The Czech Republic

The Constitutional Court on the Lisbon Treaty Decision of 26 November 2008

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Introduction

On 26 November 2008 the Czech Constitutional Court (hereinafter Court) handed down a long-awaited opinion in which it unanimously found the Lisbon Treaty (hereinafter Treaty)[1] to be compatible with the Czech constitutional order.[2] The decision has drawn broad attention at all levels, be it political circles, academia or even general public. It is certainly one of the most significant decisions in the Court's history and it has EU-wide implications.

Since the so-called 'Euroamendment' of the Czech Constitution,[3] it has become possible for authorised petitioners to challenge at the Constitutional Court the constitutionality of an international agreement prior to its ratification, as envisaged by Article 87 paragraph 2 of the Constitution.[4] The Lisbon Treaty was the first treaty submitted to this *ex ante* review. When the Lisbon Treaty was being discussed in the Czech Parliament last spring, the Senate asked the Court to

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[1] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 Dec. 2007 (*OJ* C 306, 17.12.2007, p. 1–271).

[2] Decision of 26 Nov. 2008, case No. Pl. ÚS 19/08 (published as No. 446/2008 Coll.) (hereinafter Judgment). The English translation (which I at times deliberately did not follow when providing quotations) is available at <http://angl.concourt.cz/angl_verze/doc/pl-19-08.php>.

[3] Constitutional Act No. 395/2001 Coll.

[4] The provision reads: Prior to the ratification of a treaty under Art. 10a or Art. 49, the Constitutional Court shall further have jurisdiction to decide concerning the treaty's conformity with the constitutional order. A treaty may not be ratified prior to the Constitutional Court giving judgment. An English version of the Czech constitution is available at <http://angl.concourt.cz/angl_verze/index_angl.php>.

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review the constitutionality of several of its provisions. The Chamber of Deputies, the Government and the President exercised their right to participate in these proceedings. While the Government filed an extensive brief to defend the constitutionality of the Treaty, the President held the opposite view; meanwhile, the Chamber of Deputies took a neutral position.[5]

It was not the first time the Court has ruled on the relationship between the Czech and the Union's legal orders. In the *Sugar Quotas* decision[6] the Court basically recognised that the European Community has an autonomous legal order which is applicable in the Czech Republic by virtue of Article 10a of the Constitution[7] and which prevails over all provisions of the Czech legal order, with the notable exception of fundamental elements of the rule of law-based state and the foundations of state sovereignty of the Czech Republic. In the *European Arrest Warrant* decision[8] the Court adjusted its *Sugar Quotas* stance to the peculiarities of EU (third pillar) law.[9] Their impact on the present judgment will be discussed in pertinent analytic parts of this note.

The Court held an oral hearing on 25 November (which was broadcasted live on nationwide TV); the decision was already announced only a day later.[10]

In this contribution the main points of the decision will be analysed. The structure follows that of the decision.

Preliminary questions relating to the scope of the review

Before getting to the specific points raised by the Senate, the Court had to take a stance on several questions relating to the nature of the proceedings and the criteria for the review itself.

[5] The content of Senate's petition as well as of other participants' submission made in briefs or during oral hearing is described in paras. 2-64 of the Judgment.

[6] Decision of 8 March 2006, case No. Pl. ÚS 50/04 *Sugar Quotas* (published as No. 156/2006 Coll.), the English translation is available at <http://angl.concourt.cz/angl_verze/doc/p-50-04.php..

[7] Art. 10a para. 1 reads 'Certain powers of the Czech Republic authorities may be transferred by treaty to an international organization or institution.'

[8] Decision of 3 May 2006, case No. Pl. ÚS 66/04 *European Arrest Warrant* (published as No. 434/2006 Coll.), the English translation is available at <http://angl.concourt.cz/angl_verze/doc/pl-66-04.php>.

[9] For a detailed account of these judgments from different perspectives *see* Jiří Zemánek, 'The Emerging Czech Constitutional Doctrine of European Law', 3 *European Constitutional Law Review* (2007) p. 418; Wojciech Sadurski, 'Solange, chapter 3': Constitutional Courts in Central Europe – Democracy – European Union, 14 *European Law Journal* (2008) p. 1; Jan Komárek, 'European Constitutionalism and the European Arrest Warrant: In Search of the Limits of 'Contrapunctual Principles', 44 *Common Market Law Review* (2007) p. 9.

[10] This provoked a harsh critique from the President who accused the Court that the judgment had been prepared well in advance and that the Court apparently attributed no attention to the oral hearing.

Mandatory en bloc *review? (paras. 70-78)*

The first question was to what extent the Court is bound by the Senate's petition. Is the Court obliged to review only the articles challenged by the Senate on specific grounds or is it authorised or even obliged to review the Treaty of Lisbon as a whole, as the Senate requested in its petition, supported by the President and the Government?

The Court decided to follow by analogy its settled case-law for reviewing ordinary laws and to focus only on those provisions that were contested on specific grounds provided in the petition. The Court reiterated that a petitioner always bears the burden of allegation. It is not sufficient to name the act (or individual provisions thereof) whose review is sought; it is necessary to also state the grounds for the alleged unconstitutionality. The Court further brought forward quite persuasive pragmatic arguments which referred to the epistemological impossibility of an *en bloc* constitutional review of all provisions, especially in lengthy normative texts, without being provided with specific grounds for their unconstitutionality. The Court stressed that it is not an academic institution, but a judicial body. A strong argument against exhaustive review of the Treaty for the Court was also that this would in fact make it impossible for groups of Senators or Deputies to submit a petition for review. They have an independent standing to file a petition after the Parliament has given its consent to the ratification of the treaty (and until the moment when the President ratifies the treaty) and they could not (unlike the Government, the President and the Chamber of Deputies as a whole) participate in these proceedings initiated by the Senate. The Court thus concluded that its review was concentrated only on those provisions of the Treaty of Lisbon whose compatibility with the Constitution the petitioner expressly contested in a reasoned way.

This means that the constitutionality of the Lisbon Treaty in the Czech Republic is not yet secured. As the Court explicitly conceded, after this decision new petitions might be raised by authorised petitioners against other provisions of the Treaty and probably even against those already challenged if the new challenge is supported by the grounds which the Court has not previously dealt with. According to the Court, the question of *res judicata* is to be interpreted restrictively in such a case.[11]

[11] Quite different question is the actual chance of success for a new challenge, as the President of the Court Pavel Rychetský made it quite clear in his interviews for media that all the most contentious provisions had been challenged by the Senate and that in principle he did not see any other arguments which could be successfully raised. If such is the prevailing view among the Members of the Court, it would be indeed quite a surprise to succeed with a new petition.

The difference between 'old' and 'new' provisions (paras. 79-87)

Another preliminary question concerned the range of the provisions of the Treaty to be reviewed. The question was whether the Court could review only those provisions of the Lisbon Treaty that were contested and normatively new, or all the contested provisions, i.e., including those provisions in the current EC and EU Treaties which are already applicable in the Czech Republic on account of the Accession Treaty.

The Court first emphasised that the only provisions of the Treaty which *might* be possibly considered as normatively 'old' are those codifying the case-law of the European Court of Justice. However, it added that even this distinction is debatable, as the inclusion of a certain provision which has until now existed 'only' in the case-law may, in certain circumstances, change its normative meaning. Therefore the Court found it difficult to distinguish between normatively new and old provisions, as 'one cannot even find a precise and unambiguous criterion for such a self-limiting procedure.'[12]

The Court also justified this refusal to distinguish between 'new' and 'old' provisions by its case-law that it exceptionally may also test the constitutionality of a treaty, including apparently the Accession Treaty, *ex post*, i.e., when the treaty is already ratified and forms an effective part of the Czech legal order. In my view this is an irrelevant argument in relation to an unratified treaty such as the Lisbon Treaty. Even if the provisions of international treaties were not to be opened for a constitutional challenge after the ratification, this in and of itself would not make them immune from the review when they become a part of a new, yet unratified, treaty. Why should the fact that a potentially unconstitutional provision of a treaty which was already ratified – and therefore is incontestable – prevent the Court from repudiating such a provision as a part of an unratified treaty within the preliminary review procedure?

In my view, the only argument which might militate against the review of 'old' provisions in a new treaty would be the existence of previous constitutional clearance of the identical provision by the Constitutional Court.[13] It seems that the Court ultimately employed this argument when it said, albeit in another context , that '[t]he absence of a prior review of the Accession Treaty by the Constitutional Court cannot, in and of itself, establish a presumption that it is constitutional.'[14] This statement alone in my view would have justified the Court's refusal to distinguish between 'new' and 'old' provisions.

[12] Para. 86 of the Judgment.

[13] And even this is said under the condition that the inclusion of the old (constitutional) provision has not changed its meaning in interaction with other norms of a new treaty.

[14] Para. 90 of the Judgment.

Referential framework for the review (paras. 88-94)

A particularly important preliminary question for the Court concerned the point of reference for its review: had the Court to assess the constitutionality of the Treaty in view of the constitutional order as a whole or only in view of the so-called 'fundamental core'[15] under Article 9 para. 2 of the Constitution, i.e., the 'essential requirements of a democratic rule of law-based state.' The Court took the former view, though it at the same time underlined the essential role of the fundamental core.

As mentioned above, the Court in *Sugar Quotas* basically stated that the standard for review of EC Law is the Constitution's fundamental core.[16] However, in the present matter the Court right at the outset drew an important difference between the EC/EU law provisions which are valid and effective in the Czech Republic and the provisions of the Lisbon Treaty which do not (yet) possess this quality. Admittedly, this distinction may well justify a possibly different standard of review, but the Court did not elaborate on it. Yet it could have stressed that Community law already in force is applied by virtue of Article 10a of the Constitution with all the effects that the Court of Justice ascribes to it (most notably direct effect and primacy) and is an international commitment which the Czech Republic is bound to respect under Article 1 para. 2 of the Constitution.[17] The unratified Lisbon Treaty cannot aspire to such a status. As we will see, instead of underlining this significant difference, the Court later in the judgment relied on quite an implausible distinction between the review of secondary and primary EU Law.[18]

According to the Court, also the fact that the Lisbon Treaty, as every treaty transferring competences under Article 10a of the Constitution, needs, on account of Article 39(4) of the Constitution, to be approved by parliament with the same majority as required for a constitutional amendment cannot limit the review only to the 'fundamental core' of the Constitution, as this would to a large extent deprive the institution of preliminary constitutional review of treaties of its meaning. Moreover, for the purposes of this review the Constitution does not distinguish between 'ordinary' international treaties under Article 49 and treaties under Article 10a. Also, the text of Article 87(2) of the Constitution explicitly envisages

[15] The Court's English translation as available at the time of publication referred to this as a 'material core', but we prefer to avoid this non-standard usage of the term 'material' in English. – *EuConst*

[16] *See Sugar Quotas* (*see supra* n. 6). In *EAW* (*see supra* n. 8) the Court was rather willing to use as a point of reference the constitutional order as a whole, given the peculiar and not yet clarified character of the third pillar law.

[17] 'The Czech Republic shall observe its obligations resulting from international law'.

[18] *See* text accompanying n. 20.

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the whole constitutional order as a point of reference for this review, not only its fundamental core.[19] The Court also accompanied these textual arguments by considerations regarding substantial differences between constitutional amendments and Article 10a treaties. The main difference lies in a very limited possibility of Parliament to influence the text of such a treaty, which, unlike a draft constitutional amendment, it can only approve or reject as a whole.

The Court further noted that the review in light of the constitutional order as a whole obviates the need to identify what belongs to the fundamental core and what not, an exercise the Court apparently wanted to avoid. Nevertheless, it emphasised the prominent position the fundamental core enjoys in this type of review.

The discussion of this important issue is confused by the last paragraph of the pertinent section of the text of the decision, in which the Court returned to the reason why according to the *Sugar Quotas* decision the review standard for Community law is limited to the fundamental core only, while it here opted for the constitutional order as a whole. The explanation is as simple as it is unconvincing. The Court said that in *Sugar Quotas* the assessment of secondary Community law had been based on the presumption of compatibility of that secondary Community law with the Czech constitutional order, while in the present case 'an extensive set of amended primary EU law is being evaluated.'[20] In other words, secondary law enjoys the presumption of compatibility with the constitutional order, even though the primary law from which it stems has not been subject to any kind of constitutional review, while the primary law itself does not enjoy that privilege. In fact, this reasoning of the Court gives secondary law a more prominent position than the Treaty from which it is derived, which in the absence of constitutional review of the Treaty is difficult to comprehend.

Nevertheless, the point of reference for which the Court opted should be considered correct. It is desirable that any treaty that binds the Czech Republic is in harmony with its constitutional order as a whole, not only with its most fundamental values. A preliminary review of a treaty's compatibility with all the provisions of the Constitution may pre-empt possible later tensions and clashes between constitutional and international commitments. Moreover, the preliminary review enables the legislature to subsequently amend the Constitution so as to ensure the treaty's constitutionality or to simply conclude that the treaty is not worth amending the basic law of the State.

[19] *See* Art. 87 para. 2 of the Constitution.
[20] Para. 94 of the Judgment.

General Part (Basic Assumptions)

The Court analysed the Treaty by establishing several basic assumptions and stressed that the review would primarily focus on Article 10a(1), Article 1(1) and Article 9 paras. 2 and 3 of the Constitution.

According to the Court, it follows from Article 10a para. 1[21] that only *certain* powers may be transferred by a treaty to an international organisation. This Article must be interpreted in connection with Article 1 para. 1 and Article 9 para. 2 of the Constitution and thus the transfer of powers cannot go so far as to violate the very essence of the Republic as a sovereign and democratic rule-of-law-based State, founded on respect for the rights and freedoms of human beings and of citizens, or to establish a change of the essential requirements for a democratic rule of law-based State.

The Court admitted that the notion 'sovereign state' is not uncontested and hard to define at an abstract level. Building upon Jellinek's classic definitions, it pointed out, however, that a sovereign has the freedom to restrict itself by the legal order or by freely accepted international obligations. Thus a possibility to freely amend a particular competence is not a sign of a sovereign's inadequacy, but of his/her full sovereignty.

Having made a couple of rather political statements emphasizing the necessity of EU integration in the globalised world, the Court had paved the way for resorting to the concept of 'pooled sovereignty.' In this respect the Court noted that

> [i]t is more a linguistic question whether to describe the integration process as a 'loss' of a part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., 'lending, ceding' of part of the competence of a sovereign.
> […]
> [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 upon in advance and is reviewable, is not *ex definitionem* a conceptual weakening of the sovereignty of a state, but, on the contrary, it can lead to its strengthening 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 the increasing globalization in the world.[22]

The Court's allegiance to 'pooled sovereignty' is a value judgment of a rather political nature, however the one the Court might and had to make, insofar as it is in line with the intention of the explanatory memorandum (to which the Court how-

[21] *See supra* n. 7.
[22] *See* paras. 104 and 109 of the Judgment.

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ever did not refer) accompanying the bill[23] for Euroamendment of the Constitution. Nevertheless, the Court also had something to offer to advocates of a rather traditional notion of sovereignty, as it stressed that the Lisbon Treaty explicitly enables a member state to withdraw from the Union.[24]

The Court concluded that the textual interpretation of Article 10a para. 1 proscribes an unlimited transfer of sovereignty. Read in connection with Article 1 para. 1, it means that any transfer which would deprive the Czech Republic of its status of a sovereign state is prohibited. Thus the transfer of sovereign powers under the Constitution has certain limits, however the Court, inspired by its Polish counterpart,[25] will give a broad discretion to the legislature. In words of the Court

> [t]hese limits should be left primarily to the legislature to specify, because this is *a priori* a political question which provides the legislature wide discretion; interference by the Constitutional Court should come into consideration as *ultima ratio*, i.e., in a situation where the scope of discretion was clearly exceeded, and Art. 1 para. 1 of the Constitution was affected, because there was a transfer of powers beyond the scope of Art. 10a of the Constitution.[26]

The Court then not only summarised its own case-law on the relationship between the EU law and the Czech constitutional order, but also showed willingness to draw inspiration from the case-law of other constitutional courts, particularly the main conclusions of two, in its words 'fundamental', cases of the German Federal Constitutional Court, the *Solange II* and *Maastricht* decisions.

At the very end of the 'basic assumptions' section, the Court arrived at a significant conclusion which, quite surprisingly, it had not discussed in the previous text at all. Out of the blue, the Court stated that it

> recognises the functionality of the EU institutional framework for ensuring the review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional.

Fortunately, the Court elaborated on this point a little bit more in the Special Part of the judgment to which we will turn shortly.

[23] *See* Chamber of Deputies document No. 884 of the term 1998-2002, available (only in Czech) at <http://www.psp.cz/sqw/text/tiskt.sqw?O=3&CT=884&CT1=0>.

[24] As we will see, the Court used this ' withdrawal' argument on a couple more occasions in the judgment.

[25] Decision of the Trybunal Konstytucyjny of 11 May 2005, case No. K 18/04 (Polish Accession Treaty case).

[26] Para. 109 of the Judgment.

Special Part

First point of Senate's petition – transfer of competences (paras. 125-141)

Under the first point of its petition, the Senate basically asked the Constitutional Court to consider the question of the character and classification of powers transferred to the European Union under the Lisbon Treaty. The division into the areas of exclusive and shared competences allegedly implies that the EU becomes a federal state. Moreover, these areas are so wide and vaguely defined that it opens space for a large and hardly identifiable (in advance) sphere of EU decision-making. This, according to the Senate, makes the transfer of powers under Article 10a para. 1 of the Czech Constitution not clearly identifiable[27] in advance.

The Court first reiterated that the transfer of powers cannot be unlimited. It recalled two basic limitations at the formal and substantive levels. The formal level is connected to Article 1 para. 1, which protects the foundations of state sovereignty of the Czech Republic.[28] The substantive level is reflected by the fundamental core of the Constitution. As the Court pointed out, the protection of the formal level is a *conditio sine qua non* for the effective protection of the fundamental core of the Constitution, since only the sovereign state can effectively enforce the most important constitutional rules and principles of a rule of law-based state. From this does not however follow, according to the Court, that the transfer of powers may not cover comprehensive areas of law-making, nor does it mean that the international organisation, in whose favour the transfer has been made, could not exercise these powers exclusively.

The Court further emphasised that the Treaty confirms that the constitutional competence-competence, i.e., the power to amend primary law, remains with the member states. Therefore the Union cannot be considered either a federal state or another kind of entity which would in every respect and always stand above the individual states. Referring to the new Article 5 para. 2 of the Treaty on the EU,[29] the Court recalled that the Union can act only within the scope of powers expressly conferred on it by its member states. The Court later also addressed this question of constitutional competence-competence in dealing with the flexibility clause. It said that if the Union could change its competences at will, independently of the signatory countries, then the Czech Republic would by ratifying the

[27] The judgment uses the Czech word 'určitelný' which in the English version on the Court's webpage is translated as 'determinable', however, in my opinion the real meaning is better reflected by word 'identifiable'.

[28] This provision reads: 'The Czech Republic is a sovereign, unitary, and democratic rule-of-law-based state, founded on respect for the rights and freedoms of man and of citizens.'

[29] '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.'

Lisbon Treaty violate Article 1 para. 1 and Article 10a of the Constitution. However, since the member states may withdraw from the Union and, most importantly, any revisions of primary law require the consent of all of them, it is clear that

> even after the Treaty of Lisbon enters into force, the EU will not acquire the power to create its own new competences [and] the Member States will still be the 'Masters of the Treaties'.[30]

The Court further praised the Lisbon Treaty provisions on competences as clearer and more transparent than before, which was to be welcome from the Czech constitutional perspective. However, it is worth noting that there are academic voices which would strongly disagree with this optimistic observation, which the Court did not take pain to substantiate.[31]

Relying on Article 2 para. 6 of the Treaty on the Functioning of the EU, under which the scope and manner of exercising competences are determined by provisions of treaties concerning the individual areas, the Court refused that Article 4 para. 2 of the Treaty on the Functioning of the EU, cited by the Senate, would establish an unlimited competence clause in the area of shared competences.

The Court then concluded that the transfer of powers under Article 10a of the Constitution was not unlimited.

However, the fact that the transfer was not unlimited is not enough to find it compatible with Article 10a of the Constitution. In para. 135, which is to be seen as one of the crucial parts of the whole judgment, the Court stipulated further requirements which have to be met to find the transfer of powers constitutional:

> From the constitutional law limits for the transfer of powers contained in Article 10a of the Constitution stems also the need for a clearer *delimitation* (and thus also definiteness and recognizability) of the transferred powers, together with a sufficient review which the Czech Republic, as a sovereign state, can exercise over the transfer of powers.

In other words, the content of transferred powers has to be so concrete as to enable one to predict with a sufficient level of specificity which competences the Czech Republic is giving up. This has to be accompanied by institutional tools for proper review and control of this transfer.

The Court found, contrary to the Senate's opinion, that the powers *are* clearly *delimited* in the Lisbon Treaty. It repeated that the powers of the Union are speci-

[30] Para. 146 of the Judgment.

[31] *See*, e.g., a very critical analysis of Robert Schutze: 'Lisbon and the federal order of competences: a prospective analysis', 33 *European Law Review* (2008), p. 709.

fied by individual provisions of the Treaty on the Functioning of the EU, including specific decision-making procedures and legal instruments that can be used to implement them. According to the Court, it would not have been possible to make an exhaustive list enshrining individual powers in such detail that they would always correspond to the particular legal act of the Union that implements them. However, the Treaty of Lisbon clearly and precisely defines areas in which the Union decision-making may take place. This, coupled with principles of subsidiarity and proportionality, 'provides a sufficiently specific normative framework for determining the scope in which the Czech Republic transferred its powers to the European Union.'[32]

Regarding the question of *review* of the transfer of powers from the Czech Republic as a sovereign, the Court underlined the role of a proper institutional framework for this review and identified the ECJ as a main actor within that framework.

The Court then declared that it

> generally recognises the functioning of this institutional framework for ensuring a review of the scope of exercise of conferred competences, although [the Court's] position may change in the future, should it appear that this framework is demonstrably non-functional.[33]

The Court added that in exceptional cases it could operate as an *ultima ratio* and review whether an act of the Union had exceeded the limits of powers which the Czech Republic had transferred to the EU. It stressed the analogy of this position to the decision by the German *Bundesverfassungsgericht* in its famous *Solange II* decision, 'but applied to review of powers, not to the level of protection of fundamental rights and freedoms.'[34] At first sight the Court's position seems more close to the *Bundesverfassungsgericht* decision on *Maastricht*,[35] to which the Court also referred. As is well-known, the German court in this decision reserved to itself the final word on the question whether a Community act exceeds the boundaries of the transfer of powers by Germany to the European Community. However, the Czech Court downgraded this position to a mere theoretical possibility by saying that it obviously agrees

[32] Para. 137 of the Judgment.

[33] Para. 139 of the Judgment.

[34] Ibid.

[35] The Court in this one paragraph makes also the comparison with the Polish Constitutional Tribunal (in Treaty of Accession case), whose position excluding the right of the ECJ to review the limits of competences conferred on EU approves to some extent but at the same time questions whether it is necessary to put it so bluntly.

> with the opinion that the Federal Constitutional Court's Maastricht doctrine (*Kompetenz-Kompetenz*) is more in the nature of a potential warning, but need not ever be used in practice.

This probably accounts for the Court's referral to the analogy to *Solange II*, in which the *Bundesverfassungsgericht* stated that complaints that Community acts infringe German fundamental rights would be inadmissible as long as the Court of Justice at the Community level would provide for fundamental rights protection equivalent to that offered by the German constitution.

The Court substantiated its (current) confidence in the institutional framework by referring to the famous 'tobacco advertising' case,[36] in which the Court of Justice annulled a Directive on advertising and sponsorship of tobacco products for exceeding the scope of the EU competences. Finally, the Court recalled that the Lisbon Treaty expands the current institutional framework by involvement of national parliaments in the process of supervision of competences' conferral. The Court concluded that observance of the limits of the conferral of competences is thus the joint task of all participating bodies, both at the European and national level. For all these reasons the Court dismissed the first point of the Senate's petition.

In my view, this is a crucial part of the judgment. The Court first underlined the fact that the Czech Republic retains its constitutional *Kompetenz-Kompetenz*, so to speak, under the Lisbon Treaty, which may be seen as the cornerstone of the Court's reasoning throughout the whole judgment and which is doubtlessly one of the key arguments for upholding the constitutionality of the Treaty. The Court also set out the criteria for review of the constitutionality of transfers of powers from the Czech Republic to international organisations. Such transfers must be limited, specific and reviewable within a proper institutional framework. The Court unfortunately failed to apply these criteria consistently throughout the judgment, as we will see later. As regards the Court's declared trust in the EU institutional framework, the Court apparently showed a lot of good will towards its Luxembourg counterpart. It generously omitted the fact that the 'tobacco advertising' case is a kind of lone runner among dozens of cases decided in favour of the EU/EC competence,[37] a proverbial exception which proves the rule that the ECJ usually decides in favour of the EU having the competence at the expense of member states. It also exaggerated a little bit the significance of the role given to

[36] Case C-376/98 *Germany* v. *Parliament and Council* [2000] *ECR* I-8419.

[37] A symbolic example is a sequel case to the 'Tobacco advertisement case', the 'Tobacco advertisement case II', which was decided in an ordinary way, i.e., against the member states' competence – *see* case C-380/03 *Germany* v. *Parliament and Council* [2006] *ECR* I-11573. Out of many others one can certainly mention, e.g., the recent Lugano Convention case (*see infra* n. 56).

national parliaments under the Lisbon Treaty.[38] On the other hand, one could hardly expect the Court to seriously question the whole system on which the EU is founded, when much more powerful courts in Europe did not make such an open challenge. Nevertheless, the Court sent a clear message that, albeit only as an *ultima ratio*, it is ready to serve as an arbiter over the question whether the EU exceeds its competences or not.

Second point of Senate's petition – flexibility clause (paras. 142-155)

The Senate challenged the constitutionality of the flexibility clause enshrined in the new Article 352 of the Treaty on the Functioning of the EU on the grounds that it is a blanket norm enabling the adoption of measures beyond the Union competences, i.e., beyond the scope of powers transferred under Article 10a of the Constitution.

The Court refused such a contention. It emphasised that the measures adopted under the flexibility clause are limited to the objectives defined in Article 3 of the Treaty on EU, which thus according to the Court provides a sufficient guide for determining the limits of conferred competences that the Union bodies may not exceed. Moreover, the third and fourth paragraphs of Article 352 expressly narrow the field in which it can be applied. In addition, the Court agreed with the Government's brief that the Declarations No. 41 and 42 further narrow the possibility for an expansive application of the clause.[39] The Court admitted that the declarations are not legally binding but that they nevertheless 'can serve as an important interpretational aid in interpreting the relevant provisions.'[40] The Court further referred to the Court of Justice's settled case-law on current Article 308 of EC, whereby it observed with approval that its use is limited to exceptional cases. The limiting role of subsidiarity principle and the strengthened role of national parliaments were other reasons which led the Court to conclude that

[38] There are some who see the role of national parliaments under the Lisbon Treaty as mere 'window dressing'. Of course, not everybody is as critical as is, e.g., the Global Vision report, available at <http://www.global-vision.net/files/downloads/download396.pdf>.

[39] Those declarations are attached to the Final Act of the Intergovernmental Conference which adopted the Treaty. The first one makes it clear that the reference to 'the Union's objectives' concerns the objectives in Art. 3 para. 2 and 3 of the Treaty on European Union and the objectives in Art. 3 para. 5 of that treaty related to external action on the basis of Part Five of the Treaty on the Functioning of the European Union. It is thus excluded that an action based on the flexibility clause would only pursue objectives set out in Art. 3(1) of the TEU. The second one primarily stresses that Art. 352 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaties without following the procedure which they provide for that purpose.

[40] Para. 149 of the Judgment.

> the flexibility clause cannot serve as a means for amending the Treaty on the Functioning of the EU [and] thus it will not be possible to circumvent Art. 10a of the Constitution of the Czech Republic through this clause […] [T]he Constitutional Court considers the institutional framework for review of conferred competences [with regard to the flexibility clause] to be adequate […] however, it emphasises again that application of this article can be considered quite exceptional.[41]

Coming back to the Court's criteria for reviewing the constitutionality of transfers of competences we may see that in the Court's view the transfer of power contained in the flexibility clause is neither unlimited nor unreviewable. However, the Court did not explicitly address the issue of *specificity* which is certainly the most problematic as far as the flexibility clause is concerned. As there is no reason why the Court should drop this requirement when considering this clause, we must assume that this question was addressed implicitly, and that the Court treats this criterion quite cursorily and under lenient standards. This observation is confirmed by the Court's treatment of other issues, with which we will deal below.

Third point of Senate's petition – provisions on simplified revision procedure (paras. 156-175)

The Senate also questioned the constitutionality of Article 48(6) and (7) of the Treaty on the European Union, which enables revision of the Treaty of the Functioning of the European Union by way of simplified procedures; these revisions may, *inter alia*, concern the change from unanimity to majority voting in the Council. The Senate claimed that these procedures amount to a transfer of powers under Article 10a of the Constitution by way of an 'executive act', i.e., in absence of the presence of a ratifiable international treaty or the active consent of the Parliament of the Czech Republic. It added that the eventual loss of veto rights would also limit the importance of the parliamentary mandate given to the government to make a decision.

The Court got away with this claim very easily. One is inclined to say too easily. As regards Article 48(6), the Court simply relied on the explicit wording of its third subparagraph which rules out any changes that would increase the competences conferred on the Union in the Treaties. According to the Court, this provision 'expressly eliminates any doubt in relation to Article 10a of the Constitution of the Czech Republic.'[42] Even less of the Court's attention was devoted to Article 48(7). Nothing is more self-explanatory than the exact, laconic words by which the Court dismissed the Senate's objection:

[41] Para. 152 of the Judgment.
[42] Para. 160 of the Judgment.

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> As regards this paragraph, conceptually we cannot even think about changes expanding the Union's competences, because it concerns – as is obvious – only voting.[43]

The Court further noted that the decisions adopted under both provisions are 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 (which amend a formally declassified norm).' Whilst this certainly is an interesting observation from a theoretical viewpoint,[44] one wonders how the conclusion that the provisions which might be changed by this procedure are of less legal force than 'ordinary' primary law informs the question whether their change amounts to a transfer of competence or not.

To sum up, the Court said that the decisions under simplified revision procedures do not amount to a transfer of competences under Article 10a of the Constitution and at the same time they cannot be deemed to amend the Treaties. At the same time, however, it called upon the Czech Government to adopt internal provisions to ensure not only the proper involvement of the Czech Parliament in the simplified revision procedures, but also, at least in respect of Article 48(6), the power of the Court to review the constitutionality of such a simplified revision decision(!). One must ask why this is necessary when no transfer of powers is at stake. The Court's reply might easily make readers doubt their own soundness of mind, as the Court said that

> a decision under [Art. 48 para. 6] also changes the substantive provisions of the Treaties [and thus] it is also necessary to permit review of that change in terms of provisions of the constitutional order of the Czech Republic by the Constitutional Court, so that the limits of transfer of powers under Article 10a of the Constitution will be observed.[45]

How is it possible to reconcile these contradictory statements?

This part of the judgment might count as (one of) the weakest of the judgment. Yet the contradiction just mentioned is not the main reason for the critique. That is the way the Court arrived at the conclusion that respective provisions do not anyhow deal with the transfer of powers/competences as understood by the

[43] Para. 161 of the Judgment.

[44] In probably the first comment of the decision, Zdeněk Kühn suggested on Czech legal blog Jiné právo [Other Law] that the Court had drawn its inspiration in Otto Pfersman's article, 'The New Revision of the Old Constitution', 3/2 *International Journal of Constitutional Law* (2005) p. 383. *See* <http://jinepravo.blogspot.com/2008/12/kauza-lisabonsk-smlouvy-iii-pravomoci.html>.

[45] Para. 167 of the Judgment.

Czech Constitution. In fact it all rests on a bold assumption that the notion power/competence has the very same meaning in the Constitution as in the Lisbon Treaty. Both the Czech Constitution and the official Czech translation of the Lisbon Treaty use the term 'pravomoc'[46] which might mean both power and/or competence depending on the context and above all on the very meaning a given legal system attributes to those notions which is not always the same. After all, the notion 'pravomoc' used in Article 10a of the Constitution had itself raised the questions in Czech academia as to its exact meaning.[47] Yet the Court automatically accepted that the concepts of power/competence in the Constitution and in the Treaty have the same meaning, despite the fact they are used in different contexts, in different laws, stemming from different legal systems. The worst thing is that the Court literally took it for granted that there is no difference, without giving a single reason for such a conclusion. However, it takes a lot of imagination to assume that, e.g., a loss of veto power (i.e., the right of last word over one's fate) does not amount to a *transfer of sovereign power* (or a part thereof) which is what Article 10a of the Czech Constitution is all about.

This is not to say that the Court's affirmative conclusion on constitutionality of said provisions is necessarily a wrong one. However, there were much better ways to reach the same result without having to resort to unpersuasive and even contradictory statements. It could, for instance, be argued that the Czech Republic is giving up its veto power already at the moment of ratification of the Treaty on condition that it takes effect only when the respective decision envisaged by Article 48(7) is adopted.

Fourth point of Senate's petition – conclusion of international agreements in the exclusive competence of the EU (paras. 176-186)

The target of the Senate's challenge was Article 216 of the Treaty on the Functioning of the European Union, which allegedly expanded the Union's powers to conclude international agreements. As the agreements are binding upon the EU and its member states, and (sometimes) are concluded by a decision by qualified majority in the Council, the Czech Republic might disagree with a particular international agreement and yet be bound by it. As in those situations, the usual ratification process envisaged by the Constitution for adoption of international

[46] On the other hand this term is translated as 'power' in the English version of the Constitution which in my opinion is with regard to the context a more suitable translation than 'competence'.

[47] *See* Jan Kysela, 'K dalším důsledkům přijetí tzv. euronovely Ústavy ČR'[On other consequences of the adoption of Euroamendment of the CZ Constitution], *Právní rozhledy* [Legal Perspectives] no. 11 (2002) p. 525, p. 529-530.

agreements is not used, the Senate questioned the constitutionality of this EU power.

It was not very difficult to dismiss this charge. The Court pointed out that according to Article 216 'the Union, as part of its competences simply concludes international treaties', probably implying that the Union may only do so where competences to this end have been transferred to the EU. Therefore the Czech constitutional provisions on ratification of international agreements cannot be used as they are effective only *vis-à-vis* agreements over which the Czech Republic has retained its competence.[49]

It seems that the Senate did not, at least directly, raise the question of whether the transfer of powers under Article 216 of the Treaty meets all the criteria following from Article 10a of the Constitution. It was, however, the President who in this respect strongly attacked, though only during the oral hearing,[50] that part of Article 216 which tries to embrace the so-called *AETR* doctrine[51] dealing with implied external competences.[52] The Court approached the issue but in a rather convoluted manner. It first stated that Article 216 cannot be interpreted as a provision extending the competences of the Union. However, in a long bracketed text[53] the Court expressly said that 'it is already clear that the EU can exercise more powers externally than it has internally' and it added rather mysteriously that

> In this regard – in the event of a more rigorous review – this would involve evaluation of the criterion of delimitation of competences entrusted to the EU in the area of external relationships and review of the exercise thereof.[54]

I wholeheartedly agree[55] with the Court that especially after the Court of Justice's Lugano Convention opinion,[56] the EU external competences within the AETR

[49] At least this is what I believe the rather convoluted language of para. 182 tries to say.

[50] The English version of President's speech is available at <http://www.klaus.cz/klaus2/asp/clanek.asp?id=KY4TNSxgCTkC>.

[51] *See* case 22/70 *Commission* v. *Council* [1971] *ECR* 263.

[52] The critical 'AETR' passage of Art. 216 reads: 'The Union may conclude an agreement with one or more third countries or international organisations where […] the conclusion of an agreement […] is likely to affect common rules or alter their scope.'

[53] It is not clear at all what the use of bracketed text suggests, as this way of expression is not a usual practice of the Court. One can only guess that the Court wanted to emphasize that those statements are *obiter dicta*, not directly relevant for its conclusion(s).

[54] Para. 183 of the Judgment (emphasis added).

[55] After all, it was a reference to my article (Evropský soudní dvůr: Posudek k nové Luganské úmluvě značně posiluje vnější pravomoci Společenství [The European Court of Justice: The Opinion on the New Lugano Convention Considerably Strengthens the Community's External Powers], *Právní rozhledy* [Legal Perspectives] no. 10 (2006) p. 385-390, p. 389) on which the Court supported its conclusion.

[56] Opinion 1/03 (Lugano Convention) [2006] *ECR* 1-1145.

doctrine reach well beyond the scope of the internal competences, despite the fact that the former should be derived from the latter. I also agree that it would be more than interesting to see whether a broad AETR competence could withstand all the criteria for transfer under the Article 10a in conformity with the constitution. In this respect, it is especially the criterion of specificity (*delimitation* in Court's words) that in my opinion could be hardly satisfied by a competence that is established every time an international agreement 'is likely to affect common rules or alter their scope'. This view is even stronger when one looks at the Court of Justice's expansive interpretation of this requirement, of which the *Lugano* case is a prominent example.

However, the Court's reference to 'the event of a more rigorous review' seems to show that the Court did not want to conduct such review in the present matter. The reason might be that the Senate did not raise this issue directly and the Court deliberately left this problem for possible future challenge by other actors, although the President, as noted above, raised this question during the oral hearing. However, this explanation is possibly undermined by a later paragraph in which the Court made Article 216 as a whole (i.e., not only the 'AETR part') subject to the review on grounds of its 'vagueness'.[57] The Court stressed that the ambiguous, 'vague' and 'difficult to predict' wording of Article 216 does not fit well especially with the requirement of *recognisability* (which was referred to in para. 135 as a part of *delimitation* or specificity criterion). However, even though the Court stressed that an international treaty must meet the fundamental elements of precision, definiteness and predictability of law, Article 216 of the Treaty

> […] did not go so far that the Constitutional Court could and should declare [it] inconsistent with the constitutional order of the Czech Republic. [58]

Did this single paragraph amount to a 'more rigorous review' of the competence transfer which the Court seemed earlier to be determined to avoid? Or was it a separate review based only on the ground of general requirement of clarity and predictability of law that did not pre-empt a possible 'more rigorous review' of competence transfer in the future? The only way to find out is for other entitled petitioners to try a new challenge and see what happens.

Fifth point of Senate's petition – Charter of rights (paras. 187-204)

The Senate asked the Court what the constitutional consequences are of the incorporation of the Charter of fundamental rights of the Union, especially with

[57] It is interesting that the Court did so after having concluded in the preceding paragraph that Article 216 is consistent with the Czech constitutional order.

[58] Para. 186 of the Judgment.

respect to the jurisdiction of the Strasbourg Court and to the standard of domestic human rights protection in the Czech Charter of Fundamental Rights and Freedoms.

The Court first noted that the Charter would become an integral part of the Treaties and stressed that it would be used only when Union law was to be applied, which corresponds to the current practice of the Court of Justice. According to the Court, the constitutionality of the Charter had to be assessed at two levels of protection, a formal one and a substantive one. The formal one relates to the EU commitment to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. In this regard the Court said that

> [i]n terms of the standard of protection based on the constitutional order of the Czech Republic [the inclusion of] the European Court of Human Rights in the institutional framework for protection of human rights and fundamental freedoms in the European Union is a step which only strengthens the mutual conformity of these systems.[59]

Also as regards the substantive level of protection, the Court easily found the Charter compatible with the Czech Constitution. It relied in this respect on Article 52(3) and (4) and particularly Article 53 of the Charter, which states that

> Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions.

The Court then reiterated its conclusion in the *Sugar Quotas* case that if the standard of human rights protection in the European Union were to become inadequate, the authorities of the Czech Republic would have to take back the transferred powers in order to ensure that the protection of the fundamental core of the Constitution was observed. However, the Court then noted that at an abstract level it is difficult to assess whether individual rights and freedoms ensured by the EU Charter are in line with those protected by the Czech constitutional order. With this reservation, the Court observed that generally it could say that

> the content of the catalogue of human rights expressed in the EU Charter is fully comparable with the content protected in the Czech Republic on the basis of the Czech Charter of Fundamental Rights and Freedoms, as well as the Convention for the Protection of Human Rights and Fundamental Freedoms.

[59] Para. 193 of the Judgment.

> [The] EU Charter is in harmony not only with the material core of the Constitution, but also with all provisions of the constitutional order.[60]

Moreover, referring to the opinion expressed by the Strasbourg Court in the *Bosphorus* case,[61] the Court considered the European institutional guarantee of the standard of protection of human rights to be compatible with the standard ensured on the basis of the constitutional order of the Czech Republic. It added, in agreement with the Government, that

> even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of Member States would not be in principle placed in a hierarchy in any way; it should continue to be a dialogue of equal partners, who will respect and supplement each other, not compete with each other.[62]

The Court further dismissed out of hand the President's objection that the Charter made sense only if the Union saw itself as a federal state. The Court simply referred to the Council of Europe, whose European Convention certainly does not transform this organisation into a federal state.

Sixth point of Senate's petition – Suspension of member state rights (paras. 205-210)

The Senate also took issue with Article 7 of the EU Treaty which foresees a possibility for the Council to suspend certain rights of a member state, including voting rights in the Council, in case a serious and persistent breach by that member state of the values referred to in Article 2 of the EU Treaty is established by the European Council. The Senate wondered about the interpretation of the values in Article 2 and the eventual political pressure which could be imposed on the Czech Republic under Article 7.

The Court disposed of this issue speedily. It stated that the values protected by Article 2 are the most important rules and principles, largely of a natural law origin, whose protection is the most central to a State which has committed itself to democracy and the rule of law. These values are fundamentally in harmony with those on which the fundamental core of the Czech Republic's constitutional order is built. Therefore if the Czech Republic breached these values,

[60] Para. 197 of the Judgment.

[61] *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi* v. *Ireland* [GC], No. 45036/98, judgment of 30 June 2005, ECHR 2005-VI.

[62] Para. 197 of the Judgment. One may see this pronouncement as a prime example of European constitutional pluralism.

> such a breach would at same time amount to breach of the values on which the materially understood constitutionality of the Czech Republic rests; the Constitutional Court itself, as well as domestic courts within their jurisdiction, would, in the first place, have to provide the maximum possible protection.

[And]

> in a modern, democratic, rule-of-law-based state, state sovereignty is not an aim in and of itself, in isolation, but is a means to fulfilling the abovementioned fundamental values […][63]

The Court concluded that

> [i]f the Czech Republic observes its own constitutional order, suspension of the rights arising from its membership in the EU does not come into consideration.[64]

It is interesting that the Court did not deal with a possible objection that the Council is a political body which could use an alleged breach of Article 2 as a pretext for a political pressure against an 'unruly' member state, while this member state cannot have the Council decision reviewed by the Court of Justice, as the Court's jurisdiction is limited to procedural matters.[65] However improbable that might be, at least in theory it is possible that the opinion of the Council finding the breach will differ from that of the Czech Constitutional Court, in which case there will be no independent body to which the Czech Republic may appeal under Union law. In this hypothetical situation, the statement made by the Court in the penultimate paragraph of the judgment would probably apply:

> [t]he Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by the Union institutions or European law. […] [I]f the European authorities interpreted or developed the EU law in a manner that would jeopardise [the fundamental core of the Constitution], such legal acts could not be binding in the Czech Republic.[66]

[63] Para. 209.

[64] Ibid.

[65] Art. 269 of the Treaty on Functioning of the EU reads: 'The Court of Justice shall have jurisdiction to decide on the legality of an act adopted by the European Council or by the Council pursuant to Article 7 of the Treaty on European Union solely at the request of the Member State concerned by a determination of the European Council or of the Council and in respect solely of the procedural stipulations contained in that Article.'

[66] Para. 216.

Conclusion

Ruling on the Lisbon Treaty has certainly been one of the most difficult tasks the Court has had to face in its fifteen years history. It was the first time the *ex ante* review procedure was used, and the fate of a Treaty seen by many in Europe as extraordinarily important was at stake. The Court solved a couple of important preliminary issues and was able to address all the Senate's claims in considerable detail, albeit with a different level of persuasiveness. The occasional lack of persuasiveness and a few contradictory statements makes the judgment less transparent, understandable and open to (re)interpretation in the future. On the other hand, the Court was hospitable to foreign sources; in particular, it drew a strong and explicit inspiration from judgments of the German Federal Constitutional Court. Similarly to it, it sent a clear message to Luxembourg that it remains a final guardian of the Constitution, not inferior to the ECJ but an equal partner to be respected and taken seriously.

Nevertheless, first and foremost the Court showed its very pro-European character. On a couple of occasions in the judgment it stresses the common European values as well as the necessity of close co-operation and further integration.[67] The reasoning demonstrates a visible effort to find the Treaty compatible with the Constitution almost at all costs. Therefore, even though the Court basically left open the possibility to challenge as yet uncontested provisions and to fashion new arguments, one has to realistically admit that there is neither the will nor the force within the Court to render the Treaty ineffective. However, even though the Lisbon Treaty overcame one significant hurdle, with the Czech Eurosceptic President the only certainty one may have is that in this country, the Lisbon saga will continue.

[67] The Court pertinently expressed its position when it said in the penultimate paragraph that it 'clearly subscribed to the idea of European responsibility and solidarity'.

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