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

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Abstrakt

Článek pojednává o stížnosti Senátu ČR k Ústavnímu soudu ohledně ústavní konformity Lisabonské smlouvy. Článek shrnuje hlavní argumenty Senátu a podává k nim krátký komentář. Zjišťuje, že většina z nich není dostatečně vyargumentována a tvrdí, že ve většině z nich Lisabonská smlouva reflektuje současný právní stav zejména s ohledem na judikaturu Evropského soudního dvora.

Klíčová slova:

Evropská unie, Lisabonská smlouva, kontrola ústavnosti, Senát ČR, Ústavní soud ČR

Abstract

The article deals with the complaint of the Czech Senate about the constitutional conformity of the Treaty of Lisbon lodged to the Czech Constitutional Court. It summarises the main arguments of the Senate and makes a short commentary to them. It finds out that most of the points are not properly supported by the arguments and asserts that the Treaty of Lisbon in most of the given arguments reflects the present state of law – especially the case-law of the Court of Justice.

Key words

European Union, Treaty of Lisbon, review of constitutionality, Czech Senate, Czech Constitutional Court

1. Introduction

The conformity of the Treaty of Lisbon (TL) with the Czech constitutional legal order has become a part of debates at the Czech political scene. The Czech government handled the TL to the Senate (the upper Chamber of the Czech Parliament) on 25 January 2008 and asked it for the consent with its ratification. The discussions followed (especially in the Committee for EU Affairs of the Czech Senate) and, finally, led the Senate to lodge a complaint to the

Czech Constitutional Court (further CCC).[1] At the beginning let us remind that the **preventive control** (that is before the ratification of the international agreement) of constitutionality is based on the art. 87 par. 2 of the Czech Constitution (further CC) according to which the CCC has the competence to decide on the conformity with the Czech constitutional order of an international agreement based on the art. 10a and art. 49 of the Czech Constitution. If this procedure is initiated, the contested international agreement may not be ratified until the CCC gives its ruling.[2]

The **art. 10a** concerns the transfer of certain powers of Czech state organs to international organisations or institutions – in practice this new article was put in the Czech Constitution in order to enable the accession of the Czech Republic to the European Communities. Consequently, the **art. 49** enumerates categories of international agreements the ratification of which requires the consent of both chambers of the Czech Parliament. Those include also agreements which establish a membership of the Czech Republic in an international organisation. This is also the case of the EC Treaty.

In the following we will go through the individual points which should be, according to the Senate, the main prism of the constitutionality review of the CCC in relation to the Treaty of Lisbon.

2. General review requirement

At first the Senate asserts that the TL brings fundamental amendments of the present state of law which touch the substantial features of the Czech statehood. Therefore, the Senate requires a general review of the constitutional conformity based on two reasons:

- whether the TL is in conformity with the constitutional characteristics of the Czech Republic – sovereign, unitary and democratic state governed by the rule of law (comp. art. 1/1 of the CC), and
- whether the TL does not change the essential attributes of a democratic state governed by the rule of law (comp. art. 9 par. 2 of the CC).[3]

It is evident that the reasons presented by the Senate reflect the case-law of the CCC as for the relation of the EU law and the Czech national law. In its case called "Sugar Quotas

[1] The power to start this procedure is based on the par. 117b of the act no. 107/1999 on the rules of procedure of the Czech Senate; and on the par. 71a /1/a of the act 182/1993 on the Czech Constitutional Court.
[2] For more on the control of constitutionality see f.e. Kust, J., Pítrová, L.: „Lisabonská smlouva" a předběžná kontrola ústavnosti mezinárodních smluv, Právník 5/2008, s. 473-504.
[3] The issue has a constitutional-law dimension which concerns also whether the Senate might ask for a constitutional review of an international treaty generally or only in individual points/arguments. We will not analyze it in this paper.

Judgement"[4] the CCC scrutinised the application of the EC legislation and its constitutional conformity based on these two articles. Therein, by application and interpretation of art. 10a, the CCC accepted the limitation of the powers of Czech authorities due to the accession to the EU and to the principle of EC law primacy. The CCC found this conferral of a part of its powers only conditional; the original bearer of sovereignty still remains the Czech Republic - its sovereignty founded upon the above mentioned art. 1 par. 1 of the CC. Consequently, the CCC concluded that the delegation of powers persists only if these powers are exercised in a manner compatible with the preservation of the foundations of the state sovereignty and the very essence of the substantive law-based state (comp. art. 9 par. 2 of the CC). Clearly, the CCC as other supreme and constitutional courts of Members States[5] first based the authority of EC on the national constitutional rules and, second, it made a reservation to the full application of the EU law in case it breaches the very fundaments of the Czech constitutional legal order.[6]

3. Specific problematic points

This general constitutional review is supported by several arguments which are presented as being of a demonstrative character. In the following we will summarize them and we will make a few comments on them.

First, the Senate reflects the wording of the art. 10a of the Czech Constitution, under which it is possible to limit and transfer only **certain powers** of the Czech state organs. The Senate points out that the TL brings explicit classification and division of competence and, in its opinion, such a division of competence is characteristic for federal states.

Then, the TL distinguishes **exclusive EU competence** in the area of which according to the new art. 2A of the Treaty on the EU (further TEU) only the EU may legislate and adopt legally binding acts. The Member States are allowed to do it themselves only if so empowered by the Union or for the implementation of Union acts. The new article 2B TEU gives a closed list of the EU exclusive competence – this comprises customs union; the establishing of the competition rules necessary for the functioning of the internal market; monetary policy for the Member States whose currency is the Euro; the conservation of marine biological resources under the common fisheries policy and common commercial policy. Moreover the EU has

[4] Decision of the Czech Constitutional Court in Pl. ÚS 50/04.
[5] For more see f.e. Craig, P., de Búrca G.: EU Law - Text, cases and materials, 4th ed., Oxford UP, Oxford 2008, p. 353-379.
[6] In the "Sugar Quota Judgement" the CCC found the EC legislation in conformity with the Czech constitutional order.

exclusive competence to conclude an international agreement in specific cases. According to the Senate the category of exclusive EU competence constitutes complex areas in which the competence will be transferred from the Czech Republic organs to the EU. This could be in breach of the wording of art. 10a of the Czech Constitution which allows transfer of only certain powers to the EU.

To make an assessment of this contention we suppose that the scope of exclusive EU competence as defined in the TL reflects the present case-law of the European Court of Justice and, thus, it does not bring much new. It is true that the case-law would newly be reflected expressly in founding treaties and this could be interpreted as another federal step in the European integration, but we do not share this opinion; this change could be taken rather as in favour of EU citizens. It makes the EU more readable and transparent. We suppose that the federal-like and state-like apprehension of the EU will depend more on the acceptance of this idea by Member States, their national constitutions and decisions of their supreme courts, and, last but not least, by their citizens. We do not suppose that the enumeration of areas of exclusive competence of the EU would, by itself, change the national jurisprudence and judicial attitude and induce the national actors to cease to derive the EU legitimacy from national constitutions (that is the reservation shown above on the example of the CCC decision).

The Senate challenges the reglementation of the new art. 2C TEU which deals with the competences shared between the EU and its Members States. According to this article the **shared competence** will exist in the enumerated principal areas (such as the internal market, social policy, environment, consumer protection, etc.). The Senate alleges that the category is not a closed list but only a demonstrative as it talks about “principal” areas. This is supposed not to be in concordance with the art. 10a of the Czech Constitution because the scope of transfer of competence is not clearly identifiable.

In that respect we might note that the art. 2C does not primarily or solely deal with the extent of transfer of competence. The basic idea of art. 2C is that principally the shared competence exists where the EU does not have exclusive competence (art. 2B) or supportive, coordinative o supplementary competence (art. 2E). Still the individual competence to act in a certain area should be found in concrete provisions of the founding treaty (f.e. with individual politics) or in art. 308 (so called suppletive legal basis). This article, in reflection to its demonstrative enumeration, is not aimed to be used as a legal basis for potential extension of the EU competence in areas vested with the Member States. Therefore, in our opinion the

clarity or definitiveness of transfer of competence from the Czech Republic to the EU is not endangered by the provision of art. 2C.[7]

Second, the Senate specifically suggested a review of the constitutionality of the provision of revised **art. 308 par. 1** Treaty on the Functioning of the EU (further TFEU) – so called suppletive legal basis.[8] According to this article if an action by the Union should prove necessary, within the framework of the policies defined in the Treaty, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Let us remind that this provision is contained also in the present wording of the founding treaties and by means of teleological interpretation was used by the ECJ to allow the EU action and limit the principle of conferral of powers.[9]

The TL suggested to modify it slightly. At present the application of art. 308 is limited to the adoption of rules in the course of the operation of the common market; newly this article could be used without specific limits **in all policies** defined in the treaties. The Senate asserts that this provision creates a blank norm which enables to adopt measures outside the EU competence – this being in breach of art. 10a of the Czech Constitution. This may touch areas of cooperation in criminal matters and, thus, bring these areas in the exclusive jurisdiction of the Court of Justice with the contested lack of procedural guarantees for the protection of fundamental rights.

We suppose that the use in practice of art. 308 should always reflect the existing aims of the EU which as such have been approved by Member States. Principally if the Member States set up any aim (by ratification of the founding treaties), they also presuppose that there will be sufficient competence to reach the aim. If it is not explicit, they agreed to use the procedure of the art. 308. Definitely the present change broadens the use of this article to all policies of the EU. However, crucial is that in case the Member States would like to use the suppletive competence of art. 308, they must do it **by unanimity**. Therefore all states, the Czech Republic included, must agree - if they would find it inadequate, they may stop the process of the adoption of the EU legislation.

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[7] The other forms of EU competence – that is the EU coordinative competence in economic and employment policies (comp. art. 2A par. 3, art. art. 2D); definition and implementation of a common foreign and security policy and progressive framing of a common defence policy (comp. art. 2A par. 3 and support, coordination and supplementation of the actions of Member States in certain areas defined in the Treaty (comp. art. 2A par. 5, art. 2E) - were not contested.

[8] Comp. Lenaerts, K, Nuffel, P., van: Constitutional Law of the European Union, 2nd ed., Thomson; Sweet and Maxwell, 2005, p. 87.

[9] Comp, ibid, p. 87.

Third, the Senate points out to the provision of new art. 48 par. 6 and 7. The art. 48 deals with the **revision procedures** of the founding treaties. It distinguishes the ordinary revision procedure which will be based either on the Convention method in case of extensive changes to the primary law[10] or on the Intergovernmental Conference method used now in case the changes are not substantial.[11] These changes should be welcome as the Convention method brings in play more actors and may help to reach the "all-European" consensus.

However, a completely new article 48 par. 6 and 7 suggests to introduce the **simplified revision procedure** (so called *passerelle*).

Paragraph 6 enables the government of any Member State, the European Parliament or the Commission to submit to the European Council proposals for revising all or part of the provisions of Part Three of the TEU on the TFEU relating to the internal policies and action of the Union. The European Council will decide unanimously after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area and also the approval by the Member States in accordance with their respective constitutional requirements. This decision may not increase the competences conferred on the Union in the Treaties.

Article 48 par. 7 enables that in case the TFEU provides for legislative acts to be adopted unanimously, the European Council may unanimously decide that the acts will be adopted in an ordinary legislative procedure. Similarly, a shift from the special legislative procedure to the ordinary procedure is under specified conditions possible. If decisions according to par. 7 of art. 48 are done, national parliaments must be notified and they may oppose; if they do it within the period of six months, the decision of the European Council referred to above will not be adopted.

Fourth, the Senate complaints about the art. 216 of the TFEU which concerns the **conclusion of international agreements** by the EU. According to this article the Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope. These agreements are concluded by qualified majority by the Council and

[10] The Convention method was used for the creation of the EU Constitution; according to the TL the Convention will present the proposals of amendments to the conference of the representatives of governments of the Member States and the ratification in Member States will follow.

[11] According to the TL the European Council may decide by a simple majority not to convene a Convention; still the ratification in the Member States is required.

are binding both to the EU and its Member States. According to the Senate conclusion of this agreement will not require the consent of the Czech Republic; there is no ratification process and the review of the constitutionality of the agreement according to the Czech constitutional rules is excluded. In that respect we might note that in our opinion the provision of art. 216 consolidates the present state-of-law contained not only in the Treaties but also in the case-law of the ECJ[12] and does not bring much new. The qualified majority is used also at present (comp art. 300/2 of the EC Treaty).

Fifth and sixth, the Senate complains about the **single legal personality** of the European Union which would mean that the EU would gain legal personality also in the second and third pillar. In these areas the EU would adopt decisions also by qualified majority and thus potentionally more conflicts between the EU and national standards on the protection of human rights would appear. Further it is noted that the status of the **Charter of Fundamental Rights** of the EU was changed and also its content is disputed. Specifically it contains not only rights but also principals and aspirations without any clear system. In that context the Senate puts to the Constitutional Court a few questions on the application of the Charter and its relation especially to the European Conventions and to the European Court of Human rights.

Human rights are also a basis of the last point mentioned by the Senate – that is the **broadening of the scope of EU values** on which the EU is founded (art. 2 TEU) – they comprise respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail. According to the Senate the problem is the interpretation of this provision as according to art. 7 TEU (contained also in the present TEU) in case of a serious breach of these values the Council may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. The procedure in art. 7 TEU might lead to political pressures and to the change of the national political regime. In that respect the Senate asks about the compliance of this provision with the general constitutional characteristics of the Czech Republic (principle of sovereignty of people).

[12] Comp. f.e. case 22/70 ERTA [1971] ECR 263.

4. Conclusion

The aim of this paper was to summarize the basis of the Senate's proposal and to add a few comments. As could be seen in the text most of the changes reflect the existing state of law in the EU and the settled case-law of the Court of Justice. We would expect that the Senate's proposal would give more detailed argumentation. We do not suppose that in its content the complaint is well founded in comparison to the state of law at the date of the accession of the Czech Republic to the EU, though the TL brings some changes. It seems that it concerns more the general constitutional conformity of the very accession and membership of the Czech Republic to the EU. Still we suppose that a decision of the Czech Constitutional Court would be useful to clarify the present state and to eliminate the political dimension of the discussion.

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