CONSTITUTIONAL COURT OF THE CZECH REPUBLIC

Decision P1.US. 19/08
concerning the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community

Pl.US. 19/08

The Plenum of the Constitutional Court, consisting of Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Pavel Rychetský, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, decided, under Art. 87 par. 2 of the Constitution of the Czech Republic, on a petition from the petitioner – the Senate of the Parliament of the Czech Republic – seeking review of whether the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is consistent with the constitutional order, as follows:

The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, specifically
* Articles 2 par. 1 (previously 2a par. 1), 4 par. 2 (previously 2c), 352 par. 1 (previously 308 par. 1), 83 (previously 69b par. 1) and 216 (previously 188 l), contained in the Treaty on the Functioning of he European Union,
* Articles 2 (previously 1a), 7 and 48 par. 6 and 7 contained in the Treaty on European Union
* and the Charter of Fundamental Rights of the European Union
are not inconsistent with the constitutional order.

Reasoning:

I.
1. The Senate of the Parliament of the Czech Republic (the "Senate" or the "petitioner"), on the basis of § 117b par. 1 of Act no. 107/1999 Coll., on the Rules of Procedure of the Senate, as amended by later regulations, and under § 71a par. 1 let. a) of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, (the "Act on the Constitutional Court") submitted a petition asking that the Constitutional Court, under Art. 87 par. 2 of the Constitution of the Czech Republic (the "Constitution") decide whether the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community is consistent with the constitutional order of the Czech Republic.

2. In the petition, the Senate stated that, on 25 January 2008, the government of the Czech Republic presented to the Senate the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (the "Treaty of Lisbon" or the "Treaty"), with a request for consent to ratify it. The Senate, following on from its resolution of 20 September 2007, in which it expressed its view on the Czech Republic's positions

before the summit meeting of heads of state and governments in Lisbon, taking into account the report of the Senate Committee for European Integration of 30 September 2003 concerning the proposed Treaty establishing a Constitution for Europe and the report of the Senate Committee for European Union Matters of 3 November 2004concerning the proposed Treaty establishing a European Constitution, and in view of the opinions of the Senate Standing Commission for the Constitution and Parliamentary Procedure of 9 October 2003, 3 November 2004 and 27 March 2008, believes that certain provisions of the Treaty apply directly to the norms of the constitutional order of the Czech Republic. In view of the fundamental changes that the Treaty brings, and that, in the Senate's opinion, concern substantive elements of statehood, it believes it is necessary to review whether the Treaty is consistent with the constitutional characteristics of the Czech Republic as a sovereign, unitary, and democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution) and whether it does not change the essential requirements for a democratic state governed by the rule of law, which, under Art. 9 par. 2 of the Constitution is impermissible.

3. The Senate stated that it considers it necessary for the Constitutional Court to also evaluate whether specific individual provisions of the Treaty are consistent with the norms of the constitutional order, especially in cases that it described in more detail in the points below.

4. a) In accordance with its belief that legislative competence-competence belongs to the member states of the European Union, which delegate the exercise of certain powers to international institutions, the Senate considers a key provision to be Art. 10a par. 1 of the Constitution, under which certain powers of bodies of the Czech Republic can be transferred to an international organization or institution. In the Senate's opinion, the new version of the Treaty on the Functioning of the European Union (previously the Treaty Establishing the European Community) establishes a classification of powers that is more characteristic of federal states, and it establishes, among other things, a category of competences exclusive to the Union, which includes entire, comprehensive areas of legal regulation in which, under Art. 2a par. 1 of the Treaty on the Functioning of the European Union, the member states may create and pass legally binding acts "only if so empowered by the Union or for the implementation of Union acts." The related concept of shared competences (Article 2c of the Treaty), which are to exist in addition to the exclusive competences, together with the allegedly not completely clear limits for the creation of norms of the secondary law of the Union, according to the Senate opens the door for a wide sphere of Union norm-creation, difficult to identify in advance, where, in accordance with declaration no. 17, attached to the Treaty, the principle of primacy for Union law is implicitly applied. Thus, in the Senate's opinion, the scope of transfer of powers can be seen in the sphere of shared competences, in terms of Art. 10a of the Constitution, as not fully determinable in advance (cf. in general form, the introduction to Art. 2c par. 2 of the proposed Treaty on the Functioning of the European Union – "Shared competence between the Union and the Member States applies in the following principal areas."

5. b) The Senate stated that the review of consistency with Art. 10a of the Constitution should also include the nature of the proposed Art. 308 par. 1 of the Treaty on the Functioning of the European Union, under which the Council, acting unanimously on a proposal from the Commission, of the Commission shall adopt measures "to attain one of the objectives set out in the Treaties," in a situation where, within the framework of Union policies, a particular action is necessary for which the Treaty does not provide the necessary powers. In contrast to

the existing wording of the founding treaties, the proposed Treaty provision is not limited to regulation of the domestic market, but is a blanket provision. Thus, it allegedly permits passing measures beyond the framework of Union competences, i.e. beyond the scope of the transfer of powers under Art. 10a of the Constitution. According to the Senate, such measures could subsequently also be passed in the area of sensitive issues of cooperation in criminal matters, without adequate procedural guarantees for protection of civil rights and freedoms, while preserving the European Court of Justice's monopoly on interpretation. According to the Senate, the specific jurisdiction of the European Court of Justice as the final arbiter in the event of a dispute arising, can – in a situation where the relationship to the constitutional courts of member states is not clear – raise question marks about the observance of the principle of legal certainty. Also worthy of special attention is the lack of a time limitation on the validity of a measure thus adopted, and its executive nature, which can raise doubts about the relevance of participation of national parliaments in weighing the adoption of such a measure.

6. c) According to the Senate's proposal, the concept of powers used in Art. 10a of the Constitution has not only a material dimension, overlapping with the definition of an area of competence, but also an institutional dimension, relating to the manner of making decisions. In this regard, according to the Senate, it is necessary to review whether the proposed Art. 48 of the Treaty on EUropean Union is consistent with the cited provision of the Constitution. This is because Article 48 par. 6 and 7 introduce the possibility of a simplified procedure for passing amendments to primary Union law by an executive act, which changes the nature of the duly ratified founding treaties of the EU.

7. In this regard, the general transitional clause (passerelle) is said to be formulated unambiguously; although the principle of bilateral flexibility is formally enshrined in Declaration no. 18, annexed to the Treaty, this clause remains an instrument for a unilateral change of competences. Applying this clause in order to change unanimous decision making to decision making by a qualified majority in a particular area, or replacing a special legislative procedure by a regular legislative procedure under Art. 48 par. 7 clearly represents a change of powers under Art. 10a of the Constitution, yet that change is not accompanied by ratification of an international treaty or the active consent of Parliament. According to the Senate, the loss of the right to veto can be seen as a transfer of powers to an international organization; at the same time, it de facto limits the importance of the parliamentary mandate given to the government to make a decision, if, during decision-making, after application of the transitional clause, the representative of an individual member state's government could be outvoted.

8. In the case of the proposed Art. 69b par. 1 of the Treaty on the Functioning of the EU, when the sector Council decides to include further areas of criminal activity in the sphere of Union regulation, there is no room at all for Parliament to disagree, even though in another case – the proposed wording of the general transitional clause (Art. 48 par. 7 of the Treaty on European Union) and partial transitional clause in the sphere of judicial cooperation in civil matters (Art. 65 par. 3 of the Treaty on the Functioning of the European Union) – that possibility is guaranteed. The limited involvement of national parliaments in the decision to amend other relatively widely defined competences of the Union is supplemented by expanding the voting by a qualified majority, often related to the overall communitarization of the existing third pillar of European law, where, in parallel with the implicit weakening of

the domestic parliament's mandate and annulment of the category of treaties approved by the Parliament of the Czech Republic, responsibility for the parliamentary dimension of decision making is assumed by the European Parliament. In this regard the Senate posed the question whether, in view of the character of the European Union as an association of states (not a federal state) this dimension of parliamentary democracy is sufficient, and whether this does not de facto render Art. 15 par. 1 of the Constitution meaningless. ("The legislative power of the Czech Republic is vested in the Parliament.")

9. d) The Senate continued that, in addition to the already cited transitional clauses and the flexibility clause, the procedures set forth by the Treaty also affect another aspect of the constitutional order. That is the negotiation of international treaties under the proposed Art. 188l of the Treaty on the Functioning of the European Union. This expands the grounds for concluding international treaties in the name of the EU ("where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope"). Treaties are binding on the EU and its member states, yet they are concluding by a qualified majority decision of the Council. Thus, according to the Senate, the Czech Republic need not express consent to a treaty, and yet it is bound by it; the usual ratification process does not take place at all, and thus the possibility of preliminary review of whether these treaties are consistent with the constitutional order of the Czech Republic falls away. The question remains whether this process is compatible with the text of Art. 49 and Art. 63 par. 1 let. b) of the Constitution, and whether there is scope to apply the treaties on the basis of Art. 10 of the Constitution.

10. e) The Senate also stated that strengthening the powers of European Union bodies that represent the supranational level of decision making is accompanied by introducing the single legal subject status of the European Union. Thus, the functioning of the European Union acquires a completely new legislative framework in the sphere of the existing second and third pillar, in areas of primarily political cooperation. Of course, in such a framework, which fundamentally tears away the principle of unanimous decision making in the sphere of the existing third pillar, conflict with domestic standards of protection of fundamental rights can occur more frequently than it has until now. Although, under the proposed Art. 6 par. 2 of the Treaty on EU, the European Union is to accede to the European Convention on Protection of Human Rights and Fundamental Freedoms, the same article states in paragraph 1 that "the Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." According to the Senate, this indirect reference to the Charter of Fundamental Rights of the European Union may make its status unclear, just like the fact that this Charter contains not only directly enforceable rights, but also principles and aspirations that are not clearly, systematically organized. In a situation where the Union does not and can not have a specialized body, a court handling "constitutional complaints," that would interpret the provisions of the Charter in particular cases of violation of civil rights, the role of the Charter is allegedly not clear. It is not clear to the Senate whether it protects the rights of citizens, or is rather an interpretational tool, in light of which the powers of Union bodies are interpreted or the interpretation of the aims pursued by the Union is intensified, whether it strengthens or, on the contrary, weakens the authority of domestic institutions that interpret the national catalogs of human rights, in accordance with the individual traditions of the political nations of

Europe, what procedural consequences (prolonging or, on the contrary, expediting the enforceability of rights) this step has in relation to the case law of the European Court of Human Rights, and whether, as a result of this fact, the standard of domestic protection of human rights enshrined in the Charter of Fundamental Rights and Freedoms can be strengthened or leveled.

11. f) Last but not least, according to the Senate's petition, definition of the status of the Charter, and possibilities for interpreting it is also necessary in order to grasp the newly formulated Art. la of the Treaty on EU, which expands the values on which the Union is established, and also includes standards of the European social model ("in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"). According to the petitioner, the question of interpretation of this provisions becomes all the more significant because serious violation of these values can lead to suspending a particular member state's rights under the Treaty. A simple proposal filed by 1/3 of member states, the European Parliament, or the European Commission against a member state could allegedly create political pressure leading to changes of the domestic legal order. Therefore, the Senate poses the question whether the formulation of this provision is consistent with the fundamental characteristic of the Czech Republic contained in Art. 1 par. 1 and also with Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people).

12. In view of the foregoing, the Senate proposed that the Constitutional Court, pursuant to Art. 87 par. 2 of the Constitution and § 71e of the Act on the Constitutional Court, rule on whether the Treaty is consistent with the constitutional order.

II.

13. Under § 71c of the Act on the Constitutional Court, the parties to proceedings on whether international treaties are consistent with constitutional laws are, in addition to the petitioner, the Parliament, the President of the Republic, and the government. Therefore, the Constitutional Court sent the Senate's petition to open proceedings to the Chamber of Deputies of the Parliament of the Czech Republic, the President of the Republic, and the Government of the Czech Republic (§ 69 par. 1 the Act on the Constitutional Court, per analogiam), so that they would have an opportunity to express their opinions on the Senate's petition.

III.

14. On 5 June 2008 the Constitutional Court received a brief from the President of the Republic. In the introduction, he emphasized that he welcomed the Senate's petition and agreed with it. The president stated that the Treaty of Lisbon beyond any doubt significantly changes the character of the European Union as such, and thereby also the position of the Czech Republic within it. Therefore, in his opinion, it is necessary to pay extraordinary attention to the evaluation of whether all its provisions individually and as a whole are consistent with the Constitution of the Czech Republic, the Charter of Fundamental Rights and Freedoms, and the constitutional order of the Czech Republic. In this regard the president pointed out that the Constitutional Court's decision in this matter will be one of the most important and most responsible in the history of the Czech constitutional judiciary.

15. The president's brief is divided into three long sections marked points A, B and C, and these parts are further divided into individual sub-chapters.

16. Point A is entitled "On the Proceeding Generally," and the first sub-chapter concerns the nature of the proceeding. In it the president expresses the opinion that the Constitutional Court is authorized to evaluate not only the provisions of the Treaty of Lisbon mentioned in the Senate's petition, but also whether it is consistent with the entire constitutional order, in all aspects. That is precisely the purpose of proceedings on whether international treaties under Art. 10a and 49 of the Constitution are consistent with the constitutional order. In terms of the proceeding, the reasoning of the petition, or the briefs of the parties allegedly have only the legal significance that it is necessary to deal with their claims, themes and doubts in the reasoning of the judgment. The president also concludes that this type of proceeding is a non-adversarial proceeding. If this were not so, then it would be necessary to acknowledge that another possible petitioner under § 71a par. 1 let. b), c) or d) of the Act (i.e. a group deputies, senators, or the president of the republic) would be authorized, even after a positive judgment by the Constitutional Court, to file a separate petition, drawing the Constitutional Court's attention to other provisions of the relevant international treaty or the constitutional order that the previous petitioner did not mentioned. The president considers such an interpretation to be not only absurd, but also exceptionally impractical.

17. The next passage in the president's brief is entitled "The Nature of Treaties under Art. 10a of the Constitution." Article 10 provides that promulgated international treaties which Parliament has agreed to ratify, and by which the Czech Republic is bound under international law, are part of our legal order and take precedence before statutes. According to the president, neither this nor any other provision of the Constitution differentiates between treaties under Art. 10a, whose ratification requires consent by both chambers of the Parliament by a constitutional majority (Art. 39 par. 4 of the Constitution), and treaties under Art. 49, whose ratification requires consented by both chambers by a simple majority of votes (Art. 39 par. 2 of the Constitution). It allegedly follows from this, that although the conditions of ratification differ, the subsequent legal status in the Czech legal order of treaties under Art. 10a and under Art. 49 of the Constitution must be the same. However, the president considers it impossible for ordinary international treaties under 49 of the Constitution to have the force of a constitutional act, or even precedence over one. As part of the legal order, they have precedence over statutes, but the constitutional order is above the legal order. However, that must then logically also apply to treaties under Art. 10a, such as the Treaty of Lisbon and our Treaty of Accession. According to the president, that interpretation is also confirmed by Art. 112 of the Constitution. International treaties can not be unilaterally annulled, and it is not always possible to withdraw from them immediately. Therefore, review of the constitutionality of treaties after ratification would be problematic, and for that reason it is necessary to determine whether they are consistent with the constitutional order in advance. However, such a proceeding would not make sense with an international treaty that would itself have the force of a constitutional act. A treaty that was part of the constitutional order could not, by definition, be inconsistent with the constitutional order. At the moment when the treaty becomes part of the constitutional order, it implicitly changes that order to its own image, in accordance with the fundamental legal principle lex posterior derogat legi priori. (At this point the president referred to a passage from the decision of the Permanent Court of International Justice in matters of the treatment of Polish citizens in Gdansk from 1932 – "According to generally accepted principles … a state can not object against another state

even based on its own constitution to avoid obligations that are imposed upon it by international law or valid international treaties.") The president concluded this part of the brief by saying that, if the Constitutional Court did not agree with this interpretation, and took the position that international treaties under Art. 10a of the Constitution, or other international treaties (reference to Constitutional Court judgment no. 403/2002 Coll.) are part of the constitutional order, then it would be appropriate for preliminary review of constitutionality to become the rule for all international treaties that are to become part of the constitutional order, because that would avoid implicit, involuntary, or undesirable changes to the constitutional order.

18. The longest part of the president's brief is part B, entitled "On the Consistency of the Treat of Lisbon with the Constitutional Order."

19. In it, the president first addressed the question of sovereignty. He stated that under Art. 1 of the Constitution the Czech Republic is a sovereign state that observes its obligations resulting from international law. According to the president, one can conclude that this means sovereignty in the sense of international law. The Czech Republic declares itself to be a full member of the international community and a full subject of international law. International law is consensual law; unlike domestic legal orders, its source is not an order in the most general sense of the word (a statute, directive, instruction, etc.), but consensually created or spontaneously arising legal norms (international treaties and international custom). According to the president, sovereignty means a quality where a subject is not and can not be limited by a norm that arose without its consent, expressed either explicitly, in the case of international treaties, or implicitly, in the case of international custom. A subject that is bound to follow the orders of another subject independently of its own will, or even in conflict with it, is not sovereign under international law. The Treaty of Lisbon, in a number of areas, replaces consensual decision making by decision making based on voting (he refers to Art. 9c of the Treaty on European Union, as amended by Art. 1 point 17 of the Treaty of Lisbon, i.e. Art. 16 in the new consolidated version of the Treaty on European Union, renumbered on the basis of Art. 5 of the Treaty of Lisbon; and Art. 205 of the Treaty on the Functioning of the European Union, as amended by Art. 2 point 191 of the Treaty of Lisbon, i.e. Art. 238 in the new consolidated version of the Treaty on the Functioning of the European Union, heretofore called the Treaty on European Communities, renumbered on the basis of Art. 5 of the Treaty of Lisbon). Thus, it could allegedly happen that the Czech Republic would be bound by a norm whose adoption it openly opposed. This even applies to the conclusion of certain international treaties by the European Union, that is, norms binding the Czech Republic vis-?-vis states that are not members of the Union.

20. The president also addressed the issue of the direct effect of EU legal regulations. He pointed out that international law considers itself to be an exclusive system above the legal orders of individual states, and therefore, from its point of view, considers domestic legal orders to be mere legal facts, not legal norms; therefore, also, it fundamentally does not specify the manner in which states are to implement their international law obligations. However, according to the president's brief, the Treaty of Lisbon explicitly confirms that selected legal acts of the EU are to have direct effect in the legal orders of member states (he points to Art. 249 of the Treaty on the Functioning of the European Union, as amended by Art. 2 point 235 of the Treaty of Lisbon, i.e., Art. 288 in the new consolidated version of the Treaty on the Functioning of the European Union, renumbered on the basis of Art. 5 of the

Treaty of Lisbon; see also p. 6 of the submission report for the Parliament of the Czech Republic in Chamber of Deputies publication no. 407 and Senate publication no. 181 in the current terms of office); in contrast, the Constitution of the Czech Republic provides in Art. 10 that international treaties approved by Parliament and duly promulgated are directly binding. Thus, according to the president, a contrario one can conclude that no other foreign regulations other than the cited international treaties may have direct effect in the Czech legal order.

21. The president's brief then discusses what he considers to be the unclear nature of the EU Charter of Fundamental Rights. Under the Treaty of Lisbon the European Union is required to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, and is also required to recognize the rights, freedoms, and principles contained in the Charter of Fundamental Rights of the European Union. Moreover, that Charter is to have the same legal force as the treaties establishing the EU (Art. 6 of the Treaty on EUropean Union, as amended by Art. 1 point 8 of the Treaty of Lisbon, i.e., Article 6 in the new consolidated version of the Treaty on EUropean Union, renumbered on the basis of Art. 5 of the Treaty of Lisbon). According to the president, it is essential to find an answer to the questions of: what is the relationship between our Charter of Fundamental Rights and Freedoms, which is part of the constitutional order, and the Charter of Fundamental Rights of the EU, whether the Charter of Fundamental Rights of the EU also has the legal status of an international treaty under Art. 10a of the Constitution and on those grounds has precedence over Czech statues, and, if the Charter of Fundamental Rights and Freedoms of the EU is a treaty under Art. 10a of the Constitution, whether all its provisions are consistent with our Charter of Fundamental Rights and Freedoms. The president added that he considers it obvious that they do not have the same force as our Charter, or even precedence over it, which is already clear from the previous paragraph of his brief.

22. As regards the transfer of powers to the EU, the president pointed to Art. 10a of the Constitution, under which certain powers of bodies of the Czech Republic can be transferred to an international organization or institution. In this regard, he considers essential the word "international," which allegedly clearly indicates that the powers of bodies of the Czech Republic can be transferred only to an entity existing between states, not alongside them, or even above them. The direct effect of legal regulations of the European Union allegedly testifies to the fact that the legal order of the Union feels itself to be above the legal orders of member states, and that it emancipated itself vis-?-vis international law as an independent system existing alongside international law. On the contrary, however, what would correspond to international law would be for European law not to routinely prescribe for its members how they are to fulfill the obligations that it imposes on them (based on their joint will). According to the president's brief, by trying to permeate the legal orders of member states, European law sees them as legal norms – in contrast, international law fundamentally sees them as legal facts.

23. According to the president's brief, the EU Charter of Rights is itself an unnecessary document. The member states have their own charters of rights, allegedly as a rule much more thoroughly prepared. At the international level, human rights and freedoms are guaranteed by the Council of Europe's European Convention for the Protection of Human Rights and Fundamental Freedoms. It is time-tested and has a functioning mechanism of judicial review, unlike the EU Charter of Rights, which, according to the president, makes

sense only if the Union feels itself to be a state sui generis, or a federal state in the process of formation, which is then itself bound by international law to observe and protect human rights. However, according to the president, the fact that the EU, after adopting the Treaty of Lisbon, will no longer be an international organization, is also indicated by other circumstances; European Union citizenship was already introduced by the Maastricht Treaty of 1991, but at that time this was not citizenship as it is understood in international law. It was a concept that had only the name in common with citizenship in the legal sense of the word, that is, it conferred only those "rights" that the citizens of member states would have even without it. However, according to the president's brief, the treaty of Lisbon goes farther, and connects with citizenship of the Union additional rights that citizens of the Union will have, and which make sense only in the EU context; e.g., the Treaty of Lisbon gives the right to initiate legislation to a certain number of EU citizens who must however, as a whole, "come from a substantial number of member states." Thus, the Treaty of Lisbon here allegedly already anticipates a European civil society, existing alongside the civil societies of the individual member states, and thus a kind of European nation state is being construed.

24. According to the president's brief, another example is the new definition of competences, or their division between the Union and member states, which is allegedly typical for the division of competences in a federal state. In particular, the division into powers belonging exclusively to the Union, remaining powers belonging to the member states, and the ability of the Union to interfere in these powers on the basis of the principles of proportionality and subsidiarity is not very different from the division of powers between the federation and the lands under the Basic Law of the Federal Republic of Germany. The only difference is allegedly that the Basic Law also defines the areas in which the Federation may not interfere, and which can be governed exclusively by the legislation of the lands. Such a definition of competences of member states, in which the EU could not interfere under any circumstances, is lacking in the Treaty of Lisbon.

25. The brief also states that until now all decisions of the European Union were made by the EU Council, or the European Council, or were derived from them, (the EU Commission creates secondary legislation, the Parliament performs its legislative functions together with the Council, and the European Court of Justice only interprets so-called "European" law, but de jure does not create it, although its decisions often have a fundamental influence); the members of the EU Council and the European Council are the member states, and thus the result of their activity is merely the sum of the wills of the member states. Now, however, there would be a completely new function, the Chairman of the European Council; according to the president it is not completely clear from the Treaty of Lisbon, but it can be concluded, that he too would have voting rights in the European Council. That would allegedly mean that the will of the European Union will no longer be merely the sum of the wills of the member states, but the sum of the wills of the member states and the individual who will hold the position of chairman of the European Council at a particular time. That person will de facto have a veto power, if the European Council makes decisions by consensus. Compared to the abovementioned facts, in contrast it is de iure completely unimportant that the Treaty of Lisbon in the end does not codify European symbols – a flag, anthem, or motto. Symbols are not essential elements of a state under international law, nor do they belong to the exclusive elements of states. Moreover, European symbols have long functioned, and will surely continue to function, on the basis of international custom, or so-called "secondary" Union law. Therefore, according to the president's brief, one can not claim that omitting them

fundamentally distinguishes the Treaty of Lisbon from the rejected proposal for a European Constitution. The difference between them is allegedly purely in form; while the EU Constitution replaced the existing treaties, the Treaty of Lisbon is in the nature of an amendment to them, and thus makes "primary" Union law even less clearly organized than it is now.

26. Therefore, in the conclusion of this part of his brief, the president emphasized that all of this raises fundamental doubts as to whether, even after the Treaty of Lisbon were to enter into force, the European Union would remain an international organization, or institution, under Art. 10a of the Constitution of the Czech Republic, or whether it would then rather be an entity existing alongside its members, and in future even aspiring to stand above them. The question then is, whether Article 10a even permits transferring any powers of bodies of the Czech Republic on a subject that is undergoing such transformation.

27. Part C of the president's brief concerns the manner in which the Treaty of Lisbon would be ratified. The president considers it useful for the Constitutional Court to find a way to express an opinion on the manner in which consent may be given to ratify the Treaty of Lisbon. Under Art. 10a of the Constitution, the consent of Parliament is necessary to ratify an international treaty that transfers some powers to an international organization or institution; a constitutional act may provide that consent by a referendum is required in a particular case. Under Art. 1 of constitutional Act no. 515/2002 Coll., on a Referendum on the Accession of the Czech Republic to the European Union and Amending Constitutional Act no. 1/1993 Coll., the Constitution of the Czech Republic, as amended by later constitutional acts, the Czech Republic's accession to the Union could only be decided by a referendum. The question for the referendum was directly tied to the Treaty of Accession, and read: "Do you agree that the Czech Republic should become a member state of the European Union, pursuant to a [a/the] treaty on accession of the Czech Republic to the European Union?" In the president's opinion, the accession treaty is evidently meant in the general sense, because it is not cited in the statute by its full official name, including the date of signature; moreover, a lower-case "t" is used in the word "treaty." Allegedly this evidently has in mind any treaty determining the conditions for our membership in the European Union. As follows from the foregoing text, the Treaty of Lisbon in a very fundamental manner changes the conditions of the Czech Republic's membership in the European Community agreed in the Treaty of Accession, or amends the basic treaties governing the functioning of the European Union, i.e., treaties to which the Treaty of Accession refers and which are thus de iure part of it. thus, according to the president's brief, the Treaty of Lisbon actually also amends the Treaty of Accession, and it is thus a legitimate question whether consent to ratification of the Treaty of Lisbon should not also be subject to a referendum.

28. In the conclusion of his brief, the president added that, in view of the foregoing, he considers it necessary for the Constitutional Court, before the Treaty of Lisbon is ratified, provide a clear answer to the question of whether the Czech Republic will, even after the Treaty of Lisbon enters into force, remain a sovereign state and a full subject of the international community, with capacity to independently, without anything further, fulfill its obligations resulting from international law, whether the provision of the Treaty of Lisbon on direct domestic effect of EU legal regulations is consistent with Art. 10 of the Constitution of the Czech Republic, whether the EU Charter of Fundamental Rights has the legal status of an international treaty under Art. 10a, or Art. 10 of the Constitution, and, if so, whether all its

provisions are consistent with the Charter of Fundamental Rights and Freedoms of the Czech Republic, or other components of the constitutional order, whether, after the Treaty of Lisbon enters into force, the European Union will remain an international organization or institution to which powers of bodies of the Czech may be transferred under Art. 10a of the Constitution, and, if the Treaty of Lisbon amends, even indirectly, the Treaty of Accession, then whether constitutional Act no. 515/2002 Coll., on a Referendum on the Accession of the Czech Republic to the European Union (in which it would then be necessary to amend the question for a referendum) implicitly also applies to the Treaty of Lisbon – i.e. whether therefore consent to the ratification of the Treaty of Lisbon should be subject to a referendum.

29. The president's brief also contains a summary, which states that, as a statutory party to the proceeding before the Constitutional Court, he considers fundamental and comprehensive evaluation of the content of the Treaty of Lisbon to be an absolutely key prerequisite for its ratification. According to the president, the reasoning of the Senate's petition and this brief give quite obvious indications, that the Treaty of Lisbon represents a fundamental change to our constitutional order and to the international position of the Czech Republic. The president does not consider it possible for such fundamental changes in the international position and the international functioning of the Czech Republic as adoption of the Treaty of Lisbon will undoubtedly bring, to occur as if involuntarily, without being clearly identified, understood, and without political and social consensus. According to the president, the Constitutional Court, as the highest legal authority in our state, is obligated to give political representatives and the general public a clear and comprehensive evaluation of the Treaty of Lisbon in all its aspects, so that it will be possible to decide responsibly on its ratification, unambiguously and with full awareness of the consequences. The Treaty of Lisbon brings a fundamental change in the character of the European Union and the legal position of the Czech Republic, not only as a member state, but as a sovereign state generally, which it is and has been until now. Therefore, in the president's opinion, the Constitutional Court bears enormous responsibility not only for the present day, but for the future of our state, which this year marks the 90th anniversary of its founding.

IV.

30. On 10 June 2008 the Constitutional Court received a brief from the Chamber of Deputies of the Parliament of the Czech Republic. The brief states that at present, when the Parliament of the Czech Republic discusses international treaties, the procedure is for the government to submit the international treaty to each chamber separately, and discussions in the chambers are not in any way mutually procedurally dependent or bound. Therefore, one can speak of the principle of double-track discussion of international treaties. As the Chamber of Deputies is not, in this case, bound by an obligation to suspend discussion of the international treaty until the Constitutional Court makes a decision, the Treaty is presently being discussion in the bodies of the Chamber of Deputies. The treaty was submitted to the Chamber of Deputies on 29 January 2008 as publication 407/0. The text of the treaty was sent to the deputies on 5 February 2008, and the organization committee recommended discussion of the treaty, appointed Jan Hamáček as reporter, and proposed assigning it to the foreign relations committee for discussion. The first reading took place at the 28th session of the Chamber of Deputies on 19 and 20 March and 1 April 2008. During discussion of publication 407 there was a motion to reject it, a motion to postpone, a motion to assign it to all expert committees of the Chamber of Deputies and a motion to extend the deadline for discussion to 150 days if the sponsor agreed. There was also a motion to pass an accompanying resolution that the Chamber of Deputies, pursuant to Article 87 par. 2 of the Constitution, asks the

Constitutional Court to evaluate whether the Treaty is consistent with the constitutional order of the Czech Republic. Of the foregoing motions, the Chamber of Deputies voted on 1 April 2008 to assign publication 407 for discussion to the constitutional law committee, the committee for European affairs, and the foreign relations committee, and extend the deadline for discussion in committees by 20 days, i.e. to 80 days. Out of the committees assigned to discuss publication 407, so far the committee for European affairs has placed it on its agenda; at its 35th meeting on 22 May 2008 it decided to suspend discussion of this publication. Publication 407 has not yet been placed on the agenda of the other two committees to which the Treaty was assigned for discussion.

V.

31. In the introduction to its brief of 2 July 2008, the government of the Czech Republic stated for information purposes that on 23 July 2007, in a meeting of the Council for General Matters and External Relations, an inter-governmental conference was formally opened, during which, on the basis of the submitted proposal, a final text of the "Reform Treaty" was to be prepared, in accordance with the mandate approved at the meeting of the European Council on 21-22 June 2007. In the following months the draft text of the Reform Treaty was discussed and amended by a group of legal experts from member states of the European Union, and finalized at an informal meeting of the European Council in Lisbon on 18-19 October 2007. The Treaty of Lisbon consists of two basic parts; one part contains amendments to the Treaty on EUropean Union, and the second contains amendments to the Treaty establishing the European Community, including renaming it as the Treaty on the Functioning of the European Union. The government of the Czech Republic approved negotiation of the Treaty of Lisbon by resolution no. 1367 of 4 December 2007, and the Treaty was signed by authorized representatives of EU member states in Lisbon on 13 December 2007; the Treaty of Lisbon was signed on behalf of the government of the Czech Republic by Prime Minister Mirek Topolánek and Minister of Foreign Affairs Karel Schwarzenberg. On 29 January 2008, on the basis of the same resolution, the prime minister submitted the Treaty of Lisbon to the Chamber of Deputies of the Parliament of the Czech Republic and to the Senate, for their consent to ratification under Art. 10a of the Constitution. For reasons of transparency, both chambers of Parliament were given, together with the Treaty of Lisbon, the Charter of Fundamental Rights of the European Union (the "EU Charter"), solemnly proclaimed by the European Parliament, Council and Commission on 12 December 2007 in Strasbourg, even though it is formally not part of the Treaty of Lisbon.

32. In its brief, the government also stated that the path from the Treaty of Nice to the new treaty foundation embodied in the Treaty of Lisbon was complicated, and many questions arose along the way concerning the relation of primary EU law to the legal orders or constitutional orders of member states. A number of problem points have already been discussed in the Convention on the Future of Europe, which prepared the draft Treaty on a Constitution for Europe; the government repeatedly encountered some of these problems, also identified in the Senate's petition (in particular the "transitional" clause and the EU Charter), during the course of discussions on the text of the Treaty of Lisbon. In this regard the government considers it legitimate that the Senate exercised its constitutional right and submitted a petition that will make it possible to put to rest doubts on whether the Treaty of Lisbon is consistent with the constitutional order of the Czech Republic before the Treaty actual enters into force.

33. Regarding the text of the Treaty of Lisbon, the government first – generally – stated that it had already responsibly analyzed its provisions, including the cited problem points, during the course of negotiations, and that it signed the Treaty of Lisbon in the belief that it was, in its entirety, consistent with the constitutional order of the Czech Republic.

34. From a procedural viewpoint, when formulating its brief, the government began with the legal opinion that decision-making by the Constitutional Court under Art. 87 par. 2 of the Constitution on whether an international treaty under Art. 10a is consistent with the constitutional order is a non-adversarial proceeding, not an adversarial one. The government concludes this from analysis of relevant provisions of the Constitution and the Act on the Constitutional Court, under which this is a proceeding on whether an international treaty is consistent with the constitutional order (§ 71a par. 1 and § 71d par. 3 of the Act on the Constitutional Court). A proceeding on the consistency of an international treaty under Art. 10a is based on the principle of preliminary review of constitutionality, and the non-adversarial nature of the proceeding can allegedly also be derived from § 71e of the Act on the Constitutional Court, which sets forth the requirements for a verdict in a judgment of the Constitutional Court. Therefore, the government believes that the review of constitutionality should not be limited merely to the particular claims formulated by the petitioner, but should also cover other issues related to the Treaty of Lisbon; thus, in the government's opinion, the petitioner should not bear the burden of proof, just as the government should not be in the position of an opponent, but that of a party with the same procedural rights and obligations as the other parties to the proceeding, in particular, the Chamber of Deputies and the President of the Republic.

35. The brief further states that if the Treaty of Lisbon is reviewed in relation to the formal attributes of a state enshrined in Art. 1 par. 1 of the Constitution ("The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law"), the government finds no inconsistency there. As a result of the Treaty of Lisbon entering into force the European Union will be newly constituted with its own legal subject status, and the member states will conditionally transfer additional powers to the Union, but in the case of the Czech Republic that will take place in a constitutionally consistent manner under Art. 10a of the Constitution; the Czech Republic will, of course, remain an independent, sovereign state. The government believes that it is nonetheless necessary to focus primarily on reviewing the treaty in terms of the material core of the Constitution, i.e., the essential requirements of a democratic, law-based state under Art. 9 par. 2. The government is of the opinion that the theory of immanent limits guaranteeing the identity of the Constitution, expressed in that article, is sufficient to ensure that a complete transformation of values in the constitutional system can not occur in the Czech Republic. The government holds the opinion that there are unwritten limits for amending the Constitution; amendments and expansion of the constitutional order are consistent with the material core of the Constitution if systematically consistent development of the Czech Republic is guaranteed and if the value system on which the Constitution as a whole rests is not overreached. In the government's opinion, with reference to Art. 2 of the Treaty on EU ("The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities.") it is generally evident that both the constitutional system of the Czech Republic, and the treaty system of the European Union are based on and arise from the same principles that are common to all member states of the European Union.

36. The brief goes on to discuss specific individual arguments and considerations raised in the Senate's petition.

37. In this regard the government first considers the question of definition and classification of EU competences. It proceeds from the belief that the legislative "competence - competence" belongs to the member states of the European Union, which the Treaty of Lisbon only confirms, in Art. 5 par. 2 of the Treaty on EU. The government considers this principle key for defining the competences of the Union, and fully agrees with it. It believes that the definition and classification of competences introduced by the Treaty of Lisbon do not mean that the European Union thereby acquires any attributes whatsoever of a federal state.

38. As regards the Union's exclusive competences, the government states that this is not a newly introduced category of Union competences, because this kind of competence already existed, and is exercised by the Community under the current version of the Treaty establishing the European Community, even though the exclusive competences are not explicitly enumerated in an individual provision. The existence of exclusive comeptences already clearly arises from Art. 5 par. 2 of the existing Treaty on the EC, which defines the principle of subsidiarity in relation to shared competences; a definition of the term exclusive competence can also be found in the settled case law of the European Court of Justice. According to the government, the definition now introduced by the Treaty of Lisbon does not in any way expand the concept of exclusive competence; entire comprehensive areas of legal regulation already fall into the exclusive competence of the Community (as an example one can cite the common trade policy or rules for ensuring protection of economic competition).

39. As regards the category of shared competences of the Union, the government again points to the principle of conferred competence, which is enshrined as a general principle in Art. 5 par. 1 of the Treaty on EU: "The limits of Union competences are governed by the principle of conferral. The use of Union competences is governed by the principles of subsidiarity and proportionality." The exercise of the competences of the Union will continue to be based on that principle, even after the Treaty of Lisbon enters into force. Thus – according to the government – all other provisions of the Treaty on EU and all other provisions of the Treaty on EU and of the Treaty on the Functioning of the European Union concerning the competences of the Union and the division of competences between the Union and member states must be interpreted in view of the principle of conferral. The government believes that the petitioner's concern about the sphere of Union norm-creation being difficult to identify in advance is not justified. Of course, it is not possible to enshrine individual powers in an exhaustive list in such a detailed manner that they will always precisely correspond to the particular legal act of the Union that implements them. However, it is possible, and the Treaty of Lisbon clearly does this, to enshrined precisely defined areas in which the Union may create norms. In this regard, the government also pointed to the Protocol on the Exercise of Shared Competence, annexed to the Treaty on EU and the Treaty on the Functioning of the EU, which expressly states that when the Union has taken action in a certain area, the scope of this exercise of its competence only covers those elements governed by the Union act in question and therefore does not cover the whole area. Regarding the category of shared competence, the government again pointed out that in addition to the principle of conferral, the principle of subsidiarity, enshrined in Art. 5 par. 3 of the Treaty on EU also applies to setting the limits on the exercise of the Union's competence, and represents and important

instrument in balancing the division of shared competences between the member states and the European Union.

40. The next part of the government's brief concerns the so-called flexibility clause under Art. 352 of the Treaty on the Functioning of the European Union; according to the government, it is evident from the formulation of this provision that it is not a blanket norm. In order for the Union, on the basis of the Treaty of Lisbon, to be able to apply Art. 352 par. 1 of the Treaty on the Functioning of the European Union, the conditions in it must have been met in relation to the proposed legislative act. Two declarations annexed to the Final Act of the Intergovernmental Conference which Adopted the Treaty of Lisbon also apply to the use of the flexibility clause; they are said to set the limits on an extensive interpretation and disproportionate use of the clause. Other limits on expanding the application of the flexibility clause are, again, the principle of subsidiarity, which functions as an abstract limit on the expansion of Union powers, and whose observance is supervised by domestic parliaments (Art. 352 par. 2 of the Treaty on the Functioning of the European Union), as well as the fact that application of the flexibility clause is ruled out in the area of common foreign and security policy and the fact that harmonization of the legal regulations of member states on the basis of the flexibility clause is ruled out in cases where the Treaties rule out such harmonization. According to the government, this rules out in advance application of the flexibility clause for harmonization of legal regulations in areas in which the Union has only supporting, coordinating, or supplemental powers.

41. As regards the simplified revision procedure for passing amendments to the Treaties, the government sees a fundamental difference between Art. 48 par. 6 and Art. 48 par. 7 of the Treaty on EU. Under Art. 48 par. 6 of the Treaty on EU amendment of all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union, which concern the internal policies and activities of the Union, are subject, in addition to a unanimous decision by the European Council, to approval by all member states in accordance with their constitutional regulations. The government believes that in the constitutional system of the Czech Republic such an amendment, if it were the basis for the transfer of additional powers of bodies of the Czech Republic to the European Union, would be subject to approval by the Parliament under Art. 10a of the Constitution, and the government is therefore convinced that Art. 48 par. 6 of the Treaty on EU is consistent with the constitutional order of the Czech Republic. When proceeding under Art. 48 par. 7 of the Treaty on EU (the transitional clause), as part of the powers already transferred to the level of the Union, there can be a change in voting procedure (from unanimity to a qualified majority) or a change in legislative procedure (from a special to a regular legislative procedure). The European Council adopts the relevant decision unanimously after obtaining the consent of the European Parliament. Before such a decision can be adopted, the proposal must be notified to the national parliaments. If any national parliament makes known its opposition within six months of that notification, the decision is not adopted. Although this procedure at the EU level is subject to consent on the part of the European Parliament, at the present time review at the level of member states, by national parliaments, remains in effect, which the government considers to be essential.

42. In the government's opinion, as regards the relationship of the transitional clause under Art. 48 par. 7 of the Treaty on EU to Art. 10a of the Constitution of the Czech Republic, one could argue from a formal standpoint that when it is applied there is an indirect amendment to

the Treaties without that amendment being ratified in advance by the member states in accordance with their constitutional regulations, as is the standard with international treaties. However, the government believes that, in relation to the transitional clause, consent with a procedure under Art. 48 par. 7 of the Treaty on EU, which pro futuro permits the European Council, with the consent of the European Parliament, and under specified conditions, to decide in individual cases or areas on a change in the voting procedure in the Council or a change in legislative procedure, can be considered to meet Art. 10a of the Constitution of the Czech Republic, within the transfer of powers to the European Union as a result of ratification of the Treaty of Lisbon. Thus, by an act of ratification, the Czech Republic, from the position of a sovereign member state, gives consent to future modifications in the exercise of transferred powers within the precisely specified bounds of Art. 48 par. 7 of the Treaty on EU.

43. Thus, the government believes that application of the transitional clause does not violate the principle of the sovereignty of states in adopting international law obligations. The principle of sovereignty of a member state is reflected in the requirement for unanimous decisions by the European Council and the right of every domestic parliament to reject a proposal.

44. The government also considered it necessary to state its opinion on Art. 83 of the Treaty on the Functioning of the European Union (note: or 69b), which enshrines the possibility to establish minimum rules concerning the definition of criminal offences and sanctions in the areas of particularly serious crime with a cross-border dimension. Art. 83 par. 1, third subparagraph alinea of the Treaty on the Functioning of the European Union permits the Council, based on developments in criminal activity, after obtaining the consent of the European Parliament, to unanimously adopt a decision that determines further areas of criminal activity that fulfill the criteria set forth in Art. 83 par. 1 of the Treaty on the Functioning of the European Union, above and beyond the areas explicitly set forth by that provision. In the government's opinion, a procedure under Art. 83 par. 1, third subparagraph of the Treaty on the Functioning of the European Union does not represent a simplified procedure for amending the treaty, analogous to the mechanism under Art. 48 par. 7 of the Treaty on EU. The government believes that the Treaty of Lisbon leads to transfer of powers to Union bodies, so that, within the specified procedure (a unanimously adopted decision by the Council after obtaining the consent of the European Parliament), they will define, based on the development of criminal activity, areas of especially serious criminal activity with a trans-border dimension, and some such areas are directly set forth by the Treaty on the Functioning of the European Union. According to the government, it must be emphasized that this provision does not have an immediate relationship to the transitional clause enshrined in Art. 48 par. 7 of the Treaty on EU.

45. There government also addressed the issue raised by the petitioner, whether there is not a de facto evisceration of Art. 15 par. 1 of the Constitution. The government believes there is not, because the essence of the integrating authorization contained in Art. 10a of the Constitution of the Czech Republic is the principle of self-limitation by bodies of the Czech Republic. When transferring powers to an international organization or institution, it is unavoidable that the body whose powers were transferred loses them in that scope. However, it continues to exercise all other powers that belong to it in accordance with the constitutionally defined separation of powers.

46. In the question of negotiating international treaties, the government considered it necessary to point out that in the first phases of the European Economic Community the assumption was that, in accordance with the theory of limited competence, the Community had the competence to conclude international treaties only if expressly authorized thereto in the founding treaties. In time, however, it became apparent that the normative text of the founding treaties did not meet the actual needs of the Community and its member states. Therefore, a third way had to be found to make the activity of the Community more effective vis-?-vis third-party states and to achieve greater harmony between the competences that the Community had internally and those that it had in external relations with third-party states. At the beginning of the 19790s, the decision of the European Court of Justice in the AETR matter (decision of the European Court of Justice in the matter C-22/70 AETR, 1970, ECR 263) made it possible to go beyond the rule of express authorization in the founding treaties; in it, the European Court of Justice concluded that, if the Community has the internal authority to regulate a particular area of law, then in the interests of promoting the aims of the founding treaties that gives rise to the authority to act in the name of the Community in matters that fall into that sphere vis-?-vis third-party states as well (the theory of parallelism of internal and external powers, implied powers [are these the same or 2 things?]). Thus, according to the government's brief, in the present legal situation authorization for the EU to conclude an international treaty can be established both by the founding treaties and by lower legal acts of community law that were issued in order to achieve the aims of the EU defined in the present Art. 2 of the Treaty on the EC. Therefore, the government does not find that Art. 216 et seq. of the Treaty on the Functioning of the European Union expands the existing range of legal grounds, based on which the EU will be authorized to conclude international treaties after the Treaty of Lisbon enters into force, and it states that the provision in question of the Treaty on the Functioning of the European Union in fact only codifies something that was already developed and settled in the case law of the European Court of Justice as the result of long-term developments.

47. As regards the voting procedure in the Council, the government considers it necessary to state that Art. 216 et seq. of the Treaty on the Functioning of the European Union affects only the negotiation of international treaties for purposes of meeting the aims of communitarized policies. The so-called second pillar, i.e., the area of common foreign and security policy, will maintain its special status, and international treaties negotiated by theEU in that sphere (Art. 37 of the Treaty on EU) will be concluded unanimously, even after the Treaty of Lisbon enters into force (Art. 24 par. 1, second subparagraph together with Art. 31 par. 1, first subparagraph of the Treaty on EU). However, even in the area of Community-adopted policies, a qualified majority is not applied in a blanket manner, without taking into account the nature of the treaty being negotiated. Art. 218 par. 8 subparagraph 2 of the Treaty on the Functioning of the European Union lists the cases where, in contrast, the EU Council decides unanimously.

48. On the question of defining the scope of the space that the Treaty of Lisbon leaves to member states to fulfill their constitutional requirements in the process of negotiating international treaties with third-party states, the government states that identifying the limits of that space does not follow from Art. 216 et seq. of the Treaty on the Functioning of the European Union, but from Part One of the Treaty on the Functioning of the European Union, discussing the categories and areas of EU competence (see above). It is evident from these

provisions that in the area of negotiating "external" treaties the existing concept is preserved, which distinguishes two categories of international treaties. The first consists of treaties concluded in the exclusive competence of the EU, which are not subject to domestic approval procedures and will not be so after the Treaty of Lisbon enters into force. That is because the authority of the Czech Republic to conclude this type of international treaty was already, under Art. 10a of the Constitution transferred by bodies of the Czech Republic to EU bodies. The second category is mixed treaties, which the European Community at present concludes with a third-party state together with its member states (the EC and its member states stand alongside each other and form one party to the treaty). According to the government, this joint process is unavoidable, because the European Community does not have sufficient authority in the selected legal area to negotiate a treaty or subsequently implement it, and therefore it needs the cooperation of its member states. Member states can provide the requested cooperation to the European Community only after they satisfy their constitutional law regulations. If such a mixed international treaty were classified in the Czech Republic, on the domestic level, as a treaty in the presidential category under Art. 49 of the Constitution (which is most often the case), then the Czech Republic could agree to negotiation of the treaty only after the intent to do so was approved by the government and both chambers of the Parliament of the Czech Republic, and the treaty would then be ratified by the president. According to the government's brief, the fact that the EU will in future have its own legal subject states can not change anything about that procedure and material legal basis.

49. The government also stated that, in the petition for evaluation of whether the Treaty of Lisbon is consistent with the constitutional order of the Czech Republic, the petitioner raises a number of questions concerning the status and importance of the Charter of Fundamental Rights of the EU, as well as its relationship to the national catalogs of fundamental human rights and freedoms and to the European Convention for the Protection of Human Rights and Fundamental Freedoms. From the government's point of view the EU Charter is, formally speaking, an independent document of a non-consensual nature. At this point it allegedly has the nature of a non-binding, purely political document, containing a catalog of human rights and freedoms. Thanks to the legislative reference in the new Art. 6 par. 1 of the Treaty on EU, which provides that "The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adopted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties," when of the Treaty of Lisbon enters into force the EU Charter will be de facto incorporated into the treaty acquis. In the scope of its competence, given the present maintenance of its individual legal character in the EU legal system, it will have legal effects on the subjects of member states without the need for its norms to be received by a domestic legal act. However, according to the government, it should not have precedence in application over the norms of the domestic law of member states in relation to the "material core" of the constitutions of member states, which was also said by the Czech Constitutional Court. Moreover, the abovementioned features of the EU Charter will apply only in the scope of competence set forth by the Treaty of Lisbon in Art. 6 subparagraph 2 and 3 of the Treaty on EU and by horizontal measures in Title VII of the EU Charter itself. Under Art. 51 par. 1 of the EU Charter, its provisions are intended first for the bodies, institutions, and other subjects of the Union; in contrast, they are intended to the member states only insofar as they apply Union law.

50. According to the petitioner, in a situation where the Union does not have a court to

interpret the Charter's provisions in particular cases of violation of civil rights, the role of the Charter is not clear. The government added that the EU Charter will be incorporated by reference in the treaty acquis, and thus individuals will be able to directly rely on some of its provisions, those of the nature of subjective, enforceable rights, both before the courts of member states (if they apply EU law), and before the European Court of Justice. Regarding the question of whether the EU Charter protects citizens' rights or is more a tool for interpretation, used to interpret the powers of bodies or intensify the interpretation of the aims that the Union pursues, the government stated that the EU Charter is a modern catalog and is to fulfill both of these roles in parallel, that is, protect individuals and set limits for the exercise of the competences of EU bodies, or bodies of member states when applying EU law. The government concludes that the EU Charter will exist parallel to the catalog of fundamental human rights and freedoms that are part of the constitutional law of member states, without in any way changing the scope of purely domestic material. The government believes that applying the EU Charter will not lead to lowering the standard of domestic protection of fundamental human rights and freedoms.

51. In the next part the government addresses Art. 2 of the Treaty on EU, which, according to the petitioner, should be reviewed as to whether it is consistent with Art. 1 par. 1 and Art. 2 par. 1 of the Constitution. The government is not of the petitioner's opinions; it pointed out that the values set forth in Art. 2 of the Treaty on EU have been immanent, substantive components of the Czech legal order since the beginning of the 1990s, when it was gradually democratized.

52. As regards the possibility of suspending rights that arise to a member state from the Treaties, the government noted in its brief that this possibility can not violate the fundamental characteristics of the Czech Republic as a sovereign, unitary, and democratic state governed by the rule of law under Art. 1 par. 1 of the Constitution, or the principle of the sovereignty of the people enshrined in Art. 2 par. 1 of the Constitution, because this involves a sanction against a member state in the event that it violates the values on which the EU is founded. These values, as stated above, are among the fundamental principles that are also protected by the Constitution of the Czech Republic. Therefore, the government also does nto share the petitioner's concerns about interference in the sovereignty of the Czech Republic through political pressure leading to changes in the domestic legal order in the event that the Czech Republic violates these values. In the government's opinion, if the Czech Republic observes its own constitution, suspension of rights arising to it from membership in the EU does not come into consideration.

53. In view of the foregoing arguments, the government believes that all provisions of the Treaty of Lisbon to which the petitioner refers in its submission, as well as the Treaty of Lisbon in its entirety, are consistent with the constitutional order of the Czech Republic.

VI.

54. In a hearing before the Constitutional Court, held on 25 November 2008, the petitioner (the Senate of the Czech Republic) was represented by the Senate Vice Chairman Jiří Šneberger and Senator Luděk Sefzig. Both basically repeated the arguments contained in the original petition, and did not make any motions to submit additional evidence in the matter.

55. On behalf of the Chamber of Deputies of the Parliament of the Czech Republic, its chairman, Miloslav Vlček, basically referred to the brief previously sent to the Constitutional Court.

56. On behalf of the government of the Czech Republic, Deputy Prime Minister for European Affairs, Alexander Vondra, basically repeated the opinions contained in the brief delivered to the Constitutional Court, and again emphasized that the government believes that the Treaty of Lisbon is consistent with the constitutional order of the Czech Republic.
57. President Václav Klaus, in the hearing, pointed in particular to the wider context of the matter. In his opinion, if the Treaty of Lisbon enters into force, the international position and internal situation of our state will change, and the weight of the Czech Republic in the decision-making of the European Union will be weakened.
58. The president then again raised the questions already submitted to the Constitutional Court in his brief that he considers the most important: first, whether the Czech Republic – after the Treaty of Lisbon entered ito force – would remain a sovereign, democratic and law-based state; second, whether the Czech Republic would continue to be a full member of the international community, capable of independently, without anything further, fulfilling its obligations resulting from international law; and third, whether the European Union would remain an international organization, or whether it would become a federal state, and whether our Constitution permits the Czech Republic to become a component of a state of that kind.
59. The president also pointed to the government's brief and the arguments in it, based on the legal doctrine of the so-called "material core" of the Constitution. Unlike the government, the president believes that the Treaty of Lisbon is inconsistent, not only with the constitutional order as a whole, but also with fundamental constitutional principles that are – precisely under the doctrine of the material core of the constitution – untouchable and non-amendable (Article 9 of the Constitution). In this regard, he also stated that the foundation of the Constitution (and thus also its hypothetical material core) is the principle of state sovereignty, which, the Czech Constitutional Court allegedly stated two years ago in the sugar quota case, if it refused to recognize the doctrine of the European Court of Justice on the absolute priority of community law. According to the president, the issue is who is to have the so-called "competence - competence." The president does not consider this theme to be new; the Constitution had to be changed even before joining the European Union, but even the "Euro-amendment" at that time had to observe Article 9 of the Constitution. Therefore, it permitted "only" some specific powers of bodies of the Czech Republic to be transferred to bodies of the European Union, but it did not permit a transfer of sovereignty. This allegedly said that in any transfer of powers the transferred powers must be explicitly and unambiguously defined, and that there may not be a possibility for EU bodies themselves to interpret the scope of the transfer of powers, or to even be able to transfer additional powers to themselves.
60. In the president's opinion, the concept of shared competence under Article 4 of the consolidated version of the Treaty on the Functioning of the European Union is absolutely inconsistent with the principle of state sovereignty, as is adopting measures beyond the framework of Union competences if it "should prove necessary … to attain one of the objectives set out in the Treaties" under Article 352 par. 1 of the consolidated version of the Treaty on the Functioning of the European Union (the so-called "authorization" clause, the flexibility clause) and the simplified revision procedures for adopting amendments to primary law under Art. 48 of the Treaty on European Union, the "passerelle." Also claimed to be exceptionally debatable is the so-called "doctrine of implicit external powers" formulated by

the European Court of Justice in 2006, which permits negotiating international treaties above beyond the framework of EU competences. Thus, according to the president, the Treaty of Lisbon begins a process at the end of which the sovereign will be the European Union, which will, by directives or some other unilateral form, set norms and rules both for individual member states and for the citizens of these states. Moreover, this fundamental limitation on the sovereignty of the Czech Republic and other member states of the European Union is not clearly and openly formulated in the text of the Treaty of Lisbon and it is not expressly identified as an intention and objective of the organization that this treaty is to implement.
61. According to the president, another important element of the material core of the Constitution is the principle of the sovereignty of the people. Therefore, it is appropriate to ask who is the source of legal and political power in the European Union. In the president's opinion, it is not, in any event, the people, because a "European people" does not exist. In the EU power is derived from institutions created on the basis of inter-governmental agreements or treaties. If the Treaty of Lisbon entered into force, it would be possible, through it, to implement by executive act, "from above," from Europe, things that no national parliament would ever approve. This would strengthen the opportunity to circumvent national legislative assemblies, which would fundamentally weaken democracy in the member states, including the Czech Republic. Thus, in the president's opinion, the Treaty of Lisbon is inconsistent with the constitutional principle of the sovereignty of the Czech people.
62. The president also criticized the lack of clear organization and ambiguity of the competence provisions of the Treaty of Lisbon. These provisions will be interpreted and implemented by bodies of the European Union, allegedly known for their tendency to interpret Union competences as broadly as possible. That is inconsistent with Art. 1 of the Constitution, because the Czech Republic is also a law-based stated, the essence of which is that the rules are given and known in advance.
63. In the next part of his presentation, the president criticized the government's opinion that the Treaty of Lisbon, if adopted, de facto indirectly amends the Constitution, because it will automatically become a component of it. The president considers this approach erroneous, because Article 112 of the Constitution exclusively enumerates as components of the constitutional order only the Constitution of the Czech Republic itself, the Charter of Fundamental Rights and Freedoms, and constitutional acts, and does not mention any international treaties; in fact, it does not even mention treaties cited in Article 10a of the Constitution. All this allegedly indicates that, even though under Article 10 all international treaties approved by Parliament take precedence over statutes, they do not have the force of constitutional acts, i.e. they do not form the Constitution, and therefore can not be components of it.
64. For all these reasons the president considers the Treaty of Lisbon to be inconsistent with the Czech constitutional order.

VII.
Basic facts

65. On 25 January 2008 the government presented the Treaty of Lisbon (TL) amending the Treaty on European Union (EU) and the Treaty Establishing the European Community to the Parliament of the Czech Republic, with a request to approve ratification. The government itself approved the negotiation of the TL on 4 December 2007. The Treaty of Lisbon was signed in Lisbon on 13 December 2004. It was signed on behalf of the Czech Republic by Prime Minister Mirek Topolánek and Minister of Foreign Affairs Karel Schwarzenberg.

66. Under point no. IV of the government's submission report, this is a treaty under Art. 10a par. 1 of the Constitution of the Czech Republic, as amended by later regulations, because on its basis the EU acquires certain new powers, and in certain cases there is a change from unanimity to voting by a qualified majority. This is also a treaty of the "presidential" category, which requires ratification by the President of the Republic.

67. Under Art. 10a par. 2 of the Constitution, the consent of the Parliament (or, alternately, in the event of a constitutional act, consent in a referendum) is necessary to ratify such an international treaty. Under Art. 39 par. 4 of the Constitution, a three-fifths majority of all deputies and a three-fifths majority of all senators present is necessary to consent to ratification of an international treaty set forth in Art. 10a par. 1.

68. In this matter, under Art. 87 par. 2 of the Constitution the Constitutional Court has the authority to decide whether the TL is consistent with the constitutional order. The statutory conditions for this proceeding under § 71a et seq. of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, have been met.

69. The Treaty of Lisbon is published in the Official Journal of the EU, C 306, "Information and Notices", Volume 50, 17 December 2007. The Charter of Fundamental Rights of the EU, promulgated by the European Parliament, the Council and the Commission, was published in the Official Journal of the EU, C 303, Information and Notices of EU Bodies and Institutions, on 14 December 2007.

VIII.
70. Before the Constitutional Court turned to reviewing whether the content of the Treaty of Lisbon was consistent with the constitutional order of the Czech Republic, it had to answer several fundamental questions relating to the nature of the proceedings and the criteria for the review itself.

71. The first question was to what extent the Constitutional Court, in review proceedings under § 71a of the Act on the Constitutional Court, is bound by the petition from the Senate (in the scope of specific articles whose review the Senate provided grounds for), or whether it is authorized or even obligated to review the Treaty of Lisbon as a whole, i.e. also in relation to its other articles, regardless of the scope and grounds of the petition. There was also the question of whether the Constitutional Court is to review only those provisions of the Treaty of Lisbon that are, in terms of their content, new norms, i.e. whether it is to conduct its review without fundamentally differentiating between the normatively old and new provisions of the Treaty of Lisbon. Finally, in this context, it is necessary to consider what is to be the point of reference for the Constitutional Court's review, simply stated, whether it is the constitutional order as a whole, or only the "material core" of the Constitution.

72. In the first phase the Constitutional Court thus focused on weighing the procedural issue of the scope of review that it was – at least theoretically – possible (according to the petitioner and some briefs) necessary to focus either on the entire the Treaty of Lisbon or only the provisions that were contested in the petition. The petition is conceived so that it generally calls for review of the entire treaty, but it argues specifically only against some provisions, as is evident from the relevant passage mentioned above.

73. First of all, the Constitutional Court points out that in this matter it does not intend to distinguish whether this is an adversarial or non-adversarial proceeding in the classic civil law sense. This is a completely unique proceeding on review of the constitutionality of an international treaty, which the Constitutional Court approached as set out in the following text.

74. Here the Constitutional Court inclined toward the conclusion (arising by analogy from its settled case law in the area of reviewing legal regulations) that focuses only on the provisions of the international treaty that were formally contested and grounds therefor provided in the petition. A proceeding to review the constitutionality of statutes under § 64 par. 1 of the Act on the Constitutional Court has a similar character; there the Constitutional Court has said, for example, that even though it is bound only by the proposed verdict of the petition, and not by its reasoning, when evaluating the constitutionality of a regulation, that does not mean that a petitioner in a proceeding on the review of norms, if arguing on the basis that the content of a legal regulation is inconsistent with the constitutional order, does not have the burden of allegation. If the petitioner objects that the content of a statute is inconsistent with the constitutional order, for purposes of constitutional review it is not enough to name the act or individual provisions thereof whose annulment is sought; it is necessary to also state the grounds for the alleged unconstitutionality. In a review, the Constitutional Court is not bound by these grounds; it is bound only by the proposed verdict, but not by the scope of review resulting from the grounds contained in a petition for review of a norm (cf. judgment file no. Pl. ÚS 7/03, Collection of Decisions of the Constitutional Court, volume 34, judgment no. 113, pp. 180–181, promulgated as no. 512/2004 Coll.). Thus, the text of § 71e of the Act on the Constitutional Court, which speaks of an international treaty in general, and not only of its individual provisions, is not, in relation to the (petitioner's) burden of allegation – and in view of the abovementioned arguments contained in the cited judgment – insurmountable, but it must be interpreted in the manner thus explained.

75. The Constitutional Court is bound by the scope of the petition to open proceedings, understood as described above, i.e. by the specific contested provisions as defined by an authorized petitioner, and is not authorized to exceed its scope. Thus, a subject with active standing, in a proceeding that is opened at its initiative (that is, optionally), bears the burden of allegation, which it is required to meet. We can add that an attempt at a complete constitutional review, nota bene with the consequences of the impediment of rei iudicatae, especially with lengthy normative texts, is barred by the epistemological argument (epistemologically unfulfillable); the normative argument is based on the fact that the constitutional framework and the statutory framework conceive of the Constitutional Court with the status of a court, and not a "place of interpretation." The Constitutional Court of the Czech Republic is a judicial body for the protection of constitutionality; it s a decision-making body, and not an institution that provides all sorts of positions or expert opinions. In any case, this concept is also confirmed by the exclusion of the government from the circle of those authorized to petition for a review. A review can be activated only at the moment when an international treaty is presented to Parliament for approval, and when one can thus assume that opposing views as to its constitutionality will appear at that time. Until that time, the government, in negotiating an international treaty, must be guided by its own judgment as regards constitutionality, or itself seek to correct individual provisions during the negotiations with the other parties.

76. Another argument in favor of this opinion is the overall concept of preliminary review of the constitutionality of international treaties under § 71a et seq. of the Act on the Constitutional Court. The order of individual petitioners, as set forth in § 71a par. 1, is guided by the aim of enabling each of them to properly express its doubts about the constitutionality of the international treaty under discussion. If the Constitutional Court ruled on the consistency of the Treaty of Lisbon, as a whole (in relation to all its individual provisions, as is suggested not only by the Senate, but also by the president and the government in their briefs), it would basically thereby make it impossible to submit a petition for review by a group of deputies or senators, who have independent standing to file a petition under § 71a par. 1 let. b) of the Act. While this limitation can be cured to a certain extent with the government or the president, by their participation in the present proceeding (which is guaranteed to them by § 71c of the Act on the Constitutional Court), a group of deputies or senators does not have that opportunity. Therefore, reviewing legal regulations or international treaties in their entirety, in a rather blanket manner, without presenting to the Constitutional Court specific factual effects of their application or legal arguments due to which specifically defined and identified provisions of these regulations are alleged to be unconstitutional, can not be accepted.

77. The Constitutional Court thus concludes that its review is concentrated on those provisions of the Treaty of Lisbon whose consistency with the Constitutional the petitioner expressly contested and for which it presented arguments contained in its petition.

78. Thus, we can consider prima vista that any new petition for review of this same Treaty of Lisbon would evidently be blocked by the impediment of rei iudicatae in relation to the provisions contested today. However, the Constitutional Court must judge that only if a new petition is actually submitted; we can point out in advance that in such a case it is appropriate to intepret the question of rei iudicatae restrictively. However, if a petition is submitted for review of a new (different) treaty document (whose content is fully or partly identically with the Treaty of Lisbon), then the issue will not be (or need not be) one of an identical matter, but an identical problem. However, provisions in such a new treaty document with the same content may also appear in the new text with different functional connections, etc., than is the case now. Evaluating such a situation, especially in terms of the possible impediment of rei iudicatae – in view of the Constitutional Court's judgment in this proceeding – will be a matter for the Constitutional Court in the future, if a petition for review of the constitutionality of a new (different) treaty document is actually submitted.

IX.

79. Another question that the Constitutional Court had to resolve preliminarily was the circle of provisions of the Treaty of Lisbon that were to be reviewed, in view of the Treaty on Accession of the Czech Republic to the European Union, Announcement no. 44/2004 Coll. of International Treaties (the Accession Treaty), already ratified and fully applicable in the Czech Republic. This involves the scope of review, whether the Constitutional Court is to decide only about those provisions of the Treaty of Lisbon contested in the petition that can in eventum be considered as normatively new, or about all the contested and disputed provisions.

80. Under Art. 87 par. 2 of the Constitution (as amended) the Constitutional Court (also) decides on the consistency of an international treaty under Art. 10a and Art. 49 with the

constitutional order, before it is ratified. Until the Constitutional Court makes a decision, the treaty can not be ratified. Unlike the (draft) Treaty on a Constitution for Europe, the Treaty of Lisbon is not a new, independent treat that would replace the existing complex of founding treaties, but is only an amendment to the existing treaties (the Treaty on European Union and the Treaty establishing the European Community, which it renames as the Treaty on the Functioning of the European Union), similar to what was already done by previous amendments of the founding treaties.

81. From that point of view, it is possible to distinguish – although very problematically and not consistently –in the Treaty of Lisbon the following provisions:

a) provisions taken from interpretation of the existing treaties by the European Court of Justice;

b) provisions taken from the existing treaties, but which were partly modified (whether to expand the Union's competences or to limit the Union's competences);

c) derogatory provisions that annul existing treaty provisions;

d) provisions that are completely new and have no equivalent in the existing treaties.

82. Provisions of type b), c) and d) are certainly normatively new. With provisions of type a) that is debatable. Although the consequences of interpreting the existing treaties are implicitly contained in those treaties, we can say that expressly including a certain provision which has until now existed "only" in case law can, in certain circumstances, change its normative meaning. In any case, the Senate's petition does not draw a clear dividing line between the normatively new and old provisions of the Treaty of Lisbon, but its criticisms are generally aimed against provisions that can be classified as normatively new.

83. As was already stated above, mere identification of clearly new provisions can hardly be completely unambiguous. Moreover, in this case we can conclude from the constitutional principles of foreseeability, understandability and certainty of law that, even if doubts arose, it is necessary to assume that a particular case involves a normatively new provision, and to subject it to review. This is not affected by the fact that certain amended provisions are sometimes only the results of interpretation in the present legal situation, based on the case law of the Court of Justice.

84. In the Constitutional Court's opinion, even ratification of the Accession Treaty does not completely render meaningless the normatively supreme position of the constitutional order in the legal system in the Czech Republic. The Constitutional Court has previously stated that, in exceptional cases, one can conclude that an international treaty is inconsistent with the constitutional order or with human rights treaties through the means of a decision on a constitutional complaint eve ex post. It did so in judgment file no. II. ÚS 405/02 (Collection of Decisions of the Constitutional Court, volume 30, judgment no. 80). That judgment rejected individual application of the Treaty between the Czech Republic and the Slovak Republic on Social Security, which would have unconstitutional effects, in view of the unusual strictness that its application would cause in that instance. The judgment says that the Constitutional Court must be guided by Article 88 par. 2 of the Constitution, under which the judges of the Constitutional Court are bound in their decision making only by the constitutional order and by the Act on the Constitutional Court. The Constitutional Court concluded that the Treaty between the Czech Republic and the Slovak Republic on Social Security is not a treaty that could be considered part of the constitutional order, and therefore the Constitutional Court can not accept as constitutional any application of any of its provisions that would result in a situation that is inconsistent with the Charter of Fundamental Rights and Freedoms or with the Constitution, as components of the constitutional order. The Constitutional Court is naturally aware that the Treaty between the Czech Republic and the

Slovak Republic on Social Security is not a treaty under Art. 10a of the Constitution, but it concludes that the abovementioned conclusion is applicable in the area of international treaties in general. (Note: A similar conclusion, i.e. that inconsistency of an international treaty with the constitutional order can also be concluded ex post – through a constitutional complaint – is also shared by some of the expert literature; cf. Kysela, Kühn, Právní rozhledy [Legal Perspectives] 10, 2002, no. 7, pp. 301–312.)

85. On the other hand, it is certain that after ratification of any international treaty the Constitutional Court is required to exercise considerable restraint and to regularly apply (in the case of European treaties) the principle of Euro-conforming interpretation. However, this principle can not have the character of a kind of "implicit Euro-amendment" of the Constitution. In the event of a clear conflict between the domestic Constitution and European law that can not be cured by any reasonable interpretation, the constitutional order of the Czech Republic, in particular its material core, must take precedence.

86. The Constitutional Court is a judicial body for the protection of constitutionality, the supreme interpreter of the constitutional law of the Czech Republic, and not of primary European law; it is not its role, nor is it the purpose of proceedings on the consistency of international treaties with the constitutional order to sophistically separate from each other today's allegedly new and earlier old provisions of previous treaties, because one can not even find a precise and unambiguous criterion for such a self-limiting procedure.

87. Therefore, the Constitutional Court included in its review all provisions of the Treaty of Lisbon whose consistency with the Constitution the petitioner contests in a reasoned manner, because (in the context of the foregoing deliberations) it considers them to be normatively new provisions, even though we can concede that they may, although only in some aspects, only replicate existing norms of European law.

X.

88. A question closely tied to the issue of possibly distinguishing between normatively new and old provisions of the Treaty of Lisbon, is determining the appropriate point of reference for reviewing whether the Treaty of Lisbon is consistent with the Constitution of the Czech Republic. In this case the Constitutional Court applied, as a point of reference, the constitutional order of the Czech Republic as a whole, not only its so-called material core (but see below).

89. The Constitutional Court thus gave priority to a comprehensive review. Its basic standard was the entire constitutional order, although within it the material core of the Constitution – i.e. the essential requirements of a democratic, law-based state, which may not be amended – played a central and key role.

90. The Czech Republic's accession to a supra-national organization like the European Union led to an important revision of constitutional regulations (cf. the "Euro-amendment" of the Constitution of the Czech Republic – constitutional Act no. 395/2001 Coll., which amends the constitutional Act of the Czech National Council, no. 1/1993 Coll., Constitution of the Czech Republic, as amended by later regulations), and thus a fundamental change in the Czech legal order took place. However, European Union law, which has since then been applied as an autonomous legal order alongside the legal order of the Czech Republic, based on Article 10a of the Constitution, bases its priority application only on the existence of valid and effective norms, which the provisions of the Treaty of Lisbon are not yet. The absence of a prior review of the Accession Treaty by the Constitutional Court can not, in and of itself, establish a presumption that it is constitutional (cf. Chapter VIII., above). If we accepted the opinion that consent with the ratification of an international treaty under Article

10a by the same majority as is required to adopt a constitutional act reduces the present review only to the area of the "material core" of the Constitution, and otherwise rules it out, it would mean that the institution of preliminary review of constitutionality would to a large extent become meaningless. However, in this regard the Constitution does not distinguish between "ordinary" international treaties under Art. 49 and international treaties under Article 10a, and sets forth the same procedure for review of both by the Constitutional Court. Here we also can not overlook the dominant role that the executive branch plays in negotiating international treaties under Article 10a, in contrast to the process of adopting constitutional acts, where the Parliament and its individual members can actively participate and realistically influence the final form of an adopted norm. Although, of course, one could debate the individual provisions of an international treaty submitted for approval to the Parliament of the Czech Republic, Parliament has only the opportunity to approve or reject it as a whole. This also differs from the process of adopting a constitutional act, where the democratically authorized constitutional framer may directly affect its final form. Review by the Constitutional Court, and a possible finding of inconsistency between the constitutional order and an international treaty under Article 10a of the Constitution, then makes it necessary to state which provision of the constitutional order the international treaty is inconsistent with; here a space opens up for the constitutional framer to take active part in the creation of legal norms of fundamental importance for the entire legal order of the Czech Republic.

91. As was already said, the Constitutional Court, as a judicial body for protection of constitutionality, is the highest body interpreting the constitutional regulations of the Czech Republic. This comprehensive approach to reviewing the question of what the point of reference for review of the Treaty of Lisbon must be corresponds to the express wording of Art. 87 par. 2 of the Constitution, under which the Constitutional Court shall rule on the consistency of an international treaty under Art. 10a and Art. 49 with the constitutional order before it is ratified, as well as the related passages of the Act on the Constitutional Court, which also speak of the constitutional order as a whole, and not only as a part of it, however important. In any case, the text of the "Euro-amendment" to the Constitution (constitutional Act no. 395/2001 Coll.) testifies to this; Art. 89 par. 3 provides that a decision of the Constitutional Court under Art. 87 par. 2 finding an international treaty inconsistent with the constitutional order prevents ratification of the treaty until the inconsistency is removed. Such inconsistency in international treaties can be removed by amending the Constitution, which, of course, is out of the question with the material core of the Constitution. Thus, the constitutional framer itself relies on the entire constitutional order as a referential criterion for review of the constitutionality of international treaties. A Constitutional Court judge is then bound expressly only by the constitutional order, by the Act on the Constitutional Court, and, in particular, by the obligation to protect the inviolability of the natural rights of a human being and the rights of the citizen (Art. 88 par. 2 in connection with Art. 85 par. 2 of the Constitution).

92. Another substantial argument for the selected approach is the generally recognized principle for interpretation of constitutional law, usually called the principle of unity in the constitutional code, or of the constitutional order. This means that it is always necessary to take all provisions of the constitutional order and interpret their functioning together, not to take them out of the context of the functioning of the entire constitution; all the more so because the generally and often briefly formulated constitutional texts are related in meaning

and lean on each other like individual building elements of a whole that creates a new quality, sometimes different from its individual parts. The limit is always the ban on abuse of an interpretation that would lead to removing or endangering the foundations of a democratic, law-based stated provided by Art. 9 par. 3 of the Constitution. It is the obligation of all bodies interpreting the legal order of the Czech Republic to use an interpretation that is based on material, constitutionally constituted values that are fundamentally untouchable and non-amendable. The usual method that helps overcome possible contested places is the principle of a constitutional interpretation under which, if the reviewed text permits several interpretations, it is necessary to use the one that most corresponds to the Constitution or to the constitutional order as a whole.

93. As the Constitutional Court has already stated above, within the applied point of reference, the constitutional order of the Czech Republic, it is the essential requirements of a democratic, law-based state – whose amendment is impermissible under Art. 9 par. 2 of the Constitution – that represent the central criterion. A more detailed description of the content of these essential requirements of a democratic, law-based state, which usually have the character of general principles, is the result, in specific cases, of interpretation by bodies that apply the Constitution. The Constitutional Court of the Czech Republic, in its historically first judgment, stated that our Constitution is not based on a neutrality of values, it is not a mere definition of institutions and processes (judgment file no. Pl. ÚS 19/93; Collection of Decisions of the Constitutional Court, volume 1, judgment no. 1, promulgated as no. 14/1994 Coll.); thereby it joined the modern concept of a law-based state, which is understood not as a formal, legal state, but as a material legal state. The guiding principle is undoubtedly the principle of inherent, inalienable, non-prescriptible, and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people, and separation of powers, respecting the cited material concept of a law-based state, is built to protect them. These principles can not be touched even by an amendment to the Constitution implemented formally in harmony with law, because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them. Although the Constitutional Court has already many times – since its cited first judgment in this area – pronounced the necessity of protecting the principles forming the material core of the Constitution in a heightened degree, a detailed list of them is not found in any constitutional provision or in the Constitutional Court's judgments. Even in this proceeding the Constitutional Court has no ambition to make such a list in a case or catalog; however, such an attempt would evidently be appropriate if the Constitutional Court chose as the standard for review only the material core, because what is being measured is not a particular limited problem, but a considerable set of amended primary EU laws, and it would be necessary to identify more precisely what exactly that set is being measured by and what it is not (i.e. with the remaining components of the constitutional order). Thus, for the foregoing reasons, for purposes of this proceeding, the Constitutional Court took into consideration the entire system of the Czech constitutional order, although primarily its untouchable material core, specifically those articles or parts that can apply to the provisions of the Treaty of Lisbon contested by the petitioner.

94. We can add the following. In the matter concerning sugar quotas (judgment Pl. ÚS 50/04 of 8 March 2006 – cf. point 92, Collection of Decisions of the Constitutional Court, volume 40, judgment no. 50, promulgated as no. 154/2006 Coll.), the Constitutional Court stated that lending part of the powers of the Czech Republic to EC bodies is a conditional loan and can continue as long as those powers are exercised by those bodies in a manner that is compatible

with preserving the foundations of the state sovereignty of the Czech Republic and in a manner that does not endanger the foundations of a material, law-based state; here, of course, we must emphasize that in that case (i.e. with sugar quotas) the Constitutional Court evaluated an issue that fell under "secondary" EU law. As regards secondary community law, that judgment was based on a presumption of compatibility of that community law, and especially the case law of the European Court of Justice, with the relevant provisions of the Czech constitutional order, especially with the guaranteed fundamental rights and freedoms. Therefore, any potential review was to be limited to consistency with Art. 1 par. 1 and Art. 9 par. 2 of the Constitution. However, in the presently adjudicated matter – setting aside another type of proceeding – as emphasized above, an extensive set of amended primary EU law is being evaluated. That, too, is another argument why it is appropriate to use the entire the constitutional order as a referential criterion.
(In the matter of a "Euro-arrest warrant" – file no. Pl. ÚS 66/04, Collection of Decisions of the Constitutional Court, volume 41, judgment no. 93, promulgated as no. 434/2006 Coll. – the Constitutional Court does not rule out fundamental priority application of EC law, which, as it states, is limited only by the material core of the Constitution, which is defined by, e.g. the judgment on sugar quotas. However, at the same time it implicitly admits removing possible inconsistency not only by priority application of European law norms, but also through constitutional amendments. It is appropriate to ad here that, in order for the constitution framers to be able to recognize the need for them, it is necessary for the Constitutional Court to have an opportunity to examine European law provisions in terms of their consistency with the constitutional order as a whole, not only with the material core. In such a review it can then define those provisions of the constitutional order that can not be interpreted consistently with the requirements of European law by using domestic methodology, and which it would be necessary to amend. Preliminary review gives it a suitable opportunity for this, because it does not raise problems on the application level. Moreover, the Constitutional Court thereby acquires an opportunity to evaluate to a certain extent the constitutionality of the interpretation of already existing EU law norms by the Court of Justice, without coming into direct conflict with it.
We can also add that neither the Senate, as the petitioner, nor the president, expressly addressed the point of reference for review of the Treaty of Lisbon. However, in its filing the Senate argues on the basis of provisions of the Constitution that could evidently not even be considered as part of its material core.)
XI.
Review of Content – General Part (Basic Starting Points)

95. The Constitutional Court – although it does not intend to abandon evaluating the articles of the Treaty of Lisbon (TL) contested by the Senate in terms of the constitutional order as a whole (cf. Art. 87 par. 2 of the Constitution, as amended) – focused, from a normative perspective, primarily on Art. 10a par. 1, Art. 1 par. 1 and Art. 9 par. 2 and 3 of the Constitution.

96. Article 10a par. 1 provides that certain powers of Czech Republic bodies may be transferred by treaty to an international organization or institution. Article 1 par. 1 provides that the Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens. Article 9 par. 2 provides that a change in the essential requirements for a democratic state governed by the rule of law is impermissible. Article 9 par. 3 provides that legal norms may

not be interpreted so as to authorize anyone to do away with or jeopardize the democratic foundations of the state.

97. Art. 10a par. 1 of the Constitution indicates that not all, but only certain powers can be transferred by treaty to an international organization. This Article must be interpreted in connection with Art. 1 par. 1 and Art. 9 par. 2 of the Constitution. Thus the transfer of powers of Czech Republic bodies can not go so far as to violate the very essence of the republic as a sovereign and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the human being and of citizens or to establish a change in the essential requirements for a democratic state governed by the rule of law.

98. In this regard it is necessary for the Constitutional Court to at least briefly address the term "sovereign state," although it or course has no aim to interpret that term in this judgment by an extensive analysis (this would not even be possible; the term is not undisputed, and difficult to define in the abstract). State sovereignty is traditionally understood as the highest and exclusive power on a state's territory, and as the state's independence in international relations. Thus, no international law norm can arise without the will of the states themselves, acting on the principle of equal sovereignty. However, states are required to respect the norms to whose creation they contributed in accordance with the principle pacta sunt servanda, and to fulfill them in good faith, which protects the legal certainty of other subjects.

99. States have been recognized actors in the international legal system for centuries, whereas individuals, until recently, had no direct access to this area, except the opportunity to exercise their rights with the help of the state to which they belonged. In classical theory states the subjects of "inter-state" (international) law, which they create for themselves and for their needs, whether by the acceptance of custom, or specific agreements, most often expressed in international treaties. Therefore, states traditionally had, and still have, an exclusive role in the creation of the modern international legal system.

100. Apart from the possibility of observing certain signs that are generally accepted as the constitutive elements of a state ("a territorial corporation equipped with original power to govern" per Jellinek, J.: Všeobecná státověda [General Political Science]. Prague, 1906, p. 187) and evaluation of which indicates whether a state exists or not, it is also possible to observe in a sovereign the freedom to restrict itself by the legal order or by freely accepted international obligations, in other words, the ability to regulate its competences (Jellinek, J. op. cit., p. 524). We can conclude from this that the possibility to create this free will that a state has to repeatedly amend a particular competence is not a sign of a sovereign's inadequacy, but of its full sovereignty.

101. International cooperation and coordination of national policies has become an essential requirement for managing the globalization of the world. For the first time in history, national security, which was always the core of statehood, can be effectively ensured only by sovereign states acting in concert, unifying resources, technologies, communication and information flows, power, and authority. In the globalized world the centers of power are regrouped according to factors other than simply the power and will of individual sovereign states. There is a spontaneous, undirected process of increasing intensive integration of the world's countries in a single economic system. This process, with contributions from the key

communication technologies of the mass media, internet, and television, subsequently influences relationships outside and inside individual states in the areas of politics, culture, social psychology and others, including the area of law.

102. The character of integration, in this regard also in the case of the European Union, can ultimately lead to protection and strengthening of the sovereignty of member states vis-?-vis external, especially geopolitical and economic factors; for example, also vis-?-vis newly emerging world superpowers, where it is difficult to guess the future priority of values to which they will be willing to subordinate the building of a new order in the globalized world.

103. At the core of European civilization are values that are common to all developed world cultures. These values are human freedom and human dignity, which are the foundation of a human being's self-determination. The functional forms of social cohabitation are based on an individual's conscious self-restriction and acceptance of order. The same principles also lead to higher forms of effective human organization, whether a municipality, state, or forms of integration of states. This practical need also gave birth to the principle of subsidiarity, which can be balanced and functional only insofar as the organizational levels where transfer of competence takes place feel the general benefit of such a step.

104. The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity sui generis, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a "loss" of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., "lending, ceding" of part of the competence of a sovereign. It may seem paradoxical that they key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences.

105. The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separate organization as classical theories assumed in the past. An international political system is being created in the global scale that lacks institutionalized rules of its own self-government, such as the international system created by sovereign states had until now. It is an existential interest of the integrating European civilization to appear in global competition as an important and respected force. These processes quite clearly demonstrate that the sovereign legitimate state power must necessarily observe the ongoing developmental trends and attempt to approach them, understand them, and gradually subject this spontaneous globalization process, lacking hierarchical organization, to the order of democratic legitimacy (Woodward, R. An ‚ation' not a ‚Nation': the Globalization of World Politics. In Michie, J. (ed.) The Handbook of Globalization. Edward Elgar Publishing Limited, Cheltenham, UK, 2003, pp. 311–316).

106. However, it is important to point to the ability of a member state to withdraw from the European Union by the process set forth in Art. 50 of the Treaty on EU; the explicit articulation of this possibility in the Treaty of Lisbon indisputably confirms the principle that "States are the Masters of the Treaty" and the continuing sovereignty of member states.

107. Thus, from a modern constitutional law viewpoint, sovereignty need not mean only "independence of the state power from any other power, both externally (in foreign relations),

and in internal matters" (Dušan Hendrych and collective of authors, Právnický slovník [Legal Dictionary], C. H. Beck, 2nd edition 2003, p. 1007). Sovereignty is (probably) no longer understood like this in any traditional democratic country, and stricto sensu no country, including the USA, would fulfill the elements of sovereignty. For example, David P. Calleo points out that if we understood sovereignty in the traditional concept, any international obligation deprives the state of part of its sovereignty. Therefore, in practice sovereignty should not be understood only as a rigid legal concept, but "also as a concept with a practical, moral, and existential dimension. In practice, national sovereignty is always limited by objective conditions, including the reactions of neighboring states. Under these conditions, national sovereignty means above all a legitimate government that has at its disposal the formal power to choose between available alternatives, and not to pursue an alternative dictated by a foreign power. In other words, for a nation-state just as for an individual within a society, practical freedom means being an actor, not an object. For a state that is in a tightly mutually interdependent system, practical sovereignty consists in being understood as a player to whom neighboring states listen, with whom they actively negotiate, and whose national interests are taken into consideration." (David P. Calleo, Rethinking Europe's Future, Princeton/Oxford, pp. 141, 2001).

108. We can conclude from these deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the "loss" of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world.

109. The Constitutional Court adds that – as regards the Czech Constitution – one can choose a simple linguistic interpretation of Art. 10a par. 1 of the Constitution that permits delegating only "certain powers of bodies of the Czech Republic." That indicates that the Constitution, interpreted as a whole, is consistent as regards the relationship of Article 10a and Art. 1 par. 1: Art. 10a clearly can not be used for an unlimited transfer of sovereignty; in other words, based on Article 10a on can not transfer – as already stated – powers, the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible to speak of the Czech Republic as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution. These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide discretion; interference by the Constitutional Court should come into consideration as ultima ratio, i.e., in a situation where the scope of discretion was clearly exceeded, and Art. 1 par. 1 of the Constitution was affected, because there was a transfer of powers beyond the scope of Art. 10a of the Constitution. An analogous approach was taken by the Polish Constitutional Tribunal in its decision on the constitutionality of Poland's accession to the EU, of 11 May 2005 (see judgment K 18/04, OTK ZU (2005) ser. A, nr. 5, pol. 49).

110. As the foregoing text indicates, the point of reference for permissibility of a transfer of

powers from the Czech Republic to an international organization is, especially, respecting the material core of the Constitution under Art. 9 par. 2. This means, in particular, protection of fundamental human rights and freedoms, as they are enshrined in the Charter of Fundamental Rights and Freedoms, in the (European) Convention for the Protection of Human Rights and Fundamental Freedoms, in other international treaties in this field, and in the settled case law of the Constitutional Court of the Czech Republic and the European Court of Human Rights. In this regard we can point out that what will be important is application of the Treaty of Lisbon, or the Charter of Fundamental Rights of the European Union, in specific cases that can be contested before the Constitutional Court of the Czech Republic by individual constitutional complaints, concerning possible (exceptional) excesses by Union bodies and Union law into fundamental rights and freedoms. This is also discussed at a different point in this judgment.

111. The Constitutional Court includes among the important starting points for a review of the content of the Treaty of Lisbon and the basic case law of the Constitutional Court, and – for inspiration – certain important decisions of other constitutional courts. However, the Constitutional Court does not take this case law as dogma; as already stated, the Constitutional Court considers (and wishes to consider in the future, in reviews of possible constitutional complaints) the referential view point to be, in particular, the material (hard) core of the Constitution, although this can not fully rule out the possibility that it will take into account the entire constitutional order.

112. Among the case law of the Constitutional Court, we can consider fundamental judgments to be judgment file no. Pl. ÚS 50/04 (in the matter of "sugar quotas") and judgment file no. Pl. ÚS 66/04 (in the matter of a "Euro-arrest warrant") – see above, for both.

113. In the matter of "sugar quotas" (Pl. ÚS 50/04 of 8 March 2006) the Constitutional Court state, among other things, the following theses:

- By the accession of the Czech Republic to the EU, on the basis of Art. 10a of the Constitution of the Czech Republic, there was a transfer of powers of national bodies to supra-national bodies. At the moment when the Treaty establishing the EC, as amended by revisions and the accession treaty, became binding on the Czech Republic, the transfer of the powers of national bodies that, under primary EU law are exercised by EU bodies, to those bodies.

- the Czech Republic lent these powers to EC bodies. This loan of partial powers is a conditional loan; it can continue as long as these powers are exercised by EC bodies in a manner compatible with the preservation of the foundations of the Czech Republic's state sovereignty, and in a manner that does not jeopardize the foundation of a material law-based state. (Note: Of course, this thesis does not rule out, as is stated elsewhere /cf. point 84/, evaluation of the TL in view of the constitutional order as a whole.)

- Direct applicability in domestic law, and priority application of a directive (note: this concerned a particular directive in the adjudicated matter) arise from the very dogmatics of community law, as it was presented in the past in the case law of the ECJ. Insofar as membership in the EC carries a certain limitation of the powers of domestic organs to the

benefit of community bodies, one of the expressions of that limitation must necessarily also be a limitation of the freedom of member states to determine the domestic effects of community law. Article 10a of the Constitution of the Czech Republic thus actually functions in both directions: it forms the normative basis for transfer of powers, and is simultaneously the provision of the Constitution of the Czech Republic that opens the domestic legal order for the functioning of community law, including rules concerning its effects within the legal order.
(However, it can not be ignored – cf. point 84 – that, in contrast to the Treaty of Lisbon, the difference is that in the matter of "sugar quotas" the Constitutional Court reviewed secondary community law, whereas the Treaty of Lisbon involves primary law.)

114. In the matter of the "Euro-arrest warrant" (Pl. ÚS 66/04 of 3 May 2006) the Constitutional Court stated, among other things, the following theses:

- Article 1 par. 2 of the Constitution of the Czech Republic, in connection with the principle of cooperation set forth in Art. 10 of the Treaty establishing the EC gives rise to a constitutional principle under which domestic legal regulations, including the Constitution, are to be interpreted in accordance with the principles of European integration and the cooperation of community bodies and the bodies of a member state. Thus, if there are several interpretations of the constitutional order, which includes the Charter of Fundamental Rights and Freedoms, and only some of them lead to fulfilling the obligation that the Czech Republic assumed in connection with its membership in the EU, that interpretation must be selected which supports fulfillment of that obligation, and not an interpretation that prevents such fulfillment.

- The constitutional principle of interpreting domestic law in accordance with the Czech Republic's obligations arising from its membership in the European Union is limited by the possible meaning of the constitutional text. Article 1 par. 2 of the Constitution is not a provision that is capable of changing the meaning of any other express constitutional provision at will. If domestic methodology for interpreting constitutional law does not permit interpreting a particular norm in accordance with European law, it is up to the constitutional framer to amend the Constitution. Of course, the constitutional framer can exercise this power only on condition of preserving the essential requirements for a democratic state governed by the rule of law (Art. 9 par. 2 of the Constitution), which are not at the constitutional framer's disposal, wherefore the power to amend these requirements also can not be transferred by a treaty under Art. 10a of the Constitution (cf. Holländer, P., Materiální ohnisko ústavy a diskrece ústavodárce [The Material Core of the Constitution and the Discretion of the Constitutional Framer], Právník [Lawyer] no. 5/2005).

- This indicates that if several possible interpretations of the Constitution exist under domestic interpretation methodology, and only some of them lead to fulfilling the obligation that the Czech Republic assumed with its membership in the European Union, it is necessary to select the interpretation that supports implementation of this Article 1 par. 2 of the Constitution.

(Optical there may seem to be a certain discord between the Constitutional Court's judgments in the matter of "sugar quotas" and the matter of the "Euro-arrest warrant." Judge Eliška Wagnerová pointed to this in her dissenting opinion to the Constitutional

Court's judgments in the matter of the "Euro-arrest warrant, saying that in this matter the Constitutional Court shifted the doctrine of the Constitutional Court – formulated in the matter of "sugar quotas" – by the assertion that there was "to a certain extent a limitation on the powers of the Constitutional Court" and that "where Czech law reflects a binding norm of European law, the doctrine of priority of community law does not permit the Constitutional Court to review that Czech norm in terms of its conformity with the constitutional order of the Czech Republic." Nonetheless, the Constitutional Court believes that the dissonance between these two judgments need not be seen as too sharp and clear-cut, which can be concluded both from the headnotes introducing judgment Pl. ÚS 66/04 /Euro-arrest warrant/, and from the wording of point 53 in it. For purposes of the present judgment, in the matter of evaluating the constitutionality of the TL, the Constitutional Court does not consider certain differences between the two cited judgments to be decisive.)

115. In another judgment, in the matter of review of the Act on Bankruptcy and Settlement (Pl. ÚS 36/01 of 25 June 2002, Collection of Decisions of the Constitutional Court, volume 26, judgment no. 80, promulgated as no. 403/2002 Coll.) the Constitutional Court stated the following: The constitutional maxim in Art. 9 par. 2 of the Constitution has consequences not only for the framers of the constitution, but also for the Constitutional Court. The impermissibility of changing the essential requirements of a democratic state based on the rule of law also contains an instruction to the Constitutional Court, that no amendment to the Constitution can e interpreted in such a way that it would result in limiting an already achieved procedural level of protection for fundamental rights and freedoms.
116. In the case law of other constitutional courts – which we can take as inspiration – we can consider fundamental especially the decision of the German Federal Constitutional Court (GCC), Solange II and the Maastricht decision.

117. In the matter of Solange II of 22 October 1986 The German Federal Constitutional Court essentially stated that the level of protection of human rights provided by European bodies is comparable to the protection that could be provided by German bodies; the Federal Constitutional Court concluded that it would no longer review the compatibility of Community norms and acts if the European Community and especially its Court of Justice generally ensure effective protection of fundamental rights vis-?-vis acts of the Community; this protection must fundamentally correspond to the protection of fundamental rights provided by the Basic Law (the Constitution of the Federal Republic of Germany).

118. In the matter of Maastricht of 12 October 1993 the GCC stated the following theses.

- Every entry into an inter-state community has the consequence that a member of that community is bound by its decisions. Of course, a member state – as well as its citizens – acquires an influence by participating in the creation of the Community's will to pursue common – and also its own – aims, the result of which is then binding for all member states, and therefore also assumes recognition of one's own obligations. Readiness to accept the obligations of international law in a more narrow legal union of an inter-state community is characteristic of a democratic state that wants to share in the work of inter-state institutions, and especially in the development of the European Union, as an equal member.

- Provision of sovereign authorizations has the consequence that defending them no longer always depends on the will of the member state alone. Seeing this as a violation of the

constitutional principle of democracy would be inconsistent not only with the openness of the constitution towards integration, which the constitutional framers wanted and express in 1949; it would also lay a foundation to the concept of democracy that would make every democratic state incapable of integration because of the principle of unanimity.

- The principle of the majority, according to the imperative of mutual regard, arising from loyalty to the Community (however) has a limit in the constitutional principles and elementary interests of the member states.

- In the area of "competence - competence" the fundamental question is who has the power to determine, with final effect, what is and is not a power transferred to the Community.

- The Federal Constitutional Court reserved to itself the power to evaluate the question of whether a particular Community act crossed the boundaries that German law gave to the Community (in the form of the founding treaties and amendments to them).

- The Federal Constitutional Court reserved to itself the final word in determining which community acts are ultra vires, i.e. beyond the scope of Community powers; if the Federal Constitutional Court concluded that they were, that would make them inapplicable in Germany.

- In other words, if European institutions or bodies handled the Treaty on Union or otherwise developed it in a manner that was no longer protected by the Treaty in the form that is the basis for the German act of approval, then legal acts arising from that would not be binding in the area of German sovereignty. German state bodies would not be allowed, for constitutional law reasons, to apply these acts in Germeny. In accordance with this, the Federal Constitutional Court reviews whether the legal acts of European institutions and bodies stay within the bounds of sovereign rights that were provided to them, or whether they exceed them.

119. As was already stated, the cited provisions of the Constitution and the fundamental case law of the Constitutional Court are important (thought not completely exclusive) substantive starting points for review of the content of the Treaty of Lisbon.

120. In view of the foregoing, the Constitutional Court states (and repeats)

- The Constitutional Court generally recognizes the functionality of the EU institutional framework for ensuring review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional.

- In terms of the constitutional order of the Czech Republic – and within it especially in view of the material core of the Constitution – what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application.

- The Constitutional Court of the Czech Republic will (may) also – although in view of the foregoing principles – function as an ultima ratio and may review whether any act of

Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred comeptences.

XII.
Special Part

121. Before evaluating the constitutionality of individual points in the Senate's petition, the Constitutional Court considered – in view of the unique nature of the matter – the formulation of its verdict, whether positive or negative.

122. The exact wording of § 71e par. 1 and 2 of Act no. 182/1993 Coll., on the Constitutional Court, as amended by later regulations, provides that (1) if the Constitutional Court concludes, after proceedings, that an international treaty is inconsistent with the constitutional order, the court shall state this in a judgment; the judgment shall state which provision of the constitutional order the international treaty is inconsistent with, (2) if the Constitutional Court concludes, after proceedings, that an international treaty is not inconsistent with the constitutional order, the court shall decide in a judgment that ratification of the international treaty is not inconsistent with the constitutional order.

123. However, this formulation of the judgment verdict is difficult to accept in this particular matter, because the Constitutional Court reviewed (and decided on) the constitutionality of only the eight articles of the Treaty of Lisbon contested (with grounds provided) by the Senate, not of the entire treaty.

124. Therefore, the Constitutional Court chose to formulate the judgment verdict to say that it found the articles of the Treaty of Lisbon cited in the verdict of this judgment are not inconsistent with the constitutional order.

XIII.

125. In the first point of its petition the Senate raises doubts regarding Art. 2a par. 1 (now Art. 2 par. 1) and Art. 2c (now Art. 4) of the Treaty on the Functioning of the EU.

126. Article 2a par. 1 (now Article 2 par. 1) reads:

1. When the Treaties confer on the Union exclusive competence in a specific area, only the Union may legislate and adopt legally binding acts, the Member States being able to do so themselves only if so empowered by the Union or for the implementation of Union acts.

127. Article 2c (now Article 4) reads:

1. The Union shall share competence with the Member States where the Treaties confer on it a competence which does not relate to the areas referred to in Articles 2b and 2e.

2. Shared competence between the Union and the Member States applies in the following principal areas:
(a) internal market;
(b) social policy, for the aspects defined in this Treaty;
(c) economic, social and territorial cohesion;
(d) agriculture and fisheries, excluding the conservation of marine biological resources;
(e) environment;
(f) consumer protection;
(g) transport;
(h) trans-European networks;
(i) energy;
(j) area of freedom, security and justice;
(k) common safety concerns in public health matters, for the aspects defined in this Treaty.

3. In the areas of research, technological development and space, the Union shall have competence to carry out activities, in particular to define and implement programmes; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

4. In the areas of development cooperation and humanitarian aid, the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in Member States being prevented from exercising theirs.

128. In the first point of its petition the Senate asks the Constitutional Court to consider the question of the character and classification of powers transferred to the European Union. It stated that the new version the Treaty on the Functioning of the European Union (previously the Treaty establishing the European Community) establishes a classification of powers that is more characteristic of federal states, by introducing a category of powers exclusive to the Union, which includes entire comprehensive areas of legal regulation , in which, under Art. 2a par. 1 of the Treaty on the Functioning of the European Union member states may legislate and adopt legally binding acts only if so empowered by the Union or for the implementation of Union acts. According to the petitioner, the related concept of shared competences (Article 2c of the Treaty), that are to exist alongside the cited exclusive competences, opens space for a wide sphere of Union norm creation, difficult to identify in advance, where, in accordance with Declaration no. 17 to the Treaty, the principle of priority of Union law is implicitly applied. Thus, in the sphere of shared competences, the scope of transferred powers in terms of Art. 10a of the Constitution, can be seen as not fully determinable in advance.

129. The president adds, regarding the classification of powers more characteristic of federal states, which is his opinion as well, that the literal wording of Article 10a of the Constitution indicates that the powers of bodies of the Czech Republic can be transferred only to an entity existing between states, not alongside or even above them. In his arguments he then states that the Union is not such an "entity."

130. Regarding the definition of European Union competences and their character, the

Constitutional Court states that the boundary for the transfer of powers of the Czech Republic to international organizations or institutions is primarily governed by Art. 10a of the Constitution, which speaks of the transfer of "certain" powers; we can not overlook a certain meaning that was given to Article 10a by the Constitutional Court judgment concerning sugar quotas (judgment file no. Pl. ÚS 50/04 – see above). Use of the word "certain" powers indicates that not all powers can be transferred to an international organization or institution; however, that does not mean an automatic conclusion that transfer of powers is compatible if at least some powers are retained by bodies of the Czech Republic. The meaning of the word "certain" must logically be interpreted in view of other provisions of the constitutional order, especially Article 1 par. 1 of the Constitution, under which the Czech Republic is a sovereign and unitary state governed by the rule of law, established on respect for the rights and freedoms of the human being and citizens. In judgment Pl. ÚS 50/04 the Constitutional Court stated that the transfer of powers is conditional at two levels – the formal and the material. The formal level limits the transfer of powers by compatibility with preserving the foundations of state sovereignty of the Czech Republic. In this regard the formal level is joined with Article 1 par. 1 of the Constitution. The material level concerns the manner of exercising the transferred rights, which may not jeopardize the essence of a material law-based state; this limitation arises from Article 9 par. 2 of the Constitution, under which amending the essential requirements of a democratic state governed by the rule of law is impermissible. As the Constitutional Court emphasized, the material limits for transfer of powers are even beyond the reach of the constitutional framer itself. However, this does not in any way suggest that a transfer of powers may not include "entire comprehensive areas of legal regulation," nor that the organization or institution to which powers of bodies of the Czech Republic are transferred may not exercise these powers exclusively, as the petitioner apparently believes. Regarding this, of course, we must emphasize – in addition to the cited reasons – that the present matter concerns review of the constitutionality of amended primary EU law, the referential criterion for which is not only Art. 1 par. 1 of the Constitution and Art. 9 par. 2 of the Constitution (although they are a central viewpoint), but the constitutional order as a whole (cf. point 78 et seq.).

131. Comprehensively we can say that, of course, only a sovereign state is able to undertake to observe and effectively enforce, i.e. realistically guarantee the most important constitutional rules and principles of a material law-based state; preserving the essential attributes of sovereignty is a condicio sine qua non, a prerequisite for principles of natural law origin to be protected by the state at all.

132. As the Senate, in any case, correctly emphasizes in its petition, the Treaty of Lisbon itself confirms that the legislative competence - comptence, i.e. the authorization to amend fundamental regulations, remains with the member states. This is closely tied to the doubts of the Senate and the president concerning the character of the EU as a federal state, or the classification of powers that, according to the Senate and the president, such a state is to point out; we can briefly draw from this that if the Union does not have the competence - competence, it can not be considered either a kind of federal state or special entity, standing in every respect and always above the individual states. The Union can act only within the scope of powers expressly conferred on it by member states, which it can not exceed, nor can it establish new powers for itself. Article 5 par. 2 of the Treaty on EU provides: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein.

Competences not conferred upon the Union in the Treaties remain with the Member States."

(This provision is basically taken from the existing Article 5 of the Treaty establishing the EC, and the limitation of Union competences is even more emphasized; cf. the first subparagraphs of Art. 5: "The Community shall act only within the limits of the competences conferred upon it by this Treaty to attain the objectives set out therein.")

133. In this situation the Constitutional Court – regarding the objection that the Treaty of Lisbon newly introduces the category of exclusive Union powers – concludes that this category (as such) is already know today (although exclusive powers are not explicitly named in the provision itself), in the interpretation of EU law by the Court of Justice, and in the Treaty establishing the EC itself (cf. Art. 5 of the Treaty establishing the EC). However, in comparison with the existing Art. 5 of the Treaty establishing the EC, the new provisions on competences are a step toward greater clarity and clear organization which, from a domestic constitutional viewpoint can undoubtedly be seen as an improvement. There are changes in the classification of individual competences; with a number of competences the division is based on division under the existing treaties, but some elements are different, so in this regard they can be taken as new provisions.

134. As regards the sphere of shared competences, the Senate's arguments basically ignore Art. 2 par. 6 of the Treaty on the Functioning of the EU (2a par. 6), under which the scope and manner of exercising competences are determined by provisions of treaties concerning the individual areas. Thus, Art. 4 par. 2 of the Treaty on the Functioning of the EU (2c), cited by the Senate, does not establish a kind of unlimited competence clause in the area of shared competences, but only declares the primary areas where shared competences appear; however, each individual competence must be specified in each case in the relevant part of the relevant treaty. Thus, we can say that the Treaty on EU does not contain shared competences on the basis of Art. 4 par. 2 of the Treaty on the Functioning of the EU, but on the basis of individual special treaty provisions. If some competence is not expressly identified as a Union competence, whether exclusive or shared, it remains fully within the power of the member state. This is addressed – as already stated – by Art. 5 par. 2 of the Treaty on EU: "Under the principle of conferral, the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States." Thus, the transfer of powers under Art. 10a of the Constitution is not unlimited, and this Article has not been violated in this regard. Thus, we must emphasize again that the European Union may act only in those areas in which certain powers of member states were conferred on it, on the assumptions discussed above, based on the doctrine of self-limitation of a sovereign (a unilateral, self-limiting act by a sovereign state), in accordance with a particular domestic law.

135. However, the constitutional law limits for the transfer of powers contained in Article 10a of the Constitution also indicate the need for clearer delimitation (and thus also definiteness and recognizability) of the transferred powers, together with sufficient review, which the Czech Republic, as a sovereign state, can exercise over the transfer of powers.

136. As regards this delimitation of transferred powers, it is necessary to realize that Article 2c par. 2 (now Art. 4) of the Treaty on the Functioning of the EU, cited by the Senate, by

itself does not define the powers of the Union. They are specified by individual provisions in other parts of the Treaty on the Functioning of the EU, including specific decision-making procedures and legal instruments that can be used in implementing them, as the government points out in its brief. The Constitutional Court here agrees with the government's opinion that the petitioner's concern about the sphere of Union norm creation being difficult to identify in advance is not appropriate in this situation, and that (in any case) it is not even possible to make an exhaustive list to enshrine individual powers in such detail that they would always correspond to the particular legal act of the Union that implements them. However, it is possible, and the Treaty of Lisbon clearly does so, to specify precisely defined areas in which Union norm creation may take place.

[In its brief, the government cites only Part III of the Treaty on the Functioning of the EU (Union Policies and Internal Actions), which, of course, overlooks the competence provisions in other parts of the treaty, e.g. Article 18, which is a component of Part II of the Treaty on the Functioning of the EU, and under which the European Parliament and the Council may, in a proper legislative procedure, adopt regulations prohibiting discrimination based on nationality.]

137. Article 5 of the Treaty on EU also governs the principles for defining and exercising European Union competences. More precise specification is governed by the principle of conferred competences (cf. point 124). The exercise of powers other than the exclusive competences of the European Union is limited by the principles of subsidiarity and proportionality. Under the principle of subsidiarity "in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level." (Art. 5 par. 3). The principle of proportionality requires that neither the content nor the form of the Union's activities exceed what is necessary to achieve the objectives of the Treaties (Art. 5 par. 4). The content of these principles is specified further by the Protocol on the application of the principles of subsidiarity and proportionality, together with the Protocol on the exercise of shared competence. Thus, these principles, together with the specific provisions of the Treaty on EU and of the Treaty on the Functioning of the EU, provide a sufficiently certain normative framework for determining the scope in which the Czech Republic transferred its powers to the European Union.

138. The question of review of the transfer of powers from the Czech Republic as a sovereign state must be understood especially in relation to the provisions of treaties defining the competences of the Union, with special attention to Article 5 of the Treaty on EU. As regards the institutional framework for review of the exercise of powers, certainly the basic body for review of the exercise of competence by the European Union is the Court of Justice. It exercises this review on the basis of Article 263 of the Treaty on the Functioning of the EU, as part of direct review of the legality "of legislative acts, of acts of the Council, of the Commission and of the European Central Bank, other than recommendations and opinions, and of acts of the European Parliament and of the European Council intended to produce legal effects vis-?-vis third parties. It shall also review the legality of acts of bodies, offices or agencies of the Union intended to produce legal effects vis-?-vis third parties." Its review function is also applied in rulings on preliminary issues (concerning interpretation of the

Treaties on the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union) brought by courts of member states under Article 267 of the Treaty on the Functioning of the EU. In addition to the Court of Justice, all bodies of the Union are required to ensure constant respect for the principles of subsidiarity and proportionality, as stated in Article 1 of the Protocol on the Application of the Principles of Subsidiarity and Proportionality, for which the Protocol sets forth specific procedures.

139. In this regard the Constitutional Court again states that it generally recognizes the functioning of this institutional framework for ensuring review of the scope of exercise of conferred competences, although its position may change in the future, if it appears that this framework is demonstrably non-functional. Here the Constitutional Court refers to its conclusions in part X. of this judgment (point no. 110), under which, in exceptional cases, it can function as an ultima ratio and review whether an act of the Union has exceeded the limits [of powers] which the Czech Republic transferred to the EU under Art. 10a of the Constitution.

(In this regard, this would be an analog to the decision by the Federal Constitutional Court in the matter "Solange II," but applied to review of powers, not to the level of protection of fundamental rights and freedoms.

The Polish Constitutional Tribunal, for example, expressly rules out the jurisdiction of the Court of Justice to evaluate the limits of conferral of competences on the EU, as, according to the Tribunal, that is a question of interpretation of domestic constitutional law. Although, in terms of the dogmatics of domestic constitutional law, we can agree with that conclusion to a certain extent, it is questionable whether it is necessary to formulate it as sharply as the Tribunal did.)

The German Federal Constitutional court – as stated above (point 108) – reserved to itself the final word on the question of whether a community act exceeded the boundaries/limits that German law gave the Community, and which Community acts are thus ultra vires, outside the competence of the EU. Thus, from the perspective of German law, it is theoretically possible that the Court of Justice itself will exceed its jurisdiction (e.g. if its interpretation is no longer an interpretation of the founding treaties, but, on the contrary, impermissible norm creation [b]). If the Federal Constitutional Court concluded that these acts are ultra vires, that would make them inapplicable (not invalid or null) in Germany. Thus, the Maastricht decision meant a qualitative shift; however, we can obviously agree with the opinion that the Federal Constitutional Court's Maastricht doctrine (kompetenz-kompetenz) is more in the nature of a potential warning, but need not ever be used in practice.

The Court of Justice itself has already decided that in a particular case a European act exceed the competence that the EU has on the basis of the European treaties, specifically the Treaty establishing the EC. This happened for the first time in 2000, when it annulled the Council directive on the regulation of tobacco advertising, because in its opinion this regulation was not within the competences that the EU has on the basis of transfer of competences from member states (decision of 5 October 2000, Germany v. the Parliament and the Council, C-376/98, Recueil, p. I-8419).

140. The Constitutional Court also stresses that, moreover, the Treaty of Lisbon expands the present framework– where the dominant body was the Court of Justice of the EC (together with other bodies at the EU level) – by including the parliaments of member states in the process of review of the exercise of competences in accordance with the Protocol on the role of National Parliaments in the European Union and the Protocol on Application of the Principles of Subsidiarity and Proportionality. Thus, the parliaments of member states can play an important role in protecting the limits of competences which the member states conferred on the Union. (Note: There is a question whether the heretofore central role of constitutional courts will then no longer be as important as under the previous regulation předchozí.) Review of observing the limits of the conferral of competences is thus the joint role of all participating bodies, both at the European level and at the domestic level.

141. For all the cited reasons the Constitutional Court did not find that Art. 2 par. 1 (2a par. 1) and Art. 4 par. 2 (2c) of the Treaty on the Functioning of the EU, contested by the petitioner in the first point of its petitioner were inconsistent with the constitutional order of the Czech Republic.

142. In the second point of its petition, the Senate raises doubts concerning Art. 308 par. 1 (now Art. 352) of the Treaty on the Functioning of the EU (the flexibility clause).

143. Article 308 (now 352) reads, in its entirety:

1. If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.

2. Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article.

3. Measures based on this Article shall not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation.

4. This Article cannot serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second paragraph, of the Treaty on European Union.

144. The second point in the Senate's petition states that we should also review for consistency with Art. 10a of the Constitution the nature of Art. 308 par. 1 of the Treaty on the Functioning of the European Union, under which – according to the Senate– the Council, acting unanimously on a proposal from the Commission shall adopt measures to attain one of the objectives set out in the Treaties, when particular action is necessary within the framework of Union policies and the Treaty has not provided the necessary powers. In contrast to the existing version of the founding treaties, the proposed Treaty provision is not limited to regulation of the domestic market, but is allegedly a blanket norm. This allegedly makes it possible to adopt measures beyond Union competences, i.e. beyond the scope of powers transferred under Art. 10a of the Constitution of the Czech Republic; measures may subsequently be adopted, e.g. in the area of sensitive questions of cooperation in criminal

matters. According to the Senate, the specific competence jurisdiction of the European Court of Justice, as a final arbiter of a potential dispute, can raise – in view of the unclear relationship to the constitutional courts of member states – questions concerning the observance of the principle of legal certainty. Finally, the Senate objects that the absence of a time limit for the validity of an adopted measure and its (allegedly) executive nature raise doubt about the relevance of participation by national parliaments in considering the adoption of such a measure.

145. Before specifically addressing this issue – because it relates closely to it – the Constitutional Court considers it appropriate to point out that in a wider context, the provisions on the entry into force of the Treaty of Lisbon, on possible subsequent revisions of primary European law, and on the possibility of a member state withdrawing from the EU regime, are key for evaluating the actual legal nature of the EU under the Treaty of Lisbon. This is again the question of who has the highest, constitutional competence - competence in a particular area; if the Union could change its competences at will, independently of the signatory countries, then by ratifying the TL the Czech Republic would violate Art. 1 par. 1 and Art. 10a of the Constitution. (This consideration relates to the first point of the Senate's petition, but is also important for the second point – Art. 308, or 352 – of the petition.)

146. As regards the entry into force of the Treaty of Lisbon, the condition that it be adopted unanimously by all the signatories is an important feature of an organization of an international law nature, which distinguishes the EU from a federation or another form of state. However, it is necessary to consider not only in what form the Treaty of Lisbon enters into force, but also in what manner treaties can be amended in the framework of primary EU law (whether the Treaty on EU or the Treaty on the Functioning of the EU). The system of amending primary law, as enshrined by the Treaty of Lisbon, is proof that all the named international treaties remain such treaties even as regards revision of them, and therefore the European Union, even after the Treaty of Lisbon enters into force, will be a unique organization of an international law character. In a federative state, it is primarily up to the federal bodies to adopt amendments of the constitution; the member states of a multi-member federation, if they even take part in such a constitutional amendment, need not all agree with a constitutional amendment, and yet the amendment will enter into force. In contrast, amendment of the Treaty on EU or of the Treaty on the Functioning of the EU will be possible only with the consent of all states in the Union at an intergovernmental conference, so the role of Union bodies would be only a matter of order, not decisive; thus, Union bodies will not decide on the proposed amendments, but only organize the revision of treaties, and the amendments will enter into force after ratification by all member states in accordance with their constitutional regulations (see Art. 48 par. 1 to 5 of the Treaty on EU). Thus, even after the Treaty of Lisbon enters into force, the EU will not acquire the power to create its own new competences, the member states will still be "masters of the treaties." Moreover, the Treaty of Lisbon newly introduces, in Art. 50 of the Treaty on EU, the possibility of withdrawing from the organization. This can take place by agreement between the withdrawing state and the Council as a representative of the member states (i.e., not with the Commission, as a representative of the interests of the Union itself), and if an agreement is not reached, the Treaty itself gives the withdrawing state a notice period. Thus, the manner of termination membership is also typical for an international organization, not a contemporary federative state, and this possibility, on the contrary, strengthens the sovereignty of member states. These arguments are further proof of the fact that the Treaty of Lisbon does not

markedly change the character of the EU and does not establish the ability for the Union to adopt measures beyond Union competences, i.e. beyond the scope of transfer of powers under Art. 10a par. 1 of the Constitution.

147. An issue mentioned by the Senate in the petition is closely tied to this broad definition of the legal nature of the EU; this is the flexibility clause (Art. 352 of the Treaty on the Functioning of the EU, previously Art. 308 of the Treaty establishing the EC) and the simplified revision procedure for revising primary Union law (the "passerelle") under Art. 48 par. 6 and 7 of the Treaty on EU. The simplified revision procedure for amending primary Union law will be discussed elsewhere (chapter XIV., points 146 et seq. of this judgment), as the Senate includes it in its proposal as a special third point.

148. The flexibility clause under of the Treaty of Lisbon is a modification of the present Art. 308 of the Treaty establishing the EC (originally Art. 235 of the Treaty on the European Economic Community). It enables the Council to unanimously adopt appropriate measures if the Treaty on the EC does not give the Community the necessary powers, but if those powers are exercised to achieve the community's objectives in the internal market, if it is proposed by the Commission and if Parliament is consulted; it can not be used in matters not involving achieving one of the objectives of the common market. (Note.: An example of the use of the competence by the Council is, e.g. Council Decision 87/327, which adopted the Erasmus international student exchange program; cf. judgment of the Court of Justice of 30 May 1989, Commission of the European Communities v Council of the European Communities, 242/87, Recueil, p. 142.) In comparison with the existing situation, the Treaty of Lisbon expands the applicability of the flexibility clause, because it can be used for one of the objectives of any policy defined by the Treaties (not only the internal market), except the common foreign and security policy (Article 308, paragraph 4). In this regard, new competences are conferred on the EU. This expansion corresponds to the strengthening of the European Parliament: under Art. 352 par. 1 of the Treaty on the Functioning of the EU use of this article is tied to the consent of the Parliament (note: today only consultation is required); moreover, however, domestic parliaments, which review observance of the principle of subsidiarity, acquire important powers.

149. However, we can not agree with the Senate's claim that Article 352 of the Treaty on the Functioning of the EU – as was already stated – opens room for the Union to adopt measures beyond the scope of transfer of powers under Art. 10a of the Constitution of the Czech Republic. The ability to adopt such measures is limited to the objectives defined in Article 3 of the Treaty on EU (previously Art. 2), which thus also provides a sufficient guide for determining the limits of conferred competences that Union bodies may not exceed. The third and fourth paragraphs of Article 352 expressly narrow the field in which it can be applied. In addition, as the government of the Czech Republic correctly states in its brief, Declarations no. 41 and 42 on this article (attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon) further narrow the possibility for using Article 352 of the Treaty on the Functioning of the EU as a means for covert expansion of the competences of Union bodies. Although these declarations are not binding from a legal point of view, they express the beliefs of the parties – including the government of the Czech Republic – concerning the appropriate interpretation of the relevant provision, which is also confirmed by the existing case law of the Court of Justice concerning interpretation of Article 308 of the Treaty establishing the EC. Thus, these declarations can serve as an important interpretational

aid in interpreting the relevant provisions.

(The first of these declarations states that the reference to the Union's objectives in Art. 352 par. 1 the Treaty on the Functioning of the European Union concerns the objectives set out in Art. 3 par. 2 and 3 of the Treaty on European Union and the objectives in Art. 3 par. 5 of that treaty related to external action on the basis of Part Five of the Treaty on the Functioning of the European Union. Therefore, it is ruled out that activity based on Article 352 of the Treaty on the Functioning of the European Union would pursue only objectives set out in Art. 3 par. 1 of the Treaty on European Union. In this regard the Conference states that, in accordance with Art. 31 par. 1 of the Treaty on European Union, legislative acts can not be adopted in the area of common foreign and security policy. The second of the declarations emphasizes that, in accordance with the settled case law of the European Court of Justice, Article 352 the Treaty on the Functioning of the European Union, as an integral component of the institutional system established on the principle of conferred compentences, can not serve as the foundation for expanding the scope of Union powers beyond the general framework defined by provisions of the Treaties as a whole, and, in particular, provisions that defined the role and activities of the Union. Article 352 can not, under any circumstances, be used as a foundation for adopting provisions whose effect would essentially be an amendment to the Treaties, without using the procedure provided by the Treaties for that purpose).

150. The Constitutional Court agrees with the government's opinion, stated in its brief, that the flexibility clause is not a blanket norm; in order for the Union to be able to use Art. 352 par. 1 of the Treaty on the Functioning of the EU, the following conditions must be cumulatively met for a proposed legislative act: the need to achieve one of the objectives of the EU, adopting the act must be within the policies defined by the primary law of the EU, it must be unanimously approved by the Council, and the consent of the European Parliament must be obtained. It is obvious that these conditions are quite strict, and limiting, and they sufficiently close off the path to disproportionate application (abuse) of Article 352 par. 1 of the Treaty on the Functioning of the EU.

151. However, in the Senate's opinion, the specific competence jurisdiction of the European Court of Justice – in a situation where the relationship to the constitutional courts of member states is not clear – can raise questions concerning the observance of the principle of legal certainty. Here the Constitutional Court states that the effect of the Court of Justice is, as regards the present issues, relatively clear. Under the settled case law of the Court of Justice concerning Article 308 of the Treaty establishing the EC it is clear from (just) the wording of the article itself that applying it as a legal basis for an action is justified only if no other provision of the Treaty confers on the Community the powers necessary to take the action. In that situation this article allows the bodies to act for the purpose of achieving one of the objectives of the Community even despite the lack of a provision that would confer the necessary power on them. However, in order for the bodies of the Community (note: in the context of evaluating Article 352 of the Treaty on the Functioning of the EU, meaning the bodies of the Union) to adopt such a legal act, its objective must be related to one of the objects that the Treaty assigns to the Union . (cf. decision of the Court of Justice of 26 March 1987, Commission of the European Communities v Council of the European Communities, 45/86, Recueil, p. 1493, point 13). However, the fundamental opinion on the flexibility clause must be seen to be the Opinion of the Court of Justice 2/94 of 28 March 1996, Recueil, p. 1759, on the Community's ability to accede to the European Convention for the Protection of

Human Rights and Fundamental Freedoms (the opinion also cites Art. 235, which, however, was identical with today's Art. 308 of the Treaty establishing the EC). The Court of Justice first emphasized that Art. 235 can be applied only in the absence of express or implied powers; it continued that this article was "designed to fill the gap in cases where no specific provisions of the Treaty confer on the Community institutions express or implied powers to act, if such powers appear none the less to be necessary to enable the Community to carry out its functions with a view to attaining one of the objectives laid down by the Treaty." The Court expressly stated that this provision, "being an integral part of an institutional system based on the principle of conferred powers, cannot serve as a basis for widening the scope of Community powers beyond the general framework created by provisions of the Treaty as a whole and, in particular, those that define the tasks and the activities of the Community. On any view, Article 235 cannot be used as a basis for the adoption of provisions whose effect would, in substance, be to amend the Treaty without following the procedure which it provides for that purpose."

152. Because the provision on the flexibility clause (Article 352 par. 1), as is obvious from the foregoing, represents a modified current Article 308 par. 1, even though its scope is expanded, we can undoubtedly take the opinions of the Court of Justice as confirmation of the fact that the flexibility clause can not serve as a means for amending the Treaty on the Functioning of the EU. Thus, it is not, and will not be possible to circumvent Art. 10a of the Constitution of the Czech Republic with the help of this clause – and the practice of bodies of the EU and the cited case law of the Court of Justice confirm this. In this situation the Constitutional Court considers the institutional framework for review of conferred competences – with regard to Article 352 of the Treaty on the Functioning of the EU – to be adequate, in view of all the reasons stated above; however, it emphasizes again that application of this article can be considered quite exceptional (cf. the Court of Justice, above).

153. As already mentioned, Article 352 also expressly proclaims that a decision within the flexibility clause must respect the principle of subsidiarity, whose observance is reviewed by the domestic parliaments. The Treaty of Lisbon itself does not in any way limit the space for involving domestic parliaments and leaves it completely up to the constitutional structures of the member states, how to provide it. On the contrary, compared to Article 308 of the Treaty establishing the EC, the second paragraphs of this article emphasizes the role that the domestic parliaments are to play in the process of Union norm creation, which, again, strengthens the position of the member states. Therefore, in the opinion of the Constitutional Court, the Senate's objections, as regards the lack of a time limit on the validity of an adopted measure and its allegedly executive nature, can not raise doubts about the participation of national parliaments. However, it will be up to the Czech legislature, if the Treaty of Lisbon enters into force, to adopt an appropriate legal regulation in this regard, in accordance with the constitutional order (cf. also Chapter XIV., points 155–157).

154. The Senate's other objections concerning adopting measures in the area if sensitive questions of cooperation in criminal matters and on the allegedly inadequate procedural guarantees for the protection of civil rights and freedoms have more to do with the subsequent application sphere, and with reference to the foregoing arguments they appear unjustified; in any case, the petitioner did not provide more detail about these doubts.

155. For these reasons, the Constitutional Court did not find Art. 352 (Art. 308) of the Treaty on the Functioning of the EU to be inconsistent with the constitutional order of the Czech Republic.

XV.

156. In the third point of its petition the Senate stated that the concept of powers with which Art. 10a of the Constitution of the Czech Republic works, has not only a material dimension, overlapping with the definition of an area of competence, but also an institutional dimension, relating to the manner of decision making. In this regard, in the Senate's opinion, it is necessary to review whether Art. 48 par. 6 and 7 of the Treaty on European Union are consistent with the cited provision of the Constitution of the Czech Republic (note: the numbering has not changed). These articles introduce the possibility of simplified revision procedures for passing amendments to primary Union law through an executive act that changes the form of duly ratified founding treaties of the EU. In this regard, the generally transitional clause (the "passerelle") is allegedly unambiguously formulated; according to the petitioner, although the principle of bilateral flexibility is enshrined in Declaration no. 18 annexed to the Treaty, it remains an instrument of unilateral change of competences. In the Senate's opinion, applying this clause for the purpose of changing unanimous decision making to decision making by a qualified majority in a particular area, or replacing a special legislative procedure with an ordinary one under Art. 48 par. 7 can be a change of powers under Art. 10a of the Constitution, without that change being accompanied by ratification of an international treaty of the active consent of the Parliament of the Czech Republic. The loss of a legal veto can be understood as a transfer of powers to an international organization, which, at the same time, de facto, means limiting the importance of the parliamentary mandate given to the government to make a decision, in adopting which, upon application of the transitional clause, the representative of the government of an individual member state could be outvoted.

157. Article 48 par. 6 reads:

The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

The European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

The decision referred to in the second subparagraph shall not increase the competences conferred on the Union in the Treaties.

158. Article 48 par. 7 reads:

Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

Where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure.

Any initiative taken by the European Council on the basis of the first or the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph shall not be adopted. In the absence of opposition, the European Council may adopt the decision.

For the adoption of the decisions referred to in the first and second subparagraphs, the European Council shall act by unanimity after obtaining the consent of the European Parliament, which shall be given by a majority of its component members.

159. The articles contested by the petitioner regulate the simplified revision procedure for amending primary Union law. We can point out that contemporary European law already recognizes a similar procedure – with certain not too important differences (cf. Art. 137 par. 2 and Art. 175 par. 2 of the Treaty establishing the EC).

160. Art. 48 par. 6 of the Treaty on EU permits a simplified procedure for adopting changes to Part Three of the Treaty on the Functioning of the European Union, including the internal market, the free movement of persons and services, the free movement of goods, capital and payments, the rules of economic competition, economic and monetary policy, etc., which, of course, is subject to approval by the member states in accordance with their constitutions and can not affect the conferral of new competences on the Union. Paragraph six, third subparagraph of the contested Article rules out changes under this regime that would affect the competences of the Union; this expressly eliminates any doubt in relation to Art. 10a of the Constitution of the Czech Republic. An amendment made under Art. 48 par. 6 by the unanimous decision of the European Council must be approved by the member states in accordance with their constitutional regulations. However, the key factor from a constitutional law viewpoint –as mentioned – is the fact that under the literal wording of this article no other competences can be conferred on the Union.

161. Art. 48 par. 7 governs the simplified revision procedures for adopting changes in a vote in the Council under the Treaty on the Functioning of the EU or under Part Five of the Treaty on EU, from unanimous voting to voting by a qualified majority, except for military and defense issues. As regards this paragraph, conceptually we can not even think about changes expanding Union competences, because it concerns – as is obvious – only voting. However, a change in the method of voting under Art. 48 par. 7, requiring the consent of all heads of state at the European Council, can be blocked by the lack of consent of any parliament of a member state.

162. In a general sense, paragraphs six and seven of Art. 48 of the Treaty on EU are basically different only in the degree of autonomy that they leave to the member states in approving a decision. While paragraph six leaves the member states absolute discretion as regards the manner of approving a decision, paragraph seven limits them to the opportunity to express lack of consent by the domestic parliament. Decisions under these articles are also reviewable by the Court of Justice as regards their consistency with the treaty itself, which proves that they are not amendments to the Treaties, but, on the contrary, the Treaties retain a higher legal force over these acts (which amend a formally de-classified norm).

163. For completeness, we can say that, in addition to the two passerelles set forth by Art. 48 par. 6 and 7 of the Treaty on EU, there are several special provisions through which the European Council can unanimously change the manner of voting from unanimous to majority voting (Art. 31 par. 3 of the Treaty on EU, Art. 312 par. 2 and Art. 333 of the Treaty on the Functioning of the EU), or this can be done by the Council of Ministers (Art. 81 par. 3 of the Treaty on the Functioning of the EU), which adopts measures concerning family law with an international element, which can be harmonized on the basis of majority voting; in contrast with the present situation (see Art. 67 par. 2 of the Treaty establishing the EC) there is a new ability for national parliaments to veto such an act. What was stated in analyzing Art. 48 par. 6 and 7 basically applies to these provisions; that, is acts created on their basis are not formally amendments of the Treaties, but the Treaties retain a higher legal force over them, and so these acts must be consistent with the conditions that the Treaties set out for them.

164. For the foregoing reasons the Constitutional Court did not find Art. 48 par. 6 and 7 of the Treaty on EU to be inconsistent with the constitutional order of the Czech Republic.

165. However, in this regard we can not help but see that there are as yet no related provisions in the legal order of the Czech Republic that would allow implementation of the decision making procedures set forth in paragraphs six and seven of Art. 48 on the domestic level. The absence of these procedures, in and of itself, does not affect the question of whether the Treaty of Lisbon is constitutional, but because the Treaty of Lisbon presumes the intervention of domestic parliaments, the government, as the sponsor of the Treaty of Lisbon (and the party who negotiated it at the level of the EU) should reflect that in a timely manner and adequately, by proposing relevant procedures on the domestic level, and should ensure that the Treaty is compatible and interconnected with the constitutional order of the Czech Republic, not only in view of the participation of the parliament, but also in view of the possibility of preliminary review of an amendment of the Treaties by the Constitutional Court. It is evident that the requirement that the transferred powers be certain relates not only to actions of the EU, but also of bodies of the Czech Republic, if their cooperation is necessary to adopting a decision of the EU that directly concerns the transferred powers.

166. In this situation it is necessary to clearly define the role that the individual chambers of Parliament will play, and their relationship to each other. This involves exercising the right of veto of national parliaments to decisions of the European Council (Art. 48 par. 7); this is a very important review power and responsibility that is one of the fundamental postulates of the Treaty of Lisbon with regard to observing the principle of subsidiarity. Lack of clarity in this regard is pointed to by, for example, point 3 of resolution 7 of the Permanent Commission for the Constitution of the Czech Republic and Parliamentary Procedure from

the 14th session, held on 27 March 2008, on its position on the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community and of the constitutional order of the Czech Republic.

167. Second, it is necessary to ensure review of a decision adopted on the basis of Article 48 paragraph 6, subparagraph two, by the Constitutional Court of the Czech Republic for that decision's consistency with the constitutional order. Unlike a decision under paragraph 7, where only the manner of voting is changed (and thus the content of the change can be evaluated at the moment when the powers are transferred), a decision under paragraph 6 also changes the substantive provisions of the Treaties. thus, it is also necessary to permit review of that change in terms of provisions of the constitutional order of the Czech Republic by the Constitutional Court, so that the limits of transfer of powers under Article 10a of the Constitution will be observed. Only thus can it be guaranteed that by the transfer of powers which takes place under Article 48 paragraph 6 at the moment the Treaty of Lisbon is adopted, does not give the Czech Republic the possibility to make a decision on the basis of that provision that would be inconsistent with the constitutional order of the Czech state.

168. In the next objection (included in the same point as Art. 48 par. 6 and 7 of the Treaty on EU), the Senate stated that in the case of Art. 69b par. 1 of the Treaty on the Functioning of the EU (now Art. 83 par. 1), when the sector Council decides on including further areas of criminal activity in the sphere of union regulation, space for Parliament to express lack of consent is completely lacking, although in a different case – with the proposed wording of the general transitional clause (Art. 48 par. 7 of the Treaty on European Union) and the partial transitional clause in the sphere of judicial cooperation in civil matters (Art. 65 par. 3 of the Treaty on the Functioning of the EU) – this possibility is guaranteed. The Senate added that the limited involvement of national parliaments in the decision making on the change of the relatively widely defined powers of the Union is supplemented by expanding voting by a qualified majority, not infrequently related with the overall communitarization of the current third pillar of European law, where, in parallel with the implicit weakening of the domestic parliamentary mandate and cancellation of the category of treaties approved by the Parliament of the Czech Republic, the European Parliament assumes responsibility for the parliamentary dimension of decision making. In view of the nature of the European Union as a society of states (not a federal state), the Senate questions – whether this dimension of parliamentary democracy is sufficient, and whether Art. 15 par. 1 of the Constitution of the Czech Republic is not de facto rendered meaningless. In this regard the president, in his brief, criticizes voting by a qualified majority even more emphatically, although not in relation to doubts on the requisite involvement of the Parliament of the Czech Republic in Union decision making, but in view of concerns about preserving the sovereignty of the Czech Republic in general.

169. Article 69b par. 1 (now Art. 83 par. 1) of the Treaty on the Functioning of the EU states that the European parliament and the Council may, by ordinary legislative procedure, set forth by directive the minimum rules for concerning the definition of crimes and penalties in areas of exceptionally serious crime with a cross-border dimension because of the nature or effect of these crimes or because of a special need to suppress them on a common basis. It concerns these areas of crime: terrorism, trafficking in human beings and sexual exploitation of women and children, illicit drug trafficking, illicit arms trafficking, money laundering, corruption, counterfeiting of means of payment, computer crime and

organized crime.

170. However, the Senate basically disputes the third subparagraph, according to which the Council may, on the basis of developments in crime, adopt a decision identifying other areas of crime that meet the criteria specified in this paragraph. However, it shall decide unanimously after obtaining the consent of the European Parliament. The Senate then also – in addition to the stated guarantee – basically overlooked the protection provided to the Czech Republic by Art. 83 par. 3 of the Treaty on the Functioning of the EU; it indicates that if a member of the Council believes that a draft directive would affect "fundamental aspects of its criminal justice system," it may ask the European Council to handle the matter; the ordinary legislative procedure is then suspended, and if a consensus is later reached … the suspension of the ordinary legislative procedure is terminated. Thus, it is basically not possible to apply Art. 83 par. 1, third subparagraph, to the Czech Republic's legal order without its consent. Here the Constitutional Court agrees with the government's opinion that, even within the scope of competence of Art. 83 par. 1 of the Treaty on the Functioning of the EU, domestic parliaments can fulfill their preliminary review role under the relevant provisions of the Protocol on Application of the Principles of Subsidiarity and Proportionality, and that the purpose of this provision is not to arbitrarily expand the Union's competences, but to increase the ability to respond effectively to threats of danger and to exceptionally dangerous crime, which can be considered completely legitimate.

171. For the foregoing reasons the Constitutional Court did not find Art. 83 par. 1 (69b par. 1) of the Treaty on the Functioning of the EU to be inconsistent with the constitutional order of the Czech Republic.

172. As regards the Senate's doubts concerning expanding voting by a qualified majority (Art. 48 par. 7) in relation to Art. 15 par. 1 of the Constitution ("The legislative power … is vested in the Parliament"), or the question of state sovereignty, we can refer to the conclusions already expressed above (generally, point 87 of this judgment). Here it is appropriate to again point out the ancient international law principle of possible self-limitation by a sovereign, who alone is authorized to consider the degree of limitation to which it exposes itself in the international environment while respecting the principle pacta sunt servanda. Thus, we can agree with the government that an unavoidable consequence of transferring powers to an international organization or institution is that the body whose powers were transferred loses them in that extent, although it continues to exercise all other powers that pertain to it in accordance with the constitutionally defined separation of powers. Thus, the constitutional requirement of Art. 15 par. 1 of the Constitution, that the legislative power in the Czech Republic belongs to the Parliament, is not affected in any way, nor is the sovereignty of the Czech Republic reduced below an acceptable level.

173. The Treaty of Lisbon transfers powers to bodies that have their own regularly reviewed legitimacy, arising from general elections in the individual member states. Moreover, the Treaty of Lisbon permits several ways of involving domestic parliaments (the possibility for a parliament, or one of its chambers, to directly express its lack of consent, is one of the forms of participation by domestic parliaments). Art. 12 of the Treaty on EU names them expressly as follows:

National Parliaments contribute actively to the good functioning of the Union:

(a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them in accordance with the Protocol on the role of national Parliaments in the European Union;

(b) by seeing to it that the principle of subsidiarity is respected in accordance with the procedures provided for in the Protocol on the application of the principles of subsidiarity and proportionality;

(c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area, in accordance with Article 70 of the Treaty on the Functioning of the European Union, and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities in accordance with Articles 88 and 85 of that Treaty;

(d) by taking part in the revision procedures of the Treaties, in accordance with Article 48 of this Treaty;

(e) by being notified of applications for accession to the Union, in accordance with Article 49 of this Treaty;

(f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament, in accordance with the Protocol on the role of national Parliaments in the European Union.

174. The Constitutional Court thus concludes that the Treaty of Lisbon reserves an important role to the domestic parliaments (including the Parliament of the Czech Republic), the consequence of which is to strengthen the role of individual member states; making the entire system more understandable and clear is also not negligible. It is only necessary to again point to the responsible role of relevant bodies of the Czech Republic, especially the government, in the preparation and adoption of a legal regulation that permits the full implementation of these powers.

175. For the foregoing reasons the Constitutional Court did not find that expanding voting by a qualified majority under Art. 48 par. 7 in an unconstitutional manner affected Art. 15 par. 1 of the Constitution or the sovereignty of the Czech Republic under Art. 1 par. 1 of the Constitution.

XVI.

176. In the fourth point of the petition the Senate stated that, in addition to the already cited transitional clauses and the flexibility clause, the procedural steps set forth by the Treaty of Lisbon affect the constitutional order in another respect. That is allegedly the negotiation of international treaties under the proposed Art. 188l the Treaty on the Functioning of the European Union (now Art. 216). Here – in the Senates' opinion – the grounds for concluding international treaties in the name of the EU are expanded. Treaties are binding for the EU and

its member states, and are concluded by a decision of a qualified majority in the Council. The Czech Republic thus need not express consent with the treaty, and yet it is bound by it; the usual ratification process does not take place at all, and thus also the possibility for preliminary review of whether such treaties are consistent with the constitutional order of the Czech Republic falls away. According to the Senate, the question remains whether this procedure is compatible with the text of Art. 49 and Art. 63 par. 1 let. b) of the Constitution, and if there is room to apply these treaties based on Art. 10 of the Constitution.

177. Article 216 (188l) of the Treaty on the Functioning of the EU reads:

1. The Union may conclude an agreement with one or more third countries or international organisations where the Treaties so provide or where the conclusion of an agreement is necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties, or is provided for in a legally binding Union act or is likely to affect common rules or alter their scope.

2. Agreements concluded by the Union are binding upon the institutions of the Union and on its Member States.

178. Thus, in that point the Senate questions the negotiation of international treaties under Art. 216 of the Treaty on the Functioning of the EU (previously Art. 188l).

179. Initially we must emphasize that the proposed Art. 216 (188l) of the Treaty on the Functioning of the EU is a reaction to the fact that the Treaty of Lisbon expressly assigns the Union legal subjectivity, including the capacity to conclude international treaties (Art. 47 of the Treaty on EU); the Union replaces the existing Community and European Union (Art. 1 of the Treaty on EU as amended by the Treaty of Lisbon). It is appropriate to point out that the contested provision must also be read in connection with Article 3 par. 2 of the Treaty on the Functioning of the EU, which the Senate does not expressly mention. That article reads as follows: "The Union shall also have exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope." (Note: This provisions is evidently a response to the recent Opinion of the Court of Justice – Opinion 1/03 of 7 February 2006, Lugano Convention, European Court Reports p. I-1145 – which significantly expanded the power of the EC to conclude international treaties in its exclusive competence.)

180. In its brief the government correctly pointed out, from a historical viewpoint, that in the first phases of the European Economic Community there was an assumption that, in accordance with the theory of limited competence, the Communities have the competence to conclude international treaties only if they are expressly authorized thereto in the founding treaties. However, in time it became apparent that the normative text of the founding treaties does not match the actual needs of the Community and its member states; therefore, it was necessary to find a way to make the Community's activities more effective in relation to third-party states, and to achieve greater harmony between the competences that the Community has internally and those that it has in external relations with third-party states.
181. At present there is no doubt that the EC has international law subject status and have entered into hundreds of international treaties. In the present situation, European law

expressly authorizes the Community (Art. 300 of the Treaty establishing the EC), and implicitly also the EU (Art. 24 and 38 of the present Treaty on EU) to conclude treaties with third-party states. These "external" treaties have a dual nature, because they are components of international law, but – from the viewpoint of the Union – they are also components of Community law (or Union law), which they become through the European legal regulation to which they are annexed; as regards the law of the Community, the rule is that such international treaties are annexed to "directives." In the hierarchy of sources of EU law they have a status between primary and secondary law, that is, they will take precedence before secondary law, but not before primary law.

182. The Constitutional Court believes that the Senate's main arguments basically rest on a not fully precise understanding of the existing international law subjectivity of the EC and the EU, the legal position of international treaties concluded in the competence of the Union, and the transfer of individual competences of individual states to the EU. Because international treaties within the competence of the Union will be concluded on the basis of Art. 216 et seq. of the Treaty on the Functioning of the EU (as amended by of the Treaty of Lisbon), or at present are concluded on the basis of Art. 300 of the Treaty establishing the EC, we can not speak of Art. 49 being in conflict with Art. 63 par. 1 let. b) of the Constitution of the Czech Republic, or with Art. 10 of the Constitution, as the Senate believes; these provisions of the Czech constitutional order do not affect the negotiation of such treaties concluded by the Union, nor on their application in the Czech constitutional order. (This is also evident from the arguments in the following paragraph of this judgment.) This conclusion does not apply only to mixed treaties, which involve a combination of the competences of the Union and member states (typically a treaty that contains both matters in the competence of the Union and matters in the competence of the member states); these, however, are concluded either under the regime provided by the Treaty on the Functioning of the EU, or by the regime assumed by the member states, and thus in the Czech Republic requiring a ratification process consistent with the Constitution.

183. In this regard we can add that Art. 216 can not be interpreted as a competence norm that would extend the competences of the Union; on the contrary, Article 216 only states that the Union, as part of its competences, simply concludes international treaties. The competences are not defined by Art. 216, but by specific provisions, especially of the Treaty on the Functioning of the EU. Thus, there is no significant change compared to the existing legal state of affairs; the only more substantial difference is that the Union will also acquire the ability to conclude international treaties in the area of the "second" and "third" pillar, introduced by the Maastricht Treaty.

(However, this too has already basically happened, because the existing Treaty on EU implicitly assumes it in Art. 24 and 38. Thus, we can share the opinion of the expert opinion of the House of Lords that the express assignment of legal subjectivity to the Union and the related Art. 216 are more of a declaratory than a normative character. Cf. House of Lords: The Treaty of Lisbon: an impact assessment. Volume I, Report. 13 March 2008.pp. 30 et seq., available at http://www.parliament.the-stationery-office.com/. On the other hand, we can grant that, in view of the abovementioned Opinion of the Court of Justice 1/03 it is already clear that the EU can exercise more powers externally than it has internally; for details, see, e.g., Bříza, P.: Evropský soudní dvůr: Posudek k nové Luganské úmluvě značně posiluje vnější pravomoci Společenství [The European Court of Justice: The Opinion on the New Lugano Convention Strengthens the Community's External Powers], Právní rozhledy [Legal Perspectives] no. 10/2006, pp. 385–390, p. 389. In this regard – in the event of a more

rigorous review – this would involve evaluation of criteria for the limits of competences entrusted to the EU in the area of external relationships and review of the exercise thereof.)

184. Thus, the European Union can exercise conferred competences both internally and externally; the text of Article 49 or 63 of the Constitution, on which the Senate relies, do not create an insurmountable obstacle to the transfer of powers in the area of concluding international treaties. Neither international law subjectivity nor the expanded ability to conclude international treaties makes the Union some sort of new, special subject, endowed with disproportionate competences to the detriment of the member states; anyway, other, much less significant international organizations also have legal subjectivity and the right to conclude international treaties, whether of the cooperative or integrative type. The border for the transfer of powers in this area is set by limits that the Constitutional Court has determined several times above; they are preservation of the key attributes of state of sovereignty, which is not fundamentally affected either by the given legal state, or after the possible entry into force of the Treaty of Lisbon, of course, on the assumption that the relevant bodies of the EU will responsibly observe the framework defined by the treaty and will not exceed their competences; that, however, is a question of the subsequent application of the Treaty of Lisbon in practice. As the government also noticed, in this regard the Treaty of Lisbon to a great extent provides more specific detail and codifies what was already, as a result of long-term development, previously developed and settled in the case law of the European Court of Justice; like every codification, this one too is supposed to contribute to the greater legal certainty of the parties affected by legal norms, i.e. not only the bodies of the EU, but of the individual member states. This must be viewed positively, from the domestic viewpoint as well, specifically in view of the principles contained in Art. 1 par. 1 of the Constitution.

185. For the foregoing reasons the Constitutional Court did not find Art. 216 (188l) of the Treaty on the Functioning of the EU to be inconsistent with the constitutional order of the Czech Republic.

186. On the other hand, however, we must emphasize that Article 216, because of its vagueness, is on the borderline of compatibility with the requirements for normative expression of a legal text that arise from the principles of a democratic, law-based state. The Constitutional Court itself – considering, elsewhere, the content of transfer of powers under Art. 10a of the Constitution – concluded that this transfer must be delimited, recognizable, and sufficiently definite. It is precisely the "definiteness" of a transfer of powers to an international organization that is quite problematic in Article 216 of the Treaty on the Functioning of the EU; it is obvious at first glance that its formulations (… "or" … "either" … "or" … "or … "or" …) "vague", and difficult to predict. Here, for comparison, we can mention, for example, the generally known settled case law of the European Court of Human Rights, which – as regards the term "law" – requires that it be accessible, precise, and with predictable consequences. Even though the Constitutional Court recognizes that the requirements for precision in an international treaty (obviously) can not be interpreted as strictly as a in the case of a statute, it nevertheless concludes that an international treaty must also meet the fundamental elements of precision, definiteness and predictablility of a legal regulation. However, with Article 216 of the Treaty on the Functioning of the EU is quite disputable; nevertheless it does not go so far that the Constitutional Court could and should declare – only as regards the above-mentioned normative expression of the given text – that Article 216 is inconsistent with the constitutional order of the Czech Republic.

XVII.

187. In the fifth point of the petition the Senate addressed the issue of the Charter of Fundamental Rights of the European Union. It stated that the strengthening of the powers of European Union bodies, which represent the supra-national level of decision making, is accompanied by the introduction of a unified legal subjectivity of the European Union, and its functioning thus acquires a completely new legislative framework in the sphere of the current second and third pillars, primarily in the areas of political cooperation. Of course, within this framework (which, in the sphere of the existing third pillar allegedly fundamentally breaks down the principle of unanimous decision making) there may be conflict with domestic standards of protection of fundamental rights more frequently than heretofore. Although the European Union, under the proposed Art. 6 par. 2 of the Treaty on EU, is to accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the same article also states in paragraph 1 that "[t]he Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties." In the Senate's opinion, this indirect reference to the Charter of Fundamental Rights of the European Union (the "Charter") can result in lack of clarity about its status, just like the fact that the Charter contains not only directly enforceable rights, but also principles or aspirations, with a clear systematic organization. In a situation where the Union does not have, and can not have, a specialized body, a court that handles "constitutional complaints," that would interpret Charter provisions in particular cases of violation of civil rights, its role is allegedly not clear. The Senate is not sure whether the Charter is protection for citizens' rights, or more an interpretative tool, in light of which the powers of Union bodies are interpreted or the interpretation of objectives pursued by the Union is strengthened, whether it strengthens or, on the contrary, weakens the authority of domestic institutions that interpret the national catalogs of human rights, always in connection with the individual tradition of the political nations of Europe, what procedural consequences (extending or, on the contrary, speeding up the enforceability of a right) this step has in relation to the jurisdiction of the European Court of Human Rights, and whether, as a result of this fact, the standard of domestic protection of human rights enshrined in the Charter of Fundamental Rights and Freedoms can be strengthened or leveled. In this regard the president stated in his brief that in his opinion the EU Charter of Human Rights makes sense only if the Union feels itself to be a state sui generis, or a nascent state of a federal type, which is then itself bound by international law to observe and protect human rights.

188. Thus, the Senate basically questions the very existence and character to the Charter of Fundamental Rights of the Union, as well as the issues closely related to this topic.

189. Article 6 of the Treaty on European Union provides:

1. The Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

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

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

190. By way of introduction, it is appropriate to state that the purpose of enshrining protection of human rights at the European level was the effort to achieve better protection of individuals in relation to the activities, which are supposed to be unified, more clearly organized and not markedly different under the individual national constitution. We must emphasize that the Charter in progress was already, on the basis of its assignment, conceived not as a completely new document, but more as a text that to a large extent codified and specified in more detail the already existing legal situation. Thus, the reference to the presently non-binding Charter of Fundamental Rights of the European Union of 7 December 2000 /as amended on 12 December 2007/ (Art. 6 par. 1 of the Treaty on EU as amended by Art. 1 point 8 of the Treaty of Lisbon) is thus not so revolutionary as it might seem at first glance. This catalog of human rights is part of primary European law (Art. 6 par. 1); the Charter is not directly part of the text of the Founding Treaties, but is raised to the level of primary law by reference, as stated above. There is nothing unusual about this, and certainly nothing inconsistent with the constitutional order of the Czech Republic; it is a possible legislative method, also used in domestic law, and so doubts in this regard are not appropriate (cf. Article 112 par. 1 of the Constitution of the Czech Republic).

191. As regards the (future) status of the Charter itself, it is evident from the foregoing text that the formulation in Article 6 par. 1 of the Treaty on EU, that the Charter has the same legal force as the Treaties, must undoubtedly be interpreted to mean that the Charters is an integral part of them. If the Treaty of Lisbon enters into force, the Charter would, in the first instance, bind Union bodies, and only then, indirectly, in the application of Union law, whether direct or indirect, also bind Czech bodies. The provisions of the Charter, observing the principle of subsidiarity, are intended for the bodies, institutions and other subjects of the Union, and for member states, of course only if they apply Union law (Art. 51 par. 1 of the Charter). This principle also corresponds to current case law, and the application of unwritten human rights principles by the Court of Justice; states are bound by this European standard of human rights when Community law is applied (cf., e.g., Judgment of the Court of Justice of 13 April 2000, Karlsson and others, C-292/97, Recueil, p. I-2737, par. 37, under which the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on Member States when they implement Community rules). It follows logically from this principle that the Charter does not expand the area of competences of Union law beyond the framework of Union competences (Art. 51 par. 2 of the Charter, Art. 6

par. 1 of the Treaty on EU). This is also reflected by recent case law, e.g. in the "Red Star case" (Order of the Court of Justice of 6 October 2005, Vajnai, C-328/04, European Court Reports, p. I-8577), which involved the preliminary question, whether a ban on Communist symbols, enforced in Hungary with criminal penalties, is inconsistent with European unwritten human rights principles, this question was considered obviously inadmissible, not because today's EU law does not recognize freedom of speech, but because Community law does not function in that area, and it is thus fully up to Hungary to regulate the ban of symbols that are unacceptable to it. Analogously. cf. the Judgment of 29 May 1997, Kremzow, C-299/95, Recueil, p. I-2629, where a defendant accused of murder attempted to rely on the Community level of protection of human rights, and argued that a sentence would affect his "Community" freedom of movement. The Court of Justice also rejected this argument on the preliminary issue from the Austrian court, because European law was not applicable to the matter in any way. Even if the Charter enters into force, this changes nothing on the inadmissibility of such preliminary questions, because Art. 11 of the Charter is not applicable to such cases.

192. In this regard we can only point out that at the present time, given the lack of a written (binding) catalog of human rights in the framework of the EU, it is the Court of Justice that applies (protects), at the Union level, human rights created or recognized by the Court in the form of unwritten common constitutional principles of member states, that is, in view of the domestic constitutional systems, and the system for protecting human rights conceived by the European Court of Human Rights. Note: The Court of Justice itself refers to the Charter – cf. e.g., the judgment of 27 June 2006, Parliament v Council, C-540/03, European Court Reports p. I-5769, point 38; decision of 3 May 2007, Advocaten voor de Wereld, C-303/05, European Court Reports p. I-3633, point 46, and others.

193. The Charter itself contains a catalog of fundamental rights and freedoms (concentrated in Title I to Title VI) and general provisions governing the interpretation and application of them (Title VII). The standard of protection of human rights and fundamental freedoms in the European Union must be evaluated, along with the EU Charter, also in view of other related provisions of European law. Article 6 par. 2 of the Treaty on EU provides that the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Under the third paragraph of that article, fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. This second paragraph is important primarily in view of the formal side of the standard of protection. Materially, the fundamental rights guaranteed by the Treaty are contained in the system of Union protection on the one hand by their being declared to be general principles of Union law, and on the other by their role in the case law of the Court of Justice. As a result of acceding to the Treaty, the Union bodies – including the Court of Justice – will become subject to review by the European Court of Human Rights. In terms of the standard of protection based on the constitutional order of the Czech Republic we can say that including the European Court of Human Rights in the institutional framework for protection of human rights and fundamental freedoms in the European Union is a step which only strengthens the mutual conformity of these systems.

194. The third paragraph of Article Six concerns the material element of the standard of

protection of human rights and fundamental freedoms. In this regard as well, we can say, within the framework of abstract review, that this provision reflects the requirements of the domestic standard, because they both come from the same framework of values. This is also strengthened by the Charter of Fundamental Rights of the EU itself, whose Article 52 par. 3 and 4 provides: "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions." We must also take into consideration Article 53 of the Charter of Fundamental Rights of the EU, under which, "Nothing in this Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the European Convention for the Protection of Human Rights and Fundamental Freedoms, and by the Member States' constitutions." We can only comment that this principle is key as regards limiting the reach of EU law, and thus also limiting the transfer of state sovereignty to the EU.

195. Thus, if the Charter – as already stated – recognizes fundamental rights that result from the constitutional traditions common to the member states, those rights must be interpreted in harmony with those traditions (Art. 52 par. 4). Here there is a certain change compared to the present, which reflects the fact that a written (binding) catalog of human rights is being newly introduced. Whereas today the constitutional traditions common to the member states are a material source of unwritten human rights, after the Treaty of Lisbon enters into force, that source will be the text of the Charter alone, and the oral traditions will have the character of a source used to assist interpretation, in an obligatory comparative method of interpretation.

196. As regards possible conflict between the standard of protection of human rights and fundamental freedoms ensured by the constitutional order of the Czech Republic and the standard ensured in the European Union, it is appropriate to point out that protection of fundamental rights and freedoms falls in the area of the "material core" of the Constitution, which is beyond the reach of the constitutional framers (cf. Pl. ÚS 50/04). If, from this point of view, the standard of protection ensured in the European Union were unsuitable, the bodies of the Czech Republic would have to again take over the transferred powers, in order to ensure that it was observed (cf. the abovementioned judgment in the matter of sugar quotas, file no. Pl. ÚS 50/04).

197. However, at the abstract level it is difficult to evaluate whether individual rights and freedoms ensured in these systems are in harmony with each other, if these rights are not formulated absolutely clearly and in detail. Only ten is it possible to identify a possible lack of harmony between them and possibilities for resolving it. However, the EU Charter obviously contains no such provisions, nor does the Senate, as the petitioner, express any doubts in that regard. On the contrary, the content of the catalog of human rights expressed in the EU Charter is fully comparable with the content protected in the Czech Republic on the basis of the Czech Charter of Fundamental Rights and Freedoms, as well as the Convention for the Protection of Human Rights and Fundamental Freedoms. In this regard we can say

that the EU Charter is in harmony not only with the material core of the Constitution, but also with all provisions of the constitutional order. In any case, the majority of rights and freedoms ensured by the present systems of protection, according to the dominant theories (cf., e.g., Alexy, R.: A Theory of Constitutional Rights, Oxford University Press 2002; a comparison of German, European and American methodology is found in Kumm, M.: Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice, 2 International Journal of Constitutional Law 574, 2004) and their practical application by the most important constitutional courts are open to comparison based on analysis of the proportionality of interference in one guaranteed right to the benefit of another right. A key factor here is not only the formulation of the affected right, but much more so the institutional system that ensures protection of it. In this regard we can also point to the Constitutional Court's judgment in the matter of a decree on medicines (judgment file no. Pl. ÚS 36/05, promulgated as no. 57/2007 Coll.), where the Constitutional Court expressly stated that the manner in which the European Court of Justice interprets the principles corresponding to the fundamental rights and freedoms can not remain without a response in the interpretation of domestic law and its consistency with constitutionally guaranteed rights. The European Court of Human Rights had a similar opinion recently in the Bosphorus matter (decision of the European Court of Human Rights in the matter Bosphorus Hava Yollar? Turizm ve Ticaret Anonim Şirketi v. Ireland, no. 45036/98 of 30 June 2005). For these reasons, in the present situation, we can consider the European institutional guarantee of the standard of protection of human rights and fundamental freedoms to be compatible with the standard ensured on the basis of the constitutional order of the Czech Republic. In any case, we can also agree with the government's opinion that, even after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other's activities, not compete with each other.

198. In this regard the Constitutional Court states that the leading principle in the area of human rights and fundamental freedoms is the most effective possible protection of the individual, together with the clear enforceability of the rights directly on the basis of catalogs of human rights, usually without the intermediation of other legal texts of lower legal force. Contemporary democratic Europe, in the period after World War II and after the fall of totalitarian regimes in the 1990s, reached an exception level of protection of human rights; The EU Charter in no way adds problems to this system, but on the contrary – in the area of its competence – suitably expands it, and the individual, for whose benefit the entire structure was built, can only profit from it. Potential future conflicts and disputes about interpretation, which can arise in any area of human activity, are not fundamental from this point of view; the important thing is the overall purpose, based on timeless values that are of the same or similar nature, whether guaranteed on the domestic, European, or international level.

199. It is also relevant to note here that Article 51 of the Charter expressly provides that it 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, modify powers and tasks as defined in the Treaties. Its provisions are intended (while observing the principle of subsidiarity) for the bodies, institutions and other subjects of the Union, as well as for the member states, exclusively if they are applying Union law. Therefore, they respect the rights, observe the principles and support their application in accordance with their powers, while preserving the

limits of the powers that are conferred on the Union in the treaties. In this regard, the Constitutional Court notes that the EU Charter thus does not directly apply to the areas where the bodies of the Czech Republic have not transferred their powers to the European Union, and the standard of protection based on the constitutional order of the Czech Republic is fully autonomous and independent of the Union standard in this regard.

200. As regards the Senate's other objections, we can only note that it is not the role of the Constitutional Court to evaluate the Charter in terms of criteria other than those that were defined above; thus, it is not possible to comment on the suitability of enshrining certain rights and freedoms (which the Senate describes as "principles or aspirations," without specifying in more detail the relevant provisions of the EU Charter) or to address their allegedly not fully systematic organization. We can respond similarly to the brief from the president, according to which the EU Charter makes sense only if the Union feels itself to be a nascent state of a federal type, which is then bound by international law to observe and protect human rights. The Constitutional Court has already addressed the issue of the federal character of the European Union in other points of this judgment; we can only add that there is nothing unusual about the fact that other international organizations also exist, with their own catalogs of fundamental rights and freedoms. The most prominent of them is the one to which the president himself refers; that is the Council of Europe, with its European Convention for the Protection of Human Rights and Fundamental Freedoms, which, however, unquestionably does not make it a federal-type state sui generis.

201. The Senate also raises the question whether the Charter is protection for citizens' rights, or more an interpretative tool, in light of which the powers of Union bodies are interpreted or the interpretation of objectives pursued by the Union is strengthened. Here the Constitutional Court agrees with the opinion in the government's brief, that it is obvious that these two functions are not mutually exclusive; the EU Charter is supposed to fulfill both functions in parallel, protect the individual and set limits for the exercise of the powers of EU bodies, or the bodies of a member state when applying EU law.

202. Finally, the Senate considers whether the existence of the Charter means a strengthening of "leveling" of the standard of domestic protection of human rights under the Charter of Fundamental Rights and Freedoms. However, such a concern is not appropriate. Constitutional courts traditionally take a pragmatic approach in the question of conflict between various sources of fundamental human rights and freedoms, based on the meaning and purpose of a particular legal institution, which, in the area of human rights, is, in particular, protection of an individual against unconstitutional interference by the state. Therefore, in a case of conflict of sources regulating an individual's rights and freedoms, they proceed according to the source that gives the individual a higher standard of protection.

203. In this regard, the Constitutional Court considers it appropriate to point out that most modern constitutions in European democratic states are based more or less on natural law theory, and therefore recognize that the state is not entitled to unilaterally withdraw rights that have already been recognized (cf. also point 105). Here the Constitutional Court only adds that the state is also not the provider (donor) of rights based on natural law that it might "recognize." Every individual has these rights regardless of an act of the state, which can only subscribe to observing and guaranteeing these rights; however, it acquires thereby the most important quality of a democratic, law-based, constitutional state, which bows down

before values that are inherent, inalienable, non-prescriptible, and not subject to repeal.

204. For all the foregoing reasons the Constitutional Court did not find incorporation of the Charter of Fundamental Rights of the EU into the area of European primary law to in any way cast doubt upon or problematize the standard of domestic protection of human rights and to thereby be inconsistent with the constitutional order of the Czech Republic.

XVIII.

205. In the sixth point of the petition the Senate stated that, last but not least, there are the definition of the status of the Charter and the possibilities for interpretation necessary for grasping the newly formulated Art. 1a of the Treaty on EU, which expands the values on which the Union is founded, and at the same time inclusion of standards of the European social model ("in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail"). According to the Senate, the question of interpretation of this provision is the more significant because serious violation of the cited values can lead to suspending the rights arising to a particular member state from the Treaty. A proposal submitted by a mere 1/3 of member states, the European Parliament, or the European Commission against a member state cold allegedly create political pressure leading to changes in the domestic legal order. Therefore the Senate submits for evaluation whether the formulation of this provision is consistent with the fundamental characteristic of the Czech Republic, contained in Art. 1 par. 1 and with Art. 2 par. 1 of the Constitution (the principle of the sovereignty of the people).

206. Article 1a (now Article 2) of the Treaty on EU reads:

The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail.

207. Article 7, to whose content the Senate refers, although it does not refer to it expressly, reads:

1. On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure.

The Council shall regularly verify that the grounds on which such a determination was made continue to apply.

2. The European Council, acting by unanimity on a proposal by one third of the Member States or by the Commission and after obtaining the consent of the European Parliament, may determine the existence of a serious and persistent breach by a Member

State of the values referred to in Article 2, after inviting the Member State in question to submit its observations.

3. Where a determination under paragraph 2 has been made, the Council, acting by a qualified majority, may decide to suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council. In doing so, the Council shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons.

The obligations of the Member State in question under this Treaty shall in any case continue to be binding on that State.

4. The Council, acting by a qualified majority, may decide subsequently to vary or revoke measures taken under paragraph 3 in response to changes in the situation which led to their being imposed.

5. The voting arrangements applying to the European Parliament, the European Council and the Council for the purposes of this Article are laid down in Article 354 of the Treaty on the Functioning of the European Union.

208. The Constitutional Court states that these values are fundamentally in harmony on which the material core of the Czech Republic's constitutional order is built; these are basically the most important rules and principles, largely of a natural law original, whose protection is the most central role of a state which has committed itself to being a democratic and law-based state. In the preambles to the Charter of Fundamental Rights and Freedoms and to the Constitution the constitutional framers expressed an unreserved commitment to these values, on which our constitutionalism rests; among other things, they recognized the inviolability of the natural rights of a human being, relating to generally shared values of humanity and a resolve to protect and develop the Czech Republic in the spirit of the inviolable values of human dignity and freedom, together with the will to join the states that honor these values, expressly as a member of the family of European and world democracies. In terms of the actual text of the Constitution and of the Charter of Fundamental Rights and Freedoms, key provisions are Art. 1 par. 1 of the Constitution and Art. 1 of the Charter of Fundamental Rights and Freedoms, which indicate that the Czech Republic is a sovereign, democratic state governed by the rule of law, founded on respect for inherent, inalienable, non-prescriptible, and non-repealable rights of human beings who are free and equal in dignity and rights. The rights and freedoms of minorities, generally or from a national or ethnic point of view, are covered in Art. 6 of the Constitution (which provides the obligation to take them into consideration), as well as in Chapter Three of the Charter of Fundamental Rights and Freedoms. The prohibition of discrimination is guaranteed in Art. 3 of the Charter of Fundamental Rights and Freedoms, the principle of a pluralistic democracy in Art. 2 par. 1, the principle of solidarity primarily in the passage on economic and social rights in the Charter of Fundamental Rights and Freedoms; under Art. 5 of the Constitution the political system itself is founded on the free competition of political parties that renounce force as a means of promoting their interests and respect fundamental democratic principles. For completeness we can add that virtually the same provision as the newly-formulated Art. 2 of the Treaty on EU exists in the current Art. 7 of the Treaty on EU, which refers to the

principles contained in Art. 6 par. 1, under which the Union is founded on the values of freedom, democracy, respect for human rights, the fundamental rights, and a law-based state, principles that are common to the member states. This is only further evidence of the fact that these values have had a constitutive character for the EU for a long time.

209. Thus, the Constitutional Court believes it is completely evident that in this regard the Treaty of Lisbon is consistent with the untouchable principles protected by the Czech constitutional order and that European law is based on fundamental human and democratic values, common to and shared by all EU states. In this regard it is appropriate to point out that, beginning 1 May 2004, i.e. after the Treaty on Access of the Czech Republic to the EU, Art. 1 par. 2 of the Constitution also acquired new meaning in relation to observing the obligations that arise for the Czech Republic from its membership in the EU. Thus, if the Senate points to the opportunity to use the regime of the Treaty of Lisbon if the Czech Republic seriously violates the values defined in Article 2 of the Treaty on EU, we can only state that such violation would simultaneously mean violation of the values on which the materially understood constitutionality of the Czech Republic rests; the Constitutional Court itself, as well as domestic general courts, within their jurisdiction, would, in the first place, have to provide the maximum possible protection to that. We must also see that the term "the people" as a source of all state power (Art. 2 par. 1 of the Constitution) can not replace or be replaced by the sovereignty of the Czech Republic as a state, of which Article 1 par. 1 of the Constitution speaks, on which the petitioner especially relies. In a modern, democratic, law-based state, state sovereignty is not an aim in and of itself, in isolation, but is a means to fulfilling the abovementioned fundamental values, on which the construction of a constitutional, law-based sate stands. Therefore, we can agree with the government of the Czech Republic that the opportunity to suspend the rights that arise to a member state from the Treaties can not mean a violation of the fundamental characteristic of the Czech Republic as a sovereign, unitary and democratic state governed by the rule of law under Art. 1 par. 1 of the Constitution, or the principle of the sovereignty of the people enshrined in Art. 2 par. 1 of the Constitution, because this is a penalty only vis-?-vis a member state that violates the values on which the European Union is founded; these values, as stated above, are also among the fundamental principles protected by the Constitution of the Czech Republic. If the Czech Republic observes its own constitutional order, suspension of the rights arising to it from membership in the EU does not come into consideration. Therefore, we can conclude that the existence of these values at the EU level, as well as measures to protect them, are, on the contrary, evidence that reinforces the arguments that the two systems, domestic and Union, are mutually compatible and support each other in the most important area, concerning the very essence of law and justice.

210. For the foregoing reasons the Constitutional Court did not find Art. 2 and Art. 7 of the Treaty on EU to be inconsistent with the constitutional order of the Czech Republic.

XIX.

211. With the foregoing interpretation, the Constitutional Court responded to the most essential objections and doubts that the Senate of the Parliament of the Czech Republic, as an authorized petitioner, stated against specifically named articles of the Treaty of Lisbon in view of the Czech constitutional order. However, the Constitutional Court also reflected the arguments of the president contained in his brief, cited in detail above, even though he is not

a petitioner in the proceeding. These arguments are of two kinds. Some of them agree or overlap with the Senate's petition, and therefore the Constitutional Court responded to them within the analysis of the individual points of the Senate's petition. Others of the president's arguments are either supplemental to or deviations from the Senate's petition; as regards these, the Constitutional Court mentioned them and discussed them briefly. All this is, in any case, given by the fact that both the Senate and the president relatively precisely identified those provisions of the Treaty of Lisbon that could in eventum actually be disputed or problematic in terms of the Czech constitutional order.

212. The president's brief takes a stronger position – beyond the framework of the Senate's petition – insofar as it asks that the Constitutional Court evaluate the very manner of approving the Treaty of Lisbon; the president inclines to the opinion that a referendum should be held, as with the accession treaty. Although the president is not the petitioner in this proceeding – as was already stated – in the Constitutional Court's opinion it would not be appropriate to ignore this request. However, the president's request goes beyond the limits of possible review of an international treaty as foreseen by Article 87 par. 2 of the Constitution. The Constitutional Court could review the manner of approving the Treaty of Lisbon only if that were expressly provided by a provision of the Constitution, which the constitutional framers would have to add, similarly as they did in the case of the review of the referendum on the Czech Republic's accession to the European Union by adding Article 87 par. 1 let. l), m). Otherwise, such a referendum could be held ad hoc – which was a question of an entirely political nature – which, however, the Czech Republic did not do in the case of ratifying the Treaty of Lisbon. Therefore, we can not consider that, if the Treaty of Lisbon changed (indirectly amended) the Treaty on Accession of the Czech Republic to the European Union, constitutional Act no. 515/2002 Coll., on a Referendum on the Accession of the Czech Republic to the European Union should also implicitly apply to this (Lisbon) treaty. In this regard a referendum was not obligatory, and the possible review of the process itself of approving the Treaty of Lisbon is not within the Constitutional Court's competence.

213. During the Constitutional Court's hearing on 25 November 2008 the president orally added to his brief (points 57-64). The Constitutional Court states that – in terms of content – it has basically responded to the president's arguments in the foregoing parts of this judgment.

214. For completeness, the Constitutional Court states that it was not necessary to respond in more detail to the brief from the government of the Czech Republic, because the government largely argued in favor of the Treaty of Lisbon being consistent with the constitutional order, which was also the Constitutional Court's conclusion; however, as is obvious from the foregoing, in some places in the judgment the Constitutional Court nevertheless – or perhaps precisely because of that – considered it appropriate to point out an opinion where it either completely agreed with the government, or which the government expressed but in slightly different words.

XX.

215. Thus, the Constitutional Court summarizes that the review it conducted in this matter concentrated on those provisions of the Treaty of Lisbon, where the petitioner expressly contested their consistency with the Constitution, and presented arguments contained in its

petition, to which the Constitutional Court responded as stated above. The Constitutional Court included in its review all provisions of the Treaty of Lisbon, whose consistency with the constitutional order the petitioner contested in a reasoned manner – and which the Constitutional Court considers to be normatively new – although we can admit that in some aspects they might only replicate already existing norms of European law, in view of the Treaty on Accession of the Czech Republic to the European Union, already ratified and fully applicable in the Czech Republic. A related issue then was determining the appropriate point of reference for review of whether the Treaty of Lisbon is consistent with the Constitution. In this case the Constitutional Court used as the point of reference the constitutional order of the Czech Republic as a whole, not only its so-called material core, for reasons that it also explained in detail above; it gave priority to a comprehensive review, although in the framework of the constitutional order the material core of the Constitution – i.e. the essential requirements of a democratic, law-based state, amendment of which is impermissible – still played a key role.

216. The Constitutional Court interpreted the principles of the constitutional order, including the material core of the Constitution, in the context of the Constitution as a whole. It thus clearly subscribed to the idea of European responsibility and appurtenances, which the framers of the Czech constitution expressed. (The government of the Czech Republic also did this.) It reached the conclusion that the Treaty of Lisbon changes nothing on the fundamental conception of existing European integration, and that even if the Treaty of Lisbon enters into force, the Union will remain a unique organization of an international law nature. In terms of our constitutional law, the Constitution (and the Czech constitutional order generally) remains the fundamental law of the state; as regards the Czech legal order and European law, they are relatively independent and autonomous systems. The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic, which have the highest legal force on Czech territory, it is obvious that Art. 1 par. 1 of the Constitution can not be violated. if European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic. In accordance with this, the Czech Constitutional Court also intends to review, as ultima ratio, whether the legal acts of European bodies remain within the bounds of the powers that were provided to them. In this regard the Constitutional Court basically agreed with certain conclusions of the German Federal Constitutional Court, stated in its Maastricht decision (see above), under which the majority principle, per the imperative of mutual regard, arising from loyalty to the Community, has its limits in the constitutional principles and elementary interests of the member states; the exercise of sovereign power by an association of states, the European Union, is based on authorization from the states, which remain sovereign, and which, through their governments, regularly act in the inter-state area, and thus guide the integration process.

217. However, the most important finding for the Constitutional Court's review was that the Union continues to be founded on the values of respect for human dignity, freedom, democracy, a materially understood law-based state, and the observance of human rights, and

that it therefore emphasizes that which historically, spiritually and conceptually joins the nations of Europe in finding justice in individual cases and to the benefit of the whole. In this regard the aims and the integration role of the EU are formulated clearly, and the Constitutional Court, as a guarantor to the people of the Czech Republic of the constitutionality of a democratic, law-based state, entrusted with protection of inherent, inalienable, non-prescriptible and non-repealable fundamental rights and freedoms of individuals equal in dignity and in rights, found nothing in this regard that would make it necessary for it to interfere.

XXI.

218. For all the foregoing reasons, the Constitutional Court concluded that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, specifically

* articles 2 par. 1 (previously 2a par. 1), 4 par. 2 (previously 2c), 352 par. 1 (previously 308 par. 1), 83 (previously 69b par. 1) and 216 (previously 188 l), contained in the Treaty on the Functioning of he European Union,
* articles 2 (previously 1a), 7 and 48 par. 6 and 7 contained in the Treaty on European Union
* and the Charter of Fundamental Rights of the European Union

are not inconsistent with the constitutional order.

Instruction: Decisions of the Constitutional Court can not be appealed.

Brno, 26 November 2008

Pavel Rychetský
Chairman of the Constitutional Court