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EU Law Flexibility – A European and Czech Law Perspective

Abstract: *European law flexibility makes it possible to change the rules of conduct set out in an act of greater legal force by means of an act of lower legal force. Among various cases of such legal flexibility, Article 48(6) TEU attracts special attention because it concerns changes of the EU founding treaties in the form of a Council decision – an EU secondary law act. This case of flexibility provokes consequences not only within the EU legal system, but in national law as well, as demonstrated in this article using the case of Czech law.*

Any average Central European lawyer has it in his blood that: ‘*in terms of legal force a normative instrument may be repealed or amended only by a normative instrument of equal or higher legal force*’.¹ It follows for empowering ‘blank’ norms that ‘*as regards the derived sub-statutory regulatory instruments, a blank norm cannot be filled by any act which is contra legem, but only by an act which is secundum et intra legem (in compliance with and within the law). A conduct preter legem (outside the law) is excluded*’.² Many would readily swear that this principle of hierarchy of legal norms forms a part of the rule of law principle worldwide.

1. Flexibility in general

Nevertheless there are situations which refute this postulate, i.e. legal provisions exist which allow for a norm of greater legal force to be modified by a norm of lesser legal force. We shall call this *flexibility*.

When it comes to flexibility in general, we need to distinguish between those cases of flexibility which result in an amendment of technical or non-

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¹ Cf. A. Gerloch, *Teorie práva* (Theory of Law), 4th edition, Pilsen 2007, p. 51.

² *Ibidem*, p. 59.

substantive elements (technical flexibility³) and those amendments modifying substantive rules of conduct (normative flexibility). The borderline between these two categories however is not always clear-cut. For instance, in the institutional framework of the EU, one can wonder whether an increase in the number of Advocates-General pursuant to Article 252 TFEU constitutes a mere technical amendment or amends a substantive rule of conduct.

Given that bodies issuing acts of greater legal force in a state of law always have the authority to repeal an act of lower legal force by means of an act of greater legal force, the fact that less important matters remain governed by lower legal acts reflects a certain pragmatism and flexibility in the legal order. This approach is a functionalist one, teaching that law should serve people and not vice versa. However, it is an approach that might seem incomprehensible, or even unlawful, especially to hard-line positivists.

2. Flexibility in EU law

In connection with the Lisbon Treaty, a constitutional debate was launched on the admissibility of transitional clauses, or '*passerelle*' clauses.⁴ Their underlying effect is that they make it possible to amend primary EU law otherwise than by a full-fledged international treaty. The *passerelles* therefore allow for a certain flexibility, of which they are the most significant embodiment. The greatest difference between them and the aforementioned modifications of a technical nature lies in the fact that the *passerelles* allow for a change in the normative rules of conduct themselves, rather than merely changing a list of items to which a particular rule of conduct applies. This concerns three areas specifically: (1) flexibility within primary law, (2) flexibility provided for in primary law and implemented by secondary legal acts, (3) flexibility not provided for in primary law.⁵

³ Technical flexibility exists in Czech law too: see for instance the power of the government, under Section 28 par. c) of the State Social Assistance Act No 117/1995 Coll., to modify, by means of government regulation, the amount of so-called 'normative housing expenses' in order to account for the increase in rents and expenses similar to rents and the changes in consumer price indexes.

⁴ From the French *passerelle* – footbridge, overcrossing; cf.: Decision of the Czech Constitutional Court, PL. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., in particular par. 156–167.

⁵ Although all these examples would suggest further ingratiation of the EU, we need to bear in mind *Declaration No. 18 on two-way flexibility* – a non-binding document recalling the possibility of the inverse disintegration process i.e. limitation of EU powers. This possibility (to modify the content of an international treaty in almost all conceivable ways and directions) has existed virtually from the very beginning of the international legal system (Cf. Articles 39–41 Vienna Convention on the Law of Treaties) and is therefore from a legal standpoint quite superfluous.

- 1) Flexibility within primary law includes:
 - **Shift from unanimity to qualified majority voting in the Council** (i.e. loss of the right of veto, Article 48(7)(1) TEU);
 - **Shift from special legislative procedure to ordinary legislative procedure**, which can be decided upon by the European Council generally (Article 48(7)(2) TEU) or by the Council in special cases (Articles 81(3)(2), 153 (2), 192(2), 333(2) TFEU);
 - **Revision of primary law without convening an intergovernmental conference** (Article 48(6) TEU);
 - Power of the Council to **increase the number of Advocates-General of the Court of Justice** (Article 252 TFEU) or **the number of judges of the Civil Service Tribunal** (Annex I, Article 2 of Protocol No 3 on the Statute of the ECJ);
 - Adding **areas of judicial cooperation subject to minimal harmonisation** (Article 82 (2)(d) TFEU);
 - **Transforming Eurojust into the European Public Prosecutor's Office** (Article 86(1) TFEU) and **extension of its substantive jurisdiction** (Article 86(4) TFEU).
- 2) Flexibility provided for in primary law via secondary legal acts concerns the following cases:
 - **delegated acts**: a legislative act of the Council and the European Parliament may delegate to the Commission the power to amend its non-essential elements (Article 290(1) TFEU);
 - **subsidiary powers**: the power of the Council to adopt unanimously certain measures for which no legal basis exists, but which constitute an objective of the EU within the framework of EU policies (Article 352 TFEU).
- 3) Within the EU law, flexibility exists also outside primary legislation in the case of an **amendment of a so-called external agreement**. This involves a two-fold or two-tier flexibility. First, the legal basis (Article 217 TFEU) stipulates that an external agreement shall contain, *inter alia*, 'common action and special procedure' (which to such an extent would fall under category 2) above). The specific agreement then, under the common action or special procedure provision, lays down the amending powers of bodies established pursuant to these agreements. It is only once such powers are exercised that we actually get to the final substantive rule of conduct. For instance, according to Article 50(4) of the Stabilisation and Association Agreement between the EC and Albania⁶ the

⁶ Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the Republic of Albania, of the other part; OJ L 107, 28.4.2009, p. 166.

Stabilisation and Association Council⁷ can amend the Agreement by its own decision in so far as it shall ‘*establish the modalities to extend the above provisions to the establishment of nationals of both Parties to take up economic activities as self-employed persons*’.⁸ This example is once again a predictable modification of the original norm, moreover in a predictable timeframe. However the possibility for the Stabilisation and Association Council to ‘*extend or modify*’ the scope of ‘financial services’ pursuant to art. 49 (i) of the same Agreement is much less predictable. Here we deal with a straightforward change of a substantive rule of conduct.

From the perspective of the East European 2004 enlargement countries, the above-mentioned cases are ‘post-entry’ examples; however flexibility can be found even in earlier legislation. For instance the primordial Article 166 TEC (subsequently Art. 222 TEC) made it possible for the Council to increase, by unanimous decision, the number of Advocates-General; former Article 308 TEC (originally Article 235 TEC) granted so-called subsidiary powers to the Council (similarly, see former Article 137(2) TEC and former Article 175(2) TEC).

3. Analysis of Article 48(6) TEU

We shall begin with a brief overview of the content of the provision which forms the subject of our analysis, then proceed to reflect upon the implications it might have, including several examples taken from the Czech legal order.

3.1. Procedure pursuant to Article 48(6) TEU

Revision of primary legislation by way of simplified procedure pursuant to Article 48(6) TEU may concern exclusively amendments to the TFEU provisions (not the TEU) on internal policies (Part Three), which do not increase the competences conferred on the EU. The proposal for revision may be submitted to the European Council by the government of a Member State, the European Parliament, or the Commission. The European Council shall decide unanimously after consulting the EP and the Commission (and the European Central Bank in the case of institutional changes in the monetary area), i.e.

⁷ A joint body, whose aim is in particular to manage the relevant agreement and to settle disputes that might arise from it.

⁸ Similarly in Article 50(5)(b) of the same Agreement ‘*Seven years after the date of entry into force of this Agreement the Stabilisation and Association Council shall establish the modalities for extending rights under this paragraph to the excluded sectors*’.

without intergovernmental consultation. The final phase consists in approval by the Member States according to their constitutional rules.⁹

The first-ever measures involving the application of this simplified procedure have been taking place since December 2010 in connection with the modification of certain euro area (eurozone) rules under Article 136 TFEU.

3.2. Ban on increasing EU powers based on Article 48(6) TEU

Under Article 48(6)(3) TEU it is prohibited to apply this procedure to adopt amendments that increase the EU competences. This raises two issues: (a) the meaning of ‘competence’ and (b) the meaning of ‘increasing the competence’.

3.2.1. Power vs. competence

The Czech legal system is not the only one to distinguish rigorously, in contrast to EU law, between ‘competence’ (scope of regulated relations) and ‘power’ (tools to regulate them).¹⁰ In EU law the term competence (*compétence* in French) is often used for both concepts without distinction, although such a distinction could be made (*attributions – compétences* in French, *Befugnisse – Zuständigkeiten* in German).¹¹

3.2.2. Increasing the competences

The meaning of the term ‘increasing the competences’ remains ambiguous. However, it seems beyond any doubt that it does not include, for example, modifications of the decision-making processes of the EU institutions, changes in the attribution of competences of the EU institutions to decide on different policies, changes of policy objectives, or limiting the powers of the EU.¹²

3.3. Nature of the decisions of the European Council pursuant

⁹ Cf. e.g., Decision 2010/349/EU on the location of the seat of the Office of the Body of European Regulators for Electronic Communications (BEREC); OJ 156 L, 31.05.2010.

¹⁰ Cf. D. Hendrych, *Právnícký slovník* (Law Dictionary), 3rd edition, Praha 2009, according to which: ‘the **competence of public administration** refers to the tasks attributed by the law to a specific public administration body or to a specific person acting on behalf of public administration. In connection with public administration, competence takes on a particular meaning due to the great number and variety of tasks [...] **Power** refers to the entitlement of a competent body to exercise public administration within the scope of its competence by means of legal tools defined by the law, for instance by issuing regulations, administrative decisions etc’.

¹¹ From a Czech lawyer’s perspective, this ambiguity in the EU law has been injected into Article 10a of the Czech Constitution, which refers to the conferral of ‘powers’ (pravomoci) of national bodies to an international institution, whereas it clearly aims mainly at conferring ‘competence’ (působnost).

¹² Cf. J. Syllová, L. Pítrová, H. Paldusová, *Lisabonská smlouva, komentář* (Lisbon Treaty – Commentary), Praha 2010, p. 178.

to Article 48(6) TEU

Council decisions are adopted on the basis of primary legislation, i.e. on the basis of Article 48(6) TEU. This constitutes the main characteristic of a secondary legal act. In general terms, a decision is a typical instrument of EU secondary legislation (Article 288 TFEU). Nothing can overturn this conclusion, not even the fact that the procedural rules for its adoption under Article 48(6) TEU make it, undoubtedly, a secondary legal act with the greatest legal force conceivable.¹³ Primary EU legislation provides for multiple cases where the Council acts by means of decisions, even though the procedural requirements are less strict.¹⁴

The foregoing could imply that a Council decision adopted pursuant to Article 48(6) TEU is a secondary legal act, a position confirmed by the Czech Constitutional Court: '*the Treaties retain a higher legal force over these acts (which amend a formally de-classified norm)*'.¹⁵ Such a formalistic conclusion, however, needs to be confronted first with the fact that there are other legal acts not listed in Article 288 TFEU, and secondly with the fact that under EU law legal acts are not classified according to their title but according to their content.¹⁶ On the other hand, none of the aforementioned arguments has so far called into question the fact that these acts are placed outside the category of secondary law norms.

Furthermore, the possibility to amend the TFEU by a secondary act having its basis in a TEU provision contains an implication that the TFEU is subordinated to the TEU.¹⁷

¹³ A parallel can be drawn with so-called 'external secondary legislation'. This includes legal acts adopted by joint bodies established under so-called external agreements, a typical example of such an act being a decision by a Stabilisation and Association Council based on an association agreement, today pursuant to Article 217 TFEU. The CJEU places these acts in the hierarchy of EU legal norms between external agreements and secondary legislation. With regard to the fact that the CJEU does not put these acts, which implement a norm inferior to primary law, on par with secondary law, but rather above it, it follows *a fortiori* from the argument *a minore ad maius* that an act amending primary legislation cannot be considered as an ordinary secondary legislation norm. Cf. 87/75 *Bresciani v Amministrazione Italiana delle Finanze* [1976] ECR I-1029, C-192/89 *S.Z. Sevince v Staatssecretaris van Justitie* [1990] ECR I-03461; for a counter-view see M. Hilf, *Organisationsstruktur der Europäischen Gemeinschaften*, Berlin Heidelberg 1982, p. 182.

¹⁴ See footnote 19.

¹⁵ See par. 162 of the Decision of the Czech Constitutional Court, ref. Pl. ÚS 19/08.

¹⁶ *Ibidem*, p. 106.

¹⁷ This conclusion is corroborated, from the **factual standpoint**, by the partition of the substance between the TEU and the TFEU. The TEU contains the constitutional foundations of the EU, which are then implemented by the TFEU. Article 48(6) – the material scope of which is limited only to Part Three of the TFEU dealing with internal EU policies – was clearly formulated according to the same logic. However from the legal standpoint this conclusion poses two difficulties:

3.4. Reviewability of Council decisions by the ECJ under Article 48(6) TEU

As secondary legislative acts, Council decisions are in principle amenable to review by the Court of Justice of the European Union ('CJEU') if they affect third parties' rights (Article 263(1) TFEU).¹⁸

1) Article 1(3) TEU ('*The Union shall be founded on the present Treaty and on the Treaty on the Functioning of the European Union (hereinafter referred to as 'the Treaties'). Those two Treaties shall have the same legal value.*') and Article 1(2) of the TFEU ('*This Treaty and the Treaty on European Union constitute the Treaties on which the Union is founded. These two Treaties, which have the same legal value, shall be referred to as 'the Treaties'.*') both declare that the TEU and the TFEU have equal legal force.

2) There are too many examples which are not in line with this purported factual relation between the TEU and the TFEU (i.e. the TEU providing for constitutional foundations, and the TFEU detailing the TEU). It would seem, at first glance, as if the alleged partition relied on two principles: (1) fundamental matters are governed by the TEU, less important matters by the TFEU; and (2) matters of equal importance are dealt with in the same Treaty.

– Both the EP and the Council of the EU shall be henceforth involved in the adoption of legislative acts. The general decision-making principle ('*save where otherwise provided*') according to which the EP acts by simple majority is laid down in the TFEU (Article 231 TFEU); the analogous rule stipulating that the Council acts by qualified majority is laid down, without any obvious reason, in the TEU (Article 16(3) TEU).

– The legal personality of the EU is provided for in the TEU (Article 47 TEU); its scope in the Member States is laid down in the TFEU (Article 335 TFEU).

– The territorial application of the Treaties is provided for as follows: the basis is in Article 52 TEU, the rest in Article 355 TFEU, without there being a any relation 'fundamental to implementing' between the two provisions.

– The fundamentals of the European judicial system are set out in the TEU (Article 19), the rest in the TFEU (Article 251 and following); here the incongruity of the partition is striking.

– The definition of qualified majority in the Council: situations where the Council acts on the initiative of the Commission are provided for in the TEU (Article 16(4) TEU), while if the Council acts on the initiative of any other entity, the relevant provisions are in the TFEU (Article 238(2) TFEU); a partition which fails to be justified by any underlying logic.

– Individual resignation of a Member of the Commission upon the President's request is governed by the TEU (Article 17(6)(2)); the collective resignation of the Commission as a body after a motion of censure by the EP is governed by the TFEU (Article 234 TFEU).

– The European External Action Service, a new institution, has its legal basis in Article 27(3) of the TEU; however the first mention of its units, external tentacles or Union delegations, is to be found only in Article 221 of the TFEU.

¹⁸ Similarly, according to the Czech Constitutional Court: '*Decisions under these articles are also reviewable by the Court of Justice as regards their consistency with the treaty itself, which proves that they are not amendments to the Treaties, but, on the contrary, the Treaties retain a higher legal force over these acts (which amend a formally de-classified norm)*' (Decision of the Constitutional Court Pl. ÚS 19/08 [Lisbon I], No. 446/2008 Coll., par. 162). Nevertheless it is hardly possible not to comment on the Constitutional Court's claim that the decisions of the European Council under Article 48(6) TEU '*are not amendments to the Treaties*'; taking into account that this provisions is solely about modifying, i.e. amending the Founding Treaties.

However, the European Council decides mostly on institutional matters¹⁹ and cannot issue legislative acts (Article 15(1) TEU), which are primarily intended to govern the legal situation of individuals. Therefore, the scope for review by the CJEU of the validity of Council decisions under Article 48(6) TEU is not apparent. Council decisions amending Part Three of the TFEU may obviously produce '*effects vis-à-vis third parties*' (although indirectly), in so far as the amended provisions of the TFEU do not need to be destined exclusively to the Member States or EU bodies. The reviewability is even less obvious when it comes to the Council decisions amending Article 136 TFEU governing the euro area rules i.e. an area of interstate relations. Although monetary policy falls, according to Article 3 TFEU, under the exclusive powers of the EU, the nature and the content of the measures that might be taken in the future pursuant to an amended Article 136 TFEU ('*the Member States may implement stability mechanisms*') constitute a intergovernmental tool which does not affect the legal situation of individuals.

It can, however, be assumed that the CJEU will retain, as it has done in the past, at least the possibility to review the lawfulness of Council decisions in terms of their compliance with the conditions set out in Article 48(6) TEU, in particular if the amendments concern exclusively Part Three of the TFEU, and the competences of the EU are not increased.

Notwithstanding the above, decisions by the European Council may of course be the subject of a reference for an interpretative preliminary ruling, as is the case for the Treaties themselves under Article 267 TFEU. It may be (i) a preliminary question on the interpretation of a TFEU provision which has been amended by a Council decision, i.e. a standard primary law interpretation pursuant to Article 267(a) TFEU; or (ii) a question concerning the validity and interpretation of the act of an EU institution – the European Council being quite obviously one such institution – pursuant to Article 267(b) TFEU (see above). Therefore even if Council decisions were not amenable to review of their validity under Article 263 TFEU, there would still be a way to assess their potential invalidity by means of a preliminary question on validity.

In so far as the power to review is not explicitly conferred to the General Court, it follows from the negative definition of the powers of the Court of Justice (Article 256(1) TFEU) – and indirectly from the utmost importance of these acts – that their review falls within the powers of the Court of Justice alone.

¹⁹ The European Council acts by means of a decision relatively often – in cases governed by Articles: 14(2)(1), 17(1), 15(5), 7(2), 17(5)(1), 18(1), 22(1), 24(1)(1), 24(1)(2) 26(1)(1), 31(1) 31(2)(2), 31(3), 42(2), 48(7), 49 TEU; and Articles 48(2), 82(3), 236, 244, 275(2), 283, 312 and 355(6) TFEU.

3.5. Implication of Article 48(6) TEU for the Czech legal system

The following remarks shall be dedicated first to an analysis demonstrating that flexibility formed a part of the *acquis communautaire* as adopted by the Czech Republic when joining the EU, and secondly to analysis of the Czech legal rules governing the adoption of Council decisions under Article 48(6) TEU.

3.5.1. Flexibility forms part of the *acquis communautaire*

It follows from the above-examined examples that normative flexibility is a phenomenon inherent to EU law. The examples dating back to the period preceding the entry of the Czech Republic to the EU furthermore illustrate that it is also a **phenomenon the Czech Republic adopted by its acceptance of and adherence to the *acquis communautaire* when joining the EU**. Article 2 of the Act of Accession of the Czech Republic stipulates that ‘*From the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on the new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act*’.²⁰ This provision implies that the acceding state is bound by the entire *acquis communautaire*, i.e. by everything that has been attained in EU law, including the principles of the functioning of the legal order, which include the possibilities foreseen for flexibility.

The question is whether such a lenient understanding of the incident legal force is binding for the Czech Republic legal order as well. It ensues from the case-law of the Czech Constitutional Court that, in terms of the application of EU law, the flexibility as provided for in the Lisbon Treaty is acceptable.²¹ It also follows that the principle of non-amendability of a higher legal act by a lower legal act (flexibility) does not violate the so-called ‘material core’ of the Czech Constitution, otherwise the Lisbon Treaty could not have been approved.²²

3.5.2. Limits of the Czech national rules in the adoption of Council decisions under Article 48(6) TEU

First, it is not possible to preclude the application, in the case of Council decisions, of the same procedure applicable for the adoption of national agree-

²⁰ Cf. Communication of the Czech Ministry of Foreign Affairs No. 44/2004 Sb.m.s. (Coll. of International Treaties).

²¹ Cf. Decision of the Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., particularly par. 156–167.

²² Cf. Decision of the Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon II), No. 387/2009 Coll., particularly par. 113, 114.

ments. Article 48(6) TEU aims at simplifying, from the EU law perspective, the procedure for adoption of amendments of primary EU legislation, mainly by doing away with the need to convene an intergovernmental conference. The intention of the provision cannot, by its nature, be to simplify the adoption procedures at the national level. The approval by the Member State ‘*in accordance with their respective constitutional requirements*’ (Article 48(6)(2) TEU) as a prerequisite for a Council decision proposal to be adopted further corroborates this view. It is therefore up to the Member State to set out the procedure that will apply when approving Council decisions.

Czech regulations – Rules of Procedure of the Chamber of Deputies²³ and the Senate²⁴ of the Czech Parliament,²⁵ which build on the Czech Constitution – may therefore legitimately require Council Decisions to be approved by the Czech government using the same procedure applicable to international agreements²⁶, even if they do not provide for any detailed rules governing such approval.

In author’s view, in order to lay down such rules the following restrictions need to be respected:

- To approve decisions of the European Council on behalf of the Czech Republic a previous imperative mandate is required;²⁷

²³ Cf. Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.), particularly par. 109i and par. 109l.

²⁴ Standing Rules of the Senate (Act No. 107/1999 Coll.) lays down in par. 119o the obligation for the government to proceed in the same manner as for the international treaties: ‘*The Senate shall consider decisions of the European Council to amend the provisions of Part Three of the Treaty on the Functioning of the European Union under Article 48 (6) of the Treaty on European Union as an international treaty*’.

²⁵ Cf., in particular, Articles 1(2), 10, 10a, 39(2),4, 49, 63(1) and 87(2) of the Constitution of the Czech Republic.

²⁶ Par. 109l of the Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.): ‘(1) *The deliberation of the proposal of the Government in the Chamber shall be governed by the provisions on the deliberation of international treaties accordingly*’. For the sake of accuracy it needs to be noted (although it does not affect the outcome) that the Rules of Procedure of the Chamber of Deputies and the Senate do not claim that the decisions of the European Council under Article 48(6) **are** new international treaties. They only stipulate that for their approval on the national level the same rules shall **apply** as for the deliberation on international treaties.

²⁷ Cf. par. 109i (b) of the Rules of Procedure of the Chamber of Deputies of the Czech Republic (Act No. 90/1995 Coll.): ‘*The consent on behalf of the Czech Republic may not be declared without a prior approval of the Chamber of Deputies; (b) in the European Council, when deciding on the amendment of the provisions of Part Three of the Treaty on the Functioning of the European Union pursuant to Article 48 paragraph (6) of the Treaty on European Union*’.

Par. 109l: ‘(1) *The approval of decisions by the European Council amending Part Three of the Treaty on the Functioning of the European Union pursuant to Section 48 paragraph (6) of the Treaty on European Union requires the consent of the Chamber*’.

- The government shall follow the same procedure as when approving international agreements;²⁸
- Council decisions are not an international agreement under Article 10a of the Czech Constitution, in so far as the Constitutional Court has ruled that the impossibility to increase competences pursuant to Article 46(6) TEU ‘*expressly eliminates any doubt in relation to Art. 10a of the Constitution of the Czech Republic...However, the key factor from a constitutional law viewpoint – as mentioned – is the fact that under the literal wording of this article no other competences can be conferred on the Union*’.²⁹

The question now is whether these restrictions also require approval or ratification by the President of the Republic. In the above mentioned decisions the Constitutional Court does not refer to the approval procedure of Council decisions; it only lays down its own prerogatives and those of the Parliament of the Czech Republic, not those of the President.

The Czech Constitution distinguishes between two procedures applicable to the approval of international treaties; the criteria being mainly whether the treaty involves a transfer of powers to an international institution (Art. 10a of the Constitution) or not (Art. 10 of the Constitution). The relation between Article 10 and Article 10a of the Constitution is one of *lex generalis* to *lex specialis*, therefore Article 10 applies to all cases where the condition of a transfer of powers to an international institution is not met.³⁰ According to the Constitutional Court of the Czech Republic, a mere amendment of the provisions of the Founding Treaties that does not increase the competence of the EU (i.e. procedure under Art. 48(6) TEU) cannot be deemed to constitute a further transfer of powers to the EU pursuant to Article 10a of the Czech Constitution. The Constitutional Court thus adopts a so-called ‘material qualification’ of international treaties (based on their content) rather than a ‘formal qualification’.³¹

Resorting to an approval procedure stricter than necessary – for instance in order to respect the purported principle of procedural consistency (i.e. that an amendment of an international treaty shall be approved according to the same procedure as the one used for the original approval of the treaty, i.e. application of ‘formal qualification’ of international treaties pursuant to Art. 10a of the Constitution) – might be challenged on the following grounds:

²⁸ Cf. footnote 26.

²⁹ Cf. Decision of the Czech Constitutional Court, ref. Pl. ÚS 19/08 (Lisbon I), No. 446/2008 Coll., par. 160.

³⁰ Cf. K. Klíma, *Komentář k Ústavě a Listině* (Commentary to the Constitution and the Bill), Pilsen 2005, p. 103.

³¹ See par. 160 of the Decision, ref. Pl. ÚS 19/08 (Lisbon I).

- Breach of the *pacta sunt servanda* principle, according to which: ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. (Art. 26 of the Vienna Convention on the Law of Treaties). An application of stricter national approval procedures than those required can hardly be considered as acting ‘in good faith’ where the parties have the opportunity to autonomously set out rules for the amendment of the treaty (Article 40 VCLT³²), as the Member States have done in Article 48(6) TEU;
- Breach of the principle of sincere or loyal cooperation (set out in Articles 4/3, 24/2 TEU³³), which is primarily a commitment of the Member States vis-à-vis the EU. It applies in situations where Member States retain certain exclusive powers. When exercising such powers – in particular when issuing measures implementing EU acts – the Member States are obliged to make every effort to ensure the *effet utile* of the European law. They are bound, *inter alia*, to take all measures to fulfil their obligations toward the EU (positive obligation), to facilitate the EU’s achievement of its tasks, in particular to guarantee the full effectiveness of EU law;³⁴ and to refrain from applying any measure susceptible to undermining the achievement of EU objectives (negative obligation);
- Breach of constitutional procedures due to the failure to meet the conditions necessary for the application of Article 10a of the Constitution.

Conclusions

It follows from aforementioned that European legal flexibility, which makes it possible to change the rules of conduct set out in an act of greater legal force (primary law) by means of an act of lower legal force (secondary law), was ‘absorbed’ by the Czech Republic when joining the EU and accepting thereby the *acquis communautaire* in its entirety.

In the case of Article 48(6) TEU, this flexibility does not prevent the national law from providing that the approval of Council decisions ‘in accor-

³² *A contrario*, Article 40(1) VCLT: ‘Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs’. VCLT 1969 is a treaty falling under Article 10 of the Czech Constitution. It was published in the Czech Republic under no. 15/1988 Coll., and thus prevails over national law.

³³ C-105/03 Maria Pupino [2005] ECR I-5285, par. 42.

³⁴ C-275/00 First [2002] ECR I-10943, par. 49; C-132/06 Commission v. Italy [2008] ECR I-05457.

dance with constitutional requirements' shall be carried out by applying the same procedure that applies to the adoption of international treaties.

At least in terms of the aforementioned narrow definition of 'non-increase of powers', it is obvious that when approving Council decisions at the national level, and with regard to the procedural economy of both Chambers, the procedure pursuant to Article 10 of the Czech Constitution should be used, which entails, *inter alia*, voting by simple majority as provided for in Article 39(2) of the Constitution.

The Czech Constitutional Court has ruled in its case-law that decisions of the European Council do not constitute a further transfer of powers from the Czech Republic to the EU. While the reference in Article 48(6) TEU to the national procedure '*in accordance with constitutional requirements*' does not explicitly exclude the use of the same procedure as the one applicable to international treaties pursuant to Article 10a of the Constitution, resort however to such a procedure could be challenged on the grounds of breaching the international legal principles of *pacta sunt servanda* and loyal cooperation.