Does the Czech Constitution need a new EU Amendment Bill?

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Summary: Even under circumstances when no changes to Founding Treaties have occurred, adaptation of national constitutional provisions make sense. Not only amendments to organic laws like Constitutional Court Act or Standing Rules of both parliamentary chambers evolving from practice, but the system of delegation of powers involved in the Czech Constitution can be amended after the recent principal judgements of Constitutional Court relating to the European Union have been delivered. On one hand, the supremacy of the Czech Constitution – as the Polish Constitution (article 8/1) already acknowledges – could be confirmed in this way, and the existing (but still not formally upheld) practice of formal requirements for the future changes of Founding Treaties according to the article 10a of the Czech Constitution should be constitutionally corroborated too.

1. Introduction

The nature of the European Union as a "close community of states"[1], which cannot be classified as a federal-type entity because of its internationally-contractual basis, while at the same time, in terms of the principle of supra-nationality, it has grown beyond the definition of a simple international organisation, from time to time causes us to wonder whether it is not time to consider revising the current "European" provisions of the Czech Constitution. We recall that the necessary foundations for the Czech Republic's membership of the European Union were laid down by the so-called "Euro-revision" of the Czech

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[1] The German Federal Constitutional Court consequently uses the term *Staatenverbund* to distinguish the nature of the European Union from a simple association of states (*Staatenbund*), without at the same time expanding the community into the form of a federal state (*Bundesstaat*). For more see ruling BVerfGE 89,155 on the Maastricht case.

Constitution more than ten years ago.[2] Since that time, not only has the Czech Republic acceded to the EU, but also – after an unsuccessful attempt to agree on a Treaty establishing a Constitution for Europe – revisions to the existing founding treaties were adopted in the form of the Lisbon Treaty.

The Member State experience with the functioning of decision-making mechanisms and the newly configured settings of the Union's institutional machinery represent clear factors justifying discussions on possible changes to the European provisions in the Czech Constitution. Such a revision would, however, not only reflect on development at the Union level, but also take into account the Czech Constitutional Court's case law, whose decisions on issues concerning sugar quotas, the European arrest warrant and the Lisbon Treaty pave the way for a more precise definition of the relationship between the national legislation (or constitutional order) and EU law.

2. Contractual Basis of EU Revisited?

In terms of the criteria we first mentioned, in other words changes to the contractual foundation of the Community, there is currently no apparent demand for reformulation of the Czech Constitutional provisions. The first reason might be the relatively general formulation of the relevant provisions in the Constitution. Another reason, however, is obviously the fact that the practical effect of the Lisbon Treaty has not triggered, in terms of constitutional foundations of the Member States, any fundamental move towards EU as quasi-federal state. Moreover, within the context of the economic crisis, post-Lisbon developments have highlighted the problematic nature of such predictions.

A revision of primary law also represents such a complex step that, with the exception of a few incremental changes, partly realised through the so-called simplified revision procedure, we are more likely to encounter the truly significant changes in the European integration process within recent negotiations of international agreements outside the framework of EU law. Both the Treaty establishing the European Stability Mechanism (hereinafter referred to as the ESM Treaty), and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (hereinafter referred to as the Fiscal Compact) were negotiated as separate instruments on the level of international

[2] Constitutional Act No. 395/2001 Coll. of 18 October 2001. A comparison of Czech legislation with that of other new Member States was outlined by Mlsna, P., *Reflexe komunitárního práva v ústavách středoevropských států*, Časopis pro právní vědu a praxi 1/2008, p. 22–30.

contractual capacity of the individual Member States[3], and in a form which, according to some opinions, may even cast doubt on compliance of these steps with applicable primary law. These doubts also had to be dealt with by the Court of Justice of the EU within the scope of the preliminary ruling procedure.[4] Other proceedings attracting attention in this particular respect include proceedings before the German Federal Constitutional Court which addressed (with a similar result to the Court of Justice of the EU) the question of whether certain agreements were compatible with the Basic Law[5]. In this situation, resulting from certain revival of intergovernmental decision-making methods outside the legal framework of EU, it is the return of the Member States into the role of leading players in the integration process that tends to be commented on[6], while the need to overhaul the constitutional basis required for the full participation of the Czech Republic in the Union integration project from the viewpoint of the current form of the Union's Founding Treaties is not the issue of the day.

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[3] For this reason we will leave aside the issue of the so-called financial constitutional amendment, whose adoption by the Czech Republic, which is not even a party to the Fiscal Compact, is not directly linked to the obligations of this contract.

[4] Compare the ruling on the Pringle case (C-370/12) from 27 November 2012, in which the EU Court of Justice held that "Article 4 para. 3 of the TEU, Article 13 of the TEU, or Art. 2 para. 3 of the TFEU, Art. 3 para. 1 (c) and para. 2 of the TFEU, Articles 119 to 123 of the TFEU, Articles 125 to 127 of the TFEU or the general principle of effective judicial protection do not prevent Member States whose currency is the Euro from concluding amongst themselves an agreement such as the Treaty establishing the European Stability Mechanism between the Kingdom of Belgium, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Republic of Greece, the Kingdom of Spain, the Republic of France, the Republic of Italy, the Republic of Cyprus, the Grand Duchy of Luxembourg, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Portugal, the Republic of Slovenia, the Republic of Slovakia and the Republic of Finland, concluded in Brussels on 2 February 2012, nor the ratification of this agreement by these Member States."

[5] The ruling by the German Federal Constitutional Court on 12 September 2012 (2 BvR 1390/12) confirmed that Germany may not continue in relation to the financial commitments arising from the Treaty on ESM without the permission of the German side. It also underlined the importance of the government's reporting obligations to the Bundestag and the Bundesrat.

[6] On this phenomenon, see for example Belling, V., *Finanční krize a návrat suveréna: Několik myšlenek ke státoprávnímu kontextu Fiskálního paktu*, AUC – Iuridica 1/2012, pp. 7–21. Certainly an interesting assessment of the position of the Czech Republic and the United Kingdom, which have not yet joined the Fiscal Compact (although this option remains open under Article 15 of the Fiscal Compact), is given by Frank Schorkopf, when in the given context he refers to both countries as "kerneuropäische Mitgliedstaaten mit einem selbstbewussten Eigensinn für politische Freiheit." At the same time he claims that British resistance to amending agreements was not sufficient reason for failing to respect different opinions and finding an intergovernmental solution outside the agreement. For more see Schorkopf, F., *Europas politische Verfasstheit im Lichte des Fiskalvertrages*, Zeitschrift für Staats- und Europawissenschaften 1/2012, pp. 1–29, here p. 20.

3. Case Law of the Czech Constitutional Court as the Pivotal Factor

If we take the case law of the Constitutional Court of the Czech Republic, which in the context of specific submissions formulates the doctrinal relationship between constitutional order of the Czech Republic and the European legislation, both primary and secondary, as the face value for these considerations, we should not outright reject that there is a certain justification for argument there exists a need for amendments to the constitutional text. It is certainly not this paper's purpose to discuss in detail various EU findings of the Czech Constitutional Court.[7] However, in this context, it is worth mentioning that the Constitutional Court has gradually embraced some of the fundamental features formulated by the German Federal Constitutional Court[8] in relation to European law and its effect on the national legal system, while obviously adapting these to the reality of the Czech Constitution, taking into account the fact that, unlike the Federal Republic of Germany, the relationship between national and international law in the Czech Republic is not dualistic in nature.

This convergence has obviously been gradual. In its decision on *Sugar Quotas*, the Constitutional Court ruled that the "general principles of Community law (…) radiate through its interpretation to constitutional law"[9] and stated, somewhat inaccurately, that through accession to the European Union, the Czech Republic had "transferred some portions of its state sovereignty" to this international organisation. Additionally, it opened the door to the European law influence on the constitutional order of the Czech Republic even wider by leaning toward the thesis that Article 10a (and not Article 10) of the Czech Constitution "opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic."[10]

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[7] An overview of these rulings is provided by Naděžda Šišková in *Evropské a české právo, jejich vzájemný poměr v judikatuře Ústavního soudu*, Praha: Linde 2010.

[8] More details in the volume edited by Kust, J. (ed.), *Evropská inspirace z Karlsruhe*, Praha: OEZ 2009.

[9] Pl. CC 50/04 of 8 March 2006

[10] This standpoint was defended by Kühn, Z., Kysela, J., *Na základě čeho bude působit komunitární právo v českém právním řádu?* Právní rozhledy 1/2004, pp. 23–27, and Kühn, Z., *Ještě jednou k ústavnímu základu působení komunitárního práva v českém právním řádu*, Právní rozhledy 10/2004, pp. 395–397. The opposite view was consistently defended by Jiří Malenovský in his papers *Mezinárodní smlouvy podle čl. 10a Ústavy ČR*, Právník 9/2003, pp. 841–849, or *Ve věci ústavního základu působení komunitárního práva uvnitř ČR nebylo řečeno poslední slovo*, Právní rozhledy 6/2004, pp. 227–229. Details on this debate and the possible consequences of the solution chosen are given in the monography by Bobek, M., Bříza, P., Komárek, J., *Vnitrostátní aplikace práva Evropské unie*, Praha: C.H.Beck 2011, p. 436nn.

However, as Jiří Zemánek quite aptly notes, in its *obiter dictum* the Constitutional Court failed to properly address the counterargument "in any adequate way when it did not address the issue of mutual relations between the two provisions (Art. 10a as a *lex specialis* to Art. 10?)."[11] Nevertheless, the Court realised what far-reaching effects this type of statement might have in times when the influence of European law is intensifying and its volume growing – even promoting European law provisions to the level of constitutional norms – as well as its serious consequences, and dismissed these in its subsequent decisions.

The Constitutional Court rejected the doctrine of the absolute primacy of European law already in its ruling on *Sugar Quotas*, and upheld the position of the Czech Republic as the "original bearer of sovereignty", who "conditionally bestows" certain of its sovereign powers solely for purposes of their joint execution at Union level. In this ruling, the Court also provided some guidance for the reviews of the EU secondary law or other measures derived from the authority of primary law. The exercise of the conferred powers must be compatible "with the preservation of the foundations of state sovereignty" and shall not threaten "the very essence of the substantive law-based state". By default, the Constitutional Court thus claimed the doctrine of *Solange* II as its own.

The decision concerning the *European Arrest Warrant* is also crucially important. Here, in one respect, the Court inferred the obligation to ensure that interpretation of national legislation conforms to the European law, in order that – if such an interpretation is possible – no conflict of legal systems arises. At the same time however, it adopted a position, following onto potential doubt that might arise from debates on the operation of EU law within the national legal framework, from which it is possible, within the scope of the powers conferred, to infer the primacy of European standards over national law, and therefore the establishment of the EU bodies' powers through the relevant international treaty, but does not conclude that the transfer of powers in itself surpasses the conflicting provisions in the constitutional order.[12]

The opposite conclusion, which could be formulated in response to the requirement of qualified (constitutional) majority needed for the adoption of amendments to primary law, would mean that all (and often very technical) provisions of the Founding Treaties can technically rise to the level of constitutional norms. Moreover, in terms of content – in case of reducing the terms of reference to the "material core" of the Constitution – there would no longer

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[11] Zemánek, J., *Otevření ústavního pořádku komunitárnímu právu potvrzeno, nikoli však nekontrolovatelné*, Jurisprudence 5/2006, pp. 47–51, here p. 50.

[12] Compare however the criticism of this approach in the papers by J. Kysela and R. Král in the collection by Gerloch, A., Wintr, J. (eds.), *Lisabonská smlouva a ústavní pořádek ČR*, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk 2009.

be any reason in reviewing the conformity of international treaties with the national constitutional order, if such review should result in remedying potential inconsistencies pursuant to Article 89 paragraph 3 of the Czech Constitution. The Constitutional Court therefore logically deduced the exclusive authority of the national legislator to revise the text of the Constitution, in order to assure that a planned and intended commitment, which may directly conflict with the constitutional order, could be remedied (compare points 78 and 82 of the reasoning for the judgment referred to above).[13]

Referring to the Constitutional Court's decision on the *European Arrest Warrant* the Court did not revoke (unlike the German[14] or Polish Constitutional Courts[15]) the implementing measures and gave priority to the European-conforming interpretation of the Charter of Fundamental Rights and Freedoms' respective provisions over the option to adopt some form of explicit change to its Article 14(4), however on the other hand, it did indeed confirm that "national sovereignty … continues to prevail even within the EU." It also rejected the doctrine of the absolute primacy of the European law (although here, in the opinion of the dissenting judge, Eliška Wagnerová, it had failed to take sufficient account of the fact that a framework decision constitutes an act that falls under the third pillar of the European law, where, although the Member States commit themselves to loyal cooperation, their powers remain intact).

According to Ulrich Hufeld of Helmut Schmidt University Hamburg, it was therefore possible to conclude on the basis of the Constitutional Court rulings above, that – in conditions existing in the Czech Republic – the reservation of national sovereignty in relation to the European law has three basic components: a reservation of hierarchy (international agreements prevail over national law, but not over the Constitution), a reservation of quantity (only certain powers can be transferred from Czech authorities) and a reservation of scrutiny (the Constitutional Court has the power to review whether an act of EU law has been passed *ultra vires*, and a reserve power, stemming from the spirit of the *Solange* I and II doctrines, to review whether the protection of fundamental rights conforms to the standards guaranteed to its citizens by the constitutional order of the Czech Republic).[16]

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[13] Also compare the arguments in Pl. CC 66/04 of 3 May 2006, where the Constitutional Court admits that France, Latvia and Slovenia made direct amendments to the text of their constitutions in connection with the adoption of the European Arrest Warrant.

[14] Ruling by the German Federal Constitutional Court BVerfGE 113, 273 of 18 July 2005.

[15] Ruling by the Polish Constitutional Tribunal P 1/05 of 27 April 2005.

[16] Hufeld, U., *Staatliches Europaverfassungsrecht in Tschechien. Die Grundlagen und der Richterspruch zum Europäischen Haftbefehl*, Jahrbuch für Ostrecht 48/2007, pp. 263–278, Czech translation by Jan Grinc published in the Časopis pro právní vědu a praxi 4/2008.

Some of the open issues were also addressed or clarified by the Czech Constitutional Court in its *Lisbon* ruling. The Court had confirmed the reservation of hierarchy in ruling that the reference framework for reviews is constituted by the constitutional order as a whole, and not simply by the "material core" of the Constitution[17], whose expression in the applicable constitutional law of the Czech Republic still remains, even in comparison with the so-called "eternity clause" of German Basic Law, in the shadow of the doctrinal interpretation of the meaning of Article 9(2) of the Czech Constitution. Simultaneously, the Constitutional Court also explicitly confirmed the reservation of scrutiny in the spirit of the *Maastricht* and *Solange* doctrines, without closing the door on potential future review of methods of interpretation of the Lisbon Treaty provisions. On the other hand – in contrast to the Federal Constitutional Court in its *Lisbon* ruling[18] – it did not address the requirement to specify the material boundaries of the transfer of powers (reservation of quantity), nor did it establish procedural conditions for the use of the so-called evolutive (dynamic, self-amending) clauses of the Founding Treaties, which, unless the related national provisions were adopted, could not be used without casting doubt on the maintenance of the original competence of competences power of the Czech Republic, or without the risk of exceeding the framework set for the powers that can be transferred in accordance with Article 10a of the Constitution of the Czech Republic[19].

The second of the aforementioned "deficiencies" was nonetheless – and we will return to this later on – remedied by the activity of the parliamentary chambers, particularly the Senate, who instigated it, where a change in the Rules of Procedure of both parliamentary chambers was adopted in relation to the ratification of the Lisbon Treaty. This amendment also introduced the concept of the binding mandate into the Czech legislation, or to put it another way, a compensation clause, which, in relation to the significant expansion of the so-called "evolutive (self-amending) provisions" in the Lisbon Treaty, made any future changes occurring at the jurisdictional boundaries of the EU competences subject to prior approval by both parliamentary chambers. This offset the related weakening of the international-legal capacity of the Czech legislature, which would otherwise have to take place due to the absence of ratification procedures in cases of simplified amendments to the Founding Treaties.[20]

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[17] Compare points 84 and 85 of the Lisbon ruling (Pl. CC 19/08 of 26 November 2008).

[18] Points 252–260 of the Lisbon ruling by the German Federal Constitutional Court of 30 June 2009 (2 BvE 2/08).

[19] Compare points 153 and 165–167 of the ruling by the Pl. CC 19/08.

[20] This amendment to the Rules of Procedure of both chambers was adopted as Act No. 162/2009 Coll. of 6 May 2009. On the concept of a compensatory clause see Kysela, J., *„Lisabonské"*

In the context of this discussion, one of the subsequent decisions of the Constitutional Court that should be recalled is the ruling on the issue of Czech-Slovak pension rights (*Landtová* case), in which the Constitutional Court applied the *Maastricht* doctrine of the German Federal Constitutional Court on contested legal acts in practice and set aside prior decisions by national courts in this case.[21] According to the Constitutional Court "We cannot do otherwise than state, regarding the effect of the European Court of Justice judgment of 22 June 2011, C-399/09 on similar matters, that in this case a European Union body acted in excess of the law, resulting in a situation where an act enacted by a European body overstepped the powers which the Czech Republic had transferred to the European Union by virtue of Article 10a of the Constitution; the act ignored the limits of the powers thereby delegated and was thus ultra vires."[22] Although Jan Komárek's criticism of the ruling by the Constitutional Court on this case was certainly exaggerated[23], the fact remains that the finding of the Constitutional Court in reaction to the *Landtová* case, which had been brought before the EU Court of Justice, was not accepted unequivocally, and that is also not surprising. Unlike in situations where implementing act is repealed, i.e. where the move is played out on "home turf" in relation to national rules, and which is not an entirely unusual phenomenon,[24] here the Constitutional Court intervened in another legal system, i.e. in Union law, thereby "committing" an interference, which is sometimes recognised in literature in cases where general legal principles are interpreted by the EU Court of Justice in relation to national legal

novely jednacích řádů obou komor Parlamentu ČR. In: Zemánek, J. (ed.), The Effect of the Treaty of Lisbon upon the Czech Legal Order, Praha: MUP 2009, pp. 50–68, here p. 65.

[21] Ruling of the Pl. CC 5/12 of 31.1.2012.

[22] As this was the first case where the doctrine of an ultra vires legal act was applied in practice, the ruling by the Constitutional Court also attracted attention outside the borders of the Czech Republic – compare the commentary by Robert Zbíral in Common Market Law Review 4/2012, pp. 1475–1492.

[23] Compare the paper by Komárek, J., *Playing with Matches: The Czech Constitutional Court's Ultra Vires Revolution*, published on the website Verfassungsblog in February 2012.

[24] We recall the rulings by the Polish Constitutional Tribunal and the German Federal Constitutional Court on the European Arrest Warrant cited above, or the rulings that not only the Czech (Pl. CC 24/10 of 22 March 2011) and Romanian Constitutional Courts, but also the German Federal Constitutional Court (1 BvR 256/08 of 2 March 2010) set aside the faulty implementation of the Directive on the retention of data generated in connection with telecommunications 2006/24/EC to comply with the requirements of their national constitutional order. At least in the case of Romania, we can assume that not only aspects relating to the implementation of the norm, but also the obligations arising from EU law were called into question. Also compare Durica, J., *Directive on the Retention of Data on Electronic Communication in the Rulings of the Constitutional Courts of EU Member States and Efforts for its Renewed Implementation*, The Lawyer Quarterly 2/2013, pp. 143–158.

rules[25], but which is not documented vice versa, i.e. in case of decisions of supreme national judicial institutions in relation to the European law. Nevertheless, in a similar way as the ruling of the Czech Constitutional Court on the Czech-Slovak pension rights case was criticised, the ruling of the Federal Constitutional Court on the *Honeywell* case, in which the German Constitutional Court did not apply the Maastricht doctrine (despite an expert opinion favouring such an approach that was far from being marginal[26]) to the decision of the EU Court of Justice in the *Mangold* case, could be criticised from opposite perspective. Moreover, the *Honeywell* ruling laid down new conditions which will hamper the future use of *Maastricht* doctrine[27]. The admonition that the Czech Constitutional Court did not attempt to find a compromise solution and did not cooperate through a dialogue with the EU Court of Justice is odd in our view as a judicial authority is not a body whose task is to seek out a (political) compromise. Such a role is played by the executive or the legislative branches, which would be able in these cases to find a solution that satisfies the requirements of both courts (the Constitutional Court and the EU Court of Justice) and, of course, also the persons entitled from the case itself.[28]

One aspect of the so-called Czech-Slovak pension rights case was also the issue of possible preliminary reference to the EU Court of Justice pursuant to Article 267 of the Treaty on the Functioning of the EU, i.e. an option where, before handing down a decision with such serious impact, the Constitutional Court would submit a request for a preliminary ruling, which would enable the Court of Justice to specify the conditions under which the grant of compensation for Slovak pensions (taking into account budget limits) would be acceptable under EU law. J. Komárek or M. Bobek would probably prefer this option[29], but on the other hand the Constitutional Court had – and for good reasons according to the author of this paper – rejected this possibility in its

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[25] Lastly, also compare the controversy over the interpretation of the term "scope of jurisdiction" in the Charter of Fundamental Rights of the EU in the ruling by the EU Court of Justice on the Akerberg Fransson case (C-617/10) on 26 February 2013.

[26] This type of approach was also favoured by Prof. Rudolf Streinz as co-author of the publication *„Mangold" als ausbrechender Rechtsakt*, München: Sellier 2009.

[27] Ruling by the German Federal Constitutional Court 2 BvR 2661/06 of 6 July 2010. Also the commentary by Payandeh, M., *Constitutional review of EU law after Honeywell: Contextualizing the relationship between the German Constitutional Court and the EU Court of Justice*, Common Market Law Review 48/2011, s. 9–38.

[28] The possibility of a constitutional solution to the situation regarding Czech-Slovak pension rights can be compared in Pítrová, L., *The Judgment of the Czech Constitutional Court in the Case „Slovak Pensions"*, The Lawyer Quarterly 2/2013, pp. 86–101.

[29] Compare Bobek, M., Komárek, J., Passer, J.M., Gillis, M., *Předběžná otázka v komunitárním právu*, Praha: Linde 2005, p. 221.

Pfizer ruling.[30] Certainly, in practical terms, the person who poses the question can obviously, in a certain sense, steer the answer, or prevent someone else asking it in a less fortunate manner, and that concern could constitute a rational enough reason for establishing such a practice. However, on the other hand, it is worth noting that, of the EU Member States that do have constitutional courts, only a minority of constitutional courts have taken a similar path.[31]

As the task of the Constitutional Court is to review constitutionality, the reference framework is constituted by the Czech constitutional order provisions. According to the Constitutional Court, "Community law is not a part of the constitutional order, and the Constitutional Court is therefore not in charge to interpret that law."[32] The right and sometimes also obligation to refer in certain cases for preliminary rulings to the EU Court of Justice still remains under conditions laid down in the primary law of the EU in general and administrative courts. However, given its specific function, a similar role cannot be attributed to the Constitutional Court, which should not accept to have its decision-making practices determined by the opinion of a judicial institution, which is not even specialised in cases involving alleged violations of fundamental rights and freedoms. If we focus on the judicial system of the Czech Republic, of the higher instances of the general and administrative judiciary, the Supreme Administrative Court is the one that is most involved in referring for preliminary rulings to the EU Court of Justice.[33]

4. Amending the Constitutional Court Act?

Before we attempt, in the light of previous decisions of the Constitutional Court specifying the relationship between the national and EU legal orders in

[30] Ruling by the II. CC 1009/08 of 8 January 2009.

[31] In addition to the Austrian and Belgian courts, this includes two courts from new Member States (Malta and Lithuania) as well as the Spanish and Italian constitutional courts – in the case of these last we can certainly talk of institutions whose decision-making practice in relation to European law has also been an inspiration for other Member States (e.g. the distinction between the primacy of European law in application and supremacy of national constitutional norms).

[32] In this context, I cannot help but note that any parallels between international treaties on human rights, whose standards were drawn in the constitutional order by the interpretative practice of the Czech Constitutional Court (compare ruling of the Pl. CC 36/01 of 25 June 2002, published as no. 403/2002 Coll.), and EU Founding Treaties ratified in accordance with the Article 10a of the Czech Constitution would be misleading and, given the differences between European and international law, difficult to defend.

[33] For an overview compare Chapter 4 of the publication by Malíř, J. et al., Česká republika v Evropské unii (2004–2009). Institucionální a právní aspekty členství, Praha – Plzeň: ÚSP AV ČR a Vydavatelství a nakladatelství Aleš Čeněk 2009.

terms of doctrine, to react to the question of whether a direct European amendment bill to the Czech Constitution is required, we should try to use the same perspective to look at – if we can afford to use such a term – key organic laws in force in the Czech Republic.[34] In this regard an issue arose, during the debate on Senate-based proposals to review the Lisbon Treaty before the Constitutional Court, as to whether such proceedings should be treated as adversary or non-adversary procedure, both with regard to differences between the parties with standing under Section 71a of Act No. 182/1993 Coll., on the Constitutional Court, who are competent to submit a petition for adjudging the conformity of a treaty with a constitutional act pursuant to Article 87 paragraph 2 of the Constitution and the whole range of consequences that this qualification would entail. The Constitutional Court has opted not to favour the thesis put forward by Professor Jan Filip, which viewed the given type of proceedings through the prism of an adversary procedure.[35]

It is clear from the ruling in the Lisbon Treaty case previously brought before the Constitutional Court that the legitimacy of the *de lege ferenda* argument advocating different standing of the parliamentary chamber prior to the ratification vote compared to the position of the outvoted senators, who may present completely different arguments in proceedings in the same category and on other petition-type actions, cannot be outright rejected. The parliamentary chamber is most likely filing the petition for review on the understanding that, were the Constitutional Court to confirm the constitutional conformity of the international treaty, euphemistically speaking, it is possible that it will subsequently approve the ratification of this treaty. At the same time, the President, who also negotiated the treaty, or who empowered the Government to conduct these negotiations, is, in the opinion of the Constitutional Court, required to ratify the treaty "without undue delay" unless it is found that it violates the constitutional order of the Czech Republic.[36] Practical doubts arose regarding whether it would be suitable to consider amending the relevant provisions

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[34] From the floor of the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedures a proposed amendment to the Czech Constitution in 2001 envisaged the incorporation of this notion into the Czech legislation while also expanding the number of provisions included in Article 40 of the Constitution.

[35] Compare the reaction of Filip, J., *Nález Ústavního soudu k Lisabonské smlouvě z pohledu ústavního práva*, Časopis pro právní vědu a praxi 4/2008, s. 305–315 and the text by Wintr, J., *První rozhodnutí Ústavního soudu o ústavnosti mezinárodní smlouvy*, Jurisprudence 1/2009, s. 21–31.

[36] Points 119 and 120 from ruling of the Pl. CC 29/09 of 3 November 2009. On other aspects see Kysela, J., Ondřejek, P., Ondřejková, J., *Proces vnitrostátního projednávání mezinárodních smluv v ČR*. 2. část. *Problémy stávající úpravy a praxe,* Časopis pro právní vědu a praxi 3/2010, pp. 224–238, and particularly p. 234nn.

contained in the Act on the Constitutional Court to ensure that, compared with the legislation applicable in other Member States[37], distinctions are made concerning the nature of the different standings of the different categories of petitioners in this type of procedure.

5. Amendment to the Parliamentary Rules of Procedure as the Building Stone for Future Constitutional Revison?

However, if we should identify the greatest doctrinal weaknesses of the Constitutional Court, in relation ot the previous proceedings brought before it concerning relationships between national legislation and EU law and the decisions handed down in these cases, it is the opinion of the author of this paper, that we would find these in terms of competences. However, the question marks here go even deeper, into the related issue of the sources of decision-making legitimacy in the EU. In contrast to many fashionable, but generally logically non-consequential theories of *dual legitimacy*, it can be reasonably assumed that the initial source of legitimacy for the actions of the public authorities on the territory of the Czech Republic is derived from the principle of the sovereignty of the people.[38] Parliament, or the people themselves in a referendum, may decide to transfer some powers to an international organisation. This relatively clearly defines the hierarchy of legal rules in the Czech Republic, regardless of the practical application of the primacy of European law. The text of the Constitution, which, just as the constitutions of other new Member States, was revised in the context of the country's accession to the European Union, only mentions transfer of certain powers,[39] and is therefore hardly compatible with the thesis of the devolution of a *part* of state sovereignty[40], which is in fact an act which is conceptually excluded.

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[37] Compare Kust, J., Pítrová, L., *„Lisabonská smlouva" a předběžná kontrola ústavnosti mezinárodních smluv*, Právník 5/2008, pp. 473–504.

[38] In detail and to date the most thorough treatment of these issues in the Czech literature can be found in Belling, V., *Legitimita moci v postmoderní době*, Brno: Masarykova univerzita 2009, s. 125nn.

[39] The Polish constitution speaks of the transfer of power in certain cases (Art. 90 para.1), the Slovak only mentions the "transfer of the execution of part of its rights" (Art. 7 para.2). For details also Mlsna, P., *Reflexe komunitárního práva*…, passim.

[40] Compare the already cited ruling of the Constitutional Court of the CR on sugar quotas, and also for details the so-called second Lisbon ruling (Pl. CC 29/09 of 3 November 2009) in point 147.

Obviously, such a conclusion would fail to find support in the text of the Constitution. Moreover, it does not correspond to how, for example, the German Federal Constitutional Court, whose decision-making practice is close to that of the Czech Constitutional Court in relation to EU law, approaches the concept of sovereignty. At least since the *Maastricht* ruling, the German Federal Constitutional Court has clearly distinguished the concept of *sovereignty* from the *transfer of sovereign powers*, based on the logically consequent idea of the exercise of political rights by the German people (voting rights), from which it derives the conclusion that it is not possible for the Bundestag to accept any substantive vacation of the space for decision-making on key issues at a national level. The French Constitutional Council is similarly very clear in its distinction between the transfer of sovereign rights to the European Union and sovereignty itself. We can conclude from its previous practice that "in terms of the French constitutional order, sovereignty is the property of power fully exercised in the name of the nation, or the people. It cannot be limited, because this would entail a breach of the values on which a democratic society rests." It follows from this conclusion that the "principle of primacy of EU law does not establish a new hierarchy of norms, but is only a choice-of-law rule accepted by the national constitution."[41]

In this respect, it is hardly surprising that, in his response to a proposal by a group of senators to review the constitutionality of the Lisbon Treaty, the President cast doubt on the thesis of "pooled sovereignty". However, in this respect, he may have missed the fact that the Czech Constitutional Court has not accepted this thesis, which could obviously make sense in a *political science* discourse, but only stated that the "European Union has made by far the greatest advances in the concept of shared – "pooled" – sovereignty and has already created a *sui generis* entity, which is difficult to allocate to standard political categories."[42] As the first and the second *Lisbon* Treaty ruling accepted the *Maastricht* doctrine laid down by the German Federal Constitutional Court, no more significant concerns had to be expressed over this mere mention (which was neither an expression of conviction nor a declaration of intent).

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[41] For more details on French constitutional doctrine see Zemánek, J. et al., *Tvorba a implementace práva EU z pohledu vnitrostátního*, Praha: MUP 2012, p. 112nn., here particularly pp. 117 and 121. More details on French constitutional theory and practice are provided in a number of studies by Jan Malíř – compare for example on the given topic a collective monograph by Belling, V., Malíř, J., Pítrová, L., *Kontrola dělby pravomocí v EU se zřetelem ke kompetenčním excesům*, Praha – Plzeň: ÚSP AV ČR a Vydavatelství a nakladatelství Aleš Čeněk 2010, zde s. 45nn.

[42] Pl. CC 19/08, here point 104.

6. Boundaries of the Conferral of Powers

On the other hand, the objection that the Constitutional Court did not address the issue of competences in more detail – the material and procedural limits of the transfer of powers –is clearly a justified concern because these deficiencies grow more apparent, particularly in comparison with the *Lisbon* findings of the German Federal Constitutional Court. This on the one hand defined the risk of vacating the decision-making area for national legislators, while defining areas of competences where pre-understanding at the national level is particularly strong (e.g. criminal law matters, education etc.), but also clearly understands that the method of transferring powers is itself a limited individual empowerment (*begrenzte Einzelermächtigung*), which might be far from the too loosely worded jurisdictional provisions of the Lisbon Treaty.

In contrast with the benevolent view, where the Czech Constitutional Court obviously failed to understand the risk involved in the blanket nature of Treaty provisions or in the freely formulated self-amending clauses (particularly the simplified method of Treaty revisions pursuant to Article 48 paragraph 6 of the Treaty on the EU[43] and the flexibility clause pursuant to Article 352 of the Treaty on the Functioning of the EU[44]), the Czech Republic could not combine the opinions of the legislative and executive power on one hand, which as a result of their own experience had retained a more cautious attitude, and judicial power on the other hand.

It was especially the issue of the so-called "competence of competences" of the Member States and fears of a blurring of the boundaries of powers conferred on the EU that was in the background of the senatorial submission of the Lisbon Treaty for review by the Constitutional Court, and which had also previously resonated in the wording of Section 17 of the draft Act on the principles of conduct and relations between both Chambers and in their external relations that was submitted to the Chamber of Deputies in September 2008.

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[43] On Art. 48 para. 6 of the Treaty on the EU the German Federal Constitutional Court says: „Die Tragweite der Ermächtigung zur Änderung von Bestimmungen des Teils III des Vertrags über die Arbeitsweise der Europäischen Union ist nur eingeschränkt bestimmbar und in materieller Hinsicht für den deutschen Gesetzgeber kaum vorhersehbar" (point 311 of the Lisbon ruling BVerfG, 2 BvE 2/08 of 30 June 2009).

[44] On point 328 of the Lisbon ruling cited, relating to the flexibility clause, the German Federal Constitutional Court states: „Die Vorschrift stößt im Hinblick auf das Verbot zur Übertragung von Blankettermächtigungen oder zur Übertragung der Kompetenz-Kompetenz auf verfassungsrechtliche Bedenken, weil es die neu gefasste Regelung ermöglicht, Vertragsgrundlagen der Europäischen Union substantiell zu ändern, ohne dass über die mitgliedstaatlichen Exekutiven hinaus gesetzgebende Organe konstitutiv beteiligt werden müssen."

As the response by the Constitutional Court[45] has not provided more clues to resolve this issue, another initiative has grown from parliamentary soil. The Parliament, and particularly its upper chamber (the Senate), realised that despite the rhetorical emphasis on the role of national parliaments in Article 12 of the Treaty on the EU, the Lisbon Treaty could in reality weaken their role.[46] On one hand, by the fact that the extension of qualified majority voting in the Council will weaken the strength of the parliamentary mandate entrusted to the Government (a Member State can be outvoted), and on the other hand by introduction of dynamic (evolutive) clauses enabling adoption of measures (to amend or supplement the wording of the Founding Treaties) without their formal changes associated with ratification in the legislature. Any options enabling parliaments to *veto* the application of certain bridging clauses (Article 48 paragraph 7 of the Treaty on the EU or Article 81 paragraph 3 of the Treaty on the Functioning of the EU) cannot fully replace the *assent* procedure.

The so-called "binding mandate" (respectively clause compensating loss of international legal capacity of the Member States and their parliaments resulting from the introduction of dynamic, self-amending clauses) associated with the active consent of both parliamentary chambers relating to the use of self-amending provisions of the Founding Treaties has been introduced in a form of amendment to the Rules of Procedure of both parliamentary chambers. The chosen solution basically covers most of the dynamic provisions mentioned above (particularly the flexibility clause pursuant to Article 352 of the Treaty on the Functioning of the EU, the general and some of specific bridging clauses) and thereby allows the Parliament to approve the transition to qualified majority voting in the Council and the introduction of so-called ordinary legislative procedure, or the adoption of measures needed to achieve the objectives of the Treaties in European policies when the Founding Treaties have not provided the necessary powers. As this concerns a set of previously (i.e. at time of ratification of Lisbon Treaty) identifiable cases (bridging clauses), and does not lead to the transfer of new powers, parliament will decide by simple majority, presuming that the transfer of powers took place at the time the Lisbon Treaty was adopted.

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[45] Compare points 153 and 165–167 of the Lisbon ruling Pl. CC 19/08. In the second Lisbon ruling (Pl. CC 29/09) the Constitutional Court confirmed its position that limits to the transfer of power should be left to the legislature (point 111).

[46] This fact was clearly identified by the Federal Constitutional Court (compare its conclusion on the evolutive clauses and also point 293 of Lisbon ruling BVerfG, 2 BvE 2/08 of 30 June 2009), where in Germany the ratification of the Lisbon Treaty was conditional on accompanying legislation – the adoption of national legislation reinforcing the position of the Bundestag and the Bundesrat. For more see Gärditz, K.F., Hillgruber, Ch., *Volkssouverenität und Demokratie ernst genommen – Zum Lissabon-Urteil des BVerfG*, JuristenZeitung 18/2009, pp. 872–881.

In case of a simplified method of Treaty revisions in accordance with Article 48 paragraph 6, the binding mandate guarantees the prior agreement of the chamber with the simplified procedure while negotiating amendments to any of the provisions of part three of the Treaty on the Functioning of the European Union that relate to the internal policies of the EU. Such an agreed change to the primary law (through a decision taken by the European Council) is then discussed in the Czech Parliament (similarly) as an international treaty change.[47] *Per analogiam,* it can be said that any subsequent decisions of the European Council or the Council which modify or amend the wording of the Founding Treaties should be managed in the same way (i.e. by the consent of both chambers of Parliament with ratification), and that their validity requires the approval of the Member States in accordance with their constitutional provisions.[48]

The approach adopted by the parliamentary chambers and the Government in relation to the self-amending clauses corresponds to the well justified doctrinal findings of the German Federal Constitutional Court in response to the Lisbon Treaty, and in principle corresponds to solutions adopted in the context of the ratification of the Lisbon Treaty by Germany, Ireland and, in the form of a comprehensive revision, the United Kingdom.[49] The only area of doubt, *de lege ferenda,* relates to certain criminal law provisions which may give rise to uncertainties concerning the clarity of the delegation of powers through the ratification of the Lisbon Treaty. This concerns decisions to determine other aspects of criminal procedure, which should lead to the establishment of minimum rules for police and judicial cooperation with a cross-border dimension (Article 82 paragraph (d) of the Treaty on the Functioning of the EU), the determination of other areas of criminal activity, where minimum rules relating to the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension may be established (Article 83 paragraph 1 of the Treaty on the Functioning of the EU), or the establishment of a European Public Prosecutor's office in accordance with

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[47] Compare the provisions of Section 109l para. 2 of Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies and Section 119o of Act No. 107/1999 Coll., on the Rules of Procedure of the Senate.

[48] This refers to changes according to Art. 42 para. 2 of the Treaty on the EU (common defence), and Articles 25 para. 2 (extending the rights of EU citizens), 218 para. 8 (2) second sentence (the EU's accession to the European Convention on Human Rights and Fundamental Freedoms), 223 para. 1 (rules for elections to the European parliament), 262 (jurisdiction of the EU Court of Justice in intellectual property matters) and 311 para. 3 (a system of sources of Union funding) in the Treaty on the Functioning of the EU as amended by the Lisbon Treaty.

[49] Here compare the afterword by the author of this paper to the monograph by Belling, V, *Legitimita moci*…, p. 165nn.

Article 86 paragraph 1 of the Treaty on the Functioning of the EU.[50] Here, the introduction of a binding mandate would in future contribute to strengthened legal certainty over an assessment of whether a respective decision is covered by the transfer of powers under the ratification of the Lisbon Treaty or not. Any finding that a transfer of powers is involved, from the perspective of the Czech constitutional order (!), would not automatically entail the frustration of the efforts of the Member States or the EU as a whole. The intended course of action could still be fulfilled (which is likely, particularly in case when the European Public Prosecutor should be established) through the enhanced cooperation in a group of Member States.

7. Conclusions

Having dealt with the issue of possible revisions of organic legislation, i.e. the Act on the Constitutional Court and the Rules of Procedure of both parliamentary chambers, let us now return to the question posed at the beginning of this essay. Is there any reason to open up the Constitution of the Czech Republic itself, and to adopt its second EU amendment bill? In the opinion of the author of this text, such a reason, a reason that cannot be resolved otherwise, may exist. Paradoxically, it does not relate to the abovementioned quality of European integration, its sometimes envisaged transformation into a federal entity, but instead it concerns the contractual foundations of the Community. Or, to put it more precisely, with the still insufficiently clarified concept of delegation of powers. Given the number of open questions relating to this problem, it is probable that the Czech Constitutional Court will return to this issue in its decision-making practice. Mainly because the issue of assessing the concept of powers has already provoked controversy among professionals, for example when assessing whether the ratification of subsequent amendments to the Lisbon Treaty should necessarily be classified as an international treaty pursuant to Article 10a of the Czech Constitution or not. Jan Kysela also pointed out the problem of defining the term *powers* soon after the publication of the Czech Constitutional Court's findings on the Lisbon Treaty.[51]

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[50] For more on these deliberations see Bříza, P., Švarc, M., *Komunitarizace trestního práva v Lisabonské smlouvě a její (případná) reflexe v právním řádu České republiky*, Trestněprávní revue 6/2009, pp. 161–171.

[51] Kysela, J., *Mezinárodní smlouvy podle čl. 10a Ústavy po „lisabonském nálezu" Ústavního soudu*. In: Gerloch, A., Wintr, J. (eds.), Lisabonská smlouva a ústavní pořádek ČR, Plzeň: Vydavatelství a nakladatelství Aleš Čeněk 2009, pp. 49 – 61.

However, as the Constitutional Court clearly stated in its Lisbon ruling that it did not intend to substitute for the role of constitutional legislator, it can be considered not only reasonable, but even appropriate, that the proposed solution comes from a non-judicial setting. This type of solution would not rely on the legally defined concept of powers, but in a new consequential understanding of the area of jurisdiction, with clear awareness of the fact that the authority for the execution of EU law is derived from a constitutional mandate, as formulated in Article 10a of the Constitution.

This constitutional change would, on the one hand, underline the importance of the Czech Constitution (and possibly also the Charter of Fundamental Rights and Freedoms) as the hierarchical base for the construction of the legal system in the Czech Republic. For example, it could, as in the case of Poland, explicitly identify the Constitution as the set of rules of the supreme legal force. In addition, for the sake of legal certainty and clarity, the fact that all revisions of the Founding Treaties are also enacted under Article 10a of the Czech Constitution should be explicitly confirmed by the Constitution itself. Given the lack of a clear understanding of the concept of powers in the previous case law and doctrine, the existing practice would be codified in this way, reflecting ratification of the so-called Spanish protocol, amending Protocol No. 36 of the Lisbon Treaty on the transitional provisions with regard to the composition of the European Parliament, or the revision of Article 136 of the Treaty on the Functioning of the European Union, or, most recently, the Protocol on the concerns of the Irish people on the Treaty of Lisbon (the so-called "Irish guarantees").

Over the past years, the executive moved towards the opinion that a qualified majority of parliamentary members should confirm changes to the Founding Treaties. A formal approach was therefore preferred to material approach, which would always require consideration, in each case, as to whether a ratification of amendments to Founding Treaties would result in a new delegation of powers. The choice of a purely formal approach was certainly also supported by both, the possible risk of litigation, which could arise in the case of simple majority voting and which could also delay the ratification process itself by initiating proceedings before the Constitutional Court on the conformity of the international treaty with constitutional law, as well as by the conviction that a wider political consensus should be found during discussions on international obligations applied on the territory of the Czech Republic in preference over the domestic law, meaning consent that generally extends beyond the government parties.[52] The Standing Commission on the Constitution of the Czech

[52] Compare here the Government's arguments during the parliamentary debate on the decision of the European Council amending Article 136 of the Treaty on the Functioning of the EU.

Republic and Parliamentary Procedures in the Senate has inclined towards this same opinion for some time now and has built on the principle of procedural equivalence in this regard.[53] It is this consensus between the executive and the legislature that might lead to the petrification of this practice in form of an amendment to the current text of the Constitution. It would also be a desirable example of a situation where amendments to the Constitution are achieved by the gradual crystallisation of practice and not as the result of a partial reflection of a specific situation or temporary political preference.

[53] A more detailed statement by the Standing Senate Commission on the Constitution of the Czech Republic and Parliamentary Procedure on the Government proposal to approve the ratification of the European Council Decision amending Article 136 of the Treaty on the Functioning of the European Union, as concerns the stability mechanism for Member States whose currency is the Euro of 3 August 2011, or a ruling by the same Commission on the latest partial change in the primary law, which, according to the prevailing view, does not result in a transfer of powers (the so-called "Irish Guarantees") of 11 June 2013.