

SOME THOUGHTS ON ENFORCEABILITY OF COMMISSION DECISIONS AND THE RATIFICATION OF THE LISBON TREATY

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Abstract in original language

Současná Evropská komise, která vykonávala funkci v období let 2004-2009, měla být od 1. listopadu 2009 nahrazena novou. Nicméně, s ohledem na nepředpokládané překážky v ratifikačním procesu Lisabonské smlouvy, této Komisi musí být prodlouženo funkční období, ve kterém, mezi jinými funkcemi, vydává mnoho právních aktů. Tento příspěvek se zaměří na prozkoumání možnosti, zda, a pokud ano, za jakých podmínek, tyto právní akty mohou narazit na obtíže v procesu jejich aplikace a vynucení, které vyplývají z výše uvedeného.

Key words in original language

Evropská komise; Lisabonská smlouva; Rozhodnutí; Vynutitelnost.

Abstract

The Commission in charge for the 2004-2009 term should have been replaced by a new one as from the 1.11.2009. However, due to obstacles in the ratification process of the Lisbon Treaty, the "old" Commission has to serve a prolonged term, in which, among other functions, it produces a number of legal acts. This contribution aims to explore the possibility, whether, and if yes, under which conditions, these legal acts can face any legal difficulties in the process of their application and enforcement emanating from the aforementioned conditions.

Key words

European Commission; Lisbon Treaty; Decision; Enforceability.

1. INTRODUCTION: LISBON TREATY AS A LONG-WANTED CHILD

The Lisbon Treaty came into the existence after the rejection of former so-called Constitutional treaty. Its main political aim¹ is to modernise the functioning of the European Union and to make an end to the institutional crisis lasting for more than a decade.

After the creation of the European Union in 1993, a debate on democratic legitimacy emerged. Especially, a notion of so-called democratic deficit has

¹ See the *Preamble of the Lisbon Treaty*. OJ C 306, 17 December 2007, p. 1.

become widely-used, even though being rather obscure and indefinite.² The EU started to be labelled quite often as un-democratic, distant, technocratic and without popular legitimacy. These characteristics were felt as shortcomings of the other-day institutional design. Also, at the 1992 Intergovernmental Conference (IGC), some major issues concerned the institutional design were not successfully resolved. Thus, necessary changes were to be passed at the subsequent IGC scheduled for 1996.

Nevertheless, revision by the Treaty of Amsterdam was still felt as inaccurate, non-ambitious and not meeting the expectations of both politicians and the public.³ Moreover, a serious challenge of the biggest enlargement ever was lying ahead. For these reasons, yet another treaty revision had been planned.

Treaty of Nice was to meet almost the same expectations as the Treaty of Amsterdam. But, in the end, partial issues of the size of qualified majority and technical adjustments to enlargement became the most prominent. Once again, no revolutionary and distinct changes were passed.

Leaders agreed instead, even before entry to force of the Treaty of Nice (sic!), to hold another IGC in 2004. What was important, they also issued a quite detailed declaration, annexed to the Treaty of Nice that specified issues for further debate.⁴ The perceived need for wider and deeper debate on the Future of the EU was transformed into concrete terms in the Laeken Declaration, which provided, inter alia, for the creation of the Convention on the Future of Europe.⁵ This assembly was to present its recommendations

² See eg. Lord, Ch. *Assessing Democracy in a Contested Polity*. In: *Journal of Common Market Studies*, 2001, Vol. 39, No. 4, p. 645. See also Majone, G. *Europe's 'Democratic Deficit': The Question of Standards*. In: *European Law Journal*, 1998, Vol. 4, No. 1, p. 16; Pogge, T. W. *Creating Supra-National Institutions Democratically: Reflections on the European Union's "Democratic Deficit"*. In: *The Journal of Political Philosophy*, 1997, Vol. 5, No. 2, pp. 163-182; Moravcsik, A. *In Defence of the 'Democratic Deficit': Reassessing Legitimacy in the European Union*. In: *Journal of Common Market Studies*, 2002, Vol. 40, No. 4, pp. 603-24.

³ See eg. Glen, C. M. *Re-Writing Maastricht: The Politics of the 1999 Inter-Governmental Conference*. In: *Southeastern Policy Review*, 2000, Vol. 27, No. 4, pp. 655-678.

⁴ See Declaration Nr. 23 dealt with questions on future of the EU and called for deeper and wider debate on these issues. Clear distinction of competences between the EU and member states, legal position of the Charter of Fundamental Rights, overall simplification of the Treaties and the role of national parliaments were the most prominent domains of interest. See *Treaty of Nice Amending the Treaty on European Union, The Treaties Establishing the European Communities and Certain Related Acts*. Official Journal C 80, 10 March 2001.

⁵ This declaration, adopted at the meeting of the European Council on December, 14th-15th, 2001, posed 60 detailed questions on the future of the EU. It contained three parts – Europe at a crossroads, Challenges and reforms in renewed Union and Convening the Convention on the Future of Europe. A timetable for a new treaty had been established – the Convention was to present its conclusions after one-year deliberations in 2003. Then, in 2004, IGC would be convened to pass a new treaty. See *Laeken Declaration of 15*

to the European Council.⁶ Then, the IGC in 2004 would be convened and the IGC would pass final decisions.

However, the actual outcome of the Convention was a draft of the European Constitution.⁷ This draft⁸ was to meet challenges of higher transparency, decision-making efficiency and efforts to get Union closer to its citizens. It was presented on 18 July 2003 at the meeting of the European Council in Rome. Although being a remarkable attempt from constitutional and juristic point of view, the text was not welcomed with fanfares.

After unsuccessful efforts of Italian and Irish presidencies, the text of the Constitution was finally adopted on 17 - 18 June 2004 in Rome. But the main challenge lied only ahead – in order to come into effect, the Treaty Establishing Constitution of Europe had to be ratified in all member states, pursuant to their respective national constitutional procedures.⁹ Despite the overall atmosphere of latent dissent, the ratification process was started and ran almost smoothly till referenda in France and the Netherlands took place.¹⁰ The citizens of these two founding countries rejected the project.

December 2001 on the future of the European Union. Available at [online] www.ena.lu, cit. 13 November 2009.

⁶ This requirement for the form was not met. See below.

⁷ Due to the fact that the Convention encountered many problems, especially with creation of controversial creation of permanent posts of president and ministry of foreign affairs, redefinition of qualified majority (QMV) according to the size of population and number of states and smaller Commission were introduced, the President of the Convention, Valerie Giscard d'Estaing attempted to solve emerged hostile situation by taking rather risky path – he presented a draft of the European Constitution. This document would have to be adopted as it stood; i. e. further deliberations of the IGC were ruled out. Not only it was closed, but it also substituted fully the existing Treaties. See e.g. Blahušiak, I. *Some Thoughts on the Process Leading to the Adoption of Lisbon Treaty*. In: Zborník z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov konanej v dňoch 3. – 5. 4. 2008 v priestoroch ÚZ NR SR Častá – Papiernička. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, 2008, pp. 316-327.

⁸ See *Draft Treaty Establishing Constitution for Europe*. Available at [online] <http://european-convention.eu.int/docs/Treaty/cv00850.en03.pdf>, cit. 18 November 2009.

⁹ This procedure was to be successfully concluded by October, 2006. The draft treaty also contained rather obscure provision stating that if, by November, 1st, 2006, the Treaty would be ratified only by four fifths of member states, the matter will be delegated to the European Council for further deliberations. See Article IV-443, § 2 of the Treaty Establishing Constitution for Europe.

¹⁰ 29 May 2005 in France and 1 June 2005 in the Netherlands. See eg. Walker, N. *Europe's Constitutional Engagement*. In: *Ratio Juris*, 2005, Vol. 18, No. 3, pp. 387-299.

Although a solid number of 18 ratifications have been collected, the EU fell into state of shock.¹¹ Various options, what to do after the reflection period is over, were taken into account.¹² Although this might have seemed to someone to be a healthy debate, situation was very close to the overall stalemate. British and Austrian presidencies showed rather weak efforts to revive problematic unwanted child. Indeed, at the beginning of 2007, almost nothing evidenced for Constitution (or changes encapsulated in it) to be adopted. But the contrary was true.

For a longer period, expectations on German presidency were voiced. Germany, headed by Chancellor A. Merkel, held presidency of the EU in the first half of 2007. As early as 17 January 2007 Chancellor Merkel claimed reflection period to be over. In following months, she toured all of the capitals of Member States and listened carefully to the leaders. Merkel's efforts have paid – at the meeting of the European Council in Brussels, on 21 - 23 June 2007 a rather surprising outcome for many was achieved. Leaders agreed on mandate for a new IGC that was to adopt new, so-called Reform Treaty.¹³

Following IGC was fast indeed and almost free of problems.¹⁴ One could even say that the IGC, especially compared to Nice negotiations, was rather

¹¹ Luxemburg PM, Jean-Claude Juncker was the first one to call for reflection period for the EU. The EU was to be given a time to clarify and discuss further proceedings and, also, to give more time for ratification to member states that had not done so yet. See *Jean-Claude Juncker states that there will be a period for reflection and discussion but the process to ratify the Constitutional Treaty will continue with no renegotiation*. Available at [online] <http://www.eu2005.lu/en/actualites/communiqués/2005/06/16jclj-ratif/index.html>, cit. 20 November 2009.

¹² There were supporters of retaining of the draft Constitution, who proposed concluding ratification process of the existing draft (even not in all of the member states). Another group backed retaining only the first two parts of the draft; i. e. the Constitution in a narrow sense and the Charter of the Fundamental Rights. And, finally, there was a group that proposed “cherry-picking”, meaning incremental implementation of some novelties introduced in the Constitution, with(out) need of revision of existing framework of the primary law. See for example Sarkozy's proposal of “Mini-Treaty” presented in autumn 2006 in Brussels. Sarkozy, N. *L'Europe de demain - Une nouvelle vision française*. Available at [online] http://www.friendsofeurope.org/download/Sarkozy_080906.pdf, 15 November 2009.

¹³ Leaders had learned from the “Laeken adventure” – this time, the mandate was drafted very precisely and no strange formation was introduced. See *Brussels European Council 21/22 June 2007 – Conclusions*. Available at [online] www.eu2007.de/en/News/download_docs/Juni/0621-ER/010conclusions.pdf, cit. 15 November 2009.

¹⁴ Poland stood for its reputation of the European trouble-maker – it asked for an opt-out for application of the Charter of Fundamental Rights and also for preservation of the so-called Ioannina compromise. Polish negotiators were successful and concessions to their demands were made. Rather generous opt-outs were given also to the Britain, which not only preserved its exclusion from the Schengen acquis, but also obtained the same opt-out as Poland. Italians received one additional MEP, Bulgarians can write “Euro” on banknotes in

"boring". Final text was approved by the European Council on 18 - 19 October 2007 and the celebration of signature of the new treaty was held in Lisbon on 17 December, 2007.¹⁵ In the meantime, the Treaty was renamed consistently with established practice according to a place of signature, from the "Reform Treaty" to the "Lisbon Treaty".¹⁶

2. RATIFICATION PROCESS OF THE LISBON TREATY

However, the road for a new treaty was not blossomed. There was still a need to pass through the ratification process in all Member States. In contrast to the ratification process of the Constitution, the vast majority of member states chose the parliamentary way. Nevertheless, some problems emerged even though. The most problematic was situation in Ireland, Poland and the Czech Republic.

There were also proposals to hold popular vote in the Great Britain and Denmark, but the respective governments were reluctant to realize these proposals.¹⁷ Also, a minor threat emerged in Slovakia, where the then political opposition threatened to water down the ratification. The government faced serious problems due to threat of opposition not to vote for the Treaty, if a draft Press Bill would be approved. Nevertheless, the Treaty was approved, thanks to support of the party representing Hungarian minority.¹⁸

Cyrillic, the French don't need to be feared of "free and undistorted competition" since this was on their demand left out from the preamble of new treaty and instead a social dimension has been accented. The Czech Republic was successful with its supposedly revolutionary proposal for procedure of reverse transfer of competences back from the Union level to the member states. Austria, with its demands to establish a firm proportion of foreign students at universities was not successful and the matter (to no surprise) was dropped. See e.g. Blahušiak, I. *Some Thoughts on the Process Leading to the Adoption of Lisbon Treaty*. In: Zborník z medzinárodnej konferencie doktorandov a mladých vedeckých pracovníkov konanej v dňoch 3. – 5. 4. 2008 v priestoroch ÚZ NR SR Časť – Papiernička. 1. vyd. Bratislava: Univerzita Komenského v Bratislave, 2008, pp. 316-327.

¹⁵ See *European leaders sign new EU treaty in Lisbon*. Available at [online] <http://www.euractiv.com/en/future-eu/european-leaders-sign-new-eu-treaty-lisbon/article-169112>, cit. 19 November 2009.

¹⁶ Hereinafter referred also as "the Treaty".

¹⁷ See for Denmark eg. *Denmark rules out referendum on EU Treaty*. Available at [online] <http://www.euractiv.com/en/future-eu/denmark-rules-referendum-eu-treaty/article-169046>, cit. 20 November 2009. For the Great Britain see eg. David Cameron admits *Lisbon treaty referendum campaign is over*. Available at [online] <http://www.guardian.co.uk/politics/2009/nov/04/david-cameron-referendum-campaign-over>, cit. 19 November 2009.

¹⁸ See e.g. *Slovakia, Poland ratify Lisbon Treaty*. Available at [online] <http://www.euractiv.com/en/future-eu/slovakia-poland-ratify-lisbon-treaty/article-171547>, cit. 18 November 2009.

Table 1 provides for more detailed overview on the ratification process of the Lisbon Treaty in the all of the Member States.

TABLE 1: RATIFICATION PROCESS OF THE LISBON TREATY

Country	Procedure	Date of Ratification
Austria	Parliamentary	13 May 2008
Belgium	Parliamentary	15 October 2008
Bulgaria	Parliamentary	28 April 2008
Cyprus	Parliamentary	26 August 2008
<i>Czech Republic</i>	Parliamentary	13 November 2009
Denmark	Parliamentary	29 May 2008
Estonia	Parliamentary	23 September 2008
Finland	Parliamentary	30 September 2008
France	Parliamentary	14 February 2008
Germany	Parliamentary	25 September 2009
Greece	Parliamentary	28 August 2008
Hungary	Parliamentary	6 February 2008
<i>Ireland</i>	Referendum	23 October 2009
Italy	Parliamentary	8 August 2008
Latvia	Parliamentary	16 June 2008
Lithuania	Parliamentary	26 August 2008
Luxemboug	Parliamentary	21 July 2008
Malta	Parliamentary	2 February 2008
<i>Poland</i>	Parliamentary	13 October 2009
Portugal	Parliamentary	17 June 2008
Romania	Parliamentary	11 March 2008
Slovakia	Parliamentary	24 June 2008

Slovenia	Parliamentary	24 April 2008
Spain	Parliamentary	8 October 2008
Sweden	Parliamentary	10 December 2008
The Netherlands	Parliamentary	12 September 2008
United Kingdom	Parliamentary	16 July 2008

Source: European Commission. Available at [online][
http://europa.eu/lisbon_treaty/countries/index_en.htm#].

In the following subsections, attention will be focused on the three countries that were the last to ratify the Lisbon Treaty. Issues hindering or slowing down the ratification process will be described for each respective country.

2.1 IRELAND

As predictions and analyses were warning, the most problematic situation with the ratification of the Treaty was to emerge in Ireland, where, according to country's constitutional order, a referendum needed to be held. This, in the situation that the overall popular support for the Treaty was not certain,¹⁹ raised particular concerns for meeting the "deadline" for collecting of all ratifications by the beginning of the year 2009.

Indeed, the popular support for the Treaty was not sufficient, as was shown in the referendum held on 12 June 2008. Irish voters rejected the Treaty, when only 46,6% voted for and the 53, 4% were against. Turnout was quite low, only 53,13 %.²⁰ The reasons for voting "no" were predominantly unawareness of the precise content of Lisbon Treaty and fears of not sufficient protection of Irish identity and its military neutrality.²¹

Almost immediately, diplomatic attempts to "save" the ratification process of the Treaty started. Following the rejection of the Treaty in Ireland in last year's referendum and after consultations by the Irish Parliament to

¹⁹ See *Irish 'yes' to Lisbon Treaty 'not certain'*. Available at [online] <http://www.euractiv.com/en/future-eu/irish-lisbon-treaty-certain/article-170687>, cit. 15 November 2009.

²⁰ Out of 3 million of eligible voters. See for more details *Referendum on The Lisbon Treaty (Twenty-Eighth Amendment of the Constitution Bill 2008) 12-June-2008*. Available at [online] <http://www.referendum.ie/referendum/archive/display.asp?ballotid=78&page=0>, cit. 17 November 2009.

²¹ See Qvortrup, M. *Rebels without a Cause? The Irish Referendum on the Lisbon Treaty*. In: *Political Quarterly*, 2009, Vol. 80, No. 1, pp. 59-66. Also see Brughna C. M. *Why Ireland rejected the Lisbon Treaty*. In: *Journal of Public Affairs*, 2008, Vol. 8, No. 4, pp. 303-308.

determine the main areas of concern, the Irish government presented its requirements at the 11 - 12 December 2008 European Council.²²

The Council agreed to retain number of Commissioners at the level provided for in the Treaty of Nice, as well as granting Ireland guarantees in the fields of taxation, military neutrality, ethical issues and workers' rights. Nevertheless, the precise legal form and scope of the guarantees was yet to be determined.

Following the March 2009 European Council, Irish Prime Minister Brian Cowen stated that "*the guarantees promised in December must be legally robust in order to reassure the public about the Treaty. Whilst I respect the fact that other Member States do not wish to re-ratify the Lisbon Treaty, I made it clear that for my part the legal guarantees will have to be attached to the EU Treaties at the next possible opportunity. Presuming that we reach a satisfactory outcome over the coming months, I believe we will have a good basis for consulting the Irish people again later this year.*"²³

This statement laid down the plan for concluding the ratification process of the Lisbon Treaty in Ireland. Although not very popular, the preferred solution came out to be a holding of new referendum on the matter, similarly to the situation that emerged in the ratification process of the Treaty of Nice in Ireland in 2001 and 2002.²⁴

In the meantime, a lot changed in Ireland since the first referendum. An informational campaign of the government improved the general knowledge on the Treaty.²⁵ Also, economic crisis played a role as a catalyst of the moods in the Irish society; its impacts were considerable and the Irish started to realize the safeguarding economical role of the EU.²⁶

²² Brussels European Council 11 and 12 December 2008: Presidency Conclusions. Dostupné z [online] www.consilium.europa.eu/ueDocs/cms_Data/docs/104692.pdf, cit. 27. 8. 2009.

²³ See European Commission. *The Lisbon Treaty and Ireland*. Available at [online] http://ec.europa.eu/ireland/lisbon_treaty/lisbon_treaty_progress/index_en.htm, cit. 20 November 2009.

²⁴ Ireland held two referenda to ratify the Treaty of Nice. The first one in 2001 was not successful, thus a new one was held in 2002. See e.g. Gilland, K. *Ireland's second referendum on the Treaty of Nice, October 2002*. Available at [online] www.sussex.ac.uk/sei/documents/irelandno1.pdf, cit. 18 November 2009.

²⁵ See e.g. *Poll shows rise in Lisbon Treaty support*. Available at [online] <http://www.rte.ie/news/2009/0918/eulibson.html>, cit. 19 November 2009.

²⁶ See e. g. *Ireland announces Lisbon referendum date*. Available at [online] <http://euobserver.com/9/28429>, cit. 16 November 2009.

At the European Council meeting on 18 - 19 June 2009, legal guarantees for Ireland were agreed, meant as incentives to gain the popular support in Ireland.²⁷ The Decision of the Heads of State or Government of the 27 Member States of the EU, Meeting within the European Council, on the Concerns of the Irish People on the Treaty of Lisbon and Solemn Declaration on Workers' Rights, Social Policy and other issues were annexed to the Conclusions of the aforementioned European Council meeting.²⁸ It reaffirmed the commitment of the European Council to see the Lisbon Treaty to enter into force by the end of 2009.

As for the precise guarantees given to the Irish, it stated that "*provided the Treaty of Lisbon enters into force, a decision would be taken, in accordance with the necessary legal procedures, to the effect that the Commission shall continue to include one national of each Member State.*"²⁹ It also recognized other "concerns of the Irish people" relating to taxation policy, the right to life, education and the family, and Ireland's traditional policy of military neutrality, as well as a number of social issues, including workers' rights.

The aforementioned decision of the Heads of State or Government gives legal guarantee that matters it covers will be unaffected by the entry into force of the Treaty of Lisbon. From legal point of view, it is interesting to notice that "*content [of the Decision] is fully compatible with the Treaty of Lisbon and will not necessitate any ratification of that Treaty. [T]he Decision is legally binding and will take effect on the date of entry into force of the Treaty of Lisbon...[A]t the time of the conclusion of the next accession Treaty...the annexed Decision in a [form of] Protocol [will] be attached..to the Treaty on European Union and the Treaty on the Functioning of the European Union*".³⁰

From purely legal point of view, all of the guarantees, except for the decision not to reduce the Commission, have a form of so-called subsidiary treaty, adopted within the framework of the European Council. It will become binding on the same day as the Lisbon Treaty comes into force, i. e. 1 December 2009.

²⁷ The guarantees were used for the first time in 1992 after the first referendum on the Treaty on European Union in Denmark. Danish opt-out from the European Monetary System came into the existence precisely as a result of these guarantees. See for more details *Denmark: EMU opt-out clause*. Available at [online] http://europa.eu/legislation_summaries/economic_and_monetary_affairs/institutional_and_economic_framework/125061_en.htm, cit. 13. 11. 2009.

²⁸ See *Brussels European Council 18 and 19 June 2009: Presidency Conclusions*. Available at [online] www.consilium.europa.eu/ueDocs/cms_Data/docs/108622.pdf, cit. 14 November 2009.

²⁹ Ibid.

³⁰ Ibid.

The guarantees in the area of right to life, family and education will have legal effects only within the Irish territory and will not in any case prejudice the legal position and relations within other countries. They do not alter the provisions of Lisbon Treaty, but rather constitute a basis for their interpretation in respect of Ireland.

The guarantees in the field of defence and security also can be perceived as an authentic interpretation in the terms of legal theory. Nevertheless, there is one substantial difference from the former group of guarantees - these latter will apply to all Member States of the EU.

The decision not to reduce the Commission will be dealt with separately, according to the required procedure. Although nowadays the decision constitutes merely a political obligation, it is well expected to create also legal obligations. Due to this hybrid nature, it can be attributed to the category of soft-law of the EU.³¹

In the light of these developments, the second referendum took place on 2 October 2009. At bigger turnout of 59 %, more than 2/3 of voters voted for the Treaty.³² This outcome represented a kind of turning point in ratification process. of the Lisbon Treaty in the whole EU. Very swift reactions that were brought about by result of the second Irish referendum were not expected by many. Let us analyse the impact of the second referendum in Poland and in the Czech Republic.

2.2 POLAND

Situation in Poland with the ratification of the Lisbon Treaty after defeat of eurosceptical Prime Minister Jaroslaw Kaczynski in parliamentary elections in the autumn 2007 and his substitution by more Europe-oriented Donald Tusk was rather complicated. Although the parliamentary ratification was chosen and the fact that country's parliament was one of the first to ratify the Lisbon Treaty, overall process of ratification in Poland was somewhat difficult and in the end it ended the second latest.

Although defeated, J. Kaczynski threatened the ratification of the Treaty, seeking for additional legal guarantees to protect Poland's interests in the EU. Operating with Germanophobic and homophobic arguments and

³¹ This is not said to mean that the decision will not be respected; in fact, that would be in author's point of view highly improbable, due to political sensitivity of the matter.

³² For the Treaty voted 67, 1%, only 32. 9 % of voters were against. That represents more than 20 % swing to "yes" voters compared with 2008 vote. See for more details *Results received at the Central Count Centre for the Referendum on Treaty of Lisbon 2009*. Available at [online] <http://www.referendum.ie/referendum/current/index.asp?ballotid=79>, cit. 20 November 2009.

counting on fact that the votes of his party were crucial for ratification,³³ he managed to slightly delay the parliamentary phase of the process. However, a political compromise was finally struck in the spring 2008. It was agreed between to ratify the treaty by a parliamentary vote. In this atmosphere, both houses of the Polish parliament adopted the Treaty on 1 and 2 April 2008 respectively without any considerable hindering.³⁴

However, Lech Kaczynski, President of Poland, stated almost immediately after the successful parliamentary ratification that he would not sign the Treaty and thus conclude the ratification process, until Prime Minister Tusk would not fulfil the political agreement guaranteeing that the terms that Poland had negotiated at the IGC 2007³⁵ could not be changed.

The issue then became a part of bigger struggle in the arena of domestic policy over the influence in the field of formation of Polish foreign policy between the Government and President. Thus, L. Kaczynski repeatedly promised to sign the Treaty and repeatedly broke his promises until he finally proclaimed the Treaty to be dead after June 2008 referendum in Ireland and stated that he would not be able to ratify it until the Treaty is approved by the Irish. Thus, a stalemate in ratification came into existence.

Situation altered quite radically after the October 2009 Irish referendum. Within days, L. Kaczynski invited President of the European Commission J. M. Barosso and President of the European Parliament Jerzy Buzek for a ratification ceremony. Stating that "*The fact that the Irish people changed their minds meant the revival of the treaty, and there are no longer any obstacles to its ratification,*"³⁶ he ratified the Treaty after year and half of

³³ For example, in March 2008, the Polish president Lech Kaczynski warned that ratification of the Treaty without an opt-out of the Charter could allow gay activists to force Poland to accept homosexual "marriage" or civil unions. See *Kaczynski twins threaten Polish ratification of Lisbon Treaty*. Available at [online] <http://euobserver.com/9/25842>, cit. 19 November 2009.

³⁴ The Lower House (Sejm) passed the Treaty on April, 1st, 2008 by 384 votes for, 56 against and 12 abstaining. The Upper House (Senate) did so one day after by 74 votes for, 17 against and 6 abstaining. See e. g. *Polish Parliament clears EU Treaty bill*. Available at [online] <http://www.euractiv.com/en/future-eu/polish-parliament-clears-eu-treaty-bill/article-171267>, cit. 20 November 2009.

³⁵ Represented by brothers Kaczynski and having negotiated and opt-out from the application of the EU Charter on Fundamental Rights.

³⁶ See *President of Poland signs Lisbon Treaty*. Available at [online] <http://www.telegraph.co.uk/news/worldnews/europe/poland/6290694/President-of-Poland-signs-Lisbon-Treaty.html>, cit. 16 November 2009.

confusion and opposite statements, leaving the Czech Republic as the only Member State not having ratified the Lisbon Treaty.³⁷

2.3 CZECH REPUBLIC

The Czech Republic was the last Member State to ratify the Lisbon Treaty. This situation was similar to the situation with ratification of the 2004 constitutional treaty, when the country was the only in the EU not to even decide if the ratification would be in a parliamentary way or by means of referendum.

Chamber of Deputies, the lower house of the Czech Parliament, started ratification process on 1 April 2008, by ordering the Treaty to be discussed in its committees for Constitutional and legal affairs, European affairs and Foreign affairs, which is not dissimilar procedure from the standard one.

The upper house of the Parliament, the Senate, however, opted for a non-standard procedure, by referring the Treaty to the Constitutional Court for inspection on its compatibility with the Constitution of the Czech Republic by its resolution from 24 April 2008.³⁸

As a reaction, the Czech Constitutional Court declared on 26 November 2008³⁹ Articles selected by the complaining Members of the Senate of the Lisbon Treaty to be compatible with the Czech Constitution and thus opened way for parliamentary ratification. To be more precise, the Court stated that Articles 2/1, 4/2, 352/1 and 216 of the Treaty on Functioning of the EU and 2, 7, 48/6 and 48/7 of the Treaty on the European Union (after revision by the Lisbon Treaty), as well as the Charter of Fundamental Rights of the European Union are not in the violation of the Czech constitutional order.

Although this might have seemed to some as a clear-cut decision, the ratification process remained very slow, not only with President Klaus casting eurosceptic doubts, but also with uncertain support of ruling party of Civic Democrats needed for successful ratification. Doubts were also casted by the fact that the Constitutional Court had ruled only on the selected provisions and not the whole Treaty.

³⁷ L. Kaczynski's signature was seen by some as a move towards 2010 presidential campaign, when President tried to secure more support by pretending to be europhile. See *Vaclav Klaus flies Eurosceptic flag alone*. Available at [online] <http://www.guardian.co.uk/commentisfree/2009/oct/13/vaclav-klaus-lisbon-treaty>, cit. 20 November 2009.

³⁸ Czech President was also a party to this proceedings.

³⁹ See *Decision Pl. ÚS. 19/08 Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community*. Available at [online] http://angl.concourt.cz/angl_verze/doc/pl-19-08.php.

Nevertheless, after political negotiations especially within the party of Civic Democrats, the Chamber of Deputies ratified the Treaty. By 125 votes for, 61 against, it approved the Treaty on 18 February 2009.⁴⁰ After some further delays, the upper house - Senate - had ratified the Treaty on 6 May 2009. Out of 79 appearing on the vote, 59 voted for, 20 against, 5 abstained and 2 left the house.⁴¹

After this date, only Presidential signature was missing to complete the ratification process in the Czech Republic. Although there were some legal experts saying that President shall not delay his signature by any means, citing respective provisions of the Czech Constitution,⁴² real progress was very slow.

The group of "defeated" Members of the Senate had further slowed down the ratification process, since they declared an intention to challenge the compatibility of the Treaty as whole with the Czech Constitution. This was welcomed move by President Klaus, who almost naturally declared its intention to wait for the second decision of the Constitutional Court.

Since the Czech Constitution provides for no limited time period within which the Members of the Senate should have filed their petition to the Court, they were able to considerably delay the whole process. The actual date of filing the Senators' petition to the Court was 29 September 2009, almost half a year since the ratification process in the both Houses of the Czech Parliament was successfully finished. Members of the Senate, represented by their colleague Jiří Obelfazer demanded the Court to clearly state "*whether the EU would still be an international organisation and not a certain "superstate" after the adoption of the Lisbon treaty.*"⁴³

It took another month for the Court to elaborate the final opinion on the compliance of the Treaty with the Czech Constitution as a whole. On 3

⁴⁰ See *Parlament České Republiky, Poslanecká sněmovna. 46. schůze, 11. hlasování, 18. 2. 2009, 09:47 Lisabonská smlouva pozměňující Smlouvu o Evrop.unii.* Available at [online] <http://www.psp.cz/sqw/hlasy.sqw?G=48969>, cit. 18 November 2009.

⁴¹ See *Senát Parlamentu České Republiky. 181/ 6 - Vládní návrh, kterým se předkládá Parlamentu České republiky k vyslovení souhlasu s ratifikací Lisabonská smlouva pozměňující Smlouvu o Evropské unii a Smlouvu o založení Evropského společenství dát souhlas k ratifikaci.* Available at [online] <http://www.senat.cz/xqw/xervlet/pssenat/hlasy?G=9887&O=7>, cit. 18 November 2009.

⁴² See e.g. *Rychetský v ČT ke Klausovi: Podpis smlouvy nebo vlastní stížnost.* Available at [online] <http://www.ct24.cz/ceske-predsednictvi/lisabonska-smlouva/56473-rychetsky-v-ct-ke-klausovi-podpis-smlouvy-nebo-vlastni-stiznost/>, cit. 21 November 2009.

⁴³ See *Czech senators file new complaint against Lisbon treaty.* Available at [online] <http://www.ceskenoviny.cz/eu/zpravy/senatori-predlozili-novy-navrh-na-ustavni-prezkum-lisabonu/400038?id=400057>, cit. 20 November 2009.

November 2009 it stated⁴⁴ that there is no variance between these two legal instruments and thus ruling out any factual reason for not concluding the ratification process in the Czech Republic. The Court declared that the Lisbon Treaty as a whole, Articles 7, 8, 9, 10/1, 13/1, 14/2, 17/1, 17/3, 19/1, 20, 21/2/h, 42/2, 47, 50/2 to 50/4 Treaty on the European Union (after revision by the Lisbon Treaty) and Articles 3, 78/3, 79/1 and 83 Treaty on Functioning of the EU are not in the violation of the constitutional order of the Czech Republic.

It also dismissed the proposals to inspect the compatibility of the Treaty on European Union and Treaty on European Community with the Czech Constitutional order.⁴⁵ It also dismissed similar claim for Art. 2, 4 and 216 Treaty on Functioning of the EU. Members of the Senate also wanted to proclaim the Decision of the Head of States and Governments in relation to the concerns of the Irish people adopted on June 18th and 19th, 2009, as an international treaty falling within the scope of Art. 10a of the Czech Constitution and thus needing further ratification. Finally the Court dismissed the claim to join the case with another case dealing with Rules of Procedure of the both Houses of Parliament.

In the meantime, European Council meeting in Brussels had agreed on legal guarantees for the Czech Republic, similar in form to those granted to Ireland. This was a response to the last demand of President Klaus, who asked for an opt-out in application of the Charter of Fundamental Rights of the EU within the territory of the Czech Republic.⁴⁶ Conclusions of 29 - 30 October 2009 European Council state on this matter that: *"Heads of State or Government have agreed that they shall, at the time of the conclusion of the next Accession Treaty and in accordance with their respective constitutional requirements, attach the Protocol...to the Treaty on European Union and the Treaty on the Functioning of the European Union. In this context, and with regard to legal application of the Treaty of Lisbon and its relation to*

⁴⁴ See *Nález sp. zn. Pl. ÚS 29/09 z 3. 11. 2009*. Available at [online] <http://www.concourt.cz/clanek/GetFile?id=2150>, cit. 18 November 2009.

⁴⁵ A terminology note: Complainants denoted the contested instruments as the Maastricht Treaty (for which the Court deduced that it should be the TEU in "Maastricht", i. e. 1992, version) and "Treaty of Rome" (for which the Court deduced more that it should be the TEC after the revision by the TEU in 1992). This is, in the most decent way to say, a very strange terminology showing lack of some elementary knowledge on the primary law of the EU.

⁴⁶ President Klaus demanded an opt-out from the Charter, saying he was attempting to shield the Czech Republic from property claims made by ethnic Germans expelled from the country after the WW II. See *Lisbon treaty turmoil as Czechs demand opt-out*. Available at [online] <http://www.guardian.co.uk/world/2009/oct/09/eu-lisbon-treaty-czech-republic>, cit. 17 November 2009; *EU grants Czech Republic Lisbon treaty concession*. Available at [online] <http://www.guardian.co.uk/world/2009/oct/30/czech-republic-lisbon-treaty>, cit. 17 November 2009.

*legal systems of Member States, the European Council confirms that : a) The Treaty of Lisbon provides that "competences not conferred upon the Union in the Treaties remain with the Member States" (Art. 5(2) TEU); b) The Charter is "addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law" (Art. 51(1) Charter)."*⁴⁷

Thus, enlarging the area of application of Protocol No 30 of the Lisbon Treaty on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom to the territory of Czech Republic has catered the last demand by President Klaus.

The effects of these decisions, strengthened by the result of October 2009 referendum in Ireland were seen almost immediately. Only 6 hours after the second ruling of the Czech Constitutional Court, President Klaus issued his proclamation. He stated that although expecting the decision of the Constitutional Court, he "*deeply disagrees*" with its contents and reasoning. He also challenged legal quality and form of the decision, stating that "*it is not a neutral legal analysis, but a biased political pledge for the Lisbon Treaty produced by its supporters*" and went on saying that this fact can be seen on "*not-fully-adequate confrontational style of elaborating and presentation of the decision*".⁴⁸ After final remark that "*the Czech Republic ceases to be a sovereign state*"⁴⁹ after entry of the Lisbon Treaty into force, he shortly announced that he had ratified the Treaty.⁵⁰

3. CONSEQUENCES FOR THE DECISION MAKING PROCESS OF THE COMMISSION

As we have seen from the previous two sections of this contribution, Lisbon Treaty experienced not only a very long process of "birth" but also sometimes rather twisty process of its ratification. Due to the delays in Ireland, Poland and the Czech Republic, it was not possible to meet the date

⁴⁷ *Brussels European Council 29 - 30 October 2009. Presidency Conclusions.* Available at [online] www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/.../110889.pdf, cit. 14 November 2009.

⁴⁸ See *DOKUMENT: Prezident Klaus vysvětluje, proč podepsal Lisabon.* Available at [online] http://zpravy.idnes.cz/dokument-prezident-klaus-vysvetluje-proc-podepsal-lisabon-pqc-/domaci.asp?c=A091103_161503_domaci_kot, cit. 18 November 2009.

⁴⁹ *Ibid.*

⁵⁰ Jiří Obelfalzer did not give up his struggle against the Treaty, claiming that he would consider lodging a complaint with the European Court of Human Rights for failure of the Czech Republic to grant him a lawful proceedings in the Czech Constitutional Court. See *Trapnost s Lisabonem končí, radují se politici. Jiní hrozí Štrasburkem.* Available at [online] http://zpravy.idnes.cz/trapnost-s-lisabonem-konci-raduji-se-politici-jini-hrozi-strasburkem-1kf-/domaci.asp?c=A091103_101750_domaci_bar, cit. 20 November 2009.

of entry to force projected to the beginning of the year 2009. It was also not possible to conclude the process well ahead before end of the term of 2004-2009 Commission, set to the 31 October 2009. Thus, as a consequence of these delays, new Commission has not⁵¹ been formed and some doubts are casted over its activities.

Some of these doubts are related to the question whether the enforceability of the Commission decisions is anyhow hindered as a result of the situation described above. In the next subsections, let us explore the possibility, whether, and if yes, under which conditions, these legal acts can face any legal difficulties in the process of their application and enforcement emanating from the aforementioned conditions.

3.1 RELEVANT PROVISION OF THE TREATY

From legal point of view, the situation when the "old" Commission is supposed to serve for a prolonged term is clear. Although not expressly provided for in the Treaties, primary law solves it by analogy. Article 5 Treaty on the European Union (after the revision by the Treaty of Nice; hereinafter referred to as "TEU") states that "*...[T]he Commission...shall exercise [its] powers under the conditions and for the purposes provided for, on the one hand, by the provisions of the Treaties establishing the European Communities and of the subsequent Treaties and Acts modifying and supplementing them and, on the other hand, by the other provisions of this Treaty.*"⁵² This is acknowledged also in the Article 7 Treaty Establishing the European Community (after the revision by the Treaty of Nice, hereinafter "TEC"): "*Each institution shall act within the limits of the powers conferred upon it by this Treaty.*"⁵³

Thus, even if the Commission should serve only for 5-years term only, as Article 214 TEC state in its first paragraph and the Treaties does not expressly state the procedure to be followed in the event of formation of a new Commission only after the expiry of mandate of the previous one, the situation that has been caused by the delays in the ratification process of the Lisbon Treaty does not pose any legal difficulties.

The primary law of the EU provides at two place for solution for similar situations when either the whole body of Commissioners is censured or a single Commissioner resigns or is compulsory retired. In the Article 214 TEC an exemption is made from the five years rule in the case if the motion

⁵¹ At the time of writing, which is November 2009.

⁵² Art. 5 Treaty on the European Union (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

⁵³ Art. 7 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

of censure was adopted. Then, as the TEC provides, "*[The Commission] shall continue to deal with current business until [it is] replaced in accordance with Article 214. In this case, the term of office of the Members of the Commission appointed to replace them shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.*"⁵⁴

Similarly, in the last paragraph of the Article 215 TEC provides for the situation when a single Commissioner is retired or resigns. Then, "*Members of the Commission shall remain in office until they have been replaced or until the Council has decided that the vacancy need not be filled.*"⁵⁵

We can see a strong emphasis on continuity of work of Commission, that is to be achieved even in situations when it was censured or it is short of one or more regular members. Per analogiam it is possible to set out rules for the situation that was brought about in November 2009.

We can interpret the wording of abovementioned provisions of Article 215 TEC so that the Commission shall continue in its office. However, we shall not forget to read out the limitation set thereof, stating that the Commission shall deal only "*with current business*". This limitation is very important to be noted, in order identify any legal difficulties in enforcement of Commission decisions adopted in the period between expiry of term of office of the old Commission and forming of new one.

We can also set out the rules for appointment procedure in 2014. Article 215 TEC states that "*[T]he term of office of the Members of the Commission appointed to replace [the censured Commission] shall expire on the date on which the term of office of the Members of the Commission obliged to resign as a body would have expired.*"⁵⁶ Thus, if we per analogiam perceive the situation provided for in Article 215 TEC, the wording of this provision leave no room for any other interpretations but the one concluding that the term of Commission formed after the first Commission of President Barosso shall end in 2014, irrespectively when exactly it is formed.

From this brief analysis, we can conclude that there is no other limitation for adoption of Commission decisions than the fact they cannot be adopted outside the framework of "*current business*".

⁵⁴ Art. 214 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

⁵⁵ Art. 215 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

⁵⁶ Ibid.

3.2 CONSEQUENCIES OF THE "CURRENT BUSINESS" LIMITATION

If we intend to inspect consequences of the "*current business*" limitation, we have to analyze the procedure that can bring them about.

To think about any limitations to the enforceability of the decisions of the Commission, we can take a decision imposing a fine in the framework of the EC competition policy as the first example. In this case, the "*current business*" limitation is hardly probable to be invoked, since competition policy is falling within the ambit of "*current business*".

Another example could be adoption of a decision in a policy area, where the Commission had not acted acting before. This would be more probable case for application of the "*current business*" limitation. Let's inspect the possible procedure in this case.

Article 230 TEC states that (only) "*The Court of Justice shall review the legality of acts adopted...by the Commission..., other than recommendations and opinions...*"⁵⁷ It also determines that the Court "*...shall for this purpose have jurisdiction in actions brought by a Member State, the European Parliament, the Council or the Commission on grounds of lack of competence, infringement of an essential procedural requirement, infringement of this Treaty or of any rule of law relating to its application, or misuse of powers.*"⁵⁸ Also, any natural or legal person may institute proceedings against a decision addressed to them or against a decision which is of their direct and individual concern, even if addressed to another person(s).

This Article provides us with some substantial answers. Firstly, it determines, who can challenge a decision of the Commission. Only the Parliament, the Council and any concerned legal or natural person can proceed with their claim. It is rather improbable for the Commission to challenge its decisions themselves.

Another point is the grounds that these decisions can be challenged on. Convening with the "*current business*" limitation, the claims of lack of competence, infringement of either the Treaty or essential procedural requirement, as well as misuse of powers could be invoked.

We have thus a certain number of potential subjects that can hamper the enforceability of the Commission decisions for claiming them to be out of

⁵⁷ Art. 230 Treaty Establishing the European Community (after the revision by the Treaty of Nice). OJ C 321 E, 29 December 2006, p. 1.

⁵⁸ Ibid.

"*current business*" and thus to fall into some or all of the reasons for annulment by the Court of Justice.

However, the last section of Article 230 TEC provides for a very stringent limitation. It sets out the foreclosure period of two months for the proceedings to be started. If an authorized subject fails to institute the proceedings under Art. 230 TEC "*within two months of the publication of the measure, or of its notification to the plaintiff, or, in the absence thereof, of the day on which it came to the knowledge of the latter, as the case may be*",⁵⁹ the Court has no power to declare a decision that would be challenged this way as void.

4. CONCLUSIONS

Thus, we can see that there really is a leeway for introduction of a new factual reason for challenging the legality of the decisions of the Commission, represented by using the "current business" limitation and Art. 230 TEC. If such a proceeding was incited and would be successful, it would hamper the enforceability of the Commission decisions. Nevertheless, if read the aforementioned Article to the end, we encounter a stringent limitation of 2 months, which makes the procedure above rather difficult to take and effectively minimalises number of such claims to the number located at the scale of numbers not very far away from zero.

Thus, we can conclude, that rather complicated ratification process of the Lisbon Treaty has had, at the time of writing, some not so positive consequences on the process of the formation of new Commission. Nevertheless, owing to the rules set out by the Treaties, this rather non-positive situation shall not have in short or even medium time-scale substantial implication to the functioning of the Commission by radically hampering enforceability of its decisions. These would be brought about probably in the situation when a new Commission would not be formed for a longer time period, which at the time of writing does not appear to be the case.

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⁵⁹ Ibid.

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