

The Treaty of Lisbon & the Czech Constitutional Court: Act II

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In October 2009, the lion's share of media and political attention given to the ratification process of the Lisbon Treaty in the Czech Republic has been devoted to the antics of the President, Václav Klaus. However, it is important to point out that the process is being delayed not only by the President's reservations and requests for a Czech (quasi)opt-out from the EU Charter of Fundamental Rights, but also by the pending review of the Treaty by the Czech Constitutional Court (CCC), which is set to give a second ruling on the Lisbon Treaty on November 3rd, having delivered its first decision in autumn 2008.

The constitutional framework of the CCC review

The Constitutional Court of the Czech Republic is vested with the power to review the compatibility of international treaties signed by the Czech state with the Czech Constitutional order. The review(s) of the Lisbon Treaty in 2008 and 2009 are the first substantial procedures of this kind performed by the Constitutional Court (all other previous submissions have been rejected by the CCC on procedural grounds).

The Constitution provides for three separate 'windows of opportunity', depending upon the group of applicants to initiate the review procedure. One window opens for the Assembly or Deputies and the Senate at the moment the government requests approval of the international treaty in question and closes at the moment the particular parliamentary chamber approves the treaty. Another window of opportunity opens for a group of senators or deputies after 'their' chamber approves the treaty in question. This window closes the moment the President completes the ratification process with his/her

signature. In practice, it was this latter option that has been invoked by a group of 17 Czech senators who submitted the motion to the CCC shortly before the second Irish referendum.

The third actor who can initiate a review by the CCC is the President of the Republic. His/her window opens at the moment when both parliamentary chambers approve the treaty and closes when s/he completes the ratification process by adding his signature. The relative lateness of the presidential window in the whole process was one the reasons why President Klaus did not challenge the constitutionality of the Treaty establishing the Constitution for Europe; that treaty did not even reach the parliamentary phase in the Czech Republic. He did, however, send an open letter to the Chairman of the CCC, Mr. Rychetský, requesting his opinion on the constitutionality of the EU Constitutional Treaty, but the judge declined to respond.

The first CCC review of the Lisbon Treaty

On 13 December 2007, the Lisbon Treaty was signed on behalf of the Czech Republic by Prime Minister Mirek Topolánek and Minister of Foreign Affairs Karel Schwarzenberg. The idea of a specific constitutional amendment, tailored to the Lisbon Treaty, was rejected and the government chose to use the constitutional Article 10a as the basis for the ratification. The Parliament was asked to approve the Lisbon Treaty in January 2008. In April 2008, the Senate stayed the approval procedure and asked the Constitutional Court to review the constitutionality of the Lisbon Treaty.

The first motion of the Senate was relatively brief and looked more like a political manifesto than a formal

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legal document. The Senate's submission questioned six elements of the Lisbon Treaty:

- the existence of the exclusive competencies of the European Union while the Czech Constitution permits, by means of Article 10a, the transfer only of "certain powers" to an international organisation;
- the flexibility clause in the Lisbon Treaty;
- the general passerelle clause and the specific passerelle clause in criminal law;
- the binding force of an international treaty concluded by the European Union (by a qualified majority in the Council) for the Czech Republic, regardless of Czech opposition to the treaty in the Council;
- possible conflict between the human rights provisions of the Charter of Fundamental Freedoms of the European Union and Czech constitutional human rights standards; and
- the EU sanctions regime against a member state that seriously and systematically violates human rights (Article 7 TEU), where the Senate feared that this regime could potentially lead to intense political pressure on the Czech state that would violate its sovereignty.

The Constitutional Court delivered its opinion on 26 November 2008. In a unanimous decision, the Constitutional Court found the Senate's objections against the constitutionality to be ill-founded. However, the Court made it very clear that that its decision on the Lisbon Treaty has not ruled on the constitutionality of the Lisbon Treaty in its complexity – what the Court said was only that the specific articles cited in the Senate's petition do not conflict with the Czech constitutional order.

The CCC's argumentation was based primarily on the evaluation of many features of the European Union that were challenged by the Senate as traditional or standard elements of the international cooperation. Further, the CCC finding of the constitutional conformity was built on the fact that the Czech Republic has control (due to unanimity required in the Council or the European Council) over the initiation of several procedures whose constitutionality was questioned. Regarding the parliamentary participation in the formulation of the Czech position in those affairs, the CCC ruled that the framework of the executive-parliamentary cooperation in this affair (such as the binding mandate) is not a constitutional question but one of political bargaining. The CCC's decision also stated that the EU Charter shares the same human rights values as the Czech Charter and the risk of a conflict is thus minimal.

For the future of the CCC's review powers, even more important were the 'horizontal' aspects of the Court's decision:

- the CCC answered only questions raised by the Senate and declared that the CCC review cannot go beyond the issues challenged in the particular applicant;
- Flexible reading of the *res judicata* principle by the CCC;
- Equal treatment is given to ordinary treaties and the treaties ratified under Art. 10a (EU Accession Treaty, ICC Treaty, Lisbon Treaty) regarding the review of the constitutionality performed by the CCC; and
- The CCC declared its readiness to hear constitutional complaints against the application of the Lisbon Treaty filed by individuals after the Lisbon Treaty enters into force.

After the CCC's ruling, the Lisbon Treaty was approved in both parliamentary chambers.

The approval procedure was more complicated in the Senate where the key political club of the Civic Democratic Party was split in their support of the Treaty. The number of senators opposing the Lisbon Treaty was not high enough to block its approval in the Senate (60% of senators required) but sufficient to trigger the review procedure.

The second motion to the CCC

The second submission seems to be both more radical and more complex (over 40 pages of text) than the motion formulated by the whole Senate. The timing – just before the Irish referendum – was not accidental. One of the authors of the second submission acknowledged that one of the purposes of the motion is to provide the President, who is not allowed to complete the ratification process until the CCC decides, with extra time and to relieve him from political pressures.

There are three layers to the senators' motion:

In the first layer, the senators claim that the whole Lisbon Treaty (and the Rome Treaty and Maastricht Treaty) conflicts with Art. 1 of the Czech Constitution, which states that "*the Czech Republic is a sovereign, unitary and democratic, law-abiding State, based on respect for the rights and freedoms of man and citizen*" and with a 'value neutrality' clause in the Czech Charter of Fundamental Rights and Freedoms (which is an integral part of the Czech constitutional order), which states that "*democratic values constitute the foundation of the State, so that it may not be bound either by an exclusive ideology or by a particular religious faith*". In particular, the

senators claim that the very structure and content of the Lisbon Treaty are vague, confusing, unclear and unpredictable to such an extent that it is incompatible with the principle of a law-abiding state. Further, the senators claim that the democratic character of the (Czech) state requires respect for the principle of the separation of powers and that the Lisbon Treaty (as well as the Maastricht and Rome Treaties) violates it by strengthening the position of the executive power in the Czech Republic (at the expense of the legislative branch). This problem might be addressed by the introduction of the 'binding mandate' for the Czech executive's behaviour at the EU level (i.e. voting in the European Council and the Council of the EU) in all areas covered by the parliamentary power inside the Czech Republic. However, the present system contains the binding mandate only in 'exceptional' situations, such as the use/activation of the passerelle clause by the European Council.

The most radical objection of the senators is their claim that the transfer of the competences of the Czech state to the EU level under the Lisbon Treaty is too extensive and interferes with a 'core sovereignty' area that is non-transferable. In the senators' opinion, the 'untouchable' domain includes the decision-making on the income and expenditure of the Czech budget, deference to the Czech Republic, the definition of criminal offences, sanctions and the conditions of the criminal responsibility, guaranteeing the public order in the Czech Republic and decision-making with exceptional/extraordinary impact on the cultural and social life of the Czech Republic. Since the Lisbon Treaty reaches into those domains, the transfer of powers in the Lisbon Treaty should be regarded as unconstitutional. Here, the senators' motion explicitly quotes the "Lisbon-Judgment" of the German Federal Constitutional Court from this year.

In the second layer of the senators' motion, they formulate more objections to particular clauses in the Lisbon Treaty. The major line of argumentation is the vagueness of the rules contained in the Lisbon Treaty. The specific articles under challenge are as follows:

- The sanctions regime against a member state that is violating human rights under Art. 7 TEU
- The EU competence in the external relations with neighbouring countries (Art. 8 TEU)
- Representative democracy as the principle of the functioning of the EU
- Competencies of the European Commission, in particular the statement that "the Commission shall promote the general interest of the Union and take appropriate initiatives to that end"
- "European commitment" (*evropanství*) as a criterion for the selection of commissioners (Art. 17 para.3 TEU)

- Mechanism of enhanced cooperation (Art 20 TEU)
- Promotion of an international system based on stronger multilateral cooperation and good global governance (Art. 21 para. 2 h TEU) as one of the tasks of the EU in the external relations.
- Common defence as one of the tasks of the European Union.
- Conditions for withdrawal from the European Union (Art. 50 TEU).

In a third layer to their motion, the senators ask the CCC to make several declarations (to formulate several doctrines) related to the (non)application of the EU law in the Czech Republic and on the limits of European integration as such. Among others, the CCC is asked to declare:

- The binding mandate (formulated by the legislative power) of the government is an essential element of the reduction of the democratic deficit of the EU. The binding mandate shall be used also in the process of the selection of the (Czech) candidate for the European Commission or European Court of Justice.
- The CCC is the ultimate body responsible for the protection of the Czech Constitution and is ready to reject the application of EU law on Czech territory when it conflicts with the Czech constitutional order. In other words, the senators want to hear that the CCC is ready for a 'Solange' scenario (known from Germany in 1974-1986).

Conclusions: Developments after the CCC judgment

The CCC is expected to deliver its judgment on November 3rd, but it is not likely to bring the Lisbon saga to a closure. In the aftermath of the Court's judgment, the following events can be expected:

- Václav Klaus might initiate another review of the Lisbon Treaty by the CCC. His application could, for instance, concentrate specifically on the question of the Beneš decrees and the alleged (in)stability of the property regime after the Lisbon Treaty. In this case, the CCC is most likely to answer in the same tone as in its first Lisbon judgment – no finding of any constitutional violation in abstracto but (theoretically) being ready to hear a constitutional complaint from individuals whose property rights might be violated in the future. However, regardless of its outcome, the presidential motion to the CCC would definitely cause another delay in the ratification process in the Czech Republic.
- Václav Klaus has not explicitly promised that he will finalise the ratification if the CCC finds no

conflict between the Czech Constitution and the Lisbon Treaty. In the past, several analogous (but not the same) problems emerged when the absence of a deadline (the Czech Constitution does not set any deadline for the President to give his signature) or the absence of an explicit presidential duty to act in the constitutional text were interpreted in a very different way by various political actors. In practice, the President has usually resisted more restrictive interpretations of his competencies – for instance, for several years, Václav Klaus has ignored a decision of the Supreme Administrative Court to take action (to appoint or explicitly decline to appoint) with respect to a particular candidate for a judicial post.

- Several scenarios on how to tackle the (potential) presidential inactivity were debated in the Czech Republic (including the possibility of adopting a specific law or even a constitutional amendment) but none of them has yet materialised. Even if a

specific ‘Lisbon’ legislative or constitutional measure is adopted in the future, it would be most likely followed by another reference to the CCC ... and another delay in the ratification process.

- Recently, Klaus requested the adoption of a specific ‘Czech clause’ or ‘Czech opt-out’, which would limit the application of the EU Charter of Fundamental Rights in the Czech Republic, before he would ratify the Lisbon Treaty. The preferred format of the ‘Czech clause’ is far from clear at present but, on Friday October 23rd, the President expressed optimism about the ongoing negotiations. Setting aside the legal consequences of the Czech clause for the EU-based obligations of the Czech state, its major effect might be symbolic. The Czech clause could provide Václav Klaus with a chance to ratify the Lisbon Treaty (and thus to avoid a serious constitutional crisis) while not (openly) exposing himself to domestic and external pressures to ratify unconditionally.

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