



## The Lisbon Treaty: ratification by the Czech Republic

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The Czech President, Václav Klaus, signed the *Treaty of Lisbon* at 15.00 on 3 November 2009, just a few hours after the Czech Constitutional Court had ruled that it did not contravene the Czech Constitution. The Treaty has now been ratified by all 27 EU Member States and is expected to enter into force on 1 December.

This Note considers Czech ratification of the Lisbon Treaty.

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## Contents

<b>1</b>	<b>Constitutional authority and processes for treaty ratification</b>	<b>2</b>
1.1	Transfer of powers	2
1.2	Ratification method	4
1.3	Constitutional Court authorisation	4
1.4	First Constitutional Court ruling on the Lisbon Treaty	5
<b>2</b>	<b>Lower House vote</b>	<b>5</b>
<b>3</b>	<b>Fall of the Czech Government</b>	<b>6</b>
<b>4</b>	<b>The Lisbon Treaty in the Senate</b>	<b>7</b>
4.1	The US missile connection	7
1.5	The Senate vote	7
<b>2</b>	<b>Developments after parliamentary approval</b>	<b>8</b>
2.1	Another Constitutional Court challenge	8
2.2	The Irish referendum	8
2.3	Pressure mounts on Klaus	8
	Internal pressure	8
	EU pressure	9
<b>3</b>	<b>New presidential demands</b>	<b>9</b>
3.1	A new protocol on the Charter of Rights	9
3.2	The status of the Charter of Rights and Protocol	10
3.3	The European Council summit	12
<b>4</b>	<b>The second Constitutional Court ruling on Lisbon</b>	<b>13</b>
<b>5</b>	<b>Entry into force of the Lisbon Treaty</b>	<b>17</b>
	<b>Appendix Czech public opinion</b>	<b>18</b>

## **1 Constitutional authority and processes for treaty ratification**

### **1.1 Transfer of powers**

A constitutional amendment of 18 October 2001 inserted a new Article 10a on the ratification of international treaties into the Czech Constitution:

(1) An international agreement may provide for a transfer of certain powers of bodies of the Czech Republic to an international organization or institution.

(2) The approval of the Parliament is required to ratify an international agreement stipulated in Subsection 1 unless a constitutional law requires an approval from a referendum.<sup>1</sup>

And Article 49 of the Constitution provides:

(1) International accords requiring consent from Parliament are passed by Parliament in the same way as draft laws.

(2) Accords on human rights and fundamental freedoms, political agreements, and economic agreements of a general nature, as well as agreements on the implementation of which a law must be passed, require consent from Parliament.

The question of which majority rule applies depends on the extent of sovereignty transfer brought about by the treaty in question. The ratification of an international treaty without a transfer of sovereignty is achieved by a simple majority under Article 49 of the Constitution. A treaty which transfers sovereignty, but without amending the Constitution, is achieved by a three-fifths “constitutional majority” under Article 10a. A treaty which transfers sovereignty and amends the Constitution requires a constitutional amendment under Article 89 of the Constitution.

The procedure for the adoption of draft laws (see Article 49, above) is as follows:

Art. 41

(1) Bills shall be introduced in the Chamber of Deputies.

(2) Bills may be introduced by a Deputy, a group of Deputies, the Senate, the Government, or the representative body of a superior self-governing territorial unit.

Art. 44

(1) The Government may express its opinion on all Bills.

(2) If the Government does not express its opinion on a Bill within thirty days of the day the Bill was delivered to it, it shall be deemed to have expressed itself positively.

(3) The Government may ask the Chamber of Deputies to complete its consideration of a Government Bill within three months of its introduction, provided that the Government ties thereto its request for a vote of confidence.

Art. 45

A Bill passed by the Chamber of Deputies shall be referred by it to the Senate without unnecessary delay.

Art. 46

(1) The Senate shall consider a Bill referred to it and decide thereon within thirty days of the day the Bill was sent to it.

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<sup>1</sup> <http://www.hrad.cz/en/czech-republic/constitution-of-the-cr.shtml>

(2) In its decision the Senate shall pass or defeat the Bill or shall return it to the Chamber of Deputies with amendments, or shall express its resolve not to consider it.

(3) If the Senate does not express itself within the term set in paragraph 1, the Bill shall be considered as having been passed.

#### Art. 47

(1) If the Senate defeats a Bill, the Chamber of Deputies shall take a second vote thereon. The Bill shall pass if approved by absolute majority of all Deputies.

(2) If the Senate returns a Bill to the Chamber of Deputies with amendments, the Chamber of Deputies shall vote on its version passed by the Senate. The Bill shall pass by its resolution.

(3) If the Chamber of Deputies does not pass the Bill in the version approved by the Senate, it shall take a new vote on the Bill in the version in which it was referred to the Senate. The Bill shall then pass if approved by absolute majority of all Deputies.

(4) No amendments may be introduced when a defeated or returned Bill is considered in the Chamber of Deputies.

#### Art. 48

If the Senate resolves not to consider a Bill, its resolution shall pass the Bill.

#### Art. 49

An approval of both Chambers of Parliament is required to ratify international agreements

a) governing rights and duties of persons;

b) of alliance, peace, or other political treaties;

c) which result in the membership of the Czech Republic in an international organization;

d) that are economic of a general nature; and(e) on other issues to be governed by the law.

### **1.2 Ratification method**

The then Czech Prime Minister, Mirek Topolánek, and the Minister of Foreign Affairs, Karel Schwarzenberg, signed the Lisbon Treaty on 13 December 2007. The Government chose to use Article 10a of the Constitution (see above) as the basis for ratification, rather than a constitutional amendment with a referendum.

### **1.3 Constitutional Court authorisation**

Article 87(2) of the Constitution stipulates:

2) The Constitutional Court shall also decide on the conformity of international agreements under Section 10a and Section 49 with the constitutional order

prior to their ratification. Until a ruling of the Constitutional Court is delivered, an agreement cannot be ratified.

#### 1.4 First Constitutional Court ruling on the Lisbon Treaty

In April 2008 a group of eurosceptic ODS Senators from the Upper House took questions about the Treaty to the Constitutional Court and the ratification process was suspended. The Senate's submission concerned six elements of the Lisbon Treaty:

- the exclusive competencies of the European Union, although the Czech Constitution permits under 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 Union by a qualified majority in the Council, regardless of Czech opposition to the treaty in the Council
- possible conflict between the human rights provisions of the Charter of Fundamental Rights and Czech constitutional human rights standards
- the EU sanctions regime against a Member State that seriously and systematically violates human rights (Article 7 TEU). The Senate feared that this regime could lead to political pressure that would violate Czech sovereignty.<sup>2</sup>

On 26 November 2008 the Court decided unanimously that that the elements of the Lisbon Treaty which had been referred to it were compatible with the Czech Constitution.<sup>3</sup> The Court concluded that the Treaty of Lisbon changed nothing with regard to the fundamental concept of current European integration, and that, even after the entry into force of the Treaty, the Union would remain a unique organisation under international law.<sup>4</sup>

## 2 Lower House vote

The Czech Lower House, the Chamber of Deputies, considered the Lisbon Treaty on 17 February 2009. *České Noviny.cz* reported on the three-hour debate, which came to no final decision:

Only one of the three lower house committees has submitted its position on the treaty so far. The EU affairs committee recommended that the house ratify it.

The leaders of the two big parties - Prime Minister Mirek Topolánek (Civic Democrats, ODS) and Jiri Paroubek (Social Democrats, CSSD) - today supported the Lisbon treaty.

Topolánek said it is his head, not heart that decides in support of the treaty. He repeatedly said he had a number of reservations about the document.

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<sup>2</sup> Specifically, these were Art. 2 para. 1 (before renumbering, Art. 2a para. 1), Art. 4 para. 2 (before renumbering, Art. 2c), Art. 352 para. 1 (before renumbering, Art. 308 para. 1), Art. 83 (before renumbering, Art. 69b para. 1) and Art. 216 (before renumbering, Art. 188l) of the Treaty on the Functioning of the European Union and Art. 2 (before renumbering, Art. 1a), Art. 7 and Art. 48 para. 6 and 7 of the Treaty on European Union, as amended by the Treaty of Lisbon, and the Charter of Fundamental Rights of the European Union

<sup>3</sup> See <http://news.bbc.co.uk/1/hi/world/europe/7749724.stm> and <http://euobserver.com/9/27183/?rk=1>

<sup>4</sup> For the full text of the ruling see [http://angl.concourt.cz/angl\\_verze/doc/pl-19-08.php](http://angl.concourt.cz/angl_verze/doc/pl-19-08.php)

Most ODS politicians are against the treaty. President Vaclav Klaus, ODS founder and former long-standing leader, is one of its strongest critics.

Paroubek called on the Civic Democrats to vote for the EU treaty because most ODS voters were pro-European.

It seems that some ODS deputies might support the treaty in the vote that is to be held on Wednesday.

Along with the Social Democrats, the junior coalition Greens (SZ) and Christian Democrats (KDU-CSL) want the treaty to be ratified as soon as possible.

The opposition Communist Party (KSCM) who oppose the treaty would like a referendum to be held on it. The KSCM today proposed that the discussion be postponed, but both proposals were rejected.<sup>5</sup>

However, the Lower House voted in favour of the Treaty on 18 February 2009 by 125 deputies to 61 out of 197 present. A constitutional majority of three-fifths was required, or at least 120 votes out of the 200-seat Lower House. *České Noviny.cz* reported on the vote:

According to the voting result record, the Lisbon treaty was rejected by 36 out of the 79 senior ruling Civic Democrat (ODS) MPs. Two of them then protested against the result, saying there was a mistake in the voting list since they had voted for the treaty.

Some other Civic Democrats abstained from the vote.

Most opposition Communist (KSCM) deputies and unaffiliated MP Juraj Raninec, who left the ODS deputy group some time ago, voted against the treaty.<sup>6</sup>

### **3 Fall of the Czech Government**

The Czech Prime Minister Mirek Topolánek and his minority centre-right government lost a vote of confidence in the Parliament on 24 March 2009. This immediately gave rise to concerns about the future of the Czech EU Presidency, which was due to end on 30 June 2009, and the Lisbon ratification process. Under Article 62 of the Constitution, the prime minister and cabinet may continue in office temporarily until a new government is appointed. The Topolánek government would thus be able to remain in place in a caretaker capacity until the end of June, enabling the Presidency to run its natural course, although many commentators viewed this scenario as a lame-duck leadership. The eurosceptic President Václav Klaus would, according to most analysts at the time, be strengthened with increased powers and an indefinite period in which to nominate a new government.

Jiri Paroubek, the opposition Social Democratic (CSSD) leader who had called the vote of no confidence, favoured an interim non-partisan government of technocrats until early elections in the autumn or spring 2010. Elections are due in mid-2010 and early elections can only be called after three failed attempts to form a new government, or if parliament passes a special law to call an early election.

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<sup>5</sup> [http://www.ceskenoviny.cz/news/zpravy/czech-lower-house-make-no-decision-on-eu-treaty-today/361001&id\\_seznam](http://www.ceskenoviny.cz/news/zpravy/czech-lower-house-make-no-decision-on-eu-treaty-today/361001&id_seznam). See also <http://aktualne.centrum.cz/czechnews/clanek.phtml?id=629903>

<sup>6</sup> <http://www.ceskenoviny.cz/news/zpravy/czech-lower-house-passes-lisbon-treaty/361057>

However, after talks between Topolánek's three-party coalition and the opposition Social Democrats, it was decided that the Government would step down before the end of the EU Presidency, with a government of technocrats taking over. Topolánek and Paroubek held talks on the formation of a new government. They were divided ideologically and also, allegedly, by personal animosity, compounding President Klaus's dislike of Topolánek over his support for the Lisbon Treaty. It was thought possible that the President, who had wide support in the Senate, might seek to install a eurosceptic prime minister to replace Topolánek.<sup>7</sup> However, this was not the case. Mr Topolánek stepped down on 8 May 2009, handing over the premiership to Jan Fischer, a former head of the national statistics office, who oversaw the rest of the Czech EU Presidency and the Lisbon ratification process.

## **4 The Lisbon Treaty in the Senate**

In the Senate a three-fifths constitutional majority was required (i.e. at least 49 votes out of the 81 senators) to approve the Lisbon Treaty. However, political factors threatened to prevent it from being passed.

### **4.1 The US missile connection**

Mirek Topolánek had said that ratification of Lisbon would depend on Czech ratification of an agreement with the United States on the construction of a missile shield and radar base in the Czech Republic, allegedly to counter any threat from Iran. The plan was opposed in the Senate by members of the ODS party. There was in any case a question mark as to whether the new US President, Barack Obama, would continue with his predecessor's project, which was vehemently opposed by Russia and threatened to destabilise US-Russian relations. In mid-March 2009 President Obama decided to put on hold the plans for a missile shield and radar base in the Czech Republic. It appeared that both the missile treaty and the Lisbon Treaty would be put on ice until the stalemate in the Senate could be resolved.<sup>8</sup>

### **1.5 The Senate vote**

In May 2009 reports indicated that the chances of Lisbon being approved in the Senate were high, in spite of the fall of the government.<sup>9</sup> The Senate voted on 6 May 2009 and after six hours of debate approved the Treaty by 54 votes to 20. This gave the Irish Government more confidence in its hopes for a yes-vote in the referendum in October 2009, and appeared to guarantee subsequent speedy ratification by the Czech Republic.<sup>10</sup> At this time Poland, Germany and Ireland had not yet completed ratification and President Klaus said he would not sign the Treaty off until it was clear what these States were going to do. Klaus indicated that an Irish yes-vote was no longer the only pre-condition for Czech ratification, and he dismissed the German Constitutional Court ruling on the Lisbon Treaty on 30 June 2009 as "predictable".

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<sup>7</sup> See *EurActiv* 2 April 2009 at <http://www.euractiv.com/en/future-eu/czech-press-paints-nightmare-scenario-lisbon-treaty/article-180928>

<sup>8</sup> See *EurActiv* 19 March 2009, "No US radar, no Lisbon Treaty", Prague warns" at <http://www.euractiv.com/en/future-eu/us-radar-lisbon-treaty-prague-warns/article-180434>

<sup>9</sup> *EurActiv* 2 April 2009

<sup>10</sup> At this time Poland, Germany and Ireland had also not yet completed ratification.

## 2 Developments after parliamentary approval

### 2.1 Another Constitutional Court challenge

On 29 September 2009 17 Czech Senators, led by Jiri Oberfalzer (ODS), filed a second complaint against Lisbon with the Constitutional Court in Prague, effectively suspending Czech ratification for several weeks; some thought months. The complaint centred on their concerns as to whether the Lisbon Treaty formed the legal basis for the creation of a European 'super-state'. If so, this would violate the Czech Constitution. The timing of the new challenge, which this time concerned the Treaty as a whole rather than specific aspects of it, further fuelled speculation among Lisbon supporters that the anti-Lisbon politicians aimed to delay their ratification process until the UK elections.

The Czech European Affairs Minister, Štefan Füle, maintained the new case would simply clarify the constitutional position once and for all and that it would be politically very difficult for the President to ignore the opinion of the Czech Government, Parliament and Constitutional Court.<sup>11</sup> The Czech Court allegedly agreed to fast track the Lisbon case, with a view to announcing the date of its final decision by mid-October.<sup>12</sup> (the final decision actually came in early November – see below).

On 7 October the Czech Constitutional Court rejected one challenge from Senators loyal to President Klaus concerning an amendment of the Czech Parliament's Rules of Procedure which requires both Houses to approve any potential transfer of national competences to Brussels by a simple majority vote. The Senators insisted that a qualified majority vote was required, but the Court upheld the amendment.<sup>13</sup>

### 2.2 The Irish referendum

Ireland voted in favour of ratifying Lisbon on 2 October 2009, by 67.1% to 32.9%. After the positive vote in Ireland on 2 October President Klaus declined to say how he would proceed, insisting he could do nothing until the Czech Court review was completed. Jan Fischer remained confident that ratification would be completed by the end of the year and his Government assured the EU that it was committed to ratifying.<sup>14</sup>

### 2.3 Pressure mounts on Klaus

#### *Internal pressure*

In June 2009 there were reports that the Czech Social Democrats had discussed the possibility of trying to suspend the President if he did not sign the Treaty, which would have required a simple majority of 41 votes in the Senate and allowed the interim Prime Minister Jan Fischer to sign it instead.<sup>15</sup> There were other suggestions as to how the President might, if necessary, be forced to sign the Treaty. According to the Czech daily, *Hospodarske noviny*, legal experts suggested that if Klaus continued to delay, the Government could force him to

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<sup>11</sup> *EurActiv* 30 September 2009 at <http://www.euractiv.com/en/future-eu/eurosceptic-czech-senators-put-lisbon-treaty-hold/article-185888>

<sup>12</sup> *EurActiv* 8 October 2009 at <http://www.euractiv.com/en/future-eu/eu-leaders-plead-patience-troublesome-czechs/article-186177>

<sup>13</sup> *EurActiv* 7 October 2009 at <http://www.euractiv.com/en/future-eu/czech-court-buoys-eu-lisbon-treaty-chances/article-186157>

<sup>14</sup> *Irish Times* 3 October 2009 at <http://www.irishtimes.com/newspaper/breaking/2009/1003/breaking6.html?via=rel>

<sup>15</sup> See *EUObserver* 25 June 2009 at <http://euobserver.com/9/28373/?rk=1>.

sign the Treaty by filing a complaint against him for inactivity.<sup>16</sup> However, Piotr Maciej Kaczyński of the Centre for European Policy Studies (CEPS) recalled the occasion when the Czech President had refused to appoint judges because he thought the nominees were "too young", and it had taken two years to settle the case in the courts. One Social Democrat thought the Government could exert pressure on Klaus by limiting the 2010 budget of the presidential office or by restricting foreign visits.

A report in *Le Monde* on an interview with President Klaus in the Czech *Lidové Noviny* on 17 October revealed that Klaus was resigned to signing the Treaty if the Court ruled in its favour, and would not be in a position to wait until the UK held elections. It had been widely reported that the British Conservatives were hoping Czech ratification could be delayed until the next UK general elections, when the Conservatives, if elected to government, would hold a referendum on the Lisbon Treaty.

### **EU pressure**

At EU level patience with President Klaus was wearing thin. The European Commission President, José Manuel Barroso, was reported to have told former Prime Minister Topolánek at the end of September that if President Klaus continued to block the Treaty, the Czech Republic would be the State to lose a Commissioner under the Nice Treaty provisions that would prevail.<sup>17</sup> On the other hand, the Polish conservative newspaper *Rzeczpospolita* speculated that the Czech Republic might be offered an influential Commission post in exchange for Klaus's signature of the Treaty.<sup>18</sup> Klaus appeared not to be bothered about the possibility of losing a Commissioner. He said in an interview in *La Croix*

Je pense que le fait d'avoir un commissaire tchèque au sein de la Commission européenne n'est pas très important. Ce serait important s'il représentait bel et bien son pays. Mais ce n'est pas le cas du commissaire actuel qui ne pense pas à son pays en priorité. De plus, la composition de la Commission est décidée par le Conseil européen à l'unanimité, dans le fonctionnement actuel ; et, donc, pour nous priver de commissaire, il faudrait que nous soyons d'accord, ce qui serait tout de même surprenant.<sup>19</sup>

*[Having a Czech Commissioner is not very important. It would be if he represented his country, but this is not the case at present. Moreover, the composition of the Commission is decided by the Council by unanimity so we would have to agree to being deprived of a Commissioner, which would be surprising].*

## **3 New presidential demands**

### **3.1 A new protocol on the Charter of Rights**

In October 2009 President Klaus insisted on obtaining what he called "footnote", to be added to the Lisbon Treaty to guarantee that the Charter of Fundamental Rights, to which the Treaty gives legal status, could not be used to counter the Beneš decrees and allow potential

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<sup>16</sup> *České Noviny* 29 September 2009 at <http://www.ceskenoviny.cz/news/zpravy/government-can-force-klaus-to-sign-lisbon-treaty-czech-lawyers/399935>. President Klaus had delayed signing the International Criminal Court agreement for several years, finally doing so in October 2008 after a similar proposal from lawyers was made to charge him with inactivity.

<sup>17</sup> *EUObserver* 29 September 2009 at <http://euobserver.com/9/28740/?rk=1>

<sup>18</sup> *EurActiv* 2 October 2009 at <http://www.euractiv.com/en/future-eu/press-fuels-speculation-czech-lisbon-ratification-deal/article-186020#>

<sup>19</sup> *La Croix* 6 October 2009 at <http://www.la-croix.com/-Le-referendum-irlandais-n-apporte-rien-de-neuf-/article/2396261/4077>. Unofficial translation by Edward Fairbairn.

property claims by Germans expelled from Czechoslovakia after World War Two.<sup>20</sup> The provisions of the Charter cannot be used retroactively, and so cannot be used for any past property right claims, but President Klaus was not convinced of this. By mid-October the Czech demand had changed from a footnote to an “opt-out” from the Charter, along the lines of the UK/Polish Protocol 30 attached to the Lisbon Treaty (see below). On 18 October there were indications that Slovakia, where the Beneš Decrees are also law, might follow the Czech Republic in demanding Charter opt-outs from the Lisbon Treaty.

Adam Drda, a Czech journalist, historian and author, commented on President Klaus’s tactics:

For Klaus himself, the driving factor is not the Beneš Decrees. He is executing a skilful tactical manoeuvre. For one thing, he criticised the treaty so vehemently that he does not now want to sign it without something to show for it.

Secondly, he gains time. There will now be international discussions and, spurred on by Klaus, 17 senators are already using that extra time, announcing on Monday (12 October) that they will expand a prior constitutional challenge. Until the court rules, Klaus cannot sign the treaty.

Thirdly, he has created a situation in which any pressure from the EU helps him: since he is defending “national sovereignty”, the harsher the words from abroad, the more courageous he will appear to be.

And, fourthly, this may help Klaus, who has been systematically pulling the Czech political scene apart, to pull down the head of the ODS, Mirek Topolánek, a man he hates and who forced the treaty through parliament.

The Czechs’ problem is not Lisbon; it is that their representatives chose a president with autocratic tendencies who is using a badly constructed constitution (tailored to Václav Havel) to act as if the political system were presidential. The country is now in its most serious political crisis since 1989, with a government that lacks a proper mandate and a disintegrating parliament. All that plays into Klaus’s hands.<sup>21</sup>

### **3.2 The status of the Charter of Rights and Protocol**

Under amended Article 6 (Lisbon Article 1(8)) the Charter will have “the same legal value as the Treaties”, but is not reproduced in the Treaties. It was solemnly proclaimed at a plenary session of the Parliament on 12 December 2007 by the Presidents of the Parliament, Council and Commission and published in the EU Official Journal. In response to UK concerns about possible “competence creep” in giving the Charter legal status, Lisbon further specifies:

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and

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<sup>20</sup> The Decrees of Edvard Beneš expelled some three million former Czechoslovak citizens of German ethnicity to Germany and Austria at the end of World War II for their alleged collaboration with the Nazis.

<sup>21</sup> *European Voice* 15 October 2009 at <http://www.europeanvoice.com/article/imported/klaus,-defender-of-the-czech-nation-/66138.aspx>

application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

A declaration specifies the scope of application of the Charter and its relationship with the European Convention on Human Rights (ECHR). The Declaration confirms that the Charter does “not extend the field of application of Union law beyond the powers of the Union or establish any new power or task for the Union, or modify powers and tasks as defined by the Treaties”.

A clarifying protocol on the application of the Charter to Poland and the UK states that neither the national courts of these countries nor the ECJ may declare UK law incompatible with the Charter. The protocol refers to the requirement that the Charter be applied in accordance with Title VII of the Charter itself and applied and interpreted by the national courts “strictly in accordance with the Explanations referred to in that Article”. Reaffirming amongst other things that the Protocol is “without prejudice to the application of the Charter to other Member States” and without prejudice to other UK obligations under the two Treaties, it states:

Article 1

1. The Charter does not extend the ability of the Court of Justice, or any court or tribunal of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.

2. In particular, and for the avoidance of doubt, nothing in [Title IV] of the Charter creates justiciable rights applicable to the United Kingdom except in so far as the United Kingdom has provided for such rights in its national law.

Article 2

To the extent that a provision of the Charter refers to national laws and practices, it shall only apply in the United Kingdom to the extent that the rights or principles that it contains are recognised in the law or practices of the United Kingdom.<sup>22</sup>

It has been suggested that the Charter could still have an indirect impact on UK law, however, particularly in cases where the Court has ruled on Charter-related issues in other EU Member States.<sup>23</sup> The Protocol also raises questions about whether citizens of other Member States living and working in the UK jurisdiction could claim legal protection under the Charter. The Government wrote to the European Scrutiny Committee (ESC) on 13 July 2007 in reply to questions about possible inconsistencies between the requirements of the amended Protocol and the amended Treaties, stating:

The UK-specific Protocol which the Government secured is not an 'opt-out' from the Charter. Rather, the Protocol clarifies the effect the Charter will have in the UK. The UK Protocol confirms that nothing in the Charter extends the ability of any court to strike down UK law. In particular, the social and economic provisions of Title IV give people no greater rights than are given in UK law. Any Charter rights referring to national law and practice will have the same limitations as those rights in national law. The Protocol confirms that since the Charter creates no rights, or circumstances in

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<sup>22</sup> CIG 2/1/07 REV 1, 5 October 2007 at <http://www.consilium.europa.eu/uedocs/cmsUpload/cg00002re01en.pdf>

<sup>23</sup> *EUObserver* 27 June 2007 at <http://euobserver.com/9/24368/?rk=1>

which those rights can be relied on before the courts, it does not change the status quo.<sup>24</sup>

### 3.3 The European Council summit

The European Council on 29-30 October 2009 discussed the Czech demands and agreed on the text of a new protocol which would apply the provisions of Protocol 30 of the Lisbon Treaty to the Czech Republic. The Presidency Conclusions contain an annex with the text of a "Protocol on the application of the Charter of Fundamental Rights of the European Union to the Czech Republic". This, like the Protocol on Ireland, will be attached to the next accession treaty and ratified according to national ratification methods. It will thus not entail reopening the Lisbon ratification process.

The Heads of State or Government of the 27 Member States of the European Union, taking note of the wish expressed by the Czech Republic,

Having regard to the Conclusions of the European Council,

Have agreed on the following Protocol:

#### Article 1

Protocol No 30 on the application of the Charter of Fundamental Rights of the European Union to Poland and to the United Kingdom shall apply to the Czech Republic.

#### Article 2

The Title, Preamble and operative part of Protocol No 30 shall be modified in order to refer to the Czech Republic in the same terms as they refer to Poland and to the United Kingdom.

#### Article 3

This Protocol shall be annexed to the Treaty on European Union and to the Treaty on the Functioning of the European Union.<sup>25</sup>

As in 1992, when the so-called "Edinburgh Agreement" contained provisions that allowed Denmark to ratify the *Treaty on European Union* (Maastricht Treaty), the agreement on the future adoption of a protocol on Lisbon Protocol 30 was described as an agreement of the Heads of State or Government, rather than of the European Council. However, in the Czech case, unlike both the 1992 case and the initial Decision on Irish guarantees, there is no formal Decision of the Heads of State or Government on the Protocol, merely a protocol text annexed to the Presidency Conclusions. The Conclusions are the context for the agreement on the new protocol, which will be in effect a new international treaty amending Protocol 30 to the Lisbon Treaty. This might raise questions about the legal powers of the European Council and the legal status of Presidency Conclusions as the conduit for such agreements.

According to the Swedish Prime Minister, Fredrik Reinfeldt, the Lisbon Protocol will not be modified immediately, but "at a later stage, when Lisbon is in place",<sup>26</sup> i.e. at the time of the

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<sup>24</sup> ESC 35<sup>th</sup> Report 2006-07 para. 57 at

<http://www.publications.parliament.uk/pa/cm200607/cmselect/cmeuleg/1014/101403.htm#a9>

<sup>25</sup> Presidency Conclusions – Brussels, 29/30 October 2009 at

[http://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/ec/110889.pdf](http://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/ec/110889.pdf)

next accession treaty. Thus, the Czech President will effectively sign off the Lisbon Treaty as it stands, without amendment, and thereby complete ratification, but with the political commitment to a future protocol clarifying the Czech position vis-à-vis the Charter of Rights.

Laurent Pech commented on the Czech protocol on the "International Law Prof Blog" on 30 October 2009:

Today's agreement on the Czech Protocol also sets an extremely bad precedent as it "rewards" a unilateral attempt by a constitutionally incompetent national authority to renegotiate a treaty previously agreed and signed by the national government. It might be, however, that this new Protocol is a small price to pay when considering the length of time and energy spent on agreeing and ratifying a rather modest set of institutional reforms.

From a legal point of view, it may also be worth emphasizing that Protocol no. 30 does not in fact offer any general "opt-out" regime from the EU Charter of Fundamental Rights. Indeed, Protocol no. 30 rather clarifies "the application of the Charter in relation to the laws and administrative action of Poland and of the United Kingdom and of its justiciability within Poland and within the United Kingdom." In other words, Protocol no. 30 does not render the Charter wholly inapplicable in the UK/Poland.<sup>27</sup>

The eurosceptic Professor Anthony Coughlan commented on the Czech agreement and the powers of the present and future European Council:

4. The Heads of State or Government who will be in office when the next EU Accession Treaty comes up for ratification will be different from the present group. There is no guarantee that they will all feel similarly bound by the political commitment regarding the Czechs given by their predecessors the other day, not least because the legal status of the European Council itself will be changed by the Lisbon Treaty. For Lisbon proposes to make the European Council into an EU institution for the first time, whose actions and failures to act would thereafter be subject to review by the Court of Justice. It is arguable therefore whether the present European Council can bind a future one based on a different legal constitution in the way that is proposed in last Friday's EU "summit" Conclusions.<sup>28</sup>

#### **4 The second Constitutional Court ruling on Lisbon**

The Court postponed its decision by a week from 27 October to 3 November 2009, which caused further tension in the EU institutions and Member States because the October European Council would not be able to discuss the new Lisbon institutional provisions.

On 3 November 2009 the Czech Court ruled that the Lisbon Treaty was not in breach of the Czech Constitution. Prime Minister Fischer said he was satisfied with the verdict, adding that there was now "no obstacle to the ratification".<sup>29</sup> Fischer agreed to countersign the Treaty. The Court held:

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<sup>26</sup> *EurActiv* 30 October 2009 at <http://www.euractiv.com/en/future-eu/eu-leaders-ink-czech-lisbon-treaty-guarantees/article-186900#>

<sup>27</sup> "Agreement on the "legal guarantee" to be offered to the Czech Republic on the EU Lisbon Treaty" at [http://lawprofessors.typepad.com/international\\_law/2009/10/agreement-on-the-legal-guarantee-to-be-offered-to-the-czech-republic-on-the-eu-lisbon-treaty.html](http://lawprofessors.typepad.com/international_law/2009/10/agreement-on-the-legal-guarantee-to-be-offered-to-the-czech-republic-on-the-eu-lisbon-treaty.html)

<sup>28</sup> "Different promises for the Czechs and the Irish to secure the ratification of the Lisbon Treaty", 1 November 2009 at <http://www.teameurope.info/node/713>

<sup>29</sup> <http://news.bbc.co.uk/1/hi/world/europe/8339464.stm>

I. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community as a whole, specifically in Art. 7, Art. 8, Art. 9, Art. 10 par. 1, Art. 13 par. 1, Art. 14 par. 2, Art. 17 par. 1 and 3, Art. 19 par. 1, Art. 20, Art. 21 par. 2 letter h), Art. 42 par. 2, Art. 47 and Art. 50 paras. 2 to 4 of the Treaty on European Union in Art. 3, Art. 78 par. 3, Art. 79 par. 1 and Art. 83 of the Treaty on the Functioning of the European Union and its ratification are not inconsistent with the constitutional order of the Czech Republic.

II. The petition to review the conformity of the Treaty on the European Union (referred to as the Treaty of Maastricht by the petitioner) as a whole, and the Treaty on the Functioning of the European Union (referred to as the Treaty of Rome by the petitioner) as a whole with the constitutional order is rejected [as inadmissible for being out of scope of the jurisdiction of the Court].

III. The petition to review the conformity of Art. 2, Art. 4 and Art. 216 of the Treaty on the Functioning of the European Union is rejected [as inadmissible for being *res iudicata*].

IV. The petition to find „that the Decision of the Heads of State or Government meeting within the European Council on the concerns of the Irish people on the Treaty of Lisbon, which on 18 and 19 June 2009 added certain provisions to the Treaty of Lisbon, is an international agreement pursuant to Article 10a of the Constitution and as such requires the approval of both Chambers of Parliament obtained by a constitutional majority, without which it is not applicable in relation to the Czech Republic“ is rejected [as inadmissible].

V. The petition to hear this petition to review the Treaty of Lisbon together with their previous petition of 31 August 2009, ref. no. Pl. ÚS 26/09, to annul selected provisions of the rules of procedure of both chambers of the Parliament, in joined proceedings is rejected [as inadmissible and ill-founded].<sup>30</sup>

A subsequent Court press release contained a more detailed analysis of the decision:

The Constitutional court maintained the opinion it expressed last year, and reviewed those parts of the Treaty of Lisbon that the petitioner had expressly contested on grounds that it stated. However, because this time the petitioner also contested the Treaty of Lisbon as a whole, on the grounds that it was not comprehensible, the Constitutional Court also considered that objection, which, however, it found to be unjustified, similarly to the objections raised by the petitioner against the possibility of making linguistic corrections in the Czech language version after the treaty was submitted to EU member states for ratification. In addition, the Constitutional Court rejected as inadmissible (due to the impediment of *rei iudicatae*) the part of the petition that contested that part of the Treaty of Lisbon that was already reviewed last year. It also rejected an objection aimed at review of the so-called “Irish guarantees.” Finally, the Constitutional Court rejected, due to inadmissibility, objections aimed at review of the Treaty of Rome and Treaty of Maastricht as a whole, because those parts of these treaties that are not affected by the Treaty of Lisbon have already been ratified, so the Constitutional Court did not have jurisdiction to review them.

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<sup>30</sup> Constitutional Court summary at <http://www.usoud.cz/clanek/2136>

With reference to its previous judgment, the Constitutional Court emphasized that the ranking of individual petitioners, as provided by § 71a par. 1 of the Act on the Constitutional Court (i.e. a Chamber of Parliament, a group of deputies, a group of senators, the president of the republic) is guided by the intent to provide each of them an opportunity to duly express their doubts concerning the constitutionality of an international treaty under discussion. The judge rapporteur stated in the reasoning of the judgment: “However, that does not mean that potential subsequent petitioners (or potential parties to other proceedings) may contest, over and over again, conclusions concerning an international treaty’s conformity with the constitutional order that the Constitutional Court has already stated in a judgment,” The Constitutional Court emphasized that it is a court, not a place for endless debates.

The Constitutional Court also considered, in light of the procedural steps taken by the petitioner, whether the “broadly conceived participation in proceedings on the constitutionality of international treaties, which gives procedural opportunities to raise doubts about an as yet unratified international treaty progressively to individual potential petitioners does not, on the other hand, create an intolerable risk of abuse of procedural mechanisms before the Constitutional Court, abuse that would contravene the very purpose of the proceeding.” The Constitutional Court proceeded on the basis, that doubts on the constitutionality of a negotiated international treaty need to be removed without unnecessary delay, in view of the rule of good faith in international relations, and in view of the obligation of the president of the republic to ratify, without unnecessary delay, an international treaty that was duly negotiated by the president of the republic or based on his authorization, and whose ratification has been consented to by a democratically elected legislative assembly. Based on its analysis, the Constitutional Court stated that “the opening of proceedings on the constitutionality of international treaties by groups of senators, groups of deputies, and the president of the republic must be subject to the same deadline by which it is necessary to ratify an international treaty, i.e. a deadline without unnecessary delay.”

According to the Constitutional Court, that does not mean immediately. Appropriate postponement of ratification in order for a group of senators or deputies to be able to submit its petition to open proceedings before the Constitutional Court, or for the president of the republic to be able to submit such a petition, is not unnecessary delay. However, the postponement cannot be on the order of several months, but “only weeks.” In this case the petition was submitted more than five months after Parliament consented to ratification, so it was not filed without unnecessary delay. However, this time the Constitutional Court did not, for that reason, reject the petition to open proceedings, “because it does not want to retroactively burden the petitioner with the analysis of procedural rules governing access to the Constitutional Court and deadlines that the Constitutional Court found in this judgment.”

Regarding the request that it define the substantive limits of transferred competence and define “the essential requirements of a democratic state governed by the rule of law,” the Constitutional Court stated that “it does not consider it possible, in view of the role that it plays in the constitutional system of the Czech Republic, that it should create such a catalog of non-transferrable competences and authoritatively define ‘the substantive limits for the transfer of competence’ as the petitioner requests.” It emphasized that “responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they are actually made on the political level.”

Regarding the objection of a democratic deficit in the European Union, the Constitutional Court referred to the conclusions in its first Lisbon judgment. In the Constitutional Court's opinion, the contested article of the TEU, which provides that "the functioning of the Union shall be founded on representative democracy" is directed at processes both at the European and domestic level, not only at the European Parliament. The European parliament is not an exclusive source of democratic legitimacy for decisions adopted on the European Union level. That legitimacy derives from a combination of structures existing both on the domestic and European level, and it is not possible to demand absolute equality among voters in individual member states. That would be possible only if decisions in the European Union were adopted together with ruling out legitimating connections to governments, and above all to legislative assemblies in the individual members states.

As regards objections concerning the loss of the Czech Republic's sovereignty, or objections on the non-existence of a concept of shared sovereignty, which the president of the republic raised, the Constitutional Court stated that the concept of shared sovereignty was already known to the government of Václav Klaus in 1995, when the Czech Republic applied to join the European Union. According to the Constitutional Court, "in a modern democratic state governed by the rule of law, state sovereignty is not an aim in and of itself, i.e. in isolation, but is a means to fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands [...] The transfer of certain competences to the state, which arises from the free will of the sovereign and will continue to be exercised with its participation in a pre-agreed, controlled manner, is not a sign of the weakening of sovereignty, but, on the contrary, can lead to strengthening it in the joint process of an integrated whole."

The Constitutional Court also found unjustified the other reasons for the alleged inconsistency of the Treaty of Lisbon with the constitutional order, and, in the conclusion of its judgment, stated that "this judgment refutes the doubts concerning the consistency of the Treaty of Lisbon with the Czech constitutional order, and removes the formal obstacles to its ratification."

The judge rapporteur in this matter was the chairman of the Constitutional Court, Pavel Rychetský. The judgment was unanimous; none of the judges filed a dissenting opinion to either the judgment or its reasoning.<sup>31</sup>

President Klaus signed the Treaty the same day, just a few hours after the Court had given its ruling. *EurActiv* commented on his mood:

He said he respected the ruling but he does not agree with it.

"The treaty's enforcement will limit the Czech Republic's sovereignty, regardless of the Constitutional Court's verdict," he added, quoted by the Czech press.

Klaus lashed at the court's judges, describing their behaviour as "obstructive" and their verdict as "politically motivated".<sup>32</sup>

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<sup>31</sup> Constitutional Court press release at <http://www.usoud.cz/clanek/2144>

<sup>32</sup> 3 November 2009 at <http://www.euractiv.com/en/future-eu/klaus-signs-lisbon-treaty-fully-ratified/article-187007>

## **5 Entry into force of the Lisbon Treaty**

Completion of the ratification process in all 27 Member States will allow the Treaty of Lisbon to come into force on 1 December 2009, assuming that the instrument of ratification is deposited in November. This will be almost a year later than the anticipated entry into force and the culmination of some eight years of negotiations.

The Swedish Presidency is expected to call an extraordinary European Council meeting on 13-14 November to discuss nominations for the positions of EU President and High Representative. These will be the subject of a separate Standard Note.

## Appendix Czech public opinion

According to an opinion poll in January 2009, most Czechs thought Parliament ought to approve the Lisbon Treaty. Czech News reported:

Despite the fact most Czechs do not fully understand what the Lisbon Treaty is about, they think Czech parliament should ratify the Treaty, according to the poll conducted in January by polling agency STEM.

In the past quarter of a year the support of the Lisbon Treaty among Czechs has increased by 19 percent. In October 2008 it was 45 percent of respondents supporting the Treaty, while in January it went up to 64 percent. STEM believes it is due to the Czech EU Presidency.

The most important thing is, though, that the number of people who are aware of what the Lisbon Treaty means is on the rise too. Three out of ten respondents understand what the Treaty is about.

The Green party voters show the biggest support of the Treaty (74 percent), followed by Social Democrat supporters (68 percent) and then by Civic Democrat fans (67 percent). Voters of the Communist party (KSĚM) prove to be the most skeptical among the respondents.<sup>33</sup>

A report in *La Croix* in early October 2009 suggested that opinion was roughly evenly divided on Lisbon:

Les sondages montrent que 43 % des Tchèques sont favorables au traité de Lisbonne, tandis que 44 % y sont opposés, et le reste ne se prononce pas. C'est ici comme partout, et s'il y avait un référendum chez nous, les votants se partageraient moitié-moitié.<sup>34</sup>

*[This translates to the effect that 43% of Czechs supported Lisbon, while 44% were opposed, with the rest undecided].*

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<sup>33</sup> 29 January 2009 at <http://aktualne.centrum.cz/czechnews/clanek.phtml?id=628246>

<sup>34</sup> *La Croix* 6 October 2009 at <http://www.la-croix.com/-Le-referendum-irlandais-n-apporte-rien-de-neuf-/article/2396261/4077>