RESUMÉ

Questions concerning the division of competences between the European Union and member states are those which cause the most controversy. The issue of the division of competences is closely linked to the very substance of every state. Therefore, sovereignity and the system of the division of competences between the EU and member states should be very closely examined.

At the beginning of my thesis I will outline the type of competences with which I will deal. I focus on the legislative power – the sole power which facilitates the creation of rules. However, it is important to bear in mind the nature of EU competence. The only entity holding sovereign original powers and international personality is a state. All international organizations, including the EU, posses only derived legal personality and the nature of its competences is limited to those specifically conferred on it by the states that establish it.

This character of EU competence might cause problems when dealing with issues not anticipated by the drafters of the Treaties, such as when a doctrine of implied powers steps in. This doctrine tells us that international organizations also hold powers not explicitly conferred on them which are necessary for attainment of stated objectives. Principles of implied powers were endorsed by the European Court of Justice (ECJ) many times, especially with relation to the external power of the EU to conclude international agreements.

The Lisbon Treaty brings new features into the discussion on the division of powers. This document, strongly influenced by its predecessor, the European Constitutional Treaty, aims for bigger transparency and tries to achieve greater legal certainty. The most apparent novelty is the categorization of competences of the EU according to their nature. This categorization was previously created by the theory and case-law of the ECJ. What is new is the codification of these categories and also the precise inclusion of EU policies into these categories. The Treaty on the functioning of the EU thus entails

categorization comprising of exclusive competences, shared competences, competences to support, co-ordinate or supplement and two specific categories, co-ordination of economic, employment and social policy and competence in the area of common security and foreign policy. All the policies of the EU are situated in these categories and those that are not belong to the shared competence category, which serves as a default position.

Very important general limitations on the usage of EU competences are principles of subsidiarity and proportionality. The principle of subsidiarity applies only to those competences that are non-exclusive. It limits execution of those competences to the extent that the EU shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states, either at the central level or at the regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Under the principle of proportionality, which applies to all EU actions, the content and form of Union action may not exceed what is necessary to achieve the objectives of the Treaties. Whilst priniciple of proportionality was endorsed by ECJ many times, its attitude towards acceptation of the principle of subsidiarity remains very reluctant.

The Protocol on the application of the principles of subsidiarity and proportionality annexed to the Treaties was significantly amended by the Lisbon Treaty. The most important alteration made was inclusion of national parliaments into the legislative process with relation to the application of the principle of subsidiarity. If a certain number of national parliaments express their disapproval of the legislative proposal, the Commission has to reassess this proposal.

There are certain aspects of the way in which the competences between the EU and member states are divided that are especially controversial. The flexibility clause is one of them. This clause enables the EU to conduct actions that are necessary for the attainment of stated objectives, although there is no express authorization for such an

action in the Treaty. Another contentious issue is the problem of the harmonization of laws that vests within EU the power to pass legislative harmonizing national laws, which have as their object, the establishment and functioning of the internal market. New provisions, so called passerelles, contained in the Lisbon Treaty, then provide for a simplified procedure that may lead to the transition from the voting system in the Council, based on unanimity, to the qualified majority voting system.

Generally speaking, the Lisbon Treaty brings about bigger clarity into the system of the division of competences. Although it doesn't give new competences to the EU, it significantly strenghtens the execution of the competences already conferred on it. For those who consider the EU to be a forum where problems of the overlapping capacities of member states are solved, it is good news. For those who prefer strong sovereign national states, the Lisbon Treaty means another step in an unwanted direction.