b par. 1) and Art. 216 (originally Art. 188l) of the TFEU, as amended by the Treaty of Lisbon, in Art. 2 (originally Art. 1a), Art. 7 and Art. 48 par. 6 and 7 of the TEU, as amended by the Treaty of Lisbon, and the Charter of Fundamental Rights of the European Union is not in conflict with the constitutional order.

Thus, the story of the Lisbon Treaty will continue. If the process of approval of the ratification was successful in both the Senate and the Chamber of Deputies, there will be waiting President Václav Klaus at the end.⁴⁸ According to him, any discussion on when the Lisbon Treaty will be passed or rejected by the Czech Republic is pointless now because of the Irish referendum.⁴⁹

⁴⁷ The ruling as announced was unanimous and without any form of a separate vote, thus the deliberations sub 6 concerning the qualified majority has remained in the meanwhile merely a problem of theory.

⁴⁸ Immediately after the Court's decision the President expressed its hope, that a new motion will be submitted by a group of Senators or Deputies. He discerns a lot of another new and profound reasons the Constitutional Court did not deal with. In such a case the new motion in the same matter is not excluded (so-called inadmissible petition in sense of *res iudicata*).

⁴⁹ Standpoint of the President that concerns the future potential signature of instruments of ratification of the Lisbon Treaty is coincident with the position of the President of Poland L. Kaczyński. They both would probably sign the Lisbon Treaty only if it were ratified by Ireland.