2009/11/03 - PL. ÚS 29/09: TREATY OF LISBON II

CZECH REPUBLIC
CONSTITUTIONAL COURT
JUDGMENT

IN THE NAME OF THE REPUBLIC

On 3 November 2009, the plenum of the Constitutional Court, consisting of the Chairman of the Court, Pavel Rychetský and judges Stanislav Balík, František Duchoň, Vlasta Formánková, Vojen Güttler, Pavel Holländer, Ivana Janů, Vladimír Kůrka, Dagmar Lastovecká, Jiří Mucha, Jan Musil, Jiří Nykodým, Miloslav Výborný, Eliška Wagnerová and Michaela Židlická, ruled, pursuant to Article 87(2) of the Constitution of the Czech Republic, on a petition from a group of senators of the Senate of the Parliament of the Czech Republic, jointly represented by Senator Jiří Oberfalzer, legally represented by Jaroslav Kuba, attorney, for review of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order, with the participation of the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, the government of the Czech Republic, and the president of the Czech Republic, represented by Aleš Pejchal, attorney, as follows:

I. The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community

- as a whole,

- Article 7, Article 8, Article 9, Article 10(1), Article 13(1), Article 14(2), Article 17(1) and (3), Article 19(1), Article 20, Article 21(2)(h), Article 42(2), Article 47 and Article 50(2) to (4) of the Treaty on European Union,

- Article 3, Article 78(3), Article 79(1) and Article 83 of the Treaty on the Functioning of the European Union

and ratification thereof are not in conflict with the constitutional order of the Czech Republic.

II. The petition that the Constitutional Court review the Treaty on European Union (called the "Treaty of Maastricht" by the petitioners") as a whole and the Treaty establishing the European Community (called the "Treaty of Rome" by the petitioners) as a whole for conformity with the constitutional order is denied.

III. The petition that the Constitutional Court review Article 2, Article 4 and Article 216 of the Treaty on the Functioning of the European Union for conformity with the constitutional order is denied.

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

V. The petition that the Constitutional Court join, to this petition to open proceedings to review the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order, the petition from a group of senators seeking the annulment of certain provisions of the rules of procedure of both chambers of Parliament, file no. Pl. ÚS 26/09, is denied.

REASONING

I.
Recapitulation of the Petition

A.
Petition of 28 September 2009

1. On 29 September 2009 the Constitutional Court received a petition from a group of senators jointly represented by Senator Jiří Oberfalzer (the "petitioners") to review the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community for conformity with the constitutional order pursuant to Article 87(2) of the Constitution of the Czech Republic, as amended (the "Constitution").

2. The statement of claim of the petition is divided into four points, which correspond to the following sections of the Statement of grounds of the petition.

3. In point I of the statement of claim of the petition, the petitioners contest the conformity of "the Treaty of Lisbon as a whole", "the Treaty of Maastricht as a whole", and "the Treaty of Rome as a whole" with Article 1(1) of the Constitution and Article 2(1) of the Charter; the petitioners in fact mean the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community (the "Treaty of Lisbon"), or the Treaty on European Union (the "TEU"), sometimes referred to as the "Treaty of Maastricht", as amended by the Treaty of Lisbon, or the Treaty on the Functioning of the European Union (the "TFEU"), i.e. the Treaty establishing the European Community, which was amended and renamed by the Treaty of Lisbon and is sometimes referred to as the "Treaty of Rome".

4. This point of the statement of claim in the petition is supported by extensive arguments contained in points 11 to 100. First, in points 11 to 59 of the petition, the petitioners present the starting points for their arguments, contesting the

conformity of the Treaty of Lisbon with the constitutional order of the Czech Republic. They present their own definition and description of the essential requirements of a "state governed by the rule of law" (points 14 to 26 of the petition), a "democratic state governed by the rule of law" (points 27 and 28 of the petition), a "democratic state" (points 29 to 38 of the petition), and finally, a "sovereign democratic state governed by the rule of law" (points 39 to 59 of the petition).

5. The petitioners then, in points 60 to 96, set forth the arguments why, in their opinion, the Treaty of Lisbon contravenes the characteristics set forth above, and summarize them in points 97 to 100 of the petition.

6. First, in the petitioners' opinion, the Treaty of Lisbon as a whole is inconsistent with Article 1(1) of the Constitution, or with the characteristics of the Czech Republic as a state governed by the rule of law. The reason is supposed to be that it does not meet the requirements that a legal regulation must be sufficiently comprehensible and lucid (especially in view of the lack of an "authentic consolidated version" of the TEU and the TFEU, and in view of the scope of changes that the Treaty of Lisbon introduces – see points 61 to 70 of the petition), and potentially also the principle of non-retroactivity (in view of "the capacity of the EU authorities responsible for the publication of the Official Journal of the EU to make further additional changes to the Treaty of Lisbon during the process of its approval in order to correct errors 'which may come to light in the Treaty of Lisbon or in the prior Treaties'", which the petitioners point out in point 71 of the petition). In the petitioners' opinion, these principles generally are among the fundamental elements of a state governed by the rule of law (point 97 of the petition summarizes this argument and refers to other points of the petition, which, in the petitioners' opinion, support it).

7. The petitioners add that all voting that overlaps with the powers of the Parliament on a domestic level must be subject to a "special mandate", i.e. the prior consent of Parliament to the vote of the Czech Republic's representative in the EU Council. The petitioners believe that a special mandate should be subject to review by the Constitutional Court to a similar extent as domestic decision making. According to the petitioners, "until the time of adoption of the special mandate in the abovementioned area, ratification of the Treaty of Lisbon would be inadmissible, because its implementation would conflict with the principle of separation of powers which is one of the essential prerequisites of a democratic state governed by the rule of law" (point 82 of the petition; point 100 of the petition summarizes this argument and refers to other points of the petition, which, in the petitioners' opinion, support it).

8. Second, the petitioners believe that the TEU as a whole conflicts with Article 1(1) of the Constitution (the characteristics of the Czech Republic as a democratic state), or with Article 2(1) of the Charter of Fundamental Rights and Freedoms (the "Charter"). The petitioners point to Article 3 of the TFEU, which defines the objectives of the European Union, and claim that "the objectives thus defined are contrary to the principle of political neutrality, because they restrict in advance the possible decisions of the majority, i.e. the government of the people" (point 87 of the petition). At the same time, according to the petitioners, of the TEU as a

whole does not meet the requirement of political neutrality, which is one of the fundamental features of a democratic state (point 98 of the petition summarizes this argument and refers to other points of the petition, which, in the petitioners' opinion, support it).

9. Third, the petitioners believe, that both the TEU as a whole, and the TFEU as a whole conflict with Article 1(1) of the Constitution (the characteristics of the Czech Republic as a sovereign state). According to the petitioners, the reason is that these treaties allow the possibility, as a particular goal of European integration, of the appearance of a common European defence, whereas a sovereign state must always retain the power to have its own defence if it is to remain sovereign. Another reason presented by the petitioners is that these treaties have as an ultimate objective a European integration that does not exclude the appearance of a common European federal state (point 99 of the petition summarizes this argument and refers to other points of the petition, which, in the petitioners' opinion, support it).

10. In point II of the statement of claim of the petition, the petitioners contest the conformity of selected provisions of the TEU with selected provisions of the Constitution, or of the Charter, set forth in the statement of claim.

11. First, the petitioners focus on Article 7 of the TEU, which inter alia regulates the ability to suspend certain rights deriving from the application of the Treaties to a member state in the event of a serious and persistent breach of the values referred to in Article 2 of the TEU. The petitioners contest the conformity of that provision as a whole, and particularly of the words "clear risk", "serious breach", and "certain rights", and the phrase "shall take into account the possible consequences of such a suspension on the rights and obligations of natural and legal persons" with Article 1(1) of the Constitution, particularly with the principles of appropriate generality and adequate comprehensibility of legislation, which the petitioners consider to be among the essential components of a state governed by the rule of law. According to the petitioners, Article 7 of the TEU also contravenes Article 2(3) of the Constitution. They state that, "If rights of Member States are suspended, with probable consequences for private persons as well, then Czech state authority will not in fact serve its citizens, because it will be temporarily deprived of certain rights without which the citizens cannot be served" (point 105 of the petition). The petitioners discuss their arguments in more detail in points 102 to 106 of the petition.

12. Second, the petitioners focus on Article 8 of the TEU. It states in paragraph 1 that "The Union shall develop a special relationship with neighbouring countries, aiming to establish an area of prosperity and good neighbourliness, founded on the values of the Union and characterised by close and peaceful relations based on cooperation". Similarly as with the previous provision of the TEU, the petitioners contest its conformity as a whole, and in particular that of the terms "special relationship" and "close relationships" with Article 1(1) of the Constitution, specifically with the principles of appropriate generality and adequate comprehensibility of legislation, which the petitioners consider to be among the essential components of a state governed by the rule of law. The petitioners discuss their arguments in more detail in points 107 to 109 of the petition.

13. Third, the petitioners focus on Article 10(1) of the TEU, which states that “The functioning of the Union shall be founded on representative democracy”. In the petitioner’s opinion, “the European Union, if it is to remain an international organization, cannot be based on representative democracy. It must be based, now and in the future, on the sovereign equality of its Member States, and representative democracy must remain merely its essential and at the same time privileged adjunct”. (point 111 of the petition). The petitioners state that “if representative democracy were the basis of the EU, that would mean that the EU was a state itself and this would contravene the principle that the Czech Republic may transfer to international organizations or institutions only certain powers of its authorities, but absolutely not its sovereignty itself”. (point 113 of the petition). Thus, in the petitioners’ opinion, Article 10(1) of the TEU contravenes Article 1(1) of the Constitution and Article 10a of the Constitution. The petitioners discuss their arguments in more detail in points 110 to 113 of the petition.

14. Fourth, the petitioners focus on Article 17(1) and(3) of the TEU, concerning the competences of the Commission. According to the petitioners, the first paragraph “conflicts, through its unclear formulations, with the requirements of appropriate generality and of adequate comprehensibility of legislation, and as such conflicts with the principle of legal certainty, which is a condition of the existence of a state governed by the rule of law”. Therefore, in the petitioners’ opinion, it contravenes Article 1(1) of the Constitution. The third paragraph of that article provides that “the members of the Commission shall be chosen on the ground of their general competence and European commitment from persons whose independence is beyond doubt”. According to the petitioners, “This provision effectively bars anyone who is of a dissenting opinion with regard to European integration from becoming a member of the Commission”. (point 118 of the petition). Therefore, in points 120 and 121 the petitioners state that this provision is “not only vague, but also ideologically coloured – and discriminatory – in the extreme”. Therefore, according to the petitioners, it “conflicts not only with the principle that a legal provision should be appropriately universal in nature and sufficiently comprehensible, but also with the principle of political neutrality” (point 120 of the petition). For these reasons, Article 17(3) of the TEU is claimed to conflict with Article 1(1) of the Constitution as well as Article 2(1) of the Charter, which provides that the State may not be bound by an exclusive ideology. The petitioners also believe that this provision contravenes Article 1(1) of the Charter, pursuant to which all people are equal in rights, and Article 21(4) of the Charter, pursuant to which citizens shall have access, on an equal basis, to any elective and other public office. According to the petitioners, the stipulation of a requirement for sufficient European commitment gives rise to unconstitutional inequality. The petitioners discuss their arguments in more detail in points 114 to 121 of the petition.

15. Fifth, the petitioners focus on Article 20 of the TEU, which provides for enhanced cooperation among EU Members States. According to the petitioners, making enhanced cooperation conditional on approval by EU institutions has the effect of impeding the exercise of certain powers both at European level and at Member States’ level, and as such, in their opinion, it conflicts with the principle of government of the people enshrined in Article 1(1) of the Constitution. Further,

in the petitioners' opinion, "the restriction of Member State cooperation in areas in which the Union has not yet exercised its powers also conflicts with the principle of the sovereignty of the Czech Republic" (point 127 of the petition), and thus with Article 10a of the Constitution. The petitioners discuss their arguments in more detail in points 122 to 128 of the petition.

16. Sixth, the petitioners focus on Article 21(2)(h) of the TEU. That article provides that "The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to […] promote an international system based on stronger multilateral cooperation and good global governance". According to the petitioners, this provision "contravenes the principle that legal provisions should be sufficiently comprehensible and consequently contravenes the principle of legal certainty, on which the existence of the rule of law depends [and] … also contravenes the principle of the political neutrality of the Constitution" (point 130 of the petition). Therefore, the petitioners believe that this provision contravenes Article 1(1) of the Constitution and Article 2(1) of the Charter, which provides that the state may not be bound by an exclusive ideology. The petitioners discuss their arguments in more detail in points 129 and 130 of the petition.

17. Seventh, the petitioners focus on Article 42(2) of the TEU. That article provides that "The common security and defence policy shall include the progressive framing of a common Union defence policy. This will lead to a common defence, when the European Council, acting unanimously, so decides. It shall in that case recommend to the Member States the adoption of such a decision in accordance with their respective constitutional requirements". In the petitioners' opinion, the Czech Republic "by no means … may aim at a common European defence – to do so would be to violate its own Constitution as of now" (point 135 of the petition). According to the petitioners, "even merely providing for the possibility of establishing a European federation with the Czech Republic as one of its constituent parts contravenes the principle that the Czech Republic is a sovereign state. The same applies to the obligation to aim at a common European defence, since without its own defence the Czech Republic would cease to be a sovereign state". (point 135 of the petition). Therefore, this article is said to contravene Article 1(1) and Article 10a of the Constitution. The petitioners discuss their arguments in more detail in points 131 to 136 of the petition.

18. Finally, eighth, the petitioners focus on Article 50(2) to (4) of the TEU. These provisions govern the possibility of a Member State withdrawing from the EU. According to the petitioners, this article "contravenes the principle of ... sovereignty" enshrined in Article 1(1) of the Constitution, and also contravenes "the principle of retroactivity and legitimate expectations and consequently the fundamental principle of the rule of law that all rules must be known in advance" (point 143 of the petition). According to the petitioners, the indeterminacy of the future arrangements for withdrawal from the EU also contravenes Article 10a of the Constitution, because "The transfer of powers must be defined, and the manner in which the powers transferred are to be withdrawn and returned to the national level must also be defined. Nor may the withdrawal of powers be made subject, de facto, to the requirement of approval by the EU" (point 144 of the petition). The

petitioners discuss their arguments in more detail in points 137 to 145 of the petition.

19. In point III of the statement of claim of the petition the petitioners contest the conformity [with the constitutional order] of certain provisions of the "Treaty of Rome" (i.e. of the TFEU), specifically Article 78(3) and Article 79(1). In the statement of claim of the petition the petitioners do not state which provisions of the constitutional order these articles of the TFEU are alleged to contravene, but this is recognizable from the following text of the petition, specifically from points 147 to 150.

20. Article 78(3) of the TFEU provides: "In the event of one or more Member States being confronted by an emergency situation characterised by a sudden inflow of nationals of third countries, the Council, on a proposal from the Commission, may adopt provisional measures for the benefit of the Member State(s) concerned. It shall act after consulting the European Parliament". Article 79(1) of the TFEU states that "The Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings". According to the petitioners, these provisions mean that "the Czech Republic alone will not always decide on the composition and number of the refugees on its territory. The European Union is thus acquiring the power to participate in decisions which may have a comparatively significant impact on the composition of the population of the Czech Republic and on its cultural and social character" (point 148 of the petition). According to the petitioners, this contravenes the principle in Article 1(1) and Article 10a of the Constitution that "powers relating to decisions in matters of exceptional cultural or social impact are not transferred and must always remain entirely within the competence of the institutions of the Czech Republic. Their transfer to an international organization or institution would contravene the Czech Republic's character as a sovereign State" (point 148 of the petition). In addition, the petitioners state that these articles of the TFEU only vaguely define conditions "on which the Council of the EU may begin to act and what exactly it may do" (point 149 of the petition). Therefore, in the petitioners' opinion, Article 78(3 of the TFEU "also contravenes the principle that a legal provision should be appropriately general in nature and sufficiently comprehensible, and therefore conflicts with the principle of legal certainty as an indispensable precondition for the existence of the rule of law" (point 149 of the petition). The petitioners discuss their arguments in more detail in points 147 to 150 of the petition.

21. In point III of the statement of claim of the petition the petitioners "reserve the right to supplement the petition with an application for other selected articles of the Treaty of Rome to be reviewed"; in point 146 of the petition they state that, "Owing to time constraints, only two provisions are cited for the time being; the petitioners are prepared, however, to complete this section". According to the petitioners, the reason is that they "do not wish to prevent the Constitutional Court from considering this submission as of now".

22. In point IV of the statement of claim of the petition the petitioners first “ask the Court to find that the Decision of the Heads of State or Government meeting within the European Council on the concerns of the Irish people on the Treaty of Lisbon, which on 18 and 19 June 2009 added certain provisions to the Treaty of Lisbon, is an international agreement pursuant to Article 10a of the Constitution and as such requires the approval of both Chambers of Parliament obtained by a constitutional majority, without which it is not applicable in relation to the Czech Republic”. The petitioners discuss the statement of claim, thus formulated, in more detail in points 151 to 165 of the petition.

23. Finally, the petitioners refer to their previous petition seeking the annulment of certain provisions of the rules of procedure of both chambers of Parliament (file no. Pl. ÚS 26/09), quote from that statement of claim, and with reference to § 63 of Act no. 182/1993 Coll., on the Constitutional Court, as amended, in conjunction with § 112 of Act no. 99/1963 Coll., the Civil Procedure Code, as amended by later regulations, “the petitioners call upon the Constitutional Court to hear both their petitions in joined proceedings”.

B.
Supplement to the Petition, dated 15 October 2009

24. On 15 October 2009 the Constitutional Court received a document entitled “Supplement to the petition of the group of senators for the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, or selected provisions thereof, to be reviewed for conformity with the constitutional order” (the “supplement”), submitted by Senator Jiří Oberfalzer as the representative of the group of senators. The supplement petitions “the Constitutional Court to also review the following articles of the Treaty on the Functioning of the European Union, as amended by the Treaty of Lisbon [...]: Articles 2, 3 and 4; Article 83; and Article 216 for conformity with Article 1(1) and with Article 10a of the Constitution”.

25. The arguments section of the supplement, which relates to the abovementioned contested articles of the TFEU, first reviews the starting points for review of the Treaty of Lisbon, as they are presented in the original petition (“Excursion: The essential requirements of a sovereign state based on the rule of law”, points 3 to 6 of the supplement).

26. The supplement then states in point 7, that “the petitioners consider shared competences to be very widely and too generally defined – as a result, they can be expanded further by expansive analysis”. According to the petitioners “the scope of transferred, or potentially transferred competences cannot be precisely determined”, and therefore, in their opinion, it is in conflict with “the principle of appropriate generality of legislation […] and with the principle that the Czech Republic may, pursuant to Article 10a of its Constitution, transfer only part of the competences of its authorities, but not all of them (and not even potentially)”. The supplement concludes in this regard that the definition of shared competences in

Article 4 of the TFEU is in conflict with Article 1(1) and with Article 10a of the Constitution.

27. Point 8 of the supplement states that Article 2(4) of the TFEU "moreover states that foreign and security policy is to lead to defining a common defence policy. That too, in and of itself, is [according to the opinion stated in the supplement] in conflict" with Article 1(1) and Article 10a of the Constitution – according to the petitioners, "the same arguments that apply to Article 42 of the TEU (as amended by the Treaty of Lisbon) apply here". The supplement refers to points 131 to 136 of the petition.

28. Point 9 of the supplement contests the conformity of Article 3 of the TFEU with Article 1(1) and Article 10a of the Constitution. It states:

"The exclusive competence of the Union is also problematic. The petitioners do not contest the transfer of competences listed [in Article 3 of the TFEU] to the EU. They see a problem in the fact that the EU has these competences, or acquires them, but is not necessarily required to exercise them, or it may not agree on suitable legislation; at the same time, the Member States lose these competences, i.e. they may not exercise them, precisely in the situation where the Union is unable to agree what rules are to apply in a particular area. Therefore, a situation can arise where no rules at all apply in areas of the Union's exclusive competence. That is in sharp conflict with the very essence of a state governed by the rule of law, which is the existence of rules, i.e. giving individuals and various groups of them at least relative certainty regarding the consequences of their conduct, and thus making decision making and mutual coexistence easier for them".

29. According to the opinion in point 10 of the supplement, "the exclusive competence of the EU generally contravenes Article 1(1) and Article 10a of the Constitution. Pursuant to these articles, the only possible transfer of competence is one where the result is shared competence, i.e. a situation where there is no danger that a certain area would remain without substantive legislation. Transfer of competences pursuant to Article 3 and 4 of the TFEU is not delimited, distinguishable, or sufficiently definite".

30. Points 11 to 14 contest the conformity of Article 83 of the TFEU with Article 1(1) and Article 10a of the Constitution. According to the opinion expressed in the supplement, "deciding what is a crime and what punishments are to be imposed for crimes is among the competences belonging to state authorities that cannot be transferred pursuant to Article 10a of the Constitution" (point 11 of the supplement; it refers to point 54 of the petition, or point 6 of the supplement); "it is evident from the text [of the contested article] that the European union is to acquire its own criminal law competence", which "in and of itself" contravenes the cited articles of the Constitution (point 13 of the supplement). Finally, the supplement states that "the contours of this competence are not clear, the Council, together with the European Parliament can further expand the area of its criminal jurisdiction. Therefore, transfer of competences pursuant to [Article 83 of the TFEU] is also not delimited, distinguishable, and sufficiently definite (point 14 of the supplement).

31. Points 15 to 20 of the supplement contest the conformity of Article 216 of the TFEU with Article 1(1) and Article 10a of the Constitution. The supplement states that "despite the fact that this article was already contested by the Senate petition, the petitioners believe that there are additional circumstances to which the Senate did not expressly refer in 2008, and therefore the Constitutional Court did not address them, even though it touched on them itself" (point 16). These points recapitulate the arguments stated by the Senate and the relevant part of judgment file no. Pl. ÚS 19/08 dated 26 November 2008 (446/2008 Coll.) – point 182; points 183 and 186 of the judgment are expressly cited.

32. In conclusion, point 21 of the supplement states:

"The petitioners cannot rid themselves of the impression that the Constitutional Court, in reviewing the conformity of the Treaty of Lisbon with the constitutional order, was always heretofore, in the case of any doubts, more on the side of the Treaty of Lisbon than on the side of the constitutional order. The Constitutional Court has a considerable degree of discretion in interpretation, and unfortunately the Constitutional Court's efforts to proceed intentionally so that the Treaty of Lisbon could be declared not to contravene the constitutional order cannot be denied. That, as well as certain public statements by Constitutional Court judges, gives the impression that the matter has been decided in advance".

33. The supplement quotes from the testimony of the president of the republic in the proceedings in the matter Pl. ÚS 19/08 and "calls on" the Constitutional Court to "either explain why the principle that decision making in the case of international treaties is, in the event of any doubts, always to give priority to the constitutional order over an international treaty does not apply, because it was guided by it when reviewing the petition and this supplement" (point 23 of the supplement).

34. At the very end, the supplement summarizes "the petition for review of the constitutionality of the Treaty of Lisbon, as it arises from this supplement".

35. At the hearing on 27 October 2009 the petitioners submitted a further supplement to the petition, which is recapitulated in points 78 to 90 of this judgment.

II.
The Proceeding and Recapitulation of the Briefs of the Parties

36. Pursuant to § 71c of the Act on the Constitutional Court, the parties to proceedings on the consistency of international treaties with constitutional acts are, in addition to the petitioners, the Parliament, the president of the republic, and the government. Therefore, the Constitutional Court, pursuant to § 42(4) of the Act on the Constitutional Court, sent the petition to open proceedings to the Chamber of Deputies and the Senate of the Parliament of the Czech Republic, the president of the republic, and the government of the Czech Republic, stating that they could submit briefs regarding the petition by the deadline specified.

A.

Brief from the Chamber of Deputies

37. On 8 October 2009 the Constitutional Court received a brief from the Chamber of Deputies of the Parliament of the Czech Republic, signed by its chairman, Miloslav Vlček. The brief summarizes the process of approval of the Treaty of Lisbon by the Chamber of Deputies. However, the chairman of the Chamber of Deputies also adds his "personal opinion concerning the relationship of the previous proceeding before the Constitutional Court [in which the Constitutional Court ruled in judgment file no. Pl. ÚS 19/08 dated 26 November 2008 (446/2008 Coll.)] to the petition submitted by the group of senators". He believes that in that judgment the Constitutional Court "implicitly concluded that ratification of the Treaty will not affect the Czech Republic as a sovereign state governed by the rule of law pursuant to the Constitution and the Charter of Fundamental Rights and Freedoms. A contrary conclusion would [according to the chairman of the Chamber of Deputies] necessarily lead to lack of clarity concerning the conclusions contained in the verdict and in the reasoning of Constitutional Court judgment Pl. ÚS 19/08". In the conclusion of the brief the chairman of the Chamber of Deputies states that the proposal concerning decisions by heads of state or prime ministers of governments sitting in the European Council in relation to the concerns of the Irish people regarding the Treaty of Lisbon cannot be considered, in form or content, an international treaty, and therefore one must consider the proposal "for the Constitutional Court to pronounce an evidently interpretive verdict to be groundless".

B.
Brief from the Senate

38. On 14 October 2009 the Constitutional Court received a brief from the Senate of the Parliament of the Czech Republic, signed by its chairman, Přemysl Sobotka. Parts I. and II. first summarize the content of the petition, and part III. continues with information from the process of approving ratification of the Treaty of Lisbon by the Senate. The brief states that "after a year and a quarter of discussing the Treaty of Lisbon in the upper chamber of Parliament, on 6 May 2009 the Senate approved its ratification". Part IV. of the brief then addresses the question of conformity of the Treaty of Lisbon with the constitutional order. As the brief says, during the course of Senate debate on the Treaty, considerable attention was paid to this, both before the Senate petition for review of the treaty was submitted (proceedings Pl. ÚS 10/08), and afterwards, when the senators "focused in particular on analysis of this decision, both from a formal and substantive point of view". The brief then lucidly presents the individual objections against the conformity of the Treaty of Lisbon with the constitutional order, which the petitioners now raise, the subject matter of debate in the Senate with their active participation (the brief presents questions of the degree of transfer of competences and preservation of sovereignty, the democratic deficit in the European Union, the question of "allowing the creation of a kind of European federation with the Czech Republic as a member", definition of the objectives of the European Union, the question of a Member State's withdrawal from the European Union, and finally objections against the "extreme lack of lucidity and incomprehensibility" of the Treaty of Lisbon). Part IV. concludes that the Senate "considered the Treaty of Lisbon in detail and thoroughly, not only three times at

its meetings, but also in all bodies that discussed the document, and although various opinion were heard stating both positive and negative positions regarding this international treaty, the majority opinion was expressed on 6 May 2009 in a resolution whereby the Senate consented to ratification of the Treaty". At the very end of the brief the chairman of the Senate states that he is "sending it with the knowledge that it is fully up to the Constitutional Court, pursuant to Article 87(2) of the Constitution and part two of Act no. 182/1993 Coll., on the Constitutional Court, to rule on the petition from the group of senators".

C.
Brief from the Government

39. On 15 October 2009 the Constitutional Court received a brief from the government of the Czech Republic (adopted that day by government resolution no. 1295). It addresses the individual points of the petition from the group of senators in detail.

40. In the introduction to its brief, the government considers it "necessary to emphasize that the Constitutional Court has already reviewed the conformity of the Treaty of Lisbon with the constitutional order [in judgment Pl. ÚS 19/08,] wherein it found that the specific articles of the Treaty of Lisbon contested [by the Senate] and the Charter of Fundamental Rights of the European Union do not contravene the constitutional order". According to the government, "although the verdict of the Lisbon judgment includes only certain articles of the Treaty of Lisbon, the government believes that the Constitutional Court did not review those articles in isolation, but in conjunction with other parts of the Treaty of Lisbon and in the context of its overall conception. [...] In the government's opinion, this fact must be duly considered, in particular when reviewing part I. of the petition" (point 2 of the government's brief). The government states the "the permissibility of another petition for review of the Treaty of Lisbon should be an exception" (point 3 of the government's brief). The government also believes that "this question will have to be clarified further in relation to the petition from the group of senators, because some parts of the petition clearly contest articles of the Treaty of Lisbon that have already been reviewed, or arguments are presented that the Constitutional Court already rejected in its Lisbon judgment" (point 3 of the government's brief).

41. Regarding the petitioner's reservation of the right to expand its submission by a petition for review of additional articles of the TFEU (see point 21 of this judgment) the government states:

"The Constitutional Court should review, above all, whether such a reservation, which de facto has the character of a blanket petition to open proceedings, does not contravene the significance and purpose of a proceeding on the review of an international treaty's conformity with the constitutional order of the CR. If the Constitutional Court does not reach this conclusion, the government believes that such a procedure could be reviewed in light of § 118b of the Civil Procedure Code, which, in view of the lack of an express regulation in § 71d of the Act on the Constitutional Court, could be subsidiarily used on the basis of § 63 of that Act [here the government refers to resolution file no. I. ÚS 288/2000 dated 23 January

2001 (U 4/21 SbNU 471)]. The government believes that the Constitutional Court should weigh whether, on the basis of appropriate application of the cited § 118b of the Civil Procedure Code, the petitioner's opportunity to expand the original petition is not limited by the principle of procedural efficiency, and if so, at what moment in time that limitation applies" (point 5 of the government's brief).

42. Regarding the petition to join the proceeding in this matter with the proceedings file no. Pl. ÚS 26/09, the government refers to the reasoning in resolution file no. Pl. ÚS 26/09 dated 6 October 2009, available at http://nalus.usoud.cz, denying the petition in this matter.

43. Regarding point I. of the statement of claim of the petition, the government first states that, in its opinion, it is incorrectly formulated, as it contests "the constitutional conformity not only of the Treaty of Lisbon as a whole, but also [of the TEU] and [of the TFEU] as a whole. The Treaty of Lisbon [in the government's opinion] undoubtedly represents a fundamental amendment of the existing founding treaties, and yet some articles of the wording in effect of both Treaties remain unaffected by the amendment, and therefore should not be subject to review by the Constitutional Court in proceedings on the conformity of the Treaty of Lisbon with the constitutional order. The government believes that already effective norms of primary law cannot be reviewed within the scope of that review" (point 4 of the government's brief; cf. also point 8). The government also states that this part of the petition "lacks arguments of relevance to constitutional law, and some points tend to give the impression that the petitioners are merely trying to persuade the Constitutional Court of their own legal-political opinions" (point 8 of the government's brief). If that were really so, then, in the government's opinion, the Constitutional Court would not have competence to review these parts of the petition (point 9 of the government's brief).

44. Substantively, regarding point I. of the statement of claim of the petition, the government states that "there can be not doubt whatsoever that the Parliament of the CR gave valid consent to ratification of the Treaty of Lisbon, in accordance with all the rules arising from the Constitution and the legal order of the CR" (point 11 of the government's brief). According to the government, the Treaty of Lisbon is "an amendment of the founding treaties and thus the amending points are subject to ratification. This is also the procedure applied in amending statutory norms in the Czech legislative process" (point 11 of the government's brief). In addition, according to the government, "the lack of an official consolidated version of the founding treaties reflecting the changes pursuant to the Treaty of Lisbon does not support the petitioners' conclusion, but, on the contrary, appears quite logical, because the subject matter of ratification in Member States is precise the Treaty of Lisbon, which amends the founding treaties. If an official consolidated version existed, it would, on the contrary, create uncertainty as to what is to be the subject matter of ratification in all the Member States, and which of the two texts has precedence in the (hypothetical) event that they are inconsistent. The government states that an unofficial consolidated version of the founding treaties, reflecting changes pursuant to the Treaty of Lisbon, which serves for better orientation in the text, does exist, and was published in the Official Journal of the EU, including in the Czech language" (point 12 of the government's brief, with reference to the Official Journal C 115, 9 May2008, p. 1). Regarding the violation of

the principle of non-retroactivity, alleged by the petitioners (see point 6 of this judgment) the government states that “this possibility of subsequent corrections, [...], is fully in accordance with international law. These are “errata”, or corrections of errors that arose during translation of a text from the original language or languages to the other official languages of the Union, and are not changes of a substantive nature. This procedure is subject to the rules set forth in Article 79 of the Vienna Convention on the Law of Treaties [promulgated as no. 15/1988 Coll., the “Vienna Convention”]” (point 13 of the government’s brief, references omitted). The government also disagrees with the petitioners’ claim that the Treaty of Lisbon contravenes the fundamental characteristics of the Czech Republic as a sovereign and democratic state governed by the rule of law, enshrined in Article 1(1) of the Constitution of the CR, and in Article 2(1) of the Charter of Fundamental Rights and Freedoms, in view of other grounds presented, summarized in points 6 and 7 of this judgment.

45. The government then addresses individual reasons wherein the petitioner’s find certain provisions of the Treaty of Lisbon to be inconsistent with the constitutional order and which the petitioner presents in point II. of the statement of claim of the petition.

46. In points 18 to 23 of its brief the government argues that Article 7 of the TEU is not in conflict with Article 1(1) or with Article 2(3) of the Constitution (regarding this alleged ground for the Treaty of Lisbon’s conflict with the constitutional order see point 11 of the judgment). It points out that this article was already reviewed by the Constitutional Court, which, in judgment Pl. ÚS 19/08 did not find it inconsistent with the constitutional order. The government adds, inter alia, that the phrases which the petitioners claim to be inappropriately general “are not outside the bounds of appropriate generality, not only according to the standards of norms of international treaty law, but also according to the standards of domestic law, which are evidently higher in comparison with the former” (point 20 of the government’s brief, which refers to point 186 of judgment Pl. ÚS 19/08).

47. In points 24 to 31 of its brief the government argues that Article 8 of the TEU is not, in its opinion, inconsistent with Article 1(1) of the Constitution (regarding this alleged ground for the Treaty of Lisbon’s conflict with the constitutional order see point 12 of the judgment). Here the government points out, for example, that “the meaning of disputed terms can be derived through routine means of interpretation, which are set forth for the interpretation of international treaties in Article 31 of the Vienna Convention. Pursuant to that article, the terms in an international treaty cannot be interpreted in isolation, but in conjunction with each other, they must be interpreted in good faith, and accorded their usual meaning, and, finally, the subject matter and purpose of the treaty must be taken into consideration so that the interpretation contributes to effective implementation of the treaty” (point 25 of the government’s brief). The government then performs such an interpretation in the following points of its brief.

48. In points 32 and 33 the government considers the petitioners’ doubts expressed in connection with Article 10(1) of the TEU and also states that it is not in conflict with Article 1(1), or with Article 10a of the Constitution (regarding this alleged ground for the Treaty of Lisbon’s conflict with the constitutional order see point 13

of the judgment). In point 32 of its brief the government states that this article of the TEU is

"above all a statement of the fact that representative democracy belongs to the common constitutional traditions shared by the Member States. It is precisely through representative democracy on the national level that powers, whose original holders remain the Member States, are transferred to the Union and its bodies. This fundamental line of representative democracy is accentuated by the Treaty of Lisbon by acknowledging the special role of domestic parliaments in reviewing the exercise of these transferred powers. The fact that the European Parliament, elected directly by citizens of Member States on the basis of the principle of degressive proportionality, at the Union level performs some, though not all, functions that are immanent to national representative assemblies, primarily the review and legislative functions, testifies to the fact that this body plays a supplementary role in strengthening the transparency and democratic structure of the decision-making process, and not that the Union itself thereby becomes a state, or that the rights of domestic parliaments were transferred to it. The European Union is thus a system sui generis, in which the element of democratic representation is based on a chain of legitimacy between national parliaments and the Council, and supplemented by the horizontal element of representation in the European Parliament".

49. In points 34 to 41 of its brief the government argues in favour of the conclusion formulated in point 41 that Article 17 of the TEU "is not, in its opinion, in conflict with Article 1(1) of the Constitution or with the Charter of Fundamental Rights and Freedoms" (regarding this alleged ground for the Treaty of Lisbon's conflict with the constitutional order see point 14 of the judgment). Regarding the question of the alleged vagueness of the term "European commitment" the government points to the wording of that concept in other language versions. The government states that "in the Czech translation the perhaps somewhat inappropriately chosen term European commitment must be understood in this context more as 'European engagement', or, loosely speaking, a basic loyalty to the values and common objectives of integration" (point 39 of the government's brief). The government argues similarly with regard to the alleged conflict between the requirement of "European commitment" and the principle of political neutrality.

50. In points 42 to 44 of its brief the government argues in favour of the conclusion formulated in point 44, that "it does not share the petitioners' opinion that the institution of 'enhanced cooperation'" set forth in Article 20 of the TEU "contravenes the principle of the sovereignty of the Czech Republic, and, in view of the foregoing, is convinced that Article 20 of the TEU is not in conflict with Article 1(1) or with Article 10a of the Constitution of the CR" (regarding this alleged ground for the Treaty of Lisbon's conflict with the constitutional order see point 15 of the judgment). In point 42 of its brief the government states that

"the purpose of enhanced cooperation is to permit certain Member States to integrate into the Union faster, and at the same time ensure that, if they later show interest in it, this cooperation will be open to other Member States at any time under conditions specified clearly in advance. For these reasons it is quite logical that the Treaty of Lisbon, similarly to the Treaty on the EU already in

effect, conditions enhanced cooperation between groups of Member States on the fulfilment of specified conditions and approval by the Council. If some Member States of the EU wish to enter into cooperation outside the area of competence of the Union, and without using its institutional structures, and that cooperation is not in conflict with the obligations of those states arising from them membership in the Union, the Treaty of Lisbon does not impose any limitation on them. In contrast to the enhanced cooperation pursuant to Article 20 of the TEU, however, in that case the Union cannot guarantee to other Member States that the Member States involved will permit them to join in such cooperation outside the framework of the EU".

51. The government adds in this regard that "shared competences are subject to the principle that, to the extent that the Union did not exercise a particular competence or decided to stop exercising it, the exercise of that competence belongs to the Member States" (government brief point 43). In the government's opinion, Member States may exercise these competences not exercised by the Union individually, or jointly, provided that the exercise of these competences does not come into conflict with the obligations of these Member States arising from their membership in the EU. However, as the government explains further,

"the case of enhanced cooperation pursuant to Article 20 of the TEU is a qualitatively different situation, because that cooperation takes place within the objectives and competences of the Union and within the Union integration process, which can thus be intensified and strengthened within a smaller group (at least nine) of Member States. Member States involved in enhanced cooperation exercise the non-exclusive competences of the Union, not their own competences, as is expressly and clearly stated in Article 20(1) of the TEU. If legislative acts are adopted in this qualified enhanced cooperation, they will have the character of Union law with all the appurtenant attributes" (point 43 of the government's brief).

52. In points 45 to 51 of its brief, the government argues in favour of the conclusion formulated in point 51, that "Article 21(2)(h) of the TEU is not in conflict with Article 1(1) of the Constitution of the CR or with Article 2(1) of the Charter of Fundamental Rights and Freedoms" (regarding this alleged ground for the Treaty of Lisbon's conflict with the constitutional order see point 16 of the judgment), and it refers to the arguments applied regarding similar arguments from the petitioners, and adds a comparative linguistic interpretation, through which the government reaches the conclusion that "in negotiating the Treaty of Lisbon, the Member States did not have in mind proper administration of public matters in the sense of responsible exercise of public power vis-à-vis subordinate subjects, which is effectively exercised only within a state, as the petitioners erroneously believe, as much as responsible adoption of political decisions vis-à-vis equal partners, which is intended to lead to creating and maintaining worldwide order" (point 48 of the government's brief).

53. In points 52 to 58 of its brief, the government argues in favour of the conclusion formulated in point 58, that the possibility of the creation of a common defence of the EU, enshrined in Article 42(2)(1) of the TEU, is not in conflict with Article 1(1) or with Article 10a of the Constitution (regarding this alleged ground

for the Treaty of Lisbon's conflict with the constitutional order see point 17 of the judgment). The government primarily considers it essential to oppose the petitioners' claim (in point 131 of the petition) that "the new text of the Treaty of Maastricht does not permit of any alternative to the establishment of a common defence". According to the government, this claim is "in direct conflict with Article 42 of the TEU". According to the government, it is "evident, that from a legal point of view there is a possibility to decide unanimously on common defence, but it is left to the political consideration of representatives of Member States in the European Council whether to adopt that decision. This is not, under any circumstances, a legal obligation, the failure to fulfil which would be violation of a treaty obligation. In other words, a common defence will be created if the European Council so decides at an as yet undetermined future time, solely on the basis of its political consideration, without being legally bound to do so" (both quotations from point 53 of the government's brief). The government also points to the need for all Member States to approve such a decision in accordance with their legislation (point 54 of the government's brief). The government is also convinced that

"the petitioners claim regarding the impossibility of transferring any competences concerning defence to an international organization is unsustainable. If defence matters were truly a fundamental attribute of the sovereignty of the CR, whose preservation would not permit making defence a subject of international obligations, the entire Article 43 of the Constitution of the CR would cease to make sense. It is evident that both the fulfilment of international treaty obligations on common defence against attack (Article 43(1) of the Constitution of the CR), and the CR's participation in defence systems of international organizations of which the CR is a member (Article 43(2) of the Constitution of the CR), as well as the presence of the armed forces of other states in the territory of the CR (Article 43(3) of the Constitution of the CR), clearly represent a sharing of competences in defence, based, of course, on valid international treaty obligations accepted by the CR as a sovereign state, and meeting the procedures set forth by the Constitution of the CR. Accepting such treaty obligations is expressly permitted by Article 49(b) of the Constitution of the CR, which defines 'treaties of alliance, peace, or other political nature' as one of the categories of 'presidential treaties'" (point 55 of the government's brief).

54. In this regard the government points out the Czech Republic's membership in the North Atlantic Treaty Organization – NATO (the North Atlantic Treaty [Washington, D. C., 4 April 1949], which entered into force for the Czech Republic in accordance with Article 10 of the Treaty on 12 March 1999 and was promulgated as no. 66/1999 Coll.) and the consequences arising from it, with regard to Article 42(7)(2) of the TEU.

55. In points 59 to 61 of its brief, the government argues in favour of the conclusion formulated in point 61, that Article 50(2) to (4) of the TEU "governing the process of withdrawal of a Member State from the Union is not in conflict with Article (1) or with Article 10a of the Constitution" (regarding this alleged ground for the Treaty of Lisbon's conflict with the constitutional order see point 18 of the judgment). In this regard the government points out the Constitutional Court's conclusions stated in point 106 of judgment Pl. ÚS 19/08, that "the explicit

articulation [of the possibility of withdrawal from the Union] in the Treaty of Lisbon is an undisputed confirmation of the principle that States are the Masters of the Treaty and the continuing sovereignty of Member States". According to the government, "the regulation of the withdrawal process is an expression of the common will of the Member States to address their future relationships by agreement, consensually, and comprehensively (which, in the case of such an integrated whole, is undoubtedly desirable)" (point 59 of the government's brief).

56. Regarding the alleged grounds for the non-conformity of the Treaty of Lisbon with the constitutional order that the petitioners set forth in point III of the statement of claim of the petition (regarding this point of the statement of claim of the petition see point 19 of the judgment), the government points out that the petitioners are contesting Article 78(3) of the TFEU and Article 79(1) of the TFEU, "without paying attention to the systematic interpretation of these provisions, whether the concept itself of an area of freedom, security and justice, international obligations in asylum policy, free crossing of internal borders, protection of external borders and related visa policy, or the efforts to achieve a comprehensive solution for legal and illegal migration. They ignore those articles of the TFEU that refute their arguments, as well as the literal text of the cited articles" (point 62 of the government's brief). Regarding Article 78(3) of the TFEU, the government states that it must be remembered "that it is precise the Member States who decide on such measures in the Council, to the benefit of the affected Member State(s). This provision must also be interpreted in the context of the principle of solidarity and a just distribution of responsibility among the Member States, including on a financial level" (point 63 of the government's brief). Regarding Article 79(1) of the TFEU, the government "considers it necessary to point out paragraph 5 of that article, which the petitioners completely ignored".. According to the government "that provision guarantees Member States the right to set the number of entries of citizens of third countries coming to their territory in order to seek work or do business as an independent entrepreneur. This is an especially important regulatory mechanism that should remain to protect the domestic labour market from an undesirable (unmanageable) influx of foreign citizens who can now move freely in search of work within the Union's common labour market" (point 64 of the government's brief). Based on this, "the government believes that the petitioners' claims stated in part III of the petition are obviously unjustified. In the government's opinion Article 78(3) and Article 79(1) of the TFEU are not in conflict with Article 1(1) of the Constitution" (point 65 of the government's brief).

57. Regarding point IV of the statement of claim of the petition, the government states that "the Constitutional Court does not have substantive jurisdiction to review this petition, for the reason that the Decision is not the kind of international treaty that is subject to preliminary review of constitutionality [...], and also because here the Constitutional Court is only asked to authoritative state that a particular legal opinion is true" (point 66 of the government's brief).

D.
Brief from the President of the Republic

58. On 16 October 2009 the Constitutional Court received a brief from the president of the republic. It is divided into five parts, marked A to E.

59. In part A, entitled "Preamble", the president points out the social-political context for the approval of the Treaty of Lisbon, welcomes the petition from the group of senators, and states that "although the Constitutional Court has already spoken on the matter of the Treaty of Lisbon, that was only about individual components, and not on the Treaty as a whole". In the president's opinion, the previous review of sections of the Treaty of Lisbon is not a guarantee that could refute doubts about the compatibility of the Treaty of Lisbon with our constitutional order. The task before the Constitutional Court today is completely different, and therefore not comparable to the one that it had in the autumn of last year". The president returns to the previous review of the Treaty of Lisbon in the last paragraph of the first part of his brief:

"In view of the fact that the previous review of the conformity of the Treaty of Lisbon with the constitutional order of the CR was based on a specific approach where the Constitutional Court reviewed only those provisions that the Senate then contested, and did not review the Treaty of Lisbon comprehensively and in its entirety, my arguments, presented in my brief of June 2008 were not seriously reviewed and weighed. At that time the Constitutional Court responded to my extensive brief in a single sentence. The present submission from the senators, which is much wider in the scope of contested provisions, provides an opportunity to consider the issues of the Treaty of Lisbon more comprehensively, and thus also opens an opportunity to return to my previous arguments".

60. In part B the president recapitulates his brief of June 2008 (presented in the proceedings in the matter file no. Pl. ÚS 19/08). The president believes that he "did not get complete and convincing answers, either in the proceedings or later" to five questions that he raised in that brief. He repeats those questions in the submitted brief.

61. The first question raised by the president was: "Will the Czech Republic remain, after the entry into force of the Treaty of Lisbon, a sovereign state and full subject in the international community, with capacity to independently, without anything further, to fulfil the obligations arising to it under international law?" In the president's opinion the Constitutional Court "avoided answering directly, and raised a new theory of sovereignty shared jointly by the European Union and the Czech Republic (and other Member States)". The president states:

"The term shared competence has been used relatively frequently recently, but only in non-rigorous debate. It is a contradiction in terms. Not only does our legal order not know the term 'shared sovereignty', but neither does the law of the European Union. It was used only in the decision of the European Parliament and the Council that established the 2007-2013 programme Citizens for Europe to support active European citizenship; that decision states that 'the culture of shared sovereignty – and not giving up sovereignty – that is the culture and identity

of today's European citizen, and all the more so the citizen of the future'. That, of course, cannot be the basis for any legal arguments".

62. In the following paragraph the president presents his concept of sovereignty: "The essence of sovereignty is the unrestricted exercise of power. Sovereignty rejects the sharing of power". According to the president, "the consequences of this opinion of the Constitutional Court [the president evidently means the concept of sovereignty expressed by the Constitutional Court in judgment Pl. ÚS 19/08] indicate that in the European Union there will be no sovereign in the classic sense of the word. That is a very dangerous social arrangement". The president concludes:

"I do not think that this is the kind of sovereignty that the Czech constitutional framers had in mind when they formulated Article 1 of the Constitution in 1992. The Constitutional Court's answer also indicates the answer to the second part of this question: The Czech Republic, as a subject in the international community, does not have full rights, and it can fulfil its international obligations only together with the European Union. To me that was not, and is not, an acceptable answer".

63. The second question to which the president sought an answer in the proceedings before the Constitutional Court was: "Is the provision of the Treaty of Lisbon on direct domestic effect of European Union legislation consistent with Article 10 of the Constitution of the Czech Republic?" In the president's opinion "the Constitutional Court did not provide any answer at all to this question. It touched on the issue [according to the president] only by reference to the 'sugar quota' case".

64. According to his brief, in his third question the president asked: "Does the Charter of Fundamental Rights of the European Union have the legal status of an international treaty pursuant to Article 10a of the Constitution, and if so, are all its provisions consistent with the Charter of Fundamental Rights and Freedoms of the Czech Republic, or other components of the constitutional order?" In the president's opinion "the Constitutional Court did not provide a direct answer to the first part of the question. One can only indirectly conclude from the judgment that the Constitutional Court considers the Charter of Fundamental Rights of the European Union to be an international treaty and that the Charter is not in conflict with the Constitution. However, an express answer was not provided".

65. In his fourth question the president asked whether the European Union will remain "after the entry into force of the Treaty of Lisbon an international organization, or institution, to which Article 10a of the Constitution permits transferring the powers of the authorities of the Czech Republic". According to the president, "the Constitutional Court did not provide an answer".

66. Finally, the fifth question posed by the president: "If the Treaty of Lisbon indirectly amends the Accession treaty, does not constitutional Act no. 515/2002 Coll., on a Referendum on the Accession of the Czech Republic to the European Union then implicitly also apply to the Treaty of Lisbon (the question for the referendum in that Act would then have to be amended)? Should not consent to ratification of the Treaty of Lisbon also be subject to a referendum?" Here the

president states that “this was the only question that the Constitutional court answered, although it apparently did not understand my question”. As the president understands it:

“The Constitutional Court stated that a referendum is possible, but that the decision is not up to the Constitutional Court, but to political bodies. However, I asked whether the already adopted constitutional act on a referendum on the accession of the Czech Republic to the European Union does or does not also apply to the Treaty of Lisbon. That treaty changes the conditions of our accession, in a substantial manner”.

67. The president points out the background report to constitutional Act no. 515/2002 Coll. (in his opinion “approved by the government and the Parliament of the Czech Republic”) and quotes the following passage from it:

“the formulation of Article 10a of the Constitution presupposes alternative conditions for the ratification of an international treaty that transfers certain powers of authorities of the Czech Republic to an international organization or institution either the consent of a three-fifths majority of all deputies and a three-fifths majority of senators present, or consent given in a referendum. The draft act makes this general formulation specific to the effect that ratification of the Treaty on the Accession of the Czech Republic to the European Union requires prior consent in a referendum, because only by referendum can the decision to accede to the European Union be made; thus, it selects one of the alternatives set forth in Article 10a. The act does not concern the ratification process for other defined kinds of international treaties; that will be subject to future decisions by Parliament”.

The president concludes from this that “in 2002 Parliament already assumed that, pursuant to Article 10a of the Constitution, if in the future any of the powers of authorities of the Czech Republic were to be transferred to an international organization or institution, that should take place by referendum”. In the president’s opinion the Constitutional Court

“did not at all consider the question of whether the Treaty of Lisbon, which is to be ratified more than five years after 1 May 2004, i.e. from the date of the Czech Republic’s accession to the European Union, changes the conditions under which the citizens voted on the referendum on the Czech Republic’s accession to the European Union, and whether it is therefore necessary to adopt a new act on a referendum in which the citizens would answer the question of consent to the changes adopted by the Treaty of Lisbon”.

68. In the conclusion of part B the president proclaims: “The Constitutional Court must give a direct answer to all these questions”.

69. In part C the president recapitulates the petition from the group of senators and agrees with their objections. In the conclusion of this part the president welcomes their attempt “to define in a final list the elements of the ‘essential core’ of the constitutional order, or more precisely of a sovereign democratic state governed by the rule of law”. The president believes that “if the Constitutional

Court accepts this definition as its own, or defines it in a different, similar manner, this could limit future self-serving definition of these elements based on cases being adjudicated at the time". In the president's opinion this would significantly strengthen the degree of legal certainty for the citizens and state authorities.

70. In part D the president returns to the petition of the group of senators seeking the annulment of certain provisions of the rules of procedure of both chambers of Parliament (file no. Pl. ÚS 26/09) and states that the Constitutional Court denied it "without examining it in detail". The president has "no choice but to express regret over this hasty step by the Constitutional Court, because these serious questions of Czech statehood thus remain unanswered, and can be subject to further disputes in the future".

71. In the concluding part E the president proposes,

"that the Constitutional Court decide, clearly, specifically, and with detailed reasons on the conformity of the Treaty of Lisbon as a whole with Article 1(1) of the Constitution, or with Article 2(1) of the Charter of Fundamental Rights and Freedoms, and that it state whether the Czech Republic will remain, after the ratification of the Treaty of Lisbon, a sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens".

72. On 23 October 2009 the Constitutional Court received, through the president's attorney, Aleš Pejchal, a supplement to the president's brief. In it the president agrees with the supplement to the petition from the group of senators, and then urges the Constitutional Court not to overlook review of the compatibility of the Treaty of Lisbon with the Constitution also with regard to whether "abandoning the principle of consensuality in the field including the area of freedom, security and justice, and introducing in that field the principle of majority voting by representatives of the executive branch of individual Member states of the European Union violates Article 10a of the Constitution, because in fact this is not a transfer of the powers of authorities of the Czech Republic to an international organization, but to a group of states, which will outvote the Czech Republic in promoting their own interests". In the president's opinion, "Article10a of the Constitution does not permit the transfer of powers of authorities of the Czech Republic to another state or group of states".

III.
Hearing

73. In the hearing before the Constitutional Court, held on 27 October 2009, the petitioners were represented by senator Jiří Oberfalzer and the attorney appointed by him, Jaroslav Kuba, the Chamber of Deputies fo the Parliament of the Czech republic was represented by its chairman, Miloslav Vlček, the senate of the Czech Republic was represented by its chairman, Přemysl Sobotka, the president of the republic was represented by his appointed attorney, Aleš Pejchal, and the government of the Czech Republic was represented by the Minister for European Affairs, Štefan Füle.

74. The petitioners' attorney, with reference to § 37(1) of the Act on the Constitutional Court, raised the objection that the judge rapporteur, Pavel Rychetský, was biased, and based doubts concerning his lack of bias on the fact that the text of an article published in the internet edition of Lidové noviny of 30 September 2009, entitled "German Ambassador Asks Rychetský about Fate of Lisbon Treaty", states, among other things, that "two weeks ago the German ambassador made an appointment with the chairman of the court, Pavel Rychetský, and discussed the Treaty of Lisbon with him. Judge Rychetský confirmed this to Lidové noviny. According to Rychetský, ambassador Johannes Haindl was curious about how long it would take the court to issue a judgment (sic!). As the article correctly (sic!) further states, the meeting ... came as a surprise to the senators who filed the constitutional complaint (sic!)".

75. The Constitutional Court suspended the hearing, and then ruled on the objection by resolution as follows: "Judge Pavel Rychetský is not barred from deliberating and deciding in the matter file no. Pl. ÚS 29/09". For details, we refer to that resolution, available at http://nalus.usoud.cz.

76. When the hearing resumed, the chairman of the Constitutional Court briefly recapitulated the contents of the petition, together with the supplement submitted by the petitioners, and the briefs from the parties to the proceedings, and called on the government's representative to submit, in accordance with the request made by the judge rapporteur on 26 October 2009, a copy of the resolution of the government of the Czech Republic of 13 December 1995 no. 732 on the application of the Czech Republic for admission to the European Union, together with the application and memorandum attached to that application. The government representative did so and during the recess in the hearing copies of these documents were also delivered to the other parties to the proceeding.

77. The petitioners, through their legal representatives, submitted a document entitled "Supplement and Further Detail to the Statement of Claim of the Petition, with Grounds" (the "second supplement") and briefly summarized its contents. The chairman of the Constitutional Court delivered copies of the second supplement to the other parties expediently directly during the hearing.

78. In the second supplement the petitioners, in their words, "supplement and make more precise the statement of claim of the petition" dated 29 September 2009 and the supplement to it dated 15 October 2009 as follows: Point I of the statement of claim of the petition, as it is formulated in the second supplement, reads: "The Treaty of Lisbon (the consolidated version) as a whole, (the treaty of Maastricht as a whole and the Treaty of Rome) contravenes Article 1(1) of the Constitution, and Article 2(1) [of the Charter]". The petitioners make the following changes in point II of the statement of claim of the petition:

- Article 7(3) of the TEU already contested in the original petition (see point 11 of this judgment; of course, in the original petition and the supplement the petitioners contested Article 7 of the TEU as a whole and then also the specific wording), according to the petitioners also contravenes Article 2(3) of the Constitution,
-

- Article 9 of the TEU, according to the petitioners, contravenes Article 1(1) of the Constitution,
-
- Article 13(1) of the TEU and Article 47 of the TEU, according to the petitioners, contravene Article 10a(1) of the Constitution,
-
- Article 14(2) of the TEU, according to the petitioners, contravenes Article 1 of the Charter,
-
- Article 17(1) and (3) of the TEU, already contested in the original petition (see point 14 of this judgment; of course, in the supplement the petitioners contested only the second paragraph of Article 17(3) of the TEU), according to the petitioners, also contravene Article 21(4) of the Charter,
-
- Article 19(1) of the TEU, according to the petitioners, contravenes Article 87(2) of the Constitution
-
- Article 50(2) and (4) of the TEU, already contested in the original petition (see point 18 of this judgment), according to the petitioners, contravene Article 2(3) of the Constitution.

79. In connection with Article 8 of the TEU, already contested in the original petition, (see point 12 of this judgment), in the second supplement the petitioners do not set forth conflict by specific phrases as they did in the original petition; regarding Article 7 of the TEU, in this second supplement the petitioners cite only paragraph (3); regarding Article 50 of the TEU, in this second supplement the petitioners cite only (2) and (4), not paragraphs (2) to (4), as they did in the original petition and in the supplement (see point 18). However, these differences can evidently be ascribed more to careless preparation of these submissions (just like the express questioning of only the second paragraph of Article 17(3) of the TEU in the supplement to the petition), than to the petitioners' intent, and the Constitutional Court thus does not consider them relevant.

80. The petitioner justified the abovementioned supplement, or modification of the wording of the statement of claim of the petition as summarized in the following points of this judgment (typographical errors in the quotations have been corrected, but not the syntax).

81. Regarding the alleged conflict of Article 7(3) of the TEU with Article 2(3) of the Constitution:

"In applying this power the Council, acting by qualified majority, may decide to suspend the rights of a Member State, including the voting rights of the representative of the government of that Member State in the Council. That will consequently limit the powers of that Member State, with effects on its citizens. The legal norm containing this rule, enshrined in [Article 7(3) of the TEU], and permitting the reduction of the power of a Member State, which is primarily established as service to its citizens, is thus in direct conflict with a legal norm in the Czech constitutional order. Specifically, the norm enshrined in [Article 2(3) of the Constitution], pursuant to which state authority is to serve all citizens".

82. Here the Constitutional Court notes that the petitioners used the same grounds to contest the conformity of Article 7 of the TEU with Article 2(3) of the Constitution in their original petition (cf. point 11 of this judgment).

83. Regarding the alleged conflict of Article 9 of the TEU with Article 1(1) of the Constitution:

"Application of this legal norm, involves applying the institution of so-called 'European citizenship', which is not derived from the Constitution, or the constitutional order of a Member State. In view of the fact that the institution of citizenship is not a defining element of an international organization, but of a state, introduction of so-called 'European citizenship' also proves that, in the meaning of this regulation, the legal subject status of the EU bears the signs of a state. (A designation like 'citizens of the Member States of the European Union' would correspond to the legal subject status of an international organization.)

This will subsequently limit the sovereignty of a Member State. The Constitution of the CR mentions citizenship that carries legal consequences only in relation to the state, in Articles 1, 2, 12 and 100.

Thus, from the legal norm containing that institution, and enshrined in [Article 9 of the TEU], one cannot rule out that contradictory responsibilities will arise fro a citizen of a Member state. Responsibilities arising from the state-citizenship relationship, and responsibilities arising from 'European commitment'. Thus, the creation of citizenship with legal consequences pursuant to [Article 9 of the TEU] for a citizen of the CR is in conflict with the constitutional principle of the sovereignty of the CR, enshrined in [Article 1(1) of the Constitution]: 'The Czech Republic is a sovereign, unitary and democratic state governed by the rule of law".

Because thus, its citizens, as a result of the creation of a 'European citizenship' may face, e.g. a dilemma in deciding between responsibility to the state or to the EU, in the event of a conflict between them".

84. Regarding the alleged conflict of Article 13(1) of the TEU and Article 47 of the TEU with Article 10a(1) of the Constitution, the petitioners state that "in applying the cited articles, the legal subject status of the European Union will function as the legal subject status of a state". The petitioners develop this claim in the following passages and conclude that application of these articles of the TEU

"indicates that the transfer of certain powers to the EU and its authorities will cause the Member state to lose the sovereign ability to defend its nationals from the effects of external limitations on their fundamental rights. Because the subject to which these powers are transferred has the legal subject status of a state, and not the legal subject status of an international organization or institution. Therefore [these articles are] in conflict with [Article 10a(1) of the Constitution]. Which provides that 'Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution', and thus not to another state".

85. Regarding the alleged conflict of Article 14(2) of the TEU with Article 1 of the Charter, the petitioners point out that as a consequence of application of this article "citizens of the most populous state will have up to 12.6 % of representatives in the maximum 750-member [European Parliament], while the least populous only 0.8 %". The petitioners conclude that this violates the principle of equality enshrined in the cited provision of the Charter.

86. Regarding the alleged conflict of Article 17(1) and (3) of the TEU with Article 21(4) of the Charter:

"[Article 17(3) of the TEU] states: '...The members of the Commission shall be chosen on the ground of their general competence and European commitment'. The content of 'European commitment' is not defined, may be used for discrimination, etc. Primarily, however, it is not ruled out that it may be transferred into an exclusive EU ideology that deforms the pluralism and democratic values on which it was established.

This conflict thus is no longer only the 'problem; of the CR.

The cited article of the TEU thus contravenes [Article 21(4) of the Charter]: 'The state ... may not be bound ... by an exclusive ideology.' And, likewise, [Article 21(4) of the Charter]: 'Citizens shall have access, on an equal basis, to any elective and other public office'".

87. Similarly as in relation to the arguments raised concerning the conflict of Article 7 of the TEU with Article 2(3) of the Constitution (see point 82 of this judgment) the Constitutional Court points out that this supplement in fact reproduces the original petition (see point 14 of this judgment).

88. Regarding the alleged conflict of Article 19(1) of the TEU with Article 87(2) of the Constitution, the petitioners state that "interpretation of the law by the European Union Court of Justice is one of the sources of so-called 'Union law", which, pursuant to the 'Declaration' attached to the Concluding Act of the Intergovernmental Conference under point 'A' as the 'Declaration to Treaty Provisions' no. 17: 'Declaration of the Priority of law', has priority before the laws of a Member state". Thus according to the petitioners

"interpretation of any supplements or amendments to the Treaty of Lisbon by the European Union Court of Justice will have priority over interpretation of them by the constitutional court of an EU Member State. This applies in the event of the court's decision-making on consistency of an international treaty with the constitution or the constitutional order.

This will consequently limit the power of the constitutional court in question, which, in the case of [the Constitutional Court of the CR] is enshrined in [Article 87(2) of the Constitution] and within which it decides on the consistency of an international treaty pursuant to Article 10a and Article 49 with the constitutional order, before it is ratified.

The legal norm containing this rule [Article 19(1) of the TEU] thus makes the European Union Court of Justice superior in interpretation of the 'Treaties' (meaning the Treaty of Lisbon), including in cases of their interpretation by the constitutional court of an EU Member State. This applies to its decision-making on the conformity of the Treaty of Lisbon as amended by any amendments and additions to the international treaty with the constitution or the constitutional order of the Member State.

It is thereby in direct conflict with the legal norm of the Czech constitutional order enshrined in [Article 87(2) of the Constitution]. That permits [the Constitutional Court] to reach an independent judgment concerning the interpretation of an international treaty pursuant to Article 10a and Article 49, if it is to decide on its consistency with the constitutional order of the CR. At the same time, this makes interpretation of the Constitution dependent on a norm contained in another legal document".

89. Finally, regarding the alleged conflict of Article 50(20 and (4) of the TEU with Article 2(3) of the Constitution, the petitioners state that "withdrawal [is] bound to conditions that are unilaterally determined by instructions of the European Council. Because, pursuant to (4) a Council member, representing the withdrawing state, may not take part in its discussions". Therefore, according to the petitioners, "it cannot be ruled out that conditions contained in an accession treaty can be even economically destructive for the withdrawing state, and force it to reverse its decision. In other words – and again this does not involve only the CR – that if the right of a Member State to withdraw from the EU is to be limited, then at least under conditions that are known before its accession". Directly regarding the alleged conflict the petitioners state that

"if, pursuant to (4) a member of the European Council or the Council that represents the withdrawing state may not take part in discussions concerning his state, then the 'Treaty of Lisbon' thereby, during that process, also limits the potential of the withdrawing state to serve its citizens, and at the same time, their right in this regard. Thereby it contravenes [Article 2(3) of the Constitution], pursuant to which 'state authority is to serve all citizens'".

90. After a question from the chairman of the Constitutional Court, the petitioners' attorney confirmed that the petitioners maintain the further points of the statement of claim that were not stated again in the second supplement. He also confirmed that the petitioners understand points II and III as alternatives to point I of the statement of claim.

91. In the closing statement senator Jiří Oberfalzer, representing the petitioners, returned to the contents of the previous petitions and the supplement presented by the petitioners, and extensively recapitulated the contents of the brief in the matter file no. Pl. ÚS 26/09. The petitioners' attorney then in his statement argued against points 70 to 76 of judgment Pl. ÚS 19/08. The Constitutional Court notes here, for completeness, that after presentation of evidence was concluded, closing statements were made, and the Constitutional Court retired for its final deliberations, on 30 October 2009 it received another submission from the petitioners through their attorney. In view of the timing of this submission, and in

view of the fact that, based on its content, it was evidently not a petition to open proceedings, that submission was set aside [§ 41(a) of the Act on the Constitutional Court].

92. The attorney for the president of the republic primarily repeated the questions raised by the president in his brief (see points 60 to 68 of this judgment) and then quoted extensively from the abovementioned memorandum attached to the Czech Republic's application for admission to the European Union (see point 76 of this judgment). He pointed to the fact that, in the president's opinion, the character of the European Union is fundamentally changed in comparison with its present character.

93. The representatives of both chambers of the Parliament of the Czech Republic recapitulated the contents of their written briefs and again pointed out that the Constitutional Court already considered the conformity of the Treaty of Lisbon with the constitutional order in detail in the proceeding file no. 19/08, with a positive result.

94. The government's representative first recapitulated the contents of the government's written brief and then presented a separate brief regarding the supplement to the petition, in the conclusion of which he stated that the government believes that the individual articles of the TFEU contested in the supplement are not in conflict with the constitutional order. He also responded to the president's written brief. At the conclusion of his presentation he stated that "the government of the Czech Republic performed a thorough legal analysis on the Treaty of Lisbon, the petition from the group of senators, including the later supplement to it, and the brief from the president, and based on that, concluded that the individual contested articles of the Treaty of Lisbon, and the Treaty as a whole, are not in conflict with the constitutional order of the Czech Republic".

IV.
Definition of the Scope of Review

95. Before the Constitutional Court turns to review of the Treaty of Lisbon, it must define the scope in which it is authorized to review the treaty, especially in view of its previous judgment, Pl. ÚS 19/08. In that regard, three questions arose before the Constitutional Court. First, to what extent does the Constitutional Court's previous judgment prevent it from further review of the Treaty of Lisbon (the impediment of rei iudicatae, part A below). Second, the question of the ability to review the Treaty of Lisbon, or the treaties which it amends (i.e. the TEU and the TFEU), as a whole, and the related substantive limits of the review of international treaties (part B below). Finally, third, the Constitutional Court considers it necessary to point out the fundamental principles of proceedings on the constitutional conformity of international treaties pursuant to Article 87(2) of the Constitution and related provisions of the Act on the Constitutional Court, especially with regard to the possibility of misuse of this proceeding for unconstitutional obstructive practices (part C below).

A.
The Impediment of Rei Iudicatae in Relation to Judgment Pl. ÚS 19/08

96. In point 78 of judgment Pl. ÚS 19/08 the Constitutional Court stated that any new petition for review of this same Treaty of Lisbon would evidently be barred, as regards the now-contested provisions, by the impediment of rei iudicatae. Even then, however, the Constitutional Court pointed out that it would make that evaluation only if a new petition were really submitted; at the same time, it indicated that it is appropriate to interpret the issue of rei iudicatae restrictively in such a case. The Constitutional Court thus left evaluation of the impediment of rei iudicatae open. A key point in this regard is the definition of when the "same matter" is involved.

97. A restrictive understanding of the impediment of rei iudicatae corresponds to a double unity: an identical provision of the international treaty that is contested by the petition, and at the same time the identical grounds claimed for its conflict with the constitutional order, in light of which the provision of the international treaty was reviewed in the previous decision and which is to establish the impediment of rei iudicatae. The impediment of rei iudicatae, thus defined, is restrictive in the sense that it imposes stricter requirements on the unity of the matter.

98. On the other hand, the impediment of rei iudicatae, thus defined, provides a wider opportunity to potential subsequent petitioners to contest the constitutionality of an international treaty than if the unity of the matter had occurred, e.g. through merely one unity of the contested provision of the international treaty. This also corresponds to the concept of proceedings pursuant to Article 87(2) of the Constitution, on which the Constitutional Court spoke in the already cited judgment Pl. ÚS 19/08 (point 76) as follows: "The order of individual petitioners, as set forth in § 71a(1) [of the Act on the Constitutional Court], 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 first petition for review of a provision of an international treaty could effectively bar further petitions for review of that same provision, raised in view of possible conflict with provisions of the constitutional order, which the Constitutional Court did not consider in the previous decision, the possibility for each potential petitioner to express his doubts on the constitutionality of the international treaty being discussed would lose meaning to a considerable degree.

99. However, the Constitutional Court emphasizes that this order of petitioners and the consequences that the Constitutional Court draws from it in the previous point, do not mean that potential subsequent petitioners (or potential parties to other proceedings) may contest, over and over again, conclusions that the Constitutional Court has already stated in a judgment concerning the conformity with the constitutional order of an international treaty (or of those provisions that the Court reviewed) (see also part C of this part of the judgment, below). The finality, non-changeability, and binding nature of an enforceable decision by the Constitutional Court, which follow from Article 89 of the Constitution and related provisions of the Act on the Constitutional Court, play important roles, that reflect the status of the Constitutional Court as a body of a judicial nature, not a place for comments or

a place for discussions of a primarily academic or political nature (in this regard, cf. judgment Pl. ÚS 19/08, point 75).

100. The Constitutional Court is a constitutional body endowed, pursuant to Article 89(2) of the Constitution, with the power to authoritatively and with final effect interpret provisions of the constitutional order, not a place for endless debate, which some parties seek. An enforceable judgment of the Constitutional Court is binding on all authorities and persons (Article 89(2) of constitutional Act no. 1/1993 Coll.), and thus – as is obvious in itself – is also binding on the Constitutional Court itself. In that sense, the consequence of this for any other proceedings before the Court in which a decision is to be made again (even if in a different manner), is the unavoidable procedural impediment of rei iudicatae (§ 35(1) of Act no. 182/1993 Coll.), which natural bars any further review of the matter on the merits [judgment file no. III. ÚS 425/97 dated 2 April 1998 (N 42/10 SbNU 285), p. 287–288].

101. The Constitutional Court considered in detail the arguments raised by the petitioners in their supplement relating to the alleged conflict of Article 2 and 4 of the TFEU (defining the competences of the Union) with Article 1(1) and Article 10a of the Constitution (regarding this alleged ground cf. points 26 to 29 of this judgment) in points 125 to 141 of its judgment Pl. ÚS 19/08; the same applies to the arguments raised concerning the alleged conflict of Article 216 of the TFEU with those same provisions of the Constitution (regarding this alleged ground cf. point 31 of this judgment); in this regard the petitioners do not in any way disguise the fact that they are asking the Constitutional Court to reevaluate its conclusion stated in judgment Pl. ÚS 19/08, in points 176 to 186. Therefore, the Constitutional Court must deny these petitions on the basis of § 35(2) of the Act on the Constitutional Court, as impermissible. The related petition for review of Article 3 of the TFEU cannot be denied on that basis, because the Constitutional Court did not explicitly consider it in its judgment Pl. ÚS 19/08. However, at this point the Constitutional Court refers to the same points of judgment Pl. ÚS 19/08, which also apply to review of the conformity of Article 2 and 4 of the TFEU with the constitutional order, and which also apply fully to Article 3 of the TFEU.

102. On the other hand, although Article 7 of the TEU was already subject to review in the proceedings file no. Pl. ÚS 19/08, the Constitutional Court did not consider the ground for its possible conflict with Article 1(1) and Article 2(3) of the Constitution, raised by the petitioners in the present proceeding (regarding these alleged grounds, cf. points 11 and 81 of this judgment and points 205 to 210 of judgment Pl. ÚS 19/08). Therefore, the impediment of rei iudicatae does not prevent further review of it in this proceeding.

103. The impediment of rei iudicatae also applies to the president's brief, in which he formulates "five questions", and states that he "did not get a complete and convincing answer to them in the proceeding or later". As the Constitutional Court already stated above in point 99 of this judgment, it is not the role of the Constitutional Court to answer questions, but to make authoritative rulings; in this case on the conformity of an international treaty with the constitutional order. The Constitutional Court has already made an enforceable decision regarding the

doubts that the president returns to in his brief, in judgment Pl. ÚS 19/08, and can only refer to that judgment (see points 104 and 105 below).

104. This applies to the first question, concerning the sovereignty of the Czech Republic (where the Constitutional Court also refers to part of the reasoning of this judgment, points 146 to 150, which concerns those petitioners arguments that overlap with the question posed by the president). Regarding the second question, concerning the effects of norms of European Union law on the domestic level, where the president himself, in his brief, mentions judgment file no. Pl. ÚS 50/04 dated 8 March 2006 (N 50/40 SbNU 443; 154/2006 Coll.), which provides the requested answer, the Constitutional Court only adds a reference to point 113 of its judgment Pl. ÚS 19/08, and points out that the direct domestic effects of community law were established for the Czech Republic at the moment when it joined the EU, and they cannot, under any circumstances, be derived from the Treaty of Lisbon. Regarding the third question, concerning the Charter of Fundamental Rights of the European Union (where the Constitutional Court refers to points 190 to 204 of judgment Pl. ÚS 19/08, and especially point 204, where the Constitutional Court explicitly states that it " 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 problematise the standard of domestic protection of human rights and to thereby be inconsistent with the constitutional order of the Czech Republic"), the Constitutional Court thus now adds that the question posed by the president in his brief is, in terms of reviewing conformity of the Charter of Fundamental Rights of the European Union with the constitutional order, completely irrelevant. Regarding the fourth question, concerning the character of the European Union (which the president also addressed in the supplement to his brief, recapitulated in point 72 of this judgment, and to which the president's attorney returned in the hearing – cf. point 92 of this judgment), we can refer to point 104 of judgment Pl. ÚS 19/08. Finally, regarding the fifth question, whether consent to ratification of the Treaty of Lisbon must be given in a referendum pursuant to constitutional Act no. 515/2002 Coll., the Constitutional Court refers to point 212 of judgment Pl. ÚS 19/08 and adds that a general constitutional act was not adopted for the process of ratifying international treaties pursuant to Article 10a of the Constitution, and the choice of the manner of consent (by referendum or by consent of both chambers of Parliament) remains, for all future cases, in the hands of the legislative assembly. In conclusion, the Constitutional Court points out that answers to the president's questions, which he interprets as supporting arguments for complete review of the Treaty of Lisbon, can be derived with the help of standard methods of interpretation, from those parts of the judgment to which it referred above, and it does not believe that it is necessary to analyse them more widely (even if this were not barred in many aspects by the impediment of rei iudicatae described above).

B.
Petition for Review of the Treaty of Lisbon and the Treaties that It Amends, as a Whole

105. In addition to the individual articles of the Treaty of Lisbon, the petitioners contest the constitutionality of the Treaty of Lisbon, but also of the TEU and of the TFEU, "as a whole" (see points 6 to 9 of this judgment). Yet, in judgment Pl. ÚS

19/08 the Constitutional Court refused to review the entire Treaty of Lisbon (also supported by the government and the president in their briefs). Instead, the Constitutional Court, in point 74, of the judgment, inclined to the conclusion (arising by analogy from its settled case law in the area of review of legislation, especially from judgment file no. Pl. ÚS 7/03, Collection of Decisions of the Constitutional Court, volume 34, judgment no. 113, p. 180–181, promulgated as no. 512/2004 Coll.), that it focuses only on the provisions of the international treaty that were formally contested and grounds therefor provided in the petition. A proceedings to review the constitutionality of statutes pursuant to § 64(1) of the Act on the Constitutional Court is of a similar nature; 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 petitioners object 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.

106. However, in contrast to the petition submitted by the Senate in the proceeding file no. Pl. ÚS 19/08, in this present proceedings the petitioners have submitted specific grounds why both the Treaty of Lisbon and the TEU and the TFEU should be reviewed as a whole for lack of conformity with the constitutional order of the Czech Republic. Insofar as an "epistemological" argument was also supporting argument for denying the first petition for overall review of the Treaty of Lisbon [see point 75 of judgment Pl. ÚS 19/08: "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)"], here the a requirement to make specific the petition for review of treaties as a whole has been met.

107. The possible review of the treaties as a whole is also supported by the fact that the normative significance of an international treaty cannot be derived only from its individual provisions, but also (among other things) from its overall system. The normative significance of an international treaty is not a mere sum of the significance of its individual provisions. Also, the Constitutional Court itself confirmed the importance of the system of an international treaty for review of its constitutional in judgment Pl. ÚS 19/08, point 78, when it stated (regarding the possible definition of the impediment of rei iudicatae): "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 …".

108. However, as regards the petitions for overall review of the TEU and of the TFEU, the Constitutional Court is authorised to perform such a review only to the extent to which the Treaty of Lisbon as a whole amends them. On the contrary, in view of the fact that both the Treaty on European Union and the Treaty establishing the European community, in their present versions, based on the Treaty between the Kingdom of Belgium, the Kingdom of Denmark, the Federal Republic of Germany, the Hellenic Republic, the Kingdom of Spain, the French Republic, Ireland, the Italian Republic, the Grand Duchy of Luxembourg, the Kingdom of the Netherlands, the Republic of Austria, the Portuguese Republic, the Republic of Finland, the Kingdom of Sweden, the United Kingdom of Great Britain and Northern Ireland (Member States of the European Union) and the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Republic of Slovakia concerning the Accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, and the Republic of Slovakia to the European Union, which was signed in Athens on 16 April 2003 (published as no. 44/2004 Coll. of International Treaties, the "Accession Treaty"), must be considered ratified international treaties pursuant to Article 87(2) of the Constitution, their review is at this point ruled out (cf. judgment Pl. ÚS 19/08, points 79 to 87).

109. Thus, the Constitutional Court did not find grounds to a priori deny review of the Treaty of Lisbon as a whole, if relevant constitutional law arguments in that regard are raised by the petitioners. However, in that regard the Constitutional Court must point out the substantive limits of its review, which arise from its position in the constitutional system of the Czech Republic.

110. In the introductory part of their petition, the petitioners state that "Unfortunately, the Constitution does not precisely define the essential requirements for a democratic state governed by the rule of law" (point 13 of the petition). According to the petitioners, the Constitutional Court "has already addressed that principle several times [here the petitioners refer to judgment file no. Pl. ÚS 19/93 dated 21 December 1993 (N 1/1 SbNU 1; 14/1994 Coll.), judgment file no. III. ÚS 31/97 dated 29 May 1997 (N 66/8 SbNU 149) and judgment file no. Pl. ÚS 42/2000 dated 24 January 2001 (N 16/21 SbNU 113; 64/2001 Coll.)], it too has not given a complete, comprehensive, and conclusive interpretation, that would in the future be resistant to immediate political pressure and ad hoc interpretations influenced by cases at issue at a particular time" (point 13 of the petition). In point 49 of the petition the petitioners ask the Constitutional Court to set "substantive limits to the transfer of powers", and in point 51 to 56 they attempt to formulate these themselves, evidently inspired by the decision of the German Constitutional Court dated 30 June 2009, 2 BvE 2/08, available at http://www.bverfg.de/entscheidungen/es20090630_2bve000208.html), which provides such a catalogue in point 252 (cf. especially points 51 to 56 of the petition).

111. However, the Constitutional Court does not consider it possible, in view of the position that it holds in the constitutional system of the Czech Republic, to create

such a catalogue of non-transferrable powers and authoritatively determine "substantive limits to the transfer of powers", as the petitioners request. It points out that it already stated, in judgment Pl. ÚS 19/08, that "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" (point 109). Responsibility for these political decisions cannot be transferred to the Constitutional Court; it can review them only at the point when they have actually been made on the political level.

112. For the same reasons, the Constitutional Court does not feel authorised to formulate in advance, in an abstract context, what is the precise content of Article 1(1) of the Constitution, as requested by the petitioners, supported by the president, who welcomes the attempt "in a final list to define the elements of the 'material core' of the constitutional order, or more precisely, of a sovereign democratic state governed by the rule of law", and states (in agreement with the petitioners) that this could "limit future self-serving definition of these elements based on cases being adjudicated at the time" (point 69 of this judgment).

113. The Constitutional Court believes that it is specific cases that can provide it a relevant framework in which it is possible, case by case, to interpret more precisely the meaning of the term "sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens". The Constitutional Court has already done so in the decisions cited by the petitioners themselves (see above, point 110 of this judgment), or, e.g. in judgment file no. Pl. ÚS 36/01 dated 25 June 2002 (N 80/26 SbNU 317; 403/2002 Coll.), and most recently in judgment file no. Pl. ÚS 27/09 dated 10 September 2009 (318/2009 Coll.). This does not involve arbitrariness, but, on the contrary, restraint and judicial minimalism, which is perceived as a means of limiting the judicial power in favour of political processes, and which outweighs the requirement of absolute legal certainty (cf. especially Sunstein, C. R.: One Case at a Time: Judicial Minimalism on the Supreme Court, Cambridge, Harvard University Press, 1999, pp. 209–243, directly concerning the relationship between judicial minimalism and the requirement of legal certainty). The attempt to define the term "sovereign, unitary and democratic state governed by the rule of law, founded on respect for the rights and freedoms of the man and of citizens" once and for all (as the petitioners, supported by the president, request) would, in contrast, be seen as an expression of judicial activism, which is, incidentally, consistently criticized by certain other political figures.

114. However, as is also evident from the further reasoning, many of the petitioners' arguments are in fact directed against selected articles of the Treaty of Lisbon (or the treaties that it amends). The Constitutional Court dealt with them accordingly.

C.
Limiting the Possibility of Unconstitutional Abuse of the Proceeding pursuant to Article 87(2) of the Constitution and Permissibility of Supplementing the Petition

115. Regarding the governments' objection (points 40 and 41 of this judgment), the Constitutional Court was also forced to consider the question of whether a widely

conceived participation in proceedings on the constitutionality of international treaties, opening procedural space to raise the parties doubts concerning an as yet ungratified international treaty progressively for individual potential petitioners (cf. point 98 of this judgment), does not, on the other hand, create an intolerable risk of abuse of procedural mechanisms before the Constitutional Court, abuse that would conflict with the very purpose of this proceeding. The fact that this is not a hypothetical consideration is also supported by the public, generally known statements from some of the senators who are petitioners in this proceedings, indicating that they joined the group with an obstructionist motivation, in an attempt to prevent ratification of the international treaty for reasons other than constitutional law ones. Submitting frivolous or fraudulent petitions to open proceedings and abusing the judicial procedure for protecting constitutionality can undoubtedly also be penalized by denying such petitions due to their being obviously unjustified, or for abuse of the right to submit a petition to open proceedings, or also through other disciplinary measures (§ 61 of the Act on the Constitutional Court), but this solution need not always be usable.

116. The purpose of a proceedings on the conformity of an international treaty with the constitutional order is to preventively eliminate the risk that the Czech Republic will assume an international obligation that would be in conflict with the constitutional order, or to remove doubts on the conformity of the international treaty with the constitutional order before the treaty becomes binding on the Czech Republic in international law, and legally binding domestically within the Czech Republic, because after that the possibilities for resolving a conflict between the treaty and the constitutional order are significantly limited (cf. Wagnerová E., Dostál M., Langášek T., Pospíšil I.: Zákon o Ústavním soudu s komentářem [The Act on the Constitutional Court, with Commentary], Prague, ASPI a. s., 2007, pp. 298, 309–310). Given the nature of the matter, it is necessary to remove such doubts without undue delay. At the level of international law, just by negotiating an international treaty the parties assume an obligation that they will not disproportionately draw out their definitive decision to accept or not accept the treaty, which follows from the principle of good faith (cf. Potočný, M. Mezinárodní právo veřejné. Zvláštní část [Public International Law, Special Section] 1st ed. Prague, C. H. Beck, 1996, p. 161). Connected to this at the level of domestic, or constitutional law, this is the president's obligation, without undue delay to ratify an international treaty (i.e. formally confirm externally the proper conduct of the domestic approval procedure) that was duly negotiated by the president, or by the government, based on his authorisation, and whose ratification has been consented to by a democratically elected legislative assembly, in particular in the case of an international treaty pursuant to Article 10a of the Constitution approved by a qualified constitutional majority of deputies and senators. It is only a proceeding before the Constitutional Court pursuant to Article 87(2) of the Constitution, which, in view of the appropriately raised doubts on the conformity of an international treaty with the constitutional order ex constitutione that postpones the moment of ratification until the time after these doubts are removed by an authoritative decision of the Constitutional Court, or, if conflict is found, after the conflict is removed by an amendment to the constitutional order (§ 71e(3) of the Act on the Constitutional Court).

117. The requirement to remove without undue delay doubts on the conformity of an international treaty with the constitutional order is procedurally reflected in § 71d(1) of the Act on the Constitutional Court, pursuant to which the Constitutional Court is required to treat a petition as urgent, i.e. address it without undue delay, and out of the order in which it was received, if any of the parties to the proceeding so requests, and also in strengthening the principle of the procedural efficiency, which arises from § 71d(2) of the Act on the Constitutional Court, pursuant to which the Constitutional Court is required to address a petition and decide on it without further petitions. Of course, this does not affect the authorisation of the plenum of the Constitutional Court to conclude that it is necessary to address a matter as urgent based on its own discretion, pursuant to § 39 of the Act on the Constitutional Court, which also happened in this case by resolution of the Constitutional Court dated 29 September 2009.

118. As regards periods for submitting a petition to open proceedings on the conformity of an international treaty with the constitutional order, the Act on the Constitutional Court explicitly regulates only when they start for individual potential petitioners [cf. § 71a(1)(a) and (d) of the Act on the Constitutional Court, arg. "… from the moment when …"]; the ending of these periods is then defined, given the nature of the matter, by the moment when an international treaty is ratified [resolution file no. Pl. ÚS 1/04 dated 4 March 2004 (U 11/32 SbNU 519)], because this is a matter of preventive review, before ratification (cf. Article 87(2) of the Constitution); in that sense an explicit statement of the ending of a period in the text of the Act on the Constitutional Court would be a superfluous statement of the obvious [cf. § 71a(1) (d) of the Act on the Constitutional Court, compared to § 71a(1)(b) and (c)]. Thus, this period definitively limits the time in which the Constitutional Court has authority to preventively consider an international treaty, and thus also the time in which it can receive a petition to open proceedings from any of the possible petitioners.

119. The interpretation that a petition to open proceedings pursuant to § 71a(b), (c) and (d) of the Act on the Constitutional Court is not limited by any deadline, that these petitioners can postpone submitting a petition as they wish, would come into an insoluble conflict with the requirement that the president ratify an international treaty without undue delay – as soon as all impediments have been removed. In view of the purpose of the proceeding defined above, the Constitutional Court necessarily had to conclude that opening proceedings on the conformity of international treaties by a group of senators, a group of deputies, and the president, must be limited by the same deadline by which an international treaty must be ratified, i.e. the deadline of "without undue delay".

120. The deadline of "without undue delay" naturally does not mean immediately; otherwise it would never be possible to effectively open proceedings before the Constitutional Court and the entire preventive review of constitutionality would be limited to cases when a chamber of Parliament turns to the Constitutional Court even before it itself consents to ratification of a treaty. Such an interpretation would quite obviously go against the purpose of defining party status in § 71a(1) of the Act on the Constitutional Court, and ultimately also against a broad understanding of it, which the Constitutional Court itself reached in its previous judgment, Pl. ÚS 19/08. Therefore, appropriately postponing ratification, i.e.

postponing the moment when it is no longer possible to turn to the Constitutional Court, cannot be described as undue delay. Thus, from the point of view of the Constitution, it is completely correct if the president postpones delaying ratification of an international treaty for an appropriate time so that, during that time, deputies or senators with a minority opinion can effectively exercise their rights before the Constitutional Court, with the aim of eliminating doubts about the constitutionality of the international treaty. The same applies if the president himself has doubts about the constitutionality of an international treaty and postponed ratification by an appropriate period so that he himself could, in that time, contest the international treaty before the Constitutional Court. However, evaluation of the appropriateness of that delay must reflect the fact that the text of an international treaty is already fixed at the time when it is submitted to Parliament for it to consent to ratification, so that all deputies and all senators can become familiar with it in detail; from that moment one can also presume that opposing views as to its constitutionality will appear (cf. judgment Pl. ÚS 19/08, point 75). As regards the president, we must be added that he knows the contents of an international treaty even earlier, because he negotiated it, or the government negotiated it based on his authorisation, as his alter ego.

121. In this case, the Treaty of Lisbon was negotiated by the government of the Czech Republic on 13 December 2007 in Lisbon. It was presented to the Chamber of Deputies and to the Senate, with a request that they consent to its ratification, on 29 January 2008. The Chamber of Deputies consented to ratification of the Treaty of Lisbon on 18 February 2009, and the Senate on 6 May 2009. Thus, from that day groups of deputies and senators (and the president from the moment when the Treaty of Lisbon was presented to him for ratification) authorised to petition the Constitutional Court to review the conformity of the Treaty of Lisbon with the constitutional order. The petitioner – a group of senators – did not submit its petition until 29 September 2009, i.e. more than one and a half years after the Treaty of Lisbon was presented to the senators, and almost five months after the group acquired active procedural standing. Such a period of time – a matter of months, and not merely weeks – undoubtedly is not appropriate, and therefore the petition to open this proceeding was not filed without undue delay. However, the Constitutional Court did not deny the petition to open proceedings on those grounds, this time, because it does not wish to retroactively burden the petitioners with an interpretation of procedural rules that regulate access to the Constitutional Court and the deadlines on which the Constitutional Court made a finding in this decision.

122. The Constitutional Court also considers it appropriate to emphasize that a proceeding on the conformity of an international treaty with the constitutional order is, as regards the method of review and the procedural regime, analogous to a proceeding on annulment of a statute or other legal regulation due to conflict (inconsistency) with the constitutional order, or with a statute. Therefore, analogous procedural rules apply. In this proceeding, the principle of procedural efficiency, as described above [see point 117 of this judgment and judgment file no. Pl. ÚS 7/03 dated 18 August 2004 (N 113/34 SbNU 165, s. 185–186; 512/2004 Coll.)] applies. The Constitutional Court is required to review the petition and complete proceedings on it without regard to other petitions. After submitting the petition to open proceedings the petitioners no longer control the petition. For

that reason, withdrawing the petition to open proceedings, just as in proceedings to annul a statute, is not possible, any perceived or actual changes in the group of senators, termination of a mandate of some of them, or a change of opinion or subsequently announced support and "joining" of others have no effect on the proceeding that has been properly opened. For that reason, a change of the petition is also impermissible, whether in the form of expanding or narrowing the petition request (the statement of claim). Expanding the petition would have to be classified as another new petition, which must meet all the requirements and conditions as the petition itself. Where a new petition to open proceedings overlaps with the original petition, on which a proceeding is already in progress, proceeding pursuant to [§] 35(2) of the Act on the Constitutional Court would be appropriate, i.e. denying that part as impermissible due to the impediment of lis pendens, where the denied petitioner then has a right to take part in the previously opened proceeding as a secondary party.

123. The supplement to the petition, which the group of senators submitted subsequently, after another two weeks, and also the second supplement, not submitted until the hearing before the Constitutional Court, are, in their content, expansions of the petition, because the petitioners seek review of other articles of the international treaty (thus, this is not merely developing or elaborating arguments, which may take place during the entire course of the proceeding, including the closing arguments). However, in this case the Constitutional Court procedurally accepted the supplement to the petition for reasons analogous to those for which it accepted the original petition, although it was submitted a long time after the deadline for submitting had passed. In this situation, partial denial of this supplement (in the scope of the original petition) as impermissible due to the impediment of lis pendens (§ 35(2) of the Act on the Constitutional Court) and reviewing the new expanding statement of claim as a completely new petition, which in the end would have to be – due to the connected content – joined to the original proceedings, would not be procedurally efficient. In the future, however, such a supplement would necessarily be penalized by a conclusion that it was late, and the Constitutional Court would deny such a petition.

124. In this regard the Constitutional Court emphasizes that the petitioners' repeated statements about the time pressure in which the petition was prepared, which are supposed to justify the two supplements to the petition, cannot be accepted. As the Constitutional Court already stated above, the Treaty of Lisbon was presented to the Chamber of Deputies and to the Senate with a request for its ratification on 29 January 2008. As is clear from the briefs of the representatives of both chambers of Parliament (points 37 and 38 of this judgment), questions of the possible conflict of the Treaty of Lisbon with the constitutional order were intensively discussed at the meetings of both chambers, and in the case of the Senate they even led to submission of a petition for review of the treaty by the Constitutional Court (Senate resolution 379 from its 13th session, on 24 April 2008; the Constitutional Court rule by judgment Pl. ÚS 19/08 on 26 November 2008). The Constitutional Court considers it obvious that the senators who later, as a group, submitted this petition, in accordance with their constitutional obligations, did not begin to consider possible grounds for conflict of the Treaty of Lisbon with the constitutional order (supported by relevant constitutional law arguments that would stand up in proceedings before the Constitutional Court) only at the moment

when the Senate consented to ratification of the Treaty of Lisbon, but long before that, from the moment when the treaty was presented to the Senate. Otherwise they could not conduct proper debate and later vote on the treaty. In this context, the Constitutional Court points out that in proceedings before it, although they may touch on political questions, it is necessary to apply arguments that are relevant to constitutional law, and not mere impressions, as the petitioners do, e.g. in evaluating the previous judgment, Pl. ÚS 19/08, and the standard of review that the Constitutional Court applied in it (see point 32 of this judgment). The petitioners "impression", in no way substantiated, that it has been "decided in advance" (ibid.), must be described as completely unacceptable and bordering on a grossly insulting submission pursuant to § 61(1) of the Act on the Constitutional Court.

V.
The Review

A.
Prohibition of Retroactivity

125. The petitioners claim that the Treaty of Lisbon as a whole is in conflict with Article 1(1) of the Constitution, specifically with the prohibition of retroactivity (the petitioners develop their understanding of it in point 18 of their petition), because the authorities of the European Union, responsible for publishing the Official Journal of the EU, will be able to make changes, supplementally and during the approval of the Treaty of Lisbon for purposes of correcting errors that are found in it or in the existing treaties (further regarding this alleged ground see point 6 of this judgment).

126. The Constitutional Court first points out that the only version of the Treaty of Lisbon that will be, if it enters into force, binding in the Czech Republic, will be published, in accordance with Article 10, in conjunction with Article 52(2) of the Constitution and Act no. 309/1999 Coll., on the Collection of Laws and the Collection of International Treaties, in the Collection of International Treaties, not in the Official Journal of the EU. This is supported by the fact that both the Treaty of Lisbon as well as the consolidated versions of the TEU and of the TFEU were published in Series C of the Official Journal of the EU, where only information and announcements are published, not binding legislation (cf. Bobek, M.: K absenci řádného vyhlášení komunitární legislativy v jazycích nových členských států [Regarding the Absence of Publication of Community Legislation in the Languages of New Member States], Soudní rozhledy [Judicial Perspectives], yr. 2006, no. 12, pp. 449–462, p. 450).

127. Any changes made in the version of the Treaty of Lisbon published in the Official Journal of the EU cannot directly (without anything further) affect the version published in the Collection of International Treaties. If, at a time when the Treaty of Lisbon is in force, linguistic changes are actually made in it, they would have to be published in the Collection of International Treaties in order to be effective in the Czech Republic. Moreover, such changes are implemented by a protocol, to which all signatory states must consent, and they are governed by a procedure presupposed by Article 79 of the Vienna Convention. This has happened

several times in the case of linguistic changes made in the text of the Accession Treaty – cf. e.g., notification of the Ministry of Foreign Affairs no. 64/2009 Coll. of International Treaties. The Constitutional Court would have to review the question of the chronological effects of any such changes in relation to the nature of the changes made and in view of the nature of the addressees of the norms that would be affected by the changes to the relevant article of the treaty.

128. Likewise, conflict with the prohibition of retroactivity (if one can even speak of such conflict with an international treaty that is not even binding yet) if linguistic changes are made during the course of approving treaties. In such a case too the signatory states are informed about the proposed changes, and must consent to them. It is the government's obligation to inform Parliament about these changes. The petitioners nowhere state that any changes actually occurred about which Parliament was not be informed.

129. Thus, the Treaty of Lisbon as a whole is not in conflict with the prohibition of retroactivity.

B.
Formal Requirements on Treaty Articles

130. According to the petitioners, the Treaty of Lisbon as a whole is in conflict with Article 1(1) of the Constitution also because "it does not comply with the requirements of adequate comprehensibility and clarity of a legal act" The petitioners especially object to the absence of an "authentic consolidated version" of the TEU and of the TFEU during the process of approval of the Treaty of Lisbon by Parliament, and also point to the extent of changes that the treaty introduces (further to this alleged ground see point 6 of this judgment). The petitioners also raise objections concerning conflict with the requirements of "adequate comprehensibility and lucidity of legislation", based on Article 1(1) of the Constitution, regarding Article 7, 8, Article 17(1) and 3 and Article 21(2)(h) of the TEU as well as Article 78(3) of the TFEU (further to these alleged grounds see points 11, 12, 14, 16, and 19 of this judgment).

131. In points 14 to 26 of their petition the petitioners present their understanding of the principles of a state governed by the rule of law, contained in Article 1(1) of the Constitution, from which they derive the lack of conformity of the Treaty of Lisbon as a whole, as well as the abovementioned provisions, with Article 1(1) of the Constitution. They also refer to judgment file no. Pl. ÚS 77/06 dated 15 February 2007 (N 30/44 SbNU 349; 37/2007 Coll.), in which the Constitutional Court annulled certain provisions of Act no. 443/2006 Coll., because they were impermissible "legislative riders", i.e. amending proposals that are not related to the proposed legislation (it was the lack of related content of the amending proposal and the proposed legislation that was the ground for derogation of the contested provisions of Act no. 443/2006 Coll.).

132. However, one cannot derive from that judgment a requirement that Parliament have an "authentic consolidated version" at its disposal during the approval process of an international treaty (if one can even speak of such a thing in relation to a treaty that has not yet entered into force), or even a version with the

changes marked, as the petitioners ask in point 69 of their petition. In that judgment the Constitutional Court stated certain principles that the legislative process must meet from a constitutional point of view (especially in points 36 to 48). However, in that regard it did not find that they were violated in the approval process of approval of the Treaty of Lisbon by Parliament. Moreover, as is evident from Chamber of Deputies Publication no. 407 (available at http://www.psp.cz/sqw/historie.sqw?o=5&t=407), the government presented to Parliament not only the text of the Treaty of Lisbon itself, but also a consolidated version of the treaties that the Treaty of Lisbon amends. In this regard, the process of approval of the treaty by parliament could not be affected by defects that would cast doubt on the conformity of the treaty's ratification with the constitutional order of the Czech Republic. Moreover, as the government states in point 12 of its brief (cf. point 44 of this judgment), "the lack of an official consolidated version of the founding treaties reflecting the changes pursuant to the Treaty of Lisbon does not support the petitioners' conclusion, but, on the contrary, appears quite logical, because the subject matter of ratification in Member States is precise the Treaty of Lisbon, which amends the founding treaties". The Constitutional Court agrees with the government on the conclusion that "if an official consolidated version existed, it would, on the contrary, create uncertainty as to what is to be the subject matter of ratification in all the Member States, and which of the two texts has precedence in the (hypothetical) event that they are inconsistent".

133. Likewise, one cannot derive from the cited judgment a requirement for "appropriate generality and comprehensibility" of legislation, as the petitioners formulate it in relation to the contested articles of the Treaty of Lisbon. The contested articles of the TEU are components of treaties that form the very foundations of the European Union, and express its values and objectives. Thus, by the nature of the matter, they are stated at a higher level of generality – similarly to, e.g. provisions of the constitutional order of the Czech Republic, which are given a specific content in particular situations by authorities applying the law, and to which particular procedures and methods of interpretation react (cf. e.g. Holländer, P. Ústavněprávní argumentace [Constitutional Law Arguments]. Prague, Linde, 2003, pp. 24–61). In this regard we must also emphasize that the subject of review is an international treaty to which one cannot apply requirements that the Constitutional Court applies to domestic legislation in accordance with constitutional principles. On the contrary, a greater degree of generality, declaration, and indefiniteness is typical of international treaties, as the Constitutional Court already stated in point 186 of judgment Pl. ÚS 19/08. Thus, the Constitutional Court did not find that the contested articles violate provisions of the constitutional order, to which the petitioners refer.

C.
Democracy in the European Union

134. Regarding the question of a "democratic deficit" in the decision-making process in the European Union, and its conflict with the principles of a democratic state and the separation of powers, which the petitioners seek in Article 1(1) of the Constitution, and the possibility of removing it through a "special mandate" (regarding this alleged ground see point 7 of this judgment), we must first point

out that the Treaty of Lisbon in no way prevents Member states from regulating these institutions on a domestic level, which is also proved by the practices of individual Member states in questions of inspection of government conduct in the European Union by domestic legislative assemblies (cf. e.g. Kiiver, P. The National Parliaments in the European Union: A Critical View on EU Constitution-Building. Kluwer Law International, Haag, 2006). just as the Constitutional Court did not condition the constitutionality of ratifying the Treaty of Lisbon on the adoption of domestic procedures on decisions that may be adopted on the basis of Article 48(6) and (7) of the TEU (although it expressly formulated its concerns about the absence of them), the absence of control mechanisms that the Treaty of Lisbon does not limit in any way cannot be grounds from conflict of the Treaty of Lisbon itself with the constitutional order of the Czech Republic.

135. At the same time, the Constitutional Court does not overlook the tendency toward a strengthening of the position of the parliaments of Member States in decision-making processes at the European Union level, of which the Treaty of Lisbon is an example (cf. e.g., the background report to the bill adopted as Act no. 162/2009 Coll., amending Act no. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, as amended by later regulations, and Act no. 107/1999 Coll., on the Rules of Procedure of the Senate, as amended by later regulations, Chamber of Deputies Publication no. 742, available at http://www.psp.cz/sqw/historie.sqw?o=5&t=742 and its own judgment Pl. ÚS 19/08, points 153 and 173–175).

136. Finally, the Constitutional Court adds that it is precisely the essence of transfer of powers of the authorities of the Czech Republic that, rather than Parliament (or other authorities of the Czech Republic), it is the international organisation to which these powers were transferred that exercises tem. The Constitutional Court comprehensively defined the conditions fro conformity of such a transfer with the constitutional order in points 88 to 120 of judgment Pl. ÚS 19/08, where it also did not find that these conditions were violated in the case of the Treaty of Lisbon. It has also emphasised at several points in that judgment that it is prepared to intervene in the extreme case that these conditions are violated (cf. especially points 120, 139, 196 and 197 of the cited judgment).

137. The petitioners' argument regarding conflict of Article 10(1) of the TEU with Article 1(1) and Article 10a of the Constitution (see point 13 of this judgment) can also be tied to the abovementioned criticism of the Treaty of Lisbon. Insofar as that article of the TEU provides that "The functioning of the Union shall be founded on representative democracy", that does not mean that only processes at the European level should ensure fulfilment of that principle. That article is directed at processes both on the European and the domestic level, not only at the European Parliament, as stated by the German Constitutional Court in point 280 of its decision cited above, to which the petitioners refer in point 112 of their petition (although they themselves refer to point 271 of that decision).

138. The Advocate General of the European Court of Justice, Poiares Maduro, recently stated a similar opinion in his brief dated 26 March 2009 in the matter Commission v Parliament and Council, C-411/06, as yet unpublished in the European Court Reports, note no. 5:

“Democracy … has a number of forms, especially in the Community. At the level of the Community, democratic legitimacy has two main sources: it is either ensured in the Council, where it comes from the European nations through the positions taken by their governments, under the control of the national parliaments, or it is ensured by the Parliament, which is a European body with direct representation, and the Commission, which is directly answerable to the Parliament. Direct democratic representation is indisputably a relevant measure of European democracy, but it is not the only one. European democracy also involves a delicate balance between national and European dimensions of democracy, without one necessarily outweighing the other. Therefore, the Parliament does not have the same authority in the legislative process as national parliaments, and although one could defend increasing its powers, it is left up to the European nations to decide themselves, by amending treaties. Over time a balance has evolved between the powers entrusted to the Parliament and other authorities, which is expressed according to the will of the European nations through various normative procedures, and reflects the balance between national and European instruments authorising the exercise of power on the European level”.

139. In other words, the democratic process on the Union and domestic levels mutually supplement and are dependent on each other. The petitioners are mistaken when they claim that “representative democracy can exist only within states, within sovereign subjects”. The principle of representative democracy is one of the standard principles for the organisation of larger entities, both inter-state and non-state organisations. The existence of elements of representative democracy on the Union level does not rule out implementation of those same elements presupposed by the constitutional order of the Czech Republic, nor does it mean exceeding the limits of the transfer of powers established by Article 10a of the Constitution.

140. For similar reasons, one cannot see conflict of Article 14(2) of the TEU, which governs the number of members of the European Parliament, with the principle of equality set forth in Article 1 of the Charter, as the petitioners claim (regarding this alleged ground, see point 85 of this judgment). As pointed out above, the European Parliament is not the exclusive source of democratic legitimacy for decisions adopted on the level of the European Union. That is derived from a combination fo structures existing both on the domestic and on the European level, and one cannot insist on a requirement of absolute equality among voters in the individual Member States. That would exist only if decisions in the European Union were adopted with the exclusion of legitimating ties to governments, and especially to legislative assemblies in the individual Member States. Of course, as the Constitutional Court pointed out in this section of the judgment, above, the opposite is true.

D.
“Political Neturality”

141. The petitioners point to Article 3 of the TEU, which defines the objectives of the European Union, and claim that they contravene the “principle of political neutrality”, which the petitioners seek in Article 1(1) of the Constitution as well as

in Article 2(1) of the Charter (further to this alleged ground see point 8 of this judgment). Although the petitioners rely on these norms of the constitutional order as grounds for conflict of the TEU as a whole with the constitutional order, it is obvious from their arguments that they are contesting only Article 3 of the TEU, not the TEU as a whole. The petitioners present analogous arguments in relation to Article 17(3) of the TEU (which sets "European commitment" as one of the requirements for members of the Commission; further to this argument cf. point 14 of this judgment) and in relation to Article 21(2)(h) of the TEU (which sets promoting an international system based on stronger multilateral cooperation good global governance as an objective of European Union policy in the area of international relations; further to this argument see point 16 of this judgment).

142. However, the Constitutional Court does not agree with that understanding of the cited articles. The prohibition of tying the state to an ideology or religion does not mean an absence of values and ideas in the Constitution and the entire constitutional order, or norms that are applied on their basis – such as, for example, the legal order of the European Union. The Constitutional Court has already stated, at the very beginnings of its functioning, that "the Constitution is not founded on neutrality with regard to values, it is not simply a mere demarcation of institutions and processes, rather it incorporates into its text also certain governing ideas, expressing the fundamental, inviolable values of a democratic society" [judgment file no. Pl. ÚS 19/93 dated 21 December 1993 (N 1/1 SbNU 1, 5; 14/1994 Coll.)]. Thus, insofar as Article 3 of the TEU defines regulatory ideas expressed through the objectives of the European Union, the Constitutional Court sees nothing in that to conflict with the constitutional order of the Czech Republic.

143. Similarly, the Constitutional Court does not see a substantive conflict between the value orientation of the constitutional order and the values that are expressed as the objectives of the EU. In that regard it refers to its previous judgment Pl. ÚS 19/08, points 208 and 209, where the Constitutional Court declared a fundamental consistency between the values expressed in Article 2 of the TEU and the values on which the substantive core of the constitutional order of the Czech Republic is built.

144. Finally, the Constitutional Court points out the importance of the explicit formulation of the Union's objectives for defining transferred powers, especially in relation to Article 352 of the TFEU. Here too it refers to its previous judgment in the matter of the Treaty of Lisbon, point 149. As it showed in that point of its judgment, it is precisely the objectives defined in the relevant articles of the TEU and of the TFEU that serve for control of the exercise of transferred powers by EU authorities, not as an expression of a particular ideological doctrine (which cannot be seen in them anyway).

E.
Sovereignty of the Czech Republic and State Authority

145. The petitioners also believe that both the TEU as a whole, and the TFEU as a whole are in conflict with Article 1(1) of the Constitution, specifically the characteristics of the Czech Republic as a sovereign state. According to the

petitioners, the ground is that these treaties permit, as a component objective of European integration, the creation of a common European defence, but a state's own defence is a power that must always remain with a sovereign state, if it is to remain sovereign. Another reason presented by the petitioners is that these treaties do not rule out a common European federal state as an ultimate objective of European integration (further to this alleged ground see point 9 of this judgment). The petitioners also state that Article 42(2) of the TEU is in conflict with Article 1(1) as well as Article 10a of the Constitution (further to this alleged ground see point 17 of this judgment) as are Article 78(3) and Article 79(1) of the TFEU, where the petitioners claim that these articles mean that "the Czech Republic alone will not always decide on the composition and number of the refugees on its territory. The European Union is thus acquiring the power to participate in decisions that may have a comparatively significant impact on the composition of the population of the Czech Republic and on its cultural and social character" (point 148 of the petition; further to this alleged claim see points 19 and 20 of the judgment). Finally, with regard to Article 83 of the TFEU, which governs measures adopted at the Union level in the area of judicial cooperation in criminal matters, the petitioners believe that "decision making about what is a crime and what punishments are to be imposed for crimes are among those powers of state authorities that cannot be transferred pursuant to Article 10a of the Constitution" (point 11 of the supplement, referring to point 54 of the petition, or point 6 of the supplement); "It is obvious from the text [of the contested article] that the European Union is to have its own criminal law powers", which is said, "in and of itself" to contravene the cited provisions of the Constitution (point 13 of the supplement). Finally, the petitioners state that "this power does not have clear contours; the Council, together with the European Parliament, can continue to expand its criminal jurisdiction. Therefore, even the transfer of powers pursuant to [Article 83 of the TFEU] is not delimited, distinguishable, and sufficiently definite" (point 14 of the supplement; regarding this alleged ground see point 30 of this judgment).

146. First of all, the Constitutional Court refers to the conclusions stated in its previous judgment Pl. ÚS 19/08, regarding the character of the European Union, conditions for preserving the foundations of the sovereignty of the Czech Republic, and the control that Member States maintain over the development of European integration.

147. The Court points out (as it stated in point 209 of judgment Pl. ÚS 19/08) that, in a modern democratic state governed by the rule of law, the sovereignty of the state is not an aim in and of itself, that is, in isolation, but is a means for fulfilling the fundamental values on which the construction of a democratic state governed by the rule of law stands. In point 107 it then concluded (with reference to the considerations stated in points 98 to 107 of the same judgment), 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 upon in advance and is subject to review, is not a conceptual weakening of sovereignty, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The Constitutional Court also stated in point 104 of that judgment that the European Union has advanced by far the furthest in the concept of shared – "pooled" – sovereignty, and today already forms an entity sui

generis, which is difficult to classify in classical political science categories. A key manifestation of a state's sovereignty is the ability to continue to manage its sovereignty (or part of it), or to cede certain powers temporarily or permanently.

148. Insofar as the president argues with this definition of sovereignty by claiming that "the concept of shared sovereignty has been used relatively frequently recently, but only in non-rigorous debate" and, according to the president, this concept is "a contradiction in terms" because, as the president believes, "not only does our legal order not know the term 'shared sovereignty', but neither does the law of the European Union", (see point 61 of this judgment), the Constitutional Court considers it appropriate to point out the text of the memorandum attached to the Czech Republic's application to join the European Union (available at http://www.mzv.cz/jnp/cz/zahranicni_vztahy/neverejne/205891-memorandum.html):

"The Czech nation has only recently reacquired full state sovereignty. However, the government of the Czech Republic has irrevocably reached the same conclusion as that reached in the past by today's Member states, that in modern European evolution, the exchange of part of one's own state sovereignty for a share in a supra-state sovereignty and shared responsibility is unavoidable, both for the prosperity of one's own country, and for all of Europe".

149. Resolution of the government of the Czech Republic dated 13 December 1995, no. 732 regarding the Czech Republic's application to join the European Union authorised the then- prime minister (and today's president) Václav Klaus, to deliver the application and memorandum (which was an inseparable part of the application, in accordance with the government resolution) in January 1996 to the government of the Republic of Italy, as the state holding the presidency of the European Union for the first six months of 1996. Thus, there is no doubt that the concept of shared sovereignty had to be familiar, not only to the president, but also to other political representatives responsible for adopting the cited memorandum, at a time when the Czech Republic was not yet a member of the European Union. This fact was proved by the president's attorney, who quoted extensively from the memorandum at the hearing to support the claim that the Treaty of Lisbon will fundamentally change the character of the European Union.

150. The Constitutional Court also stated in point 120 of judgment Pl. ÚS 19/08 that

- it generally recognizes the functionality of the EU institutional framework to ensure review of the scope of exercise of transferred powers; 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 essential 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;

and finally, that

- the Constitutional Court of the Czech Republic too will (may) – although in view of the foregoing principles – function as an ultima ratio and may review whether any act by Union bodies exceeded the powers that the Czech Republic transferred to the European Union pursuant to Article 10a of the Constitution. However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could include, in particular, abandoning the identity of values and, as already cited, exceeding of the scope of conferred competences.

151. Over and above that, [the Court] adds the following regarding the specific arguments presented by the petitioners.

152. The petitioners' arguments on the unconstitutionality of the European Union objective of a "common European defence", according to which only "a state's own defence is a power that must always remain with a sovereign state", is quite inappropriate. The creation of inter-state systems of collective defence in no way violates the sovereignty of the states that share in these systems. The petitioners' idea that the Czech Republic would lose sovereignty as the result of a treaty obligation concerning common defence would have been fulfilled on 12 March 1999, when the Czech Republic joined the North Atlantic Treaty Organisation (NATO), founded on Article 5 of the North Atlantic Treaty (promulgated as no. 66/1999 Coll.): "The parties agree that an armed against one or more of them in Europe or North America shall be considered an attack against them all and consequently they agree that, if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence recognised by Article 51 of the Charter of the United Nations, will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area".

153. Likewise, according to the petitioners' claims, the alleged unconstitutionality of the changes implemented by the Treaty of Lisbon in the TEU and in the TFEU "as a whole", consist of the fact that these treaties "do not rule out as an ultimate objective the appearance of a common federal state", will not stand. Both parties contain a listing of common objectives only in a positive sense, which cannot, in and of itself, create conflict with the Czech constitutional order. The Constitutional Court further refers to point 132 of judgment Pl. ÚS 19/08. A this point the Constitutional Court considers it important to specify that in that point it did not review the TEU and the TFEU themselves (which it could not do – see point 108 of this judgment), but rather how the Treaty of Lisbon amends these treaties – in this regard the review performed here must also be applied to verdict I of this judgment, i.e. as applicable to review of the Treaty of Lisbon as a whole (and not the TEU and the TFEU as a whole).

154. The petitioners also contest Article 78(3) and Article 79(1) of the TFEU, concerning policies for border control, immigration and asylum. They interpret that part of the treaty as "a legal basis for future decision-making by EU institutions as to which Member State is to accept refugees, and how many and what refugees it is to accept".. The Constitutional Court, like the government's brief (points 62 to 65 of the brief) points out that this is basically transference of the existing Article

64(2) of the Treaty establishing the European Community, and that the change made by the Treaty of Lisbon consists of strengthening the European Parliament's participation in Union decisions. Moreover, Article 79(5) of the TFEU explicitly guarantees Member States the right to set the number of entries by citizens of third countries on their territory in order to look for work or to do business, so that the contested treaty, on the contrary, leaves the regulatory mechanism for the movement of persons from third countries in the competence of the Member States. Thus, the contested provisions are a special form of social regulation through temporary measures in the case of a sudden influx of asylum applicants. The Constitutional Court considers the specification to be a predominantly political question, which is primarily up to the government, which negotiated the treaty, and the chambers of Parliament, which consented to its ratification. The Constitutional Court considers such an agreement to be permissible within Article 10a of the Constitution, and not in conflict with the constitutional order (in this regard, see also point 111 of this judgment).

155. Finally, regarding the petitioners' objection concerning the alleged conflict of Article 83 of the TFEU with Article 1(1) and Article 10a of the Constitution, the Constitutional Court points out the conclusions stated in its judgment file no. Pl. ÚS 66/04 dated 3 May 2006 (N 93/41 SbNU 195; 434/2006 Coll.), in points 70 and 71. According to these points, we cannot overlook the fact that the present time brings with it exceptionally high mobility among people, increasing international cooperation, and growing trust among the democratic states of the European Union. The citizens of the Member States have, in addition to the civil rights of their states, the rights of citizens of the Union, which guarantee them, among other things, freedom of movement within the entire Union. Investigation and suppression of crime within the European area cannot be conducted successfully within a single Member State, but requires wide international cooperation. In the Constitutional Court's opinion, the present standard for protection of fundamental rights within the European Union does not give any cause to believe that this standard for protection of fundamental rights, through the implementation of principles arising from them, is of a lower quality than the protection provided in the Czech Republic. The powers transferred to the Union by Article 83 of the TFEU in the sphere of cooperation in the criminal justice system reflect this development.

156. We cannot overlook the fact that Article 83(1) of the TFEU makes it possible to adopt these measures only if the criminal activity to which they pertain has a cross-border dimension, and it is also required by its nature or effects of the criminal activity, or the need to suppress it jointly. The following subparagraph explicitly lists the criminal activity that is of that nature (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 organised crime). Thus, this is not a blanket norm that would give the Union general powers in the area of criminal law, but a power whose exercise at the European Union level is, in accordance with the conclusions stated in the previous point of this judgment, in the interest of the Czech Republic and its citizens.

157. Similarly, measures adopted on the basis of the second paragraph of Article 83 of the TFEU must be "essential to ensure the effective implementation of a Union policy in an area which has been subject to harmonisation measures" and are thus limited to areas where, given the nature of the matter, individual states must act jointly in order to ensure effective implementation of the jointly adopted rules.

158. This provision must also be understood in the context of the case law of the Court of Justice of the European Communities. In its decision dated 23 October 2007, Commission v. Council ("Pollution of Seas"), C-440/05, European Court Reports p. I-9097 [in which it made more precise the conclusions formulated by the Court of Justice in the decision dated 13 September 2005, Commission v Council, ("Environmental Criminal Law"), C-176/03, European Court Reports p. I-7879] it stated that "while it is true that, as a general rule, neither criminal law nor the rules of criminal procedure fall within the Community's competence, this does not, however, prevent the Community legislature, when the application of effective, proportionate and dissuasive criminal penalties by the competent national authorities is an essential measure for combating serious environmental offences, from taking measures which relate to the criminal law of the Member States which it considers necessary in order to ensure that the rules which it lays down on environmental protection are fully effective". Article 83(2) of the TFEU modifies this case law to the effect that it provides a special legal basis (lex specialis) for adopting measures in criminal law and narrows the application of the cited decision. If the Treaty of Lisbon enters into force, it will no longer be possible to use this case law as a basis for applying the provisions of treaties that permit adopting harmonisation measures in order to adopt measures in the field of criminal law [this conclusion was reached by, e.g. report of the House of Lords, European Union Committee, 10th Report of Session 2007–08, "The Treaty of Lisbon: an impact assessment", in point 6.188]. This is important especially with regard to the safeguard provided in Article 83(3) of the TFEU. Thus, in this regard this provision of the TFEU contested by the petitioners is more a step toward stronger protection of the constitutional principles on which it relies than toward violation of them.

159. These objections can also be connected to the petitioners' claim that Article 7 of the TEU is in conflict with Article 2(3) of the Constitution (regarding this alleged ground see points 11 and 81 of this judgment). The petitioners state that "If rights of Member States are suspended, with probable consequences for private persons as well, then Czech state authority will not in fact serve its citizens, because it will be temporarily deprived of certain rights without which the citizens cannot be served" (point 105 of the petition). In this regard, the Constitutional Court points to the conclusions that it stated in judgment Pl. ÚS 19/08. In point 209 it stated that violation of the fundamental values of the European Union, at which Article 7 of the TEU is directed, "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". Any exercise of state authority that would violate these values could hardly serve the citizens. Thus, Article 7 must be understood as a supplement to the mechanism of the protection of principles on which the constitutionality of the Czech Republic stands, and not as a means for violating them.

160. Likewise, in this part of judgment we can respond to the petitioners' claims that Article 9 of the TEU is in conflict with Article 1(1) of the Constitution (regarding this alleged ground see point 83 of this judgment), because it is primarily related to the claimed conflict between the institution of citizenship of the European Union and the principle of sovereignty contained in Article 1(1) of the Constitution. Here the Constitutional Court points out that the institution of citizenship of the European Union was already introduced by the Treaty of Maastricht in 1993 (when that treaty entered into force), and not just now by the Treaty of Lisbon, and citizenship of the European Union adds only a minimum or new normative content to the rights of citizens of Member States that the European Court of Justice derived from the existing provisions of Community law (cf. esp. Weiler, J. H. H. The Constitution of Europe. "Do the new clothes have an emperor?" and other essays on European integration. Cambridge, Cambridge University Press, 1999, pp. 324–357). Citizenship of the European Union in no way denies membership of a Member State, but on the contrary enriches it with a European dimension (cf. judgment Pl. ÚS 66/04, point 70). Moreover, the Constitutional Court already stated in its judgment Pl. ÚS 66/04, point 71, that if Czech citizens enjoy the advantages connected with citizenship of the European Union, in that context it is natural that a certain degree of responsibility must be accepted with these advantages. Thus, in this regard the Constitutional Court did not find any conflict between Article 9 of the TEU and Article 1(1) of the Constitution.

161. Finally, we must reject the petitioners' claim that Article 13(1) of the TEU and Article 47 of the TEU are in conflict with Article 10a of the Constitution (regarding this alleged ground see point 84 of this judgment), with reference to the ground stated in point 147 of this judgment.

F.
The Requirement of "European Commitment for Commission Members

162. In addition to the objections raised by the petitioners against the constitutionality of Article 17(3) of the TEU, which provides that members of the Commission are to be chosen "on the ground of their general competence and European commitment from persons whose independence is beyond doubt", which the Constitutional Court considered above in sections B and D of this part of the judgment, the petitioners also claim that this provision contravenes Article 1(1) of the Charter (sic!), pursuant to which people enjoy equality of rights, and Article 21(4) of the Charter, pursuant to which citizens shall have access, on an equal basis, to any elective and other public offices. According to the petitioners, the unconstitutionality consists of setting the condition of sufficient European commitment (regarding this alleged ground see points 14 and 86 of this judgment).

163. A determination whether the requirement of "European commitment", imposed on Commission members by Article 17(3) of the TEU, establishes unconstitutional inequality is necessarily based on a value and political evaluation of whether this a relevant distinguishing criterion kritérium (cf. e.g. Bobek, M., Boučková, P., Kühn, Z. Rovnost a diskriminace. [Equality and Discrimination] Prague, C. H. Beck, 2007, pp. 12 to 14). As the Constitutional Court recently stated

in its judgment file no. II. ÚS 1609/08 dated 30 April 2009 (available at http://nalus.usoud.cz), "In law it is […]quite normal that there is a differentiation between various subjects of rights, and therefore not every differentiation is automatically discrimination within the meaning that contemporary law assigns to that term. If […] the constitutional principle of equality cannot be understood absolutely as an abstract category, but as relative equality, then not every difference in rights and obligations of various subjects of law can be considered discrimination, but only those differences that are unjustified". Thus, the Constitutional Court must evaluate whether this request is justified.

164. In this regard, we must also begin with the objectives that the European Union sets for itself, and from the fact that, from a constitutional point of view, these objectives are fully consistent with the value orientation of the constitutional order of the Czech Republic (see section D of this part of the judgment). A member of the Commission, as an institution that is to support the general interest of the European Union pursuant to Article 17(1), must be dedicated to the interests of the Union and to its objectives – this corresponds to the formulation of this requirement contained in the various language versions of the Treaty of Lisbon, e.g. as a requirement for "európskej angažovanosti" in the Slovak version, "European commitment" in the English version, "engagement européen" in the French version "Einsatzes für Europa" in the German version, or „zaangażowanie w sprawy europejskie" in the Polish version (the government argues similarly in point 39 of its brief – cf. point 49 of this judgment). Thus, in this regard, this requirement is legitimate and fully compatible with the requirement of equality set forth by the cited provisions of the Czech constitutional order.

G.
Enhanced Cooperation

165. According to the petitioners, Article 20 of the TEU contravenes Article 1(1) and Article 10a of the Constitution because conditioning enhanced cooperation on the consent of EU authorities prevents the exercise of certain powers both on the European level and on the level of Member States, and thus contravenes the principle of government by the people and the principle of the sovereignty of the Czech Republic (further to this alleged ground, see point 15 of this judgment).

166. In the Constitutional Court's opinion, this provision of the Treaty of Lisbon does not contravene the cited provisions of the constitutional order. From an international law point of view, the possibility for European Union Member States to cooperate beyond the framework of existing integration is, of course, a fully legitimate form for the exercise of each state's sovereignty as a subject of international law. The condition of approval by the Council has the fundamental purpose of observing the rules of subsidiarity and differentiation of exclusive and shared competences so as to preserve the obligations arising from membership in the Union. Essential for evaluation of this institution, which may appear to be the basis for a "multi-speed Europe", is the presently enshrined principle of being open to all Member States (Article 20(1) of the TEU) and the condition that all members of the Council shall act unanimously on a decision to proceed with enhanced cooperation (Article 329(2 of the TFEU). The Czech Republic's consent with enshrining the institution of enhanced cooperation – without it being in any way

implemented at this phase – does not affect the principle of government by the people and the sovereignty of the Czech Republic, because it leaves pro futuro up to the will of its constitutional authorities, including both chambers of Parliament, whether and in what form the Czech Republic will join in enhanced cooperation, or whether, on the contrary, it will use its rights and prevent that form of different tempos for integration processes within the Union. When the petitioners claim that Article 20 of the TEU "can be said to circumvent and completely invalidate the meaning of one of the fundamental principles governing relations between states – namely that whatever is not forbidden in international law, or on the basis thereof – for instance in European law – remains permissible" and that as a result "the principle would apply that states may only cooperate when the EU authorises them to do so" they completely overlook the fact that it is precisely without a special regulation of international integration processes in the Union that they could completely avoid control by the sovereign Member States.

H.
Withdrawal of a Member State from the European Union

167. Likewise, we can refute the petitioners' doubts concerning Article 50(2) to 4 of the TEU, which regulate the process of a Member State withdrawing from the European Union. The petitioners claim that this regulation "conflicts with the principle of sovereignty" enshrined in Article 1(1) of the Constitution, and also contravenes "the principle of retroactivity and legitimate expectations and consequently the fundamental principle of the rule of law that all rules must be known in advance" (point 143 of the petition). According to the petitioners the indeterminacy of the future arrangements for withdrawal from the EU also contravenes Article 10a of the Constitution, because, according to the petitioners, "The transfer of powers must be defined, and the manner in which the powers transferred are to be withdrawn and returned to the national level must also be defined. Nor may the withdrawal of powers be made subject, de facto, to the requirement of approval by the EU" (point 144 of the petition; further to this alleged ground see point 18 of this judgment).

168. However, sovereignty does not mean arbitrariness, or an opportunity to freely violate obligations from international treaties, such as the treaties on the basis of which the Czech Republic is a member of the European Union. Based on these treaties, the Czech Republic has not only rights, but also obligations vis-à-vis the other Member states. It would contravene the principle of pacta sunt servanda, codified in Article 26 of the Vienna Convention, if the Czech Republic could at any time begin to ignore these obligations, claiming that it is again assuming its powers. If it were to withdraw from the European Union, even in the present state of the law, the Czech Republic would have to observe the requirements imposed by international law on withdrawal from the treaty with other Member States. This follows from Article 1(2) of the Constitution, pursuant to which "The Czech Republic shall observe its obligations resulting from international law". Thus, it is fully in accordance with this constitutional law requirement that the Czech Republic would have to, if withdrawing from the European Union, observe the pre-determined procedures (regarding limitations arising from international law and the law of the European Union, cf. Zbíral, R. Vystoupení z Evropské unie ve světle evropského a mezinárodního práva. [Withdrawal from the European Union in View

of European and International Law] Právník [The Lawyer], year 2008, no. 7, pp. 752–773).

169. Moreover, paragraph 3 of the contested provision provides that "The Treaties shall cease to apply to the State in question from the date of entry into force of the withdrawal agreement or, failing that, two years after the notification [the Member State's intention to withdraw from the European Union], unless the European Council, in agreement with the Member State concerned, unanimously decides to extend this period". Thus, it is not true that "withdrawal of powers" (as the petitioners describe withdrawal from the European Union) is necessarily subject to consent by the EU. On the contrary, this provision expresses a balance between the requirement of the sovereignty of the Czech Republic and the requirement to observe obligations that the Czech Republic assumed together with the other Member States. The Constitutional Court of the Republic of Latvia evaluated the contested provision similarly in its decision dated 7 April 2009 no. 2008-35-01 (English translation of the decision available at http://www.satv.tiesa.gov.lv/upload/judg_2008_35.htm), in part 16.2.

170. The alleged conflict of that provision with Article 2(3) of the Constitution (regarding this alleged ground, see point 89 of this judgment) then follows from a misunderstanding of the process of withdrawal of a member [State] from the European Union. The petitioners claim that "if, pursuant to (4) [Article 50 of the TEU] the member of the European Council or the Council who represents the withdrawing state may not take part in negotiations concerning his state, then during the time of that process 'the Treaty of Lisbon' limits the potential of the withdrawing state to serve its citizens, and at the same time, their rights in this regard. Thus it contravenes [Article 2(3) of the Constitution], pursuant to which: 'State authority is to serve all citizens'". The petitioners completely overlook the fact that within these negotiations the determination of the content of an agreement on the withdrawal of a member State takes place with the European Council (or the Council) as one of the parties, and the withdrawing Member State is to be the other party. Thus, it is quite natural that it will not take part in the decisions made by the other party to the agreement that is to be concluded with it. Moreover, the withdrawing Member State always has the option of not entering into the agreement and proceeding in accordance with Article 50(3) of the TEU.

I.
Powers of the Court of Justice of the European Communities and Proceedings on the Conformity of International treaties with the Constitutional Order

171. The essence of the alleged inconsistency between Article 19(1) of the TEU and Article 87(2) of the Constitution, as indicated by the provision of the Constitution that the petitioners cite, is claimed to be that it makes it impossible for the Constitutional Court to form "an independent judgment concerning interpretation of an international treaty pursuant to Article 10a and Article 49, if it is to rule on its consistency with the constitutional order of the CR". In the petitioners' opinion, the legal norm containing this rule in Article 19(1) of the TEU (the petitioners have in mind the priority of Community law) sets the Court of Justice above the constitutional court of an EU Member State in interpretation of the 'Treaties" (meaning the Treaty of Lisbon). This also applies in the event of its decision-making

on conformity of the Treaty of Lisbon, as amended by any amendments or additions to the international treaty, with the constitution or the constitutional order of a Member State" (regarding this alleged ground, see point 88 of this judgment).

172. However, this claim directly contravenes the conclusion that the Constitutional Court stated in its judgment Pl. ÚS 19/08, in point 94, when it concluded that it was necessary to use the entire constitutional order as a point of reference for review of the Treaty of Lisbon, and not only its essential core. The Constitutional Court first pointed out that in judgment Pl. ÚS 66/04 it did not rule out the fundamental priority of application of community law, whose limits, as it stated, are only in the essential core of the Constitution, which is stated in judgment Pl. ÚS 50/04. At the same time, however, the Constitutional Court implicitly admitted the possibility of removing any potential inconsistency not only through priority application of the norms of Community law, but also through constitutional amendments. From the point of view of the grounds alleged by the petitioner for conflict between Article 19(1) of the TEU and Article 87(2) of the Constitution the following is a key passage: "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 conformity with the constitutional order as a whole, not only with the essential 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".

173. In other words, priority of Community law will not be applied in the event of review of treaties that are not yet in force (and thus cannot even be applied, or, on the level of application, be inconsistent with provisions of domestic law).

VI.
Proposal to Join the Proceedings with the Matter file no. Pl. ÚS 26/09

174. In point IV of the statement of claim of the petition the petitioners ask that the Constitutional Court join both petitions for joined proceedings.

175. However, in the cited proceeding the Constitutional Court already decided, by resolution file no. Pl. ÚS 26/09 dated 6 October 2009 (available at http://nalus.usoud.cz) to deny the petition in this matter and thus the proposal to join both proceedings has become irrelevant, regardless of the fact that it was impermissible from the beginning (see resolution file no. Pl. ÚS 26/09, points 14 and 27).

VII.
Decisions by Heads of State or Prime Ministers of Governments sitting in the European Council in Relation to Concerns of the Irish People Concerning the Treaty of Lisbon

176. In point IV of the statement of claim of the petition the petitioners first “ask the Court to find that the Decision of the Heads of State or Government meeting within the European Council on the concerns of the Irish people on the Treaty of Lisbon, which on 18 and 19 June 2009 added certain provisions to the Treaty of Lisbon, is an international agreement pursuant to Article 10a of the Constitution and as such requires the approval of both Chambers of Parliament obtained by a constitutional majority, without which it is not applicable in relation to the Czech Republic“. They then develop this statement of claim in points 151 to 165 of the petition.

177. Only international treaties can be subject to proceedings on the conformity of international treaties pursuant to Article 10a and Article 49 of the Constitution; § 71a of the Act on the Constitutional Court sets the conditions for opening a proceeding, concerning the subject matter, the circle of parties with active standing, and the time when they can submit a petition. The Act on the Constitutional Court, in § 71b(1), classifies failure to meet any of these procedural requirements as a special case of impermissibility of the petition to open proceedings on the conformity of international treaties with the constitutional order. The subject matter of this proceeding is the Treaty of Lisbon, not an act adopted in connection with it at the European Union level. Though not considering the nature of the decision in question, the Constitutional Court had to state that this part of the petition is impermissible pursuant to § 71b(1) of the Act on the Constitutional Court, because the petitioner does not have standing for such a petition, and the Constitutional Court does not have jurisdiction for such a decision.

VIII.
Conclusion

178. In view of the foregoing, the Constitutional Court ruled on the petition of the group of senators to review the conformity of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community with the constitutional order, in a proceeding pursuant to Article 87(2) of the Constitution, as follows:

- the request that the Constitutional Court review the conformity of the Treaty on European Union as a whole and the Treaty establishing the European Community as a whole, with the constitutional order the Constitutional Court – denied by verdict II of this judgment due to impermissibility pursuant § 71b(1), in conjunction with § 43(1)(e) of the Act on the Constitutional Court (for reasoning, see point 108 of this judgment),

- the request that the Constitutional Court review the conformity of Article 2, Article 3, Article 4 and Article 216 of the Treaty on the Functioning of the European Union with the constitutional order – denied by verdict III of this judgment due to impermissibility as a matter already decided by judgment of the Constitutional Court pursuant to § 35(1), in conjunction with § 43(1)(e) of the Act on the Constitutional Court (for reasoning, see point 101 of this judgment),

- the request that the Constitutional Court state that “the Decision of the Heads of State or Government meeting within the European Council on the concerns of the Irish people on the Treaty of Lisbon, which on 18 and 19 June 2009 added certain provisions to the Treaty of Lisbon, is an international agreement pursuant to Article 10a of the Constitution and as such requires the approval of both Chambers of Parliament obtained by a constitutional majority, without which it is not applicable in relation to the Czech Republic” – denied by verdict IV of this judgment, pursuant to § 71b(1) in conjunction with § 43(1)(e) of the Act on the Constitutional Court, due to impermissibility (for reasoning, see point 177 of this judgment),

- the request that the Constitutional Court join to this petition to open proceedings on the conformity with the constitutional order of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community the petition from a group of senators seeking annulment of selected provisions of the rules of procedure of both chambers of Parliament, conducted as file no. Pl. ÚS 26/09 – denied by verdict V of this judgment, pursuant to § 71b(1) in conjunction with § 43(1)(e) of the Act on the Constitutional Court, due to impermissibility (for reasoning, see point 175 of this judgment),

- finally, in verdict I of this judgment, pursuant to § 71e(2) of the Act on the Constitutional Court, the Constitutional Court stated that the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community

- as a whole (for reasoning, see points 125 to 129 together with points 130 to 133 of this judgment),

- its Article 7 (for reasoning, see points 130 to 133 together with point 159 of this judgment),

- Article 8 (for reasoning, see points 130 to 133 of this judgment),

- Article 9 (for reasoning, see point 160 of this judgment),

- Article 10(1) (for reasoning, see points 137 to 139 of this judgment),

- Article 13(1) (for reasoning, see point 161 of this judgment),

- Article 14(2) (for reasoning, see point 140 of this judgment),

- Article 17(1) and (3) (for reasoning, see points 130 to 133 together with points 141 to 144 and points 162 to 164 of this judgment),

- Article 19(1) (for reasoning, see points 171 to 173 of this judgment),

- Article 20 (for reasoning, see points 165 and 166 of this judgment),

- Article 21(2)(h) (for reasoning, see points 130 to 133 together with points 141 to 144 of this judgment),

- Article 42(2) (for reasoning, see points 145 to 150 together with point 152 of this judgment),

- Article 47 (for reasoning, see point 161 of this judgment)

- and Article 50(2) to (4) (for reasoning, see points 167 to 170 of this judgment)

contained in the Treaty on European Union,

- Article 3 (for reasoning, see points point 101 of this judgment),

- Article 78(3) (for reasoning, see points 130 to 133 together with points 145 to 150 and point 154 of this judgment),

- Article 79(1) (for reasoning, see points 145 to 150 together with point 154 of this judgment)

- and Article 83 (for reasoning, see points 145 to 150 together with points 155 to 158 of this judgment)

contained in the Treaty on the Functioning of the European Union

and ratification thereof are not in conflict with the constitutional order of the Czech Republic.

179. The Constitutional Court states that this judgment refutes doubts about the conformity of the Treaty of Lisbon with the Czech constitutional order and removes formal obstacles to its ratification.

Instruction: This decision cannot be appealed.

Brno, 3 November 2009

Pavel Rychetský
Chairman of the Constitutional Court