

CHAPTER V

CONSTITUTIONAL IDENTITY OF THE CZECH REPUBLIC



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Abstract

This section focuses on the relationship between national and European Union (EU) laws from the Czech Republic's perspective. Its aim is not to provide a comparative analysis of these issues but rather to present a specific Czech perspective, with particular emphasis on the concept of Czech constitutional identity. Thus, this chapter is based on the jurisprudence of the Czech Constitutional Court and the corresponding academic discourse. It begins with a discussion of the incorporation of EU Law into the Czech constitutional order, its direct effect, and the limits on the primacy of EU Law. It concludes that while there are no provisions on the effects of EU Law on the Czech constitutional order, the Constitutional Court uses the principles established by EU Law itself. Notably, even though the Constitutional Court is known to be a strong protector of Czech constitutional identity, the primacy of EU Law has never been called into question. The chapter further examines in-depth the concept of transfer of national sovereign powers to the EU and its constitutional consequences, its legal basis and the procedure for it, and, in particular, its limits, including the ultima ratio supervision of the Czech Constitutional Court. Accordingly, the first ever ultra vires ruling, passed by the Czech Constitutional Court, is explained, including its consequences for further practice. Finally, the Chapter focuses on European values, as enshrined in Article 2 of the Treaty on the European Union, and national identity, protected by Article 4 thereof. The Constitutional Court finds these fundamental values compatible in principle, even though in practice, it did not have to resolve any specific problem concerning this issue.

Keywords: constitutional identity, primacy, sovereign rights, ultra vires, Treaty of Lisbon

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1. Introduction

This chapter addresses the relationship between the European Union (EU) and national law from the perspective of the Czech Republic, focusing not only on the core issues of the incorporation of the EU law into Czech legal order but also considering the principles of EU law, in particular its fundamental values, as expressed in Article 2 of the Treaty on the European Union (TEU), and the EU's obligation to respect the Member States' national identity, as prescribed by Article 4 (2) TEU. We also discuss several related issues, including the academic discourse on these issues in the Czech Republic and the constitutional dialogue between key institutions. This chapter is founded on the jurisprudence of the Czech Constitutional Court (CCC) and the academic writings of predominantly Czech scholars. Its aim is not a cross-border comparison of the topics discussed or a generalised analysis of these issues; rather, it strives to provide a specific Czech perspective, which may be used for future comparative work.

For the same reason, it tries to work as much as possible with sources in English; fortunately, the CCC has published a translation of its most important judgements on its English website. If possible, we provide citations from academic papers in English, although we do not overlook Czech papers.

2. Incorporation of European Union legal acts into Czech law

This chapter discusses the specific provisions of Czech constitutional law, enabling EU law to take effect in the Czech legal order, including the relevant academic discussion and the doctrine of conditional transfer of powers, as developed by Czech jurisprudence and reflected in academic discourse.

2.1. The constitutional foundations of the EU Law

The Constitution of the Czech Republic (hereinafter the 'Constitution')¹ was amended in 2001 to enable the accession of the Czech Republic to the EU (this amendment is known as the 'Euro-amendment' of the Constitution).² The crucial provision thereof, which enabled the EU membership and is, therefore, known as

1 English language version of the Constitution is online available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Ustava_EN_ve_zneni_zak_c_98-2013.pdf (Accessed: 14 February 2023).

2 This amendment is incorporated in the English language of the Constitution, mentioned in the previous footnote.

the ‘*integration clause*’, is contained in Article 10a of the Constitution, which reads as follows: ‘*Certain powers of Czech Republic authorities may be transferred by treaty to an international organization or institution*’.

First, it does not contain any specific provisions regarding the incorporation of the EU legal order into the Czech Republic. This sparked intensive debate among scholars discussing what should be understood as the legal basis for the legal effects of EU law in the Czech Republic. Two approaches have emerged from this debate. First, if the integration clause of the Constitution does not prescribe the effects of EU law in the Czech legal order, other provisions of the Constitution must be identified and employed to that effect. According to others, the effects of EU law in the Czech legal order flow directly from EU law, and the Constitution does not need to add anything to this regard.

The first approach was summarised in a series of articles by professor Jiří Malenovský,³ then a judge of the CCC and since 2004 a judge of the Court of Justice of the European Union (CJEU). According to him, the Constitution must not only enable part of the state sovereignty to be conferred on the EU (the ‘*integration clause*’, contained in Article 10a of the Constitution) but also define the effects of EU law in Czech legal order (known as the ‘*incorporation clause*’).⁴ Thus, primary EU law requires specific incorporation clauses in its Constitution. Conversely, because secondary law is the product of EU institutions and primary law, not Member States, its legal effects should be governed by EU law; however, this is possible only if the effects of primary law are defined by the Constitution.⁵

According to prof. Malenovský, Article 10a of the Constitution contains only an ‘*integration clause*’, not an ‘*incorporation clause*’;⁶ therefore, another provision of the Constitution defining the effects of EU law in Czech legal order must be identified. He proposes that it must be the general reception clause on international law contained in Article 10 of the Constitution, according to which

Promulgated treaties, to the ratification of which Parliament has given its consent and by which the Czech Republic is bound, form a part of the legal order; if a treaty provides something other than that which a statute provides, the treaty shall apply.

3 Malenovský, 2003; Malenovský, 2004; Malenovský, J. 2005b.

4 Malenovsky, 2003, p. 845: ‘*The effects which the primary Community law connects with the impact of different forms of secondary Community law [...] cannot be put into effect and enforced without an intermediation of constitutional norms of the states concerned. If the Community law is to be applied directly vis-à-vis persons under the jurisdiction of individual [...] states, the respective sovereign needs to issue an original instruction in this regard. First, by vacating the space hitherto reserved only to his organs to exercise sovereign powers (by conferring these powers on the organs of EC/EU), and second, by authoritatively informing its organs and subordinates about the binding character and characteristics of the Community law in the space he has vacated for their application*’.

5 Ibid., p. 846.

6 Malenovský, 2004, p. 228.

According to the ‘general reception clause’ (Article 10 of the Constitution), international law enjoys applicational primacy over the ‘normal’ Czech law, not the Constitution. To secure the primacy of EU law over the constitutional law, prof. Malenovský argues that unlike ‘normal’ international treaties, international treaties adopted according to Article 10a of the Constitution (the ‘integration clause’) (i.e. the EU primary law) must be endorsed by a qualified majority in the Parliament (the same as the constitutional law, see Chapter 3.1); by analogy, it should, therefore, enjoy application priority even over the constitutional law. The term ‘statute’ in the ‘reception clause’ (Article 10 of the Constitution), therefore, must be interpreted as a ‘constitutional statute’; thus, the Constitution itself would provide that the EU law has primacy even over the Czech constitutional law.

The opposing interpretation, proposed by Dr Jan Kysela, currently a professor at Charles University, and Dr. Zdeněk Kühn, also currently a professor at Charles University and a judge at the Supreme Administrative Court, relies solely on the wording of Article 10a of the Constitution.⁷ According to them, national law cannot define the effects of the EU law: ‘*The effects of the Community law stem from it itself, without the constitutions of Member States having anything to add; if they do, it often only clouds the matter*’.⁸ Article 10a of the Constitution, therefore, serves a double purpose: it is an ‘integration clause’ and an ‘implicit incorporation clause’; EU law has a priority over the Czech one not because Article 10 of the Constitution must be interpreted in this way, but because Article 10a of the Constitution had vacated the legal space for the EU law, together with its effects.⁹ The effects of EU law in space thus vacated must be governed by EU law itself, as Czech law is no longer applicable.

Very intensive debate crystalised around these two interpretations in a few years after the ‘Eura-amendment’ had been adopted¹⁰ without leading to any conclusion or consensus. It was finally settled only by the CCC in its judgement ‘*Sugar Quotas III*’ in 2006,¹¹ its first judgement concerning the EU law.

This case concerns the regulation of the sugar market. Before the Czech Republic acceded to the EU, the CCC annulled two government regulations setting quotas for sugar production.¹² In the third case (*Sugar Quotas III*), the CCC was asked to annul another governmental regulation adopted after the EU accession. The CCC annulled the regulation again, though this time, not because of its unconstitutional content (as before) but because the government acted *ultra vires* while adopting it.

The CCC fully endorsed the interpretation of the Constitution suggested by Dr Kühn and Dr Kysela, according to which Article 10a of the Constitution serves both

7 Kühn, 2004; Kysela, 2002; Kühn and Kysela, 2002; Kühn and Kysela, 2004.

8 Kühn and Kysela, 2004, p. 23.

9 Ibid., p. 24.

10 Among others Bartoň, 2002; Král, 2004; Syllová, 2002.

11 CCC Pl. ÚS 50/04, 8 March 2006. The judgement is available in English at: <https://www.usoud.cz/en/decisions/2006-03-08-pl-us-50-04-sugar-quotas-iii> (Accessed: 14 February 2023).

12 CCC Pl. ÚS 45/20, 14 February 2002; CCC Pl. ÚS 39/01, 10 October 2002.

as an ‘integration clause’ and ‘incorporation clause’, and the effects of EU law within Czech legal order are governed by the EU law itself:

Article 10a of the Constitution of the Czech Republic [...] operates in both directions: it forms the normative basis for the transfer of powers and is simultaneously that provision of the Czech Constitution which opens up the national legal order to the operation of Community law, including rules relating to its effects within the legal order of the Czech Republic [...];¹³ thus, ‘[i]n contrast to international law, Community law itself determines and specifies the effects it has in the national law of the Member States.’¹⁴

This crucial interpretation has been maintained without question in further jurisprudence of the CCC and gradually accepted by the commentators, though not without question.¹⁵ Overall, Article 10a of the Constitution is the sole legal basis for the effects of EU law on the Czech Republic. Specific EU legal acts need not be incorporated into the Czech legal order; the mere fact that the Czech Republic had transferred some of its competences to the EU means that EU law is applicable in the Czech Republic, with legal effects prescribed by the EU law.

2.2. Conditional transfer of powers

Beyond clarifying the constitutional basis of EU law in the Czech Republic, the CCC in the *Sugar Quotas III* judgement and its subsequent case-law also explained other points concerning the effects of EU Law in the Czech legal order, in particular, the doctrine of limited transfer of powers and the limits to the primacy of EU Law.¹⁶

First, Article 10a of the Constitution enables the transfer of certain powers from the Czech Republic to the EU; the transfer must be limited such that it must not ‘violate the very essence of the republic as a sovereign and democratic state’ (see Chapter 5.2.1).¹⁷ The transfer of power means that the Czech organs lose their corresponding powers and competences.¹⁸ Thus, any exercise of powers by Czech organs in the area

13 CCC Pl. ÚS 50/04, 8 March 2006. To support this reasoning, the CCC added that: ‘*The Constitutional Court is of the view that [...] [a] different approach would, after all, not correspond with the fact that the very doctrine of the effects that Community acts call forth in national law has gone through and is still undergoing a dynamic development. This conception also best ensures [...] the conditionality of the transfer of certain powers.*’

14 CCC Pl. ÚS 50/04, 8 March 2006.

15 Král, 2006; Maršálková, 2006; Malenovský, 2006; Zemánek, 2006.

16 For a comprehensive summary in English, see e.g. Zemánek, 2007.

17 CCC Pl. ÚS 19/08, 26 November 2008.

18 CCC Pl. ÚS 50/04, 8 March 2006: ‘*Art. 10a [...] constitutes a provision that makes possible the transfer of certain powers of Czech state organs to [...] the European Community and its organs. In the moment when the Treaty establishing the European Community [...] became binding on the Czech Republic, a transfer was affected of those powers of national state organs which, according to EC primary law, are exercised by organs of the EC, upon those organs. In other words, at the moment of the Czech republic’s*

where the competences had been transferred to the EU was *ultra vires*; this was the reason the CCC annulled governmental regulation in the *Sugar Quotas III* case.¹⁹ Second, power transfer is conditional. Similar to the constitutional courts of other Member States, the CCC declared in *Sugar Quotas III* that:

the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.²⁰

Thus, the transfer of powers is conditional on two levels:²¹ the formal level, requiring the transfer of only limited powers, thus preserving the foundations of the state sovereignty of the Czech Republic (as defined in Article 1 (1) of the Constitution),²² and the material level, requiring that the transferred powers be exercised in a way that does not jeopardise the foundations of a material law-based state (as prescribed in Article 9 (2) of the Constitution).²³ The CCC should remain the ultimate guardian of conditional power transfer.²⁴

Third, concerning the power of the CCC, it confirmed that it had no power to assess the validity of EU law; the CCC could only assess the compatibility of Czech law with the Czech constitutional order. Meanwhile, the CCC must interpret the Czech constitutional order per EU Law.²⁵ The *European Arrest Warrant* Judgement clarifies

accession to the European Community, the transfer of these powers was accomplished such that the Czech Republic conferred these powers upon EC organs. Thus, the powers of all relevant national organs are restricted to the extent of the powers that are being exercised by EC organs, regardless of whether they are powers of norm creation or powers of individual decision-making’.

19 CCC Pl. ÚS 50/04, 8 March 2006: ‘In adopting [the Governmental regulation], the Government exceeded its authority; that is, it asserted its powers of norm-creation in a field which, on the basis of Art 10a of the Constitution of the Czech Republic, had already been transferred to EC organs’.

20 Ibid.

21 CCC Pl. ÚS 19/08, 26 November 2008.

22 Art. 1 (1) of the Constitution reads as follows: ‘The Czech Republic is a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizens’.

23 Art. 9 (2) of the Constitution reads as follows: ‘Any changes in the essential requirements for a democratic state governed by the rule of law are impermissible’.

24 CCC Pl. ÚS 50/04, 8 March 2006: ‘Should [...] these delegated powers be carried out by the EC organs in a manner that is regressive in relation to the existing conception of the essential attributes of a democratic law-based state, then such exercise of powers would be in conflict with the Czech republic’s constitutional order, which would require that these powers once again be assumed by the Czech Republic’s national organs’.

25 CCC Pl. ÚS 50/04, 8 March 2006: ‘Although the Constitutional Court’s referential framework has remained, even after 1 May 2004, the norms of the Czech Republic’s constitutional order, the Constitutional Court cannot entirely overlook the impact of Community law on the formation, application, and interpretation of national law [...]. In other words, in this field the Constitutional Court interprets constitutional law taking into account the principles arising from Community law’.

the extent of this obligation.²⁶ As will be discussed in detail below in Chapter 5.3, in this case, the CCC assessed the compatibility of the European Arrest Warrant with the Czech constitution order and in particular the Charter of the Fundamental Rights and Freedoms (hereinafter ‘Czech Charter’),²⁷ which guarantees that ‘*No citizen may be forced to leave her homeland*’.²⁸ The CCC concluded that if the constitution is interpreted per the principles of EU integration, such an interpretation must be adopted.²⁹ The CCC then found that the European Arrest Warrant was not contrary to the Czech Constitutional Order.

Finally, in the *European Arrest Warrant* Judgement, the CCC further clarified the extent of its competence. Given the supremacy of EU law, it generally has no competence to assess the EU legislation and the Czech law implementing it but for the cases where EU law leaves Member States with some discretion in implementation,³⁰ provided, as the CCC outlined already in the *Sugar Quotas III* judgement, that the EU organs exercise the power transferred to them in a manner that is compatible with the preservation of the foundations of Czech state sovereignty and in a manner that does not threaten the very essence of the substantive law-based state. Thus, ‘*unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court [...] will not review individual norms of Community law for their consistency with the Czech constitutional order*’.³¹

If indeed the CCC were to review a specific act of EU law, it would, thus, make sure that it is not beyond the powers granted to the EU – *ultra vires* – as the CCC found in the *Slovak Pensions* judgement, discussed in Chapter 6, and that it is not in conflict with the ‘material core’ of the Constitution, discussed in Chapter 5.1. Even though not without critique,³² the doctrine on the effects of EU law in Czech legal order, the limits to the principle of primacy of EU law and the role of the CCC

26 CCC Pl. ÚS 66/04, 3 May 2006. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2066-04.pdf (Accessed: 14 February 2023).

27 English language version of the Czech Charter is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/Charter_of_Fundamental_Rights_and_Freedoms.pdf (Accessed: 14 February 2023).

28 Art. 14 (4) of the Czech Charter.

29 CCC Pl. ÚS 66/04, 3 May 2006, para. 61: ‘*A constitutional principle may be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC treaty, according to which domestic legal enactments, including constitution, should be interpreted in conformity with the principles of European integration and the cooperation between the Community and Member State organs. If the Constitution [...] can be interpreted in several manners, only certain of which lead to the attainment of an obligation which the Czech Republic undertook in connection with its membership in the EU, then an interpretation must be selected [which] supports the carrying out of that obligation, and not an interpretation which precludes it*’.

30 *Ibid.*, para. 54: According to the CCC: ‘*[W]here the delegation of authority leaves the member states no room for discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm of EC law, the doctrine of primacy of Community law in principle does not permit the Constitutional Court to review such Czech norm in terms of its conformity with the constitutional order of the Czech Republic [...]*’.

31 CCC Pl. ÚS 66/04, 3 May 2006, para. 53.

32 Bříza, 2009; Hamulák, 2016, p. 67–72; Komárek, 2008.

vis-à-vis the EU law, thus, crystallised relatively early around several seminal judgments of the CCC.³³

3. Transfer of additional powers to the European Union

As discussed in the previous section, the constitutional basis for the effects of EU law in the Czech legal order is Article 10a of the Constitution, which enables certain powers of Czech institutions to be transferred to the EU, and the fact that transferring the powers itself enables those powers to be exercised by EU institutions in the Czech Republic. Thus, in general, the Constitution does not require any amendments to enable any possible future transfer of power to the EU. Nevertheless, Czech law prescribes specific domestic procedures concerning the adoption of acts, transferring powers according to Article 10a of the Constitution, as discussed below via the ordinary and simplified revision procedures of EU primary law.

3.1. Ordinary revision procedure of primary law

Concerning the ordinary revision procedure of primary law – that is, if the transfer of additional powers is executed based on an international treaty according to Article 10a of the Constitution (as was the case with the Lisbon Treaty, the review of which will be discussed in Chapters 4.1 and 5.2) – the Czech Parliament must give consent to the ratification of the treaty unless a specific constitutional act adopted for this purpose would require a referendum.³⁴ The referendum was required only for the Czech accession to the EU (and contemplated regarding the Constitutional Treaty, see Chapter 4),³⁵ not for the Lisbon Treaty.

Consent must be obtained from the majority (three-fifths) of members of the Chamber of Deputies and three-fifths of members of the Senate.³⁶ This is a significantly higher majority than in the case of ‘normal’ international treaties for the ratification of which only a simple majority is required³⁷ and comparable to the adoption of a constitutional act, which also requires a three-fifths majority.³⁸

³³ Hamulák, 2014; Šlosarčík, 2015.

³⁴ Art. 10a (2) of the Constitution.

³⁵ Constitutional act No. 515/2002 Coll. concerning the Referendum on the Czech Republic’s Accession to the European Union and Amendments to Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended by subsequent constitutional acts. English language version of the constitutional act is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/515_2002_EN.pdf (Accessed: 14 February 2023).

³⁶ Art. 39 (4) of the Constitution.

³⁷ Art. 39 (1) of the Constitution.

³⁸ Art. 39 (4) of the Constitution.

Before such a treaty is ratified, the CCC may be asked to assess its conformity with the constitutional order;³⁹ the Constitutional Court Act prescribes the details of the proceedings before the CCC.⁴⁰ The petition for review may be submitted by members of Parliament or the President.⁴¹ If petitions were filed, the treaty may not have been ratified before the judgement of the CCC.⁴²

If the CCC concludes that the international treaty conflicts with the constitutional order, it declares such a nonconformity in its judgement and lists the provisions of the constitutional order with which the treaty conflicts.⁴³ Such a judgement of the CCC is a hindrance to the treaty's ratification until the nonconformity is cured;⁴⁴ to do that, an amendment to the Constitution would be necessary. Such an amendment, however, cannot touch the 'material core' of the Constitution (see Chapter 5.1).⁴⁵ Conversely, if the CCC concludes that the international treaty does not conflict with the constitutional order, it shall declare this in its judgement,⁴⁶ enabling its ratification.

Concerning specifically the Lisbon Treaty, the CCC was asked twice to review its compatibility with Czech constitutional orders, once by the Senate as a whole and once by a group of Senators; this process and the CCC judgements, *Lisbon I*⁴⁷ and *Lisbon II*,⁴⁸ will be discussed below in Chapters 4 and 5.2.

3.2. Simplified revision procedure of the primary law

Second, in the simplified revision procedure of primary law, no additional powers may be conferred on the EU on this basis, as is clear from the treaty of

39 Art. 87 (2) of the Constitution.

40 English language version of the Constitutional Court Act is available at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Pravni_uprava/AJ/ConstitutionalCourtAct_1.pdf. (Accessed: 14 February 2023).

41 According to Section 79a (1) of the act Constitutional Court Act, the petition may be filed by either (i) one of the chambers of Parliament, as of the moment when the treaty is submitted to it for its consent to ratification, until the moment when the treaty receives that consent; (ii) a group of at least 41 Deputies or a group of at least 17 Senators, from the moment when the Parliament has given its consent to the ratification of the treaty, until the moment when the President of the Republic ratifies the treaty; (iii) a group of at least 41 Deputies or a group of at least 17 Senators, from the declaration of the results of a referendum in which consent to the ratification of a treaty is given, until the moment when the President of the Republic ratifies the treaty; or (iv) the President of the Republic, from the moment when the treaty was submitted to him for ratification.

42 Art. 87 (2) of the Constitution.

43 Section 79e (1) of the Constitutional Court Act.

44 Section 79e (3) of the Constitutional Court Act.

45 Art. 9 (2) of the Constitution.

46 Section 79e (2) of the Constitutional Court Act.

47 CCC Pl. ÚS 19/08, 26 November 2008. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2019-08.pdf (Accessed: 14 February 2023).

48 CCC Pl. ÚS 29/09, 3 November 2009. The judgement is available in English at: https://www.usoud.cz/fileadmin/user_upload/ustavni_soud_www/Decisions/pdf/Pl%20US%2029-09.pdf (Accessed: 14 February 2023).

the EU.⁴⁹ Therefore, no further discussion of this procedure is necessary for this study. For completeness, it ought to be mentioned that the Constitution does not address the simplified procedure; prior consent from the Chamber of Deputies is required.⁵⁰

When reviewing the Lisbon Treaty, the CCC also concluded that no additional competencies may be granted to the EU through Articles 48 (6) and (7) TEU.⁵¹ However, the CCC proclaimed in 2008 its *Lisbon I* judgement that ‘it is necessary to ensure review of a decision adopted on the basis of Article 48 paragraph 6, subparagraph two, by the Constitutional Court of the Czech Republic for the decision’s consistency with the constitutional order’.⁵² Such a review procedure is not in place and, surprisingly, has not yet been adopted.

4. Constitutional review of the Constitutional Treaty and the Lisbon Treaty

The Constitutional Treaty of the Czech Republic has not been formally examined. Similar to accession to the EU, a referendum was considered a form of political representation, even though it was challenging to reach an agreement on it.⁵³ The Constitutional Treaty was abandoned before an agreement on the form of ratification was reached. Conversely, the review of the Lisbon Treaty was extensive, as discussed below.

4.1. Review of the Lisbon Treaty by the Czech Constitutional Court

Concerning the Lisbon Treaty, the CCC issued two judgements, *Lisbon I* and *Lisbon II*, discussed in-depth in section 5.2. The most vocal political opponent of the Lisbon Treaty was then president Václav Klaus, who was the last head of state in the EU to sign it. Surprisingly, he did not challenge the Lisbon Treaty before the CCC, even

⁴⁹ Art. 48 (6) and (7) TEU.

⁵⁰ Section 109i and 109l of the Act No. 90/1995 Coll., on the Rules of Procedure of the Chamber of Deputies, as amended. The act on the rules of procedure of the Chamber of Deputies is available in English at: <https://pspen.psp.cz/chamber-members/legal-framework/> (Accessed: 14 February 2023).

⁵¹ CCC Pl. ÚS 19/08, 26 November 2008, paragraphgraph 160: ‘Paragraphgraph six, third subparagraphgraph of the contested Article rules out changes under this regime that would affect the competences of the Union; this expressly eliminates any doubt in relation to Article 10a of the Constitution of the Czech Republic’. Paragraphgraph 161: ‘As regards this article [i.e. Article 48 (7) TEU], conceptually we cannot even think about changes expanding union competences, because it concerns – as is obvious – only voting’.

⁵² CCC Pl. ÚS 19/08, 26 November 2008, para. 167.

⁵³ Malenovský, 2005a.

though he was empowered to do so, as described in section 3.1. The CCC was first requested to review the Lisbon Treaty by the Senate, the upper chamber of Parliament. It decided in November 2008 that certain specific provisions of the Treaty, identified in the Senate's petition, were not inconsistent with the Czech constitutional order (*Lisbon I* judgement).⁵⁴ The CCC famously concluded that:

The Treaty of Lisbon changes nothing on the fundamental conception of existing European integration [...]. In terms of our constitutional law, the Constitution [...] remains [the] fundamental law of the state [...]. The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law, which also clearly answers the contested issue of the sovereignty of [the] Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic [...], it is obvious that Article 1 par. 1 of the Constitution cannot be violated.⁵⁵

The CCC also stressed, and underlined it as its most important finding, that the values upon which the EU is founded are fully compatible with the core values of the Constitution: *'the most important finding for the Constitutional Court's review was that the Union continues to be founded on the values of respect for human dignity, freedom, democracy, a materially understood law-based state, and the observance of human rights'*.⁵⁶

Thereafter, both Chambers of Parliament consented to the ratification of the Lisbon Treaty. However, the president did not ratify it, and almost a year after the Lisbon Treaty had been cleared by the CCC, a group of Senators (i.e. not the Senate as a whole) brought another petition to the CCC, asking it to review the Lisbon Treaty 'as a whole'. As the process of ratification had become highly politicised, the senators stated in their petition that:

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 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.⁵⁷

The CCC, however, dismissed this petition as well in November 2009, summarising that *'this judgement refutes doubts about the conformity of the Treaty of Lisbon*

⁵⁴ This judgement is discussed in detail e.g. in Bříza, 2009a or Zemánek, 2009.

⁵⁵ CCC Pl. ÚS 19/08, 26 November 2008, para. 216.

⁵⁶ CCC Pl. ÚS 19/08, 26 November 2008, para. 217.

⁵⁷ CCC Pl. ÚS 29/09, 3 November 2009, para. 32.

with the Czech constitutional order and removes formal obstacles to its ratification'.⁵⁸ On the same day, the president finally ratified the treaty. The specific issues that the CCC analysed in the Lisbon Treaty and the conclusions the CCC arrived at are discussed in Section 5.2.

4.2. Principles of review of the 'Article 10a Treaties'

The CCC judgement *Lisbon I* was the first case in which the CCC reviewed the compatibility of an international treaty, transferring the powers of the Czech Republic to international organisations per Article 10a of the Constitution, with the Czech constitutional order. Therefore, it is necessary to answer several general questions regarding this procedure.

First, the CCC declared in the *Lisbon I* judgement that it would review only the specific provisions of the Lisbon Treaty identified in the petition. Specifically, the CCC decided that it was not authorised to review the Lisbon Treaty 'as a whole'.⁵⁹ Interestingly, a year later, when the CCC returned to the review of the Lisbon Treaty in its *Lisbon II* judgement, it changed its initial position expressed in the *Lisbon I* judgement and decided it may review the Lisbon Treaty 'as a whole'.⁶⁰

Second, in connection with the specific provisions under review, the CCC stated that it may review the provisions that were part of the 'previous' treaties, as the 'new' ones are 'normatively new provisions';⁶¹ in this connection, it added that '[t]he absence of a prior review of the Accession Treaty by the Constitutional Court cannot, in and of itself, establish a presumption that it is constitutional'.⁶²

Third, the CCC determined its point of reference when reviewing the Lisbon Treaty. As discussed in Chapter 2, given the transfer of power from the Czech Republic to the EU, the CCC generally accepts the primacy of EU Law, even though only conditionally.⁶³ Thus, the CCC's review of the EU law is generally limited to the 'material core' of the Constitution (see Chapter 5.1). The CCC, however, decided that, regarding the preliminary review of treaties according to Article 10a of the

58 CCC Pl. ÚS 29/09, 3 November 2009, para. 179.

59 CCC Pl. ÚS 19/08, 26 November 2008, para. 74: 'Here, the Constitutional Court inclined towards the conclusion (arising by analogy from its settled case law in the area of reviewing legal regulations) that focuses only on the provisions of the international treaty that were formally contested and grounds therefore provided in the petition'.

60 CCC Pl. ÚS 29/09, 3 November 2009, para. 109.

61 CCC Pl. ÚS 19/08, 26 November 2008, para. 87: 'The Constitutional Court included in its review all the provisions of the Treaty of Lisbon whose consistency with the Constitution the petitioner contests in a reasoned manner, because [...] it considers them to be normatively new provisions, even though we can concede that they may, although only in some aspects, only replicate existing norms of European law'.

62 CCC Pl. ÚS 19/08, 26 November 2008, para. 90.

63 As the CCC repeated in Pl. ÚS 19/08, 26 November 2008, para. 113: 'This loan of partial powers is a conditional one; it can continue as long as these powers are exercised by EC bodies in a manner compatible with the preservation of the foundations of the Czech Republic's state sovereignty, and in a manner that does not jeopardise the foundation of a material law-based state'.

Constitution, such a limited review would not be sufficient.⁶⁴ For the review of the Lisbon Treaty, the CCC therefore ‘took into consideration the entire system of the Czech constitutional order, although primarily its untouchable material core, specifically those articles and parts that can apply to the provisions of the Treaty of Lisbon’.⁶⁵

5. Issues on which the Constitutional Court refused to intervene to protect Czech constitutional order

It is appropriate to distinguish between two situations in which the CCC can intervene to protect national law and its competence against EU law. The first situation concerns the *ex-ante* review of international treaties according to Article 10a of the Constitution, discussed in Chapter 4; in this case, the review is more extensive, having as its reference criterion the entire Czech constitutional order. This review was conducted regarding the Lisbon Treaty, as discussed in-depth in Section 5.2.

The second situation concerns the *ex-post* review of specific activities of EU organs, in particular the EU legislation; in this case, the review is limited to the reference criterion of the ‘material core’ of the Constitution and the intervention is generally ‘exceptional and highly unlikely’;⁶⁶ an example of such a review will be discussed below in Chapter 5.3.

In this chapter, we will, however, discuss first the concept of the ‘material core’ of the Constitution, and, thereafter, the specific cases of review the CCC has performed.

5.1. ‘Material core’ of the Constitution

The CCC addressed the issue of the ‘material core’ of the Constitution in its first judgement, reviewing the compatibility of a legal act with the Czech constitutional order in 1993 and stressing that the Constitution ‘is not established on neutrality of

64 CCC Pl. ÚS 19/08, 26 November 2008, para. 90: ‘If we accepted the opinion that consent with the ratification of an international treaty under Art. 10a [...] reduces the present review only to the area of the ‘material core’ of the Constitution, and otherwise rules it out, it would mean that the institution of the preliminary review of the constitutionality would to a large extent become meaningless’.

65 CCC Pl. ÚS 19/08, 26 November 2008, para. 93.

66 CCC Pl. ÚS 66/04, 3 May 2006, para. 53: the Constitution ‘joined the modern concept of a law-based state, which is understood not as a formal, legal state, but as a material legal state. The guiding principle is undoubtedly the principle of inherent, inalienable, non-prescriptible, and non-repealable fundamental rights and freedoms of individuals, equal in dignity and rights; a system based on the principles of democracy, the sovereignty of the people, and separapgraphption of powers, respecting the cited material concept of a law-based state, is built to protect them. These principles cannot be touched even by an amendment to the Constitution implemented formally in harmony with law, because many of them are obviously of natural law origin, and thus the state does not provide them, but may and must – as a constitutional state – only guarantee and protect them’.

values, it is not merely a definition of institutions and processes, but incorporates in its text certain regulatory ideas, expressing the basic untouchable values of a democratic society'.⁶⁷ These principles stem from Article 1 (1) of the Constitution, according to which the Czech Republic is 'a sovereign, unitary, and democratic state governed by the rule of law, founded on respect for the rights and freedoms of man and of citizen', and the 'eternity clause' contained in Article 9 (2) of the Constitution, according to which 'any changes in the essential requirements for a democratic state governed by the rule of law are impermissible'. This notion was summarised again in the *Lisbon I* judgement section.⁶⁸

The 'material core' of the Constitution has been extensively discussed in academia⁶⁹ but beyond the focus of this study. From the perspective of the relationship with EU law, these fundamental values are viewed as the Czech 'constitutional identity' by scholars,⁷⁰ even though this term is not frequently used and the term 'material core' of the Constitution is more common in Czech discourse (on the relationship with Article 4 (2) TEU, see Chapter 8). Crucially, these values are fundamentally the same as those evoked by the Article 2 TEU,⁷¹ and any conflict between 'Czech' and 'EU' values is, thus, regarded as very improbable by the academia,⁷² given the overall pro-European approach of the CCC.

5.2. Ex-ante review of the Lisbon Treaty

As indicated, the CCC performed an in-depth review of the Lisbon Treaty and ultimately found it to accord with the Czech constitutional order. This chapter discusses four fundamental issues that the CCC needed to resolve before consenting to the ratification of the Lisbon Treaty.

5.2.1. Sovereignty of the Czech Republic

The fundamental objection to the Treaty was that after its ratification, the Czech Republic would no longer continue to be a sovereign state. This issue was analysed in-depth in the *Lisbon I* judgement. The CCC began with the premise that the

67 CCC Pl. ÚS 19/93, 21 December 1993. The CCC went on to declare that: 'In the concept of a constitutional state on which the Czech Constitution is based, law and justice are not subject to the discretion of the legislature, and thus of laws, because the legislature is bound by certain fundamental values that the Constitution declares to be untouchable. For example, the Czech Constitution provides in Art. 9 para. 2 that 'any change in the essential requirements for a democratic state governed by the rule of law is impermissible'. This places the constitutive principles of a democratic society, within this constitution, above legislative competence, and thus 'ultra vires' of Parliament. A constitutional state stands and falls with these principles. Removal of one of these principles, by anyone, even by a majority or unanimous decision of Parliament, could not be interpreted otherwise than as removal of this constitutional state as such'.

68 CCC Pl. ÚS 19/08, 26 November 2008, paragraph 93.

69 E.g. Holländer, 2005; Molek, 2014.

70 E.g. Kosař and Vyhnálek, 2018, p. 861.

71 CCC Pl. ÚS 19/08, 26 November 2008, paragraph 217.

72 Kosař and Vyhnálek, 2018, p. 866.

traditional doctrine of state sovereignty⁷³ was no longer adequate for describing the current state of international affairs.⁷⁴ The CCC, therefore, endorsed the doctrine of non-binary ‘shared’ or ‘pooled’ sovereignty.⁷⁵

The European Union has advanced by far the furthest in the concept of pooled sovereignty, and today is creating an entity *sui generis*, which is difficult to classify in classical political science categories. It is more a linguistic question whether to describe the integration process as a ‘loss’ of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., ‘lending, ceding’ of part of the competence of a sovereign. It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one’s sovereignty (or part of it), or to temporarily or even permanently cede certain competences.⁷⁶

Given this nature of modern sovereignty and the consequences of its sharing, the CCC could conclude that a limited transfer of state powers to the EU is not to be understood as a weakening of Czech sovereignty but may, on the contrary, lead to its strengthening.⁷⁷ However, going into details of the transfer of powers, the CCC stressed that it must be limited and cannot influence the existence of the Czech Republic as a sovereign state, as defined in Article 1 (1) of the Constitution; these limits should ultimately be guaranteed by the CCC.⁷⁸ Even so, the transfer may

73 According to the CCC in Pl. ÚS 19/08, 26 November 2008, para. 98: ‘State sovereignty is traditionally understood as the highest and exclusive power on a state’s territory, and as the state’s independence in international relations. Thus, no international law norm can arise without the will of the states themselves, acting on the principle of equal sovereignty’.

74 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 105: ‘The global scene can no longer be seen only as a world of isolated states. It is generally accepted that the state and its sovereignty are undergoing change, and that no state is such a unitary, separable organization as classical theories assumed in the past’. Therefore, according to para. 209: ‘In a modern, democratic, law-based state, state sovereignty is not an aim in and of itself, in isolation, but is a means to fulfilling the above-mentioned fundamental values, on which the construction of a constitutional, law-based state stand’.

75 In more detail, see e.g. Belling, 2016 or Hamulák, 2015.

76 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 104.

77 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 108: ‘We can conclude from these deliberations that the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign’s participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU’s integration process is not taking place in a radical manner that would generally mean the ‘loss’ of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world’.

78 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 109: ‘Art. 10a clearly cannot be used for an unlimited transfer of sovereignty; in other words, based on Art. 10a one cannot transfer – as already stated – powers, the transfer of which would affect Art. 1 par. 1 of the Constitution to the effect that it would no longer be possible to speak of the Czech Republic as a sovereign state. Thus, the concept of sovereignty, interpreted in the context of Art. 1 par. 1 of the Constitution and Art. 10a of the Constitution, clearly shows that there are certain limits to the transfer of sovereignty, and failure to observe them would affect both Art. 1 par. 1 and Art. 10a of the Constitution. These limits should be left primarily to the legislature to specify, because this is a priori a political question, which provides the legislature wide

include ‘*entire comprehensive areas of legal regulation*’.⁷⁹ Similarly, the CCC did not address any issues with the existence and definition of the exclusive⁸⁰ and shared⁸¹ competencies of the EU. Summarising the transfer of powers, the CCC stressed the importance of the fact that the EU does not have the ‘*legislative competence – competence, i.e. the authorization to amend fundamental regulations, [which] remains with the member states*’.⁸²

Similarly, the CCC refused the claims against the existence of the ‘flexibility clause’ (Article 308 TFEU) which, according to the petitioners, works as a ‘blanket norm’, enabling the EU to adopt measures beyond its competences (i.e. beyond the powers transferred to the EU under Article 10a of the Constitution). The CCC repeated that ‘*even after the Treaty of Lisbon enters into force, the EU will not acquire the power to create its own new competences, the member states will still be ‘masters of the treaties’*’.⁸³ For the same reasons, the CCC also dismissed claims against the simplified revision procedure of the primary law (Articles 48 (6) and (7) of the TEU).⁸⁴ The same applies to the ability of the EU to conclude international treaties and bind Member States (Article 216 TFEU).⁸⁵

Beyond these general considerations of sovereignty, the CCC ruled out the possibility that sovereignty would be weakened by the common European defence⁸⁶ or provisions on border control, immigration, and asylum policies;⁸⁷ the same applies to provisions on judicial cooperation in criminal affairs.⁸⁸ Czech sovereignty can also not be infringed upon by EU provisions on enhanced cooperation.⁸⁹

The CCC also refused to accept that the principle of sovereignty might be infringed by the possibility of suspending member-state rights according to Article 7 of the TEU. The CCC stated in *Lisbon I* that the violation of values that Article 7 TEU is meant to protect ‘*would simultaneously mean violation of the values on which the materially understood constitutionality of the Czech Republic rests*’.⁹⁰ The CCC, thus, concluded that ‘*Article 7 [TEU] must be understood as a supplement to the mechanism of the protection of principles on which the constitutionality of the Czech Republic stands,*

discretion; interference by the Constitutional Court should come into consideration as ultima ratio, i.e., in a situation where the scope of discretion was clearly exceeded, and Art. 1 par. 1 of the Constitution was affected, because there was a transfer of powers beyond the scope of Art. 10a of the Constitution’.

79 CCC Pl. ÚS 19/08, 26 November 2008, para. 130.

80 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 133.

81 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 134.

82 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 132.

83 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 146.

84 CCC Pl. ÚS 19/08, 26 November 2008, para. 105, para. 164.

85 According to the CCC Pl. ÚS 19/08, 26 November 2008, para. 183: ‘*Art. 216 cannot be interpreted as a competence norm that would extent the competences of the Union*’ and thus, according to para. 184: ‘*the European union can exercise conferred competences both internally and externally*’.

86 CCC Pl. ÚS 29/09, 3 November 2009, para. 152.

87 CCC Pl. ÚS 29/09, 3 November 2009, para. 154.

88 CCC Pl. ÚS 29/09, 3 November 2009, para. 155.

89 CCC Pl. ÚS 29/09, 3 November 2009, para. 166.

90 CCC Pl. ÚS 19/08, 26 November 2008, para. 209.

and not as a means for violating them'.⁹¹ The CCC, hence, concluded that the Lisbon Treaty, 'as a whole' and its individual provisions, did not infringe on the existence of the Czech Republic as a sovereign state.

5.2.2. 'Political neutrality'

The claimants in *Lisbon II* proposed that the Lisbon Treaty infringes on the principle of 'political neutrality', on which the Czech Republic is founded. However, the CCC replied that the Constitution is not founded on neutrality but is based on values (see Chapter 5.1) and that it *'does not see any conflict between the value orientation of the constitutional order and the values that are expressed as the objectives of the EU'*.⁹² For the same reason, the CCC did not challenge the requirement of 'European commitment' on the part of the Commission members (Article 17 (3) TEU).⁹³

5.2.3. The 'democratic deficit' of the European Union

The petitioners in *Lisbon II* also proposed that because of the 'democratic deficit' in the EU decision-making process, the Czech Republic would lose its position as a democratic state, as defined by Article 1 (1) of the Constitution. The CCC, however, retorted that the transfer of some decision-making power to a supranational entity is the essence of EU membership⁹⁴ and that *'the democratic process on the Union and domestic levels mutually supplement and are dependent on each other'*.⁹⁵

The CCC added in the *Lisbon II* judgement that the Lisbon Treaty *'transfers powers to bodies that have their own regularly reviewed legitimacy, arising from general elections in the individual member states'* and that it *'permits several ways of involving domestic parliaments'*,⁹⁶ referring to Article 12 TFEU.

5.2.4. The Charter of Fundamental Rights of the European Union

Finally, the petitioners also challenged the Charter of Fundamental Rights of the European Union (hereinafter the 'Charter'), both its existence and its effects on the protection of human rights in the Czech Republic. The CCC conceded that the protection of fundamental rights belongs to the 'material core' of the Constitution; it, however, did not find any conflict:

91 CCC Pl. ÚS 29/09, 3 November 2009, para. 159.

92 CCC Pl. ÚS 29/09, 3 November 2009, para. 143.

93 CCC Pl. ÚS 29/09, 3 November 2009, para. 163.

94 According to the CCC Pl. ÚS 29/09, 3 November 2009, para. 136: *'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 them'*.

95 CCC Pl. ÚS 29/09, 3 November 2009, para. 139.

96 CCC Pl. ÚS 19/08, 26 November 2008, para. 173.

The content of the catalogue of human rights expressed in the EU Charter is fully comparable with the content protected in the Czech Republic on the basis of the Czech Charter of Fundamental Rights and Freedoms, as well as the Convention for the Protection of Human Rights and Fundamental Freedoms. In that regard, we can say that the EU Charter is in harmony not only with the material core of the Constitution but also with all provisions of the constitutional order.⁹⁷

5.2.5. Partial conclusions

Thus, even though the Lisbon Treaty was reviewed twice and in much detail, the CCC concluded that it did not need to intervene to stop its ratification or require additional changes to the Constitution.

5.3. Ex-post review of EU legislation

As noted, when reviewing the EU legislation and the Czech law implementing it, the CCC generally accepts the primacy of EU law and limits itself to assessing whether the legislation does not exceed the powers transferred to the EU and is in line with the ‘material core’ of the Czech constitutional order (see Chapter 5.1).⁹⁸ Thus, the number of CCC decisions concerning the review of EU law is small relative to the overall workload of the CCC. Meanwhile, the CCC is inclined to decide in favour of EU law and interpret Czech constitutional law in line with EU law.⁹⁹

This is evident from the early *European Arrest Warrant* case,¹⁰⁰ where the CCC reviewed several provisions of the Czech Criminal Code and Criminal Procedure Code implementing the European Arrest Warrant, allowing for the extradition of Czech nationals, which seemingly contradicted the Constitution and the Czech Charter and guarantees that ‘*No citizen may be forced to leave her homeland*’.¹⁰¹ Indeed, the Czech

97 CCC Pl. ÚS 19/08, 26 November 2008, para. 197. The CCC added in para. 198: ‘*Contemporary democratic Europe [...] reached an exceptional level of protection of human rights; the EU Charter in no way adds problems to this system, but on the contrary – in the area of its competence – suitably expands it, and the individual, for whose benefit the entire structure was built, can only profit from it*’.

98 CCC Pl. ÚS 66/04, 3 May 2006, para. 53: ‘*the delegation of a part of the powers of national organs upon organs of the EU may persist only so long as these powers are exercised by organs of the EU in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner that does not threaten the very essence of the substantive law-based state. Understandably [...], unless such an exceptional and highly unlikely eventuality comes to pass, the Constitutional Court [...] will not review individual norms of Community law for their consistency with the Czech constitutional order*’; emphasis added. The same, according to para. 54, applies to Czech law implementing the EU one, ‘*where the delegation of authority leaves the member states no room for discretion as to the choice of means, that is, where the Czech enactment reflects a mandatory norm of EU law*’.

99 Kosař and Vyhnaněk, 2018, p. 866.

100 This case is discussed in detail e.g. in Komárek, 2007.

101 Art. 14 (4) of the Czech Charter.

Government intended to amend the constitutional order and refrained from doing so after failing in parliament.¹⁰²

The CCC took the view that the cited provision of the charter was not in itself.

Unambiguously resolve whether and to what extent it precludes the surrender of a citizen, for a limited time, to an EU Member State for a criminal proceeding being conducted there if, following the conclusion of such proceedings, he has the right to return to his homeland.

Instead, the CCC took the position that Czech law, including constitutional law, must be interpreted in line with EU law.¹⁰³ In this case, the CCC, therefore, declared that it must reflect *‘the contemporary reality of the EU’*,¹⁰⁴ characterised by *‘an extraordinarily high mobility of people, ever-increasing international cooperation and growing confidence among the democratic states of the EU’*¹⁰⁵ and the fact that *‘[i]f Czech citizens enjoy certain advantages, connected with the status of EU citizenship, then it is natural in this context that a certain degree of responsibility must be accepted along with these advantages’*.¹⁰⁶ The CCC also added that *‘it is necessary to take into account not only the protection of rights of the persons suspected of committing a criminal act but also the interests of the victims’*.¹⁰⁷ Based on these presumptions, the CCC determined that the European Arrest Warrant was in line with the Czech constitutional order.

6. Issues on which the Constitutional Court intervened to protect the Czech constitutional order

The CCC is believed to be one of the most activist in protecting the ‘material core’ of the Constitution.¹⁰⁸ Even so, there was only one exceptional case in which the CCC refused to accept the primacy of EU law, known as the *Slovak Pensions* case. Although essential, the facts of the case are very complicated. Thus, this study

102 CCC Pl. ÚS 66/04, 3 May 2006, para. 63.

103 CCC Pl. ÚS 66/04, 3 May 2006, para. 61: *‘A constitutional principle can be derived from Art. 1 par. 2 of the Constitution, in conjunction with the principle of cooperation laid down in Art. 10 of the EC Treaty, according to which domestic legal enactments, including the Constitution, should be interpreted in conformity with the principles of European integration and cooperation between Community and Member State organs’*.

104 CCC Pl. ÚS 66/04, 3 May 2006, para. 72.

105 CCC Pl. ÚS 66/04, 3 May 2006, para. 70.

106 CCC Pl. ÚS 66/04, 3 May 2006, para. 71.

107 CCC Pl. ÚS 66/04, 3 May 2006, para. 96.

108 Kosař and Vyhnálek, 2018, p. 861.

will only briefly outline them for this chapter; a more detailed description is also available in English.¹⁰⁹

On 31 December 1992, the former Czechoslovakia was dissolved, and, on 1 January 1993, two new countries entered into existence: the Czech Republic and the Slovak Republic. Among the many arrangements between the two new states, a specific agreement was concluded on social security and pensions,¹¹⁰ according to which participants of the hitherto Czechoslovak pension scheme were assigned to either the Czech or Slovak scheme based on the registered seat of their employer on 31 December 1992. Thus, many Czech citizens became members of the Slovak scheme, even though they had been living and working only in the Czech Republic.

Because of the differences in economic performance and different parameters of these pension schemes, the pensions of some Czech citizens, calculated within the ‘Slovak’ scheme, were in some cases lower than they would hypothetically have been if calculated within the ‘Czech’ one. Some Czech citizens perceived this as a form of discrimination and unequal treatment, as the current Czechs and Slovaks were then contributing to the same pension scheme. Moreover, as the right to ‘adequate’ pensions is guaranteed by the Constitution to Czech citizens,¹¹¹ they ultimately addressed the CCC in numerous individual but similar cases.

In 2003, the CCC issued its first judgement, declaring this practice, having an effect on smaller ‘Slovak’ pensions, unconstitutional.¹¹² Thus, Czech social security organs began to add a ‘special increment’ to the pensions of Czech citizens affected, compensating them up to the ‘Czech’ level of pensions. After the Czech Republic became a member of the EU, some institutions, including, in particular, the Supreme Administrative Court (SAC), adopted the position that the matter will be governed by EU law and the hitherto practice by granting the ‘special increment’ only to Czech citizens resident in the Czech Republic is contrary to the EU principle of non-discrimination. The SAC addressed the CJEU with a request for a preliminary ruling concerning this issue; the CJEU replied in the *Landtová* case¹¹³ that the EU law is indeed applicable in this matter and that the practice of granting ‘special increment’ only to Czech citizens residing in the territory of Czech Republic is contrary to the EU law. According to the CJEU: ‘*The documents before the Court show incontrovertibly that the [CCC] judgement discriminates, on the ground of nationality, between Czech nationals and the nationals of other Member States*’.¹¹⁴

109 Anagnostaras, 2013; Komárek, 2012; Zbírál, 2012.

110 Agreement on Social Security of 29 October 1992 between the Czech Republic and the Slovak Republic.

111 Art. 30 (1) of the Czech Charter: ‘*Citizens have the right to adequate material security in old age and during periods of work incapacity, as well as in the case of the loss of their provider*’.

112 CCC II. ÚS 405/02, 3 June 2003. The judgement is available in English at: <https://www.usoud.cz/en/decisions/2003-06-03-ii-us-405-02-pension-insurance> (Accessed: 14 February 2023).

113 CJEU, C-399/09, 22 June 2011.

114 CJEU, C-399/09, 22 June 2011, para. 43.

The Czech social security organs and ordinary courts followed this practice until another claim for a ‘special increment’ reached the CCC. In its judgement, *Slovak Pensions XVII*,¹¹⁵ the CCC, however, retained the view that EU law is not at all applicable to this matter: ‘*a period of employment with an employer with its registered office in the present-day Slovak Republic during the existence of the Czechoslovak state cannot be retroactively considered to be a period of employment abroad*’. Consequently, as EU law was not applicable, the CCC concluded that the CJEU’s judgement was *ultra vires*:

European law [...] cannot be applied to entitlements of citizens of the Czech Republic arising from social security until 31 December 1992; [...] we cannot do otherwise than state, in connection with the effects of ECJ judgement [...] C-399/09 on analogous cases, that in that case *there were excesses on the part of a European Union body, that a situation occurred in which an act by a European body exceeded the powers that the Czech Republic transferred to the European Union* under Article 10a of the Constitution; this *exceeded the scope of the transferred powers, and was ultra vires* (emphasis added).¹¹⁶

In this conflict of opinions, the CCC, thus, did not invoke the protection of the ‘material core’ of the Constitution or the Czech ‘constitutional identity’¹¹⁷ but relied on its role of the ultimate guardian of the Constitution, claiming that the EU organs exercised powers not granted to them by the Czech Republic and that the CCC, not the CJEU, is empowered to finally decide on this question of competence. The clash of competences between the CCC and the CJEU has since not been resolved;¹¹⁸ its urgency, however, evaporated in practice, as the economic situation in Czechia and Slovakia levelled and the demand for ‘special increments’ disappeared on its own. As will be discussed in Chapters 9 and 10, this judgement remains one of the most criticised CCC findings.

7. Interpretation of Article 2 TEU in the practice of national courts

The Czech courts rarely refer to the EU values contained in Article 2 of the TEU. As has already been discussed in Section 4.1, the CCC concluded in the *Lisbon I* judgement that these values were fundamentally identical to those upon which the

115 CCC Pl. ÚS 5/12, 31 January 2012. The judgement is available in English at: <https://www.usoud.cz/en/decisions/2012-01-31-pl-us-5-12-slovak-pensions> (Accessed: 14 February 2023).

116 CCC Pl. ÚS 5/12, 31 January 2012; emphasis added.

117 Zbíral, 2014.

118 Stehlík and Sehnálek and Hamulák, 2020.

Czech constitutional order was founded. Conversely, referrals to the rule of law are relatively common in Czech jurisprudence; however, courts mainly refer to Czech constitutional law rather than EU law.

8. Interpretation of Article 4 TEU in the practice of national courts

The concept of national (constitutional) identity has not developed much in case law. As has already been discussed above, it is generally understood as corresponding with the term ‘material core’ or ‘material focus’ of the Constitution,¹¹⁹ a concept developed by the CCC (see Chapter 5.1). The same applies to the interpretation of Article 4 (2) of the TFEU in Czech academia.¹²⁰ If there is an academic debate on the national or constitutional identity of Member States, it mostly focuses on CJEU case law and¹²¹ not specifically on the Czech Republic.

In the case-law of the CCC, the term ‘constitutional identity’ has only been used in a couple of cases without drawing any specific consequences out of it. For example, in the *Slovak Pensions* case, the CCC merely remarked that the CCC should have ‘familiarize[d] itself with the arguments that respected the case law of the Constitutional Court and the constitutional identity of the Czech Republic’.¹²² References to Article 4 (2) of TFEU are even rarer. For example, in the *Lex Babiš* judgement, the CCC merely stated that the EU is bound to respect the national identity of its Member States.¹²³

9. Academic position on the impact of EU law in the Czech Republic

Though matters of Czech constitutional law and its relationship with EU law are not intensively discussed outside of the Czech Republic, and academic literature is predominantly published in the Czech Republic by Czech authors, the discussion is relatively intense. Still, over the nearly 20 years of Czech EU membership, there have been no significant developments; the ‘mainstream’ position has remained the same.

¹¹⁹ Kosař and Vyhnaněk, 2018, p. 861.

¹²⁰ Tomášek et al., 2022, p. 1214: ‘In the case of Czech Republic, the core of its ‘constitutional identity’ is connected in particular with the ‘eternity clause’ and material focus of the Constitution, derived especially from Art. 1 and Art. 9 (2) of the Constitution’.

¹²¹ Burda, 2021; Hamulák and Kopal and Kerikmäe, 2017; Zbiral, 2014.

¹²² CCC Pl. ÚS 5/12, 31 January 2012.

¹²³ CCC Pl. ÚS 4/17, 11 February 2020.

Intense disputes over specific topics were common. The most famous was the dispute concerning the constitutional legal basis of the effects of EU Law in the Czech legal order, outlined in Chapter 2.1. Another important dispute followed the *Slovak Pensions* judgement of the CCC, arguably the most famous international judgement of the CCC. While most opinions criticised the CCC,¹²⁴ often rather harshly,¹²⁵ some publications supported it.¹²⁶

It may be observed with some exaggeration that the position taken by the authors follows somewhat along ‘generational’ lines, with the younger authors being more in favour of undistorted application of the EU, while the older ones retain more reserved positions towards it. However, there has been no significant change in academic position regarding the assessment of EU law in Czech legal order.

10. Constitutional dialogue in the Czech Republic

In Czech legal theory, the term ‘constitutional dialogue’ is not much used and has not been addressed in academic writings regarding the application of EU law. Several observations may, however, be made in understanding the ‘dialogue’ in the broadest possible sense.

First, the Czech courts do not reflect much in their rulings on Czech academic writing. Even though they occasionally cite some of the papers, it is mainly to support the findings of the court and elaborate on the ideas therein, lest they be discussed with them. Thus, as already observed in Chapter 2.1, when resolving the biggest-ever

124 E.g. Bobek, 2014; Král, 2012; Král, 2013; Kühn, 2016.

125 Anagnostaras, 2013, p. 973: ‘*Historic as it may be, the Slovak Pensions ruling of the Czech Constitutional Court seems to amount to a legally contestable and politically inappropriate application of the ultra vires doctrine. [...] Struggling over the protection of its prerogatives, the constitutional court may consider it then necessary to attack the source of this peril although its primary target is ultimately the rival national court*’; Komárek, J. (2012), p. 323: ‘*The Court of Justice’s authority (and the authority of EU law as a whole) was just collateral damage in judicial war that had been raging between the Czech Constitutional Court and the Czech Supreme Administrative Court for several years. [...] The Constitutional Court’s decision appears to be an unmeasured response to the continuing undermining of the authority of national highest judicial body*’; Zbíral, R. (2012), p. 1488: ‘*All in all, it is firmly hoped that the Constitutional Court’s decision will be taken for what it really was: a poorly written judgement whose objective was to cement the Constitutional Court’s position in the domestic judicial hierarchy rather than to declare all-out war on the EU. It belongs in the footnotes of EU law textbooks, as a reminder of the axiom ‘being the first is not always the best’.*’

126 In particular, Pitrová, 2013, p. 93, states that ‘*The conclusion of the Constitutional Court that the European regulation governing the coordination of pension systems between Member States cannot be applied to the very unique situation of the dissolution of the Czechoslovak Federation and its consequences is completely justified*’ and ‘*As for the question which body has the competence of making the final decision in such a ‘conflict of courts’, it is absolutely necessary to answer that when applying the principle of derived legitimacy of the EU bodies and the character of member States as the masters of the Treaties, it is the Constitutional Court*’.

dispute among Czech scholars concerning the legal basis of the effects of EU law in the Czech legal order, the CCC in the *Suga Quotas* judgement simply cited one of the articles without even referring to the other possible interpretation. In this regard, there is no ‘dialogue’ on the side of the courts. The major judgements of Czech courts are, conversely, subject to detailed scrutiny by academia.

Second, concerning the relationships between ordinary courts, they are governed by the principle of court hierarchy and no ‘dialogue’ is taking place. However, on several occasions, the lower courts, not agreeing with the higher courts, referred the case to the CJEU for a preliminary ruling, thus avoiding the interpretation of the higher court with which it was not in agreement. A famous case concerned the Regional Court in Brno, which found that the proceedings before the Czech Competition Authority infringed on the *ne bis in idem* principle, as prescribed in Czech and EU law. After being overruled by the SAC,¹²⁷ the Regional Court addressed the CJEU, seeking support for its interpretation. Only when the CJEU found that the Regional Court’s interpretation was contrary to EU¹²⁸ law did the Regional Court change its approach and decide per the previous ruling of the SAC.¹²⁹

The situation was somewhat similar to the *Slovak Pensions* case discussed in Chapter 6. When the SAC did not want to respect the interpretation of the CCC, it asked the CJEU to support it. However, this case was later criticised for the lack of constructive dialogue on all fronts. The main dispute was between the SAC and the CCC; in dozens of individual cases concerning the ‘Slovak Pensions’, the position of the courts shifted from any attempt to argue persuasively to contempt (SAC suggesting that CCC does not understand the basics of social security law) and force (CCC suggesting that the SAC judges should face disciplinary proceedings).¹³⁰ The Czech government, which represented the Czech Republic before the CJEU, fully sided with the SAC and refused to provide it with any opportunity to support its views.¹³¹ When the CCC wanted to inform the CJEU of its interpretation, its letter was returned.¹³² Ultimately, after receiving the CJEU judgement, the CCC disregarded it as *ultra vires*. Any attempt at dialogue occurred only after the *Slovak Pensions XVII* judgement was delivered. In another similar case, the SAC addressed the CJEU again with a request for a preliminary ruling, somewhat taking the position of the CCC; in fact, the SAC was reasoning for and in the place of the CCC.¹³³ However, this case was settled before the Czech institutions, and the CJEU was not allowed to resolve these issues.¹³⁴

127 SAC 2 Afs 93/2008, 10 April 2009.

128 CJEU C-17-10, 14 February 2012.

129 For more details on this interesting case, see e.g. Hamulák et al., 2014, pp. 236-241.

130 Bobek, 2014, p. 59.

131 CCC Pl. ÚS 5/12, 31 January 2012; according to the CCC: ‘the Czech government, as a party to the proceeding on the preliminary question, unprecedentedly stated in its statement that the case law of the Constitutional Court violates European Union law’.

132 CCC Pl. ÚS 5/12, 31 January 2012.

133 Bobek, 2014, p. 64.

134 Ibid.

Third, the CCC is not inclined to enter any dialogue with the CJEU, as it is not willing to submit requests for preliminary rulings. The CCC does not explicitly rule this out,¹³⁵ as it has not yet been done.

11. Conclusion

This chapter aims to introduce the relationship between national and EU law from the perspective of the Czech Republic, with an emphasis on the concept of Czech constitutional identity, considering, in particular, the jurisprudence of the CCC and the corresponding academic literature. Three issues were analysed in detail: (i) what is the constitutional basis for the effects of EU law in the Czech legal order, what are these effects and the limits the Czech constitutional law puts on them; (ii) the process of adoption and revision of EU law, with a particular emphasis on the Treaty of Lisbon; and (iii) Czech constitutional identity and fundamental values of the EU, as set for by the TEU?

Concerning the incorporation of EU law into the Czech constitutional order, there are no provisions on the effects of EU law in the Czech legal order; the Constitution only provides for the possibility of transferring certain sovereign powers to the EU. The CCC concluded that this setting is sufficient and that the principles established by EU law may be used to determine its effects. Similar to other European constitutional courts, the CCC, in principle, adopted the principle of primacy of EU Law as long as it does not infringe on the material core of the Constitution. In practice, the CCC has always adopted a pro-European interpretation of the Czech constitutional order, and the principle of primacy has never been questioned.

Meanwhile, the CCC imposed on itself the role of *ultima ratio* supervisor regarding whether the EU does not exercise competences that had not been transferred on it. In this regard, the CCC was the first constitutional court in the EU to declare that the EU has trespassed on its competences. To a great extent, this specific ruling, connected with a single historical event predating EU membership, has been heavily criticised by academia and does not seem to have influenced subsequent Czech jurisprudence in any significant way.

Second, the adoption of EU law, a referendum, was necessary for the Czech Republic to join the EU. Interestingly, the content of the EU law in force had not been scrutinised by the CCC. Conversely, all subsequent revisions of primary EU law are

135 In CCC Pl. ÚS 50/04, 8 March 2006, the CCC did not rule out the possibility that in the future, it might address the CJEU with a request for a preliminary ruling (the CCC ‘*reserves to itself in the future the possibility of adopting an unequivocal answer, in other words, to refer a matter for the adjudication to the ECJ in individual types of proceedings*’). In a more recent judgement CCC II. ÚS 3432/17, 11 September 2018, the CCC, however, ruled that it will not itself address the CJEU in case of individual constitutional complaints.

subject to ratification by the Parliament by a majority corresponding to the majority needed to adopt any international treaty. Before ratification, a treaty may be subject to CCC review. The Lisbon Treaty was reviewed twice, and the CCC found it to accord fundamentally with the Czech constitutional order.

Finally, concerning European values, as enshrined in Article 2 of the TEU and national identity, protected by Article 4, the CCC equates Czech constitutional identity with the material core of the Constitution and finds these fundamental values in principle compatible. In practice, there is no need to resolve the specific problems concerning this issue.

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