JUDGMENT
of 24 November 2010
Ref. No. K 32/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Marek Mazurkiewicz – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Marian Grzybowski
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Andrzej Rzepliński
Sławomira Wronkowska-Jaśkiewicz
Mirosław Wyrzykowski
Bohdan Zdziennicki – Judge Rapporteur,

Grażyna Szałygo and Krzysztof Zalecki - Recording Clerks,

having considered, at the hearing on 10 November 2010, in the presence of the applicants, the Sejm, the President of the Republic of Poland, the Minister of Foreign Affairs and the Public Prosecutor-General:

1) an application by a group of Sejm Deputies to determine the conformity of:

a) Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws - Dz. U. of 2009 No. 203, item 1569), to the extent it specifies the content of:

– Article 9 C(3); Article 15b(2), first subparagraph; Article 28(3), third subparagraph; Article 28 D(2), second sentence; as well as Article 28 E(2), second sentence; Article 28 E(3), second subparagraph, second sentence; and Article 28 E(4), second subparagraph, first sentence, of the Treaty on

* The operative part of the judgment was published on 6 December 2010 in the Journal of Laws - Dz. U. No. 229, item 1506.

European Union, to the extent they allow the Council of the European Union to enact - by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland - legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

– Article 15b(3); Article 28 A(2), first subparagraph, second and third sentences; and Article 28 A(3), first subparagraph, first sentence; as well as Article 48(6), second subparagraph, and Article 48(7) of the Treaty on European Union,

b) Article 2 of the Treaty of Lisbon, to the extent it specifies the content of:

– Article 188 C(4), first subparagraph; Article 188 K(1), first sentence; Article 188 N(8) as well as Article 251(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the extent they allow the Council to enact - by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland - legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

– Article 22, second subparagraph; Article 65(3), second and third subparagraphs, Article 69 A(2), second subparagraph, point (b); Article 69 B(1), third subparagraph; Article 69 E(4); Article 137(2), fourth subparagraph; Article 175(2), second subparagraph; Article 188 N(8), second subparagraph, second sentence; Article 190(1), second subparagraph; Article 229a; Article 245, second subparagraph; Article 266, third subparagraph, second sentence; Article 269, third subparagraph; Article 270a(2), second subparagraph; Article 280 H(1) and (2); as well as Article 308(1) of the Treaty on the Functioning of the European Union,

to Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution of the Republic of Poland as well as in conjunction with the principle of the Polish Nation’s sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution,

c) the Declaration No. 17 concerning primacy, annexed to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon, to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution,

as the alternative to the above:

d) Article 1 of the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws - Dz. U. No 62, item 388)

to the extent the legislator’s consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by the statutory regulation stipulating the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland in every case of

possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions – to Article 2, Article 4, Article 8(1), Article 10 and Article 95(1) of the Constitution,

2) an application by a group of Senators to determine the conformity of Article 1(56) of the Treaty of Lisbon, to the extent it amends Article 48 of the Treaty on European Union in conjunction with Article 2(12), (13) and (289) of the Treaty of Lisbon, as regards Article 2 A(2), Article 2 B(2), and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, to Article 8 and Article 90(1) of the Constitution,

adjudicates as follows:

1. Article 1(56) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws - Dz. U. of 2009 No. 203, item 1569)**, specifying the wording of Article 48 of the Treaty on European Union, in conjunction with Article 2 of the Treaty of Lisbon specifying the wording of Article 2(2), Article 3(2) and Article 7 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland**.

2. Article 2 of the Treaty of Lisbon, specifying the wording of Article 352 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution.

Moreover, the Tribunal decides:

on the basis of Article 39(1)(1) of the Tribunal Constitutional Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375 as well as of 2010 No. 197, item 1307**), to discontinue the proceedings on the grounds that the pronouncement of a judgment is inadmissible.**

STATEMENT OF REASONS

I

1. A group of Sejm Deputies referred an application of 27 November 2009 to the Constitutional Tribunal for it to determine the conformity of:

a) Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007

(Journal of Laws - Dz. U. of 2009 No. 203, item 1569; hereinafter: the Treaty of Lisbon), to the extent it specifies the content of:

– Article 16(3); Article 31(2), first subparagraph; Article 41(3), third subparagraph; Article 45(2), second sentence; as well as Article 46(2), second sentence; Article 46(3), second subparagraph, second sentence; and Article 46(4), second subparagraph, first sentence, of the Treaty on European Union, to the extent they allow the Council of the European Union to enact - by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland - legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

– Article 31(3); Article 42(2), first subparagraph, second and third sentences; and Article 42(3), first subparagraph, first sentence; as well as Article 48(6), second subparagraph and Article 48(7) of the Treaty on European Union,

b) Article 2 of the Treaty of Lisbon, to the extent it specifies the content of:

– Article 207(4), first subparagraph; Article 215(1), first sentence; Article 218(8), the paragraph part; as well as Article 294(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the extent they allow the Council of the European Union to enact - by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland - legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

– Article 25, second subparagraph; Article 81(3), second and third subparagraphs; Article 82(2), second subparagraph, point (b); Article 83(1), third subparagraph; Article 86(4); Article 153(2), fourth subparagraph; Article 192(2), second subparagraph; Article 218(8), second subparagraph, second sentence; Article 223(1), second subparagraph; Article 262; Article 281, second and third subparagraphs; Article 308, third subparagraph, second sentence; Article 311, third subparagraph; Article 312(2), second subparagraph; Article 333(1) and (2); as well as Article 352(1) of the Treaty on the Functioning of the European Union,

to Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution of the Republic of Poland as well as in conjunction with the principle of the Polish Nation’s sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution;

c) the Declaration No. 17 concerning primacy, annexed to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon, to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution of the Republic of Poland.

Moreover, as the alternative to the above, the applicant requested the examination of conformity to Article 2, Article 4, Article 8, Article 10 and Article 95(1) of the Constitution with regard to Article 1 of the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws - Dz. U. No. 62, item 388; hereinafter: the Act on the Ratification of the Treaty of Lisbon) to the

extent the legislator's consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by the statutory regulation stipulating the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland in every case of possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions.

The fundamental constitutional doubts of the applicant concern the mechanism for enacting the law of the European Union and for taking other serious decisions.

First of all, the applicant challenges the principle, introduced by the Treaty of Lisbon, that the Council of the European Union enacts legal acts, by a qualified majority, independently or jointly with the European Parliament. The application is limited to the situation where the stance of the Republic of Poland on a given matter is different than the stance of the majority. The conferral of competences (by the Republic of Poland) which may be exercised against Poland's will, and in accordance with the will of other Member States being able to summon a required majority, without Poland's participation, is tantamount - in the opinion of the applicant - to conferring (contrary to the provisions of Article 90(1) of the Constitution) the competences on other Member States, which impose their will on our state. Additionally, enacting legal acts which are legally binding for the Republic of Poland by the Council of the European Union, without Poland's consent, does not give any guarantee of conformity of such legal acts to the Constitution, and thus it is contrary to Article 8(1) of the Constitution.

What raises the applicant's doubts as regards the Treaty of Lisbon is the introduction therein of authorisation to confer competences - which they recognise as carte blanche authorisation - bypassing the requirement of democratic determination of the scope of competences in the ratification procedure pursuant to Article 90(2) or (3) of the Constitution, which implements the principles expressed in Article 2 and 4 of the Constitution.

The applicant points out that in the case of possible initiatives with regard to enacting legal acts on the basis of the authorisation in the Treaties indicated in Part I point 1 point (b) and point 2 point (b) in the *petitum* of the application, the stance of the Republic of Poland would be determined solely by the Council of Ministers; neither the Sejm nor the Senate would have an opportunity to firmly decide on those issues due to the lack of a treaty-related competence regulation. The issues concerning the competences of organs of the state, which are to be conferred outside the system of the said state organs, may not be determined solely by the executive branch; and the mechanism for taking a stance by the Council of Ministers, after consultation with relevant Sejm and Senate committees, does not guarantee – in the opinion of the applicant – the conformity of the result to the Constitution, as the said mechanism functions outside the scope of constitutional review conducted by the Constitutional Tribunal.

The applicant also challenges the conformity of the Declaration No. 17 to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution. In the opinion of the applicant, the said declaration is a normative act, since it constitutes the first official document issued in the name of all the Member States – being the parties to the Treaties constituting the Union – which proclaims the principle of primacy in a general and abstract way. In the view of the applicant, the use of a declaration for a general and

abstract way of proclaiming that principle does not deprive the challenged act of a normative character, although the applicant himself recognises that, pursuant to Article 51 (consolidated version) of the Treaty on European Union, the Declaration No. 17 does not have the rank of a treaty norm.

In the opinion of the applicant, declaring the provisions indicated in the *petitum* of the application to be consistent with the Constitution means the necessity for issuing a treaty-related statutory regulation which will enable the Sejm and the Senate to be involved in determining the stance of the Republic of Poland with regard to the matters of authorisation arising from those provisions.

The application has been assigned the reference number K 32/09.

The Presiding Judge of the bench of the Constitutional Tribunal in this case requested the group of Sejm Deputies, in a letter of 18 January 2010, to indicate the challenged provisions precisely.

2. In reply to the letter of 18 January 2010 by the Constitutional Tribunal, the group of Sejm Deputies, in a letter of 18 February 2010, anew indicated the challenged provisions of the Treaty of Lisbon, stressing that their notations (enumeration) may be done by applying different specified techniques.

Moreover, the applicant from the Sejm corrected the obvious mistakes noticed in the text of the application, and in particular stated that the *petitum* of the application, instead of "the second and third subparagraphs of Article 218" should contain "the second subparagraph of Article 218" since, both according to the Polish Journal of Laws (Dz. U.) and the Official Journal of the EU, this Article consists of three sentences, the first of which constitutes the first subparagraph, and the last two – the second subparagraph, and there is no third subparagraph; hence the application concerns the second subparagraph.

3. A group of Senators referred an application to the Constitutional Tribunal, on 18 December 2009, for it to determine the conformity of Article 1(56) of the Treaty of Lisbon, to the extent it amended Article 48 of the Treaty on European Union in conjunction with Article 2(12), (13) and (289) of the Treaty of Lisbon, as regards Article 2 A(2), Article 2 B(2) and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, to Article 8 and Article 90(1) of the Constitution.

The allegations of the applicant are related to the new wording of Article 48 of the Treaty on European Union, which indeed provides for the entrance into force of a decision of the European Union only after it is approved by the Member States, but this is limited to the cases of institutional changes in the monetary area.

According to the applicant, the main reason for the unconstitutionality of the Treaty of Lisbon is the lack of a treaty-related regulation with regard to the procedure for granting consent to amendments to the primary EU law. In the view of the applicant, only the introduction of a treaty-related norm makes it possible to apply the Treaty of Lisbon in a way that would be consistent with the Constitution. Such a regulation should provide for a possibility of veto over amendments to the primary EU law, by a representative of the

Polish government, which is enacted by the Union, in the event it does not conform to the Polish constitutional order. The principle expressed in Article 9 of the Constitution that the Republic of Poland shall respect international law binding upon it may not be contrary to Article 8 of the Constitution, which introduces the primacy of the Constitution in the Polish legal order.

The applicant considers the lack of participation of the constitutional organs of the state which are competent in that regard to be an infringement of the Constitution, which is, in his opinion, a prerequisite for the admissibility of amendments made to the primary EU law by revising the Treaties.

The applicant considers the conferral of constitutional competences of the organs of the Polish state on the EU bodies, with the consultative role of the organs of the Polish state and the right of veto of limited effectiveness, to be inconsistent with Article 90(1) of the Constitution.

The application has been assigned the reference number K 37/09.

The President of the Constitutional Tribunal decided that the cases K 32/09 and K 37/09 should be examined in full bench, under the common reference number K 32/09 (the decision of the President of the Constitutional Tribunal of 23 December 2009).

4. In a letter of 17 March 2010, the Marshal of the Sejm requested the Tribunal to determine that the challenged Article 48 of the Treaty on European Union, as amended by the Treaty of Lisbon in conjunction with Article 2(2), Article 3(2), Article 7 and Article 352 of the Treaty on the Functioning of the European Union, was consistent with Article 8 and Article 90(1) of the Constitution.

Moreover, he put forward a request for discontinuation of the proceedings on the grounds that the pronouncement of a judgment was inadmissible with regard to the application by the group of Deputies. In the event of rejecting the request for discontinuation of the proceedings in the indicated regard, the Marshal of the Sejm requested that the provisions of the Treaty of Lisbon which had been challenged by the group of Deputies were recognised as consistent with Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8 of the Constitution and with the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution; whereas, with regard to the examination of the Declaration No. 17, he requested that the proceedings be discontinued on the grounds that the pronouncement of a judgment was inadmissible.

First of all, the Marshal of the Sejm drew attention to the fact that the application of 27 November 2009 had been submitted by the Deputies prior to the entrance into force of the Treaty of Lisbon, i.e. prior to 1 December 2009, and its publication in the Polish Journal of Laws (2 December 2009), which indicates that the request was premature. On the day the Deputies submitted the application to the Tribunal, the Treaty of Lisbon had not yet been published in the Polish Journal of Laws, and thus was not a source of universally binding law of the Republic of Poland. In addition, the Marshal expressed doubts whether the group of Deputies that had submitted the application had standing to commence the proceedings before the Constitutional Tribunal, since almost all the

signatures required to submit the application were dated 8 October 2009. In the opinion of the Marshal of the Sejm, the signatures should be regarded merely as signatures supporting the initiative of referral to the Constitutional Tribunal, and not as support for the content of the application.

With regard to a possibility of challenging Article 1 of the Act on the Ratification of the Treaty of Lisbon, expressed in the application, to the extent the legislator's consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by a statutory regulation of the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland (in every case of possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions), The Marshal of the Sejm pointed out that, due to a special legal character of the Act on the Ratification of the Treaty of Lisbon, it might not contain any additional substantive content. For that reason, he regarded the allegations of the group of Deputies - that the Act on the Ratification of the Treaty of Lisbon lacked provisions conditioning the ratification - as groundless. Additionally, he emphasised that in that case it was negligence on the part of the legislator (and not a legislative omission) which was not subject to examination of the Constitutional Tribunal. The Marshal pointed out that the regulations which were demanded by the applicants were the object of legislative proceedings in the Polish Parliament.

Next, mainly on the basis of the jurisprudence of the Constitutional Tribunal, the Marshal of the Sejm discussed the higher-level norms for constitutional review which had been indicated by the applicants.

Making reference to the allegations concerning Article 48 of the Treaty on European Union, the Marshal of the Sejm indicated two groups of procedures which were regulated by the provision under examination – an ordinary revision procedure and a simplified revision procedure of the Treaties. A simplified revision procedure of the Treaties concerns solely the indicated provisions of the Treaty on the Functioning of the European Union relating to the internal policies and actions of the Union. In the other cases, amendments to the Treaties must be made in accordance with an ordinary revision procedure. In the view of the Marshal of the Sejm, the revision procedures of the Treaties set out in Article 48 of the Treaty on the Functioning of the European Union does not result in the loss of sovereignty of the Polish state and is consistent with the higher-level norms for constitutional review indicated in the application.

The Marshal of the Sejm stated that the new wording of Article 308 of the Treaty on European Union was consistent with Article 8 and Article 90(1) of the Constitution. According to the applicant, the said provisions allowed for excessive freedom to extend the scope of competences of the European Union; by contrast, the Marshal of the Sejm, analysing the content of that Article and citing the opinion of the Court of Justice of the European Union, indicated that it might not constitute the basis of extending the competences of the European Union beyond the general framework specified in the provisions of the Treaty. Moreover, he emphasised that, with the application of the flexibility clause, the Council acts by unanimity, and therefore the consent of the representatives of the Republic of Poland in the Council was indispensible.

In the opinion of the Marshal of the Sejm, an analysis of particular provisions of the Treaty of Lisbon referring to the mechanism for enacting EU law and taking significant decisions related to voting by a qualified majority "is groundless"., as the provisions indicated in the application do not enumerate all the instances of voting by a qualified majority. However, instead of examining the selected provisions concerning that type of voting, according to the Marshal, what should be analysed is the mechanism for taking decisions in such a way.

The Marshal of the Sejm holds the view that taking decisions by the Council by a qualified majority does not infringe on the higher-level norms for constitutional review indicated in the application. Such a form of voting was known and accepted in the Republic of Poland at the moment of its accession to the European Union. Therefore, the view that taking decisions by a qualified majority by the Council suddenly changes Poland's position in the European Union should be regarded as erroneous. In the opinion of the Marshal of the Sejm, unanimous voting does not guarantee the conformity to the Constitution. It may not be assumed that the legal act voted by the European Union against the stance of the Republic of Poland would always be inconsistent with the Constitution.

With reference to the allegation of carte blanche authorisation of the European Council and the Council of the European Union, in the matters of common policy regarding security and defence of the European Union, the Marshal of the Sejm claims that the allegations presented by the applicant are insufficiently specified and may not lead to declaring the unconstitutionality of the legal norms under review.

The Marshal of the Sejm agrees with the allegation that the Council receives authorisation to introduce an out-of-treaty amendment to the content of the Treaty, without amending its wording. The challenged regulation does not lead to an amendment to the content of the Treaty on the Functioning of the European Union, but constitutes a basis for supplementing the rights of EU citizens concerning, *inter alia*, freedom of movement, voting and running for elections in the elections to the European Parliament. The Treaty also grants a guarantee and possibility of control over the rights, supplemented on its basis, to all the Member States.

The allegations put forward by the applicant as regards: Article 81(3), second and third subparagraphs, (consolidated version), Article 153(2), fourth subparagraph, (consolidated version), Article 192(2), second subparagraph, (consolidated version), Article 333(1) and (2) (consolidated version), Article 312(2), second subparagraph (consolidated version) of the Treaty on the Functioning of the European Union, in the opinion of the Marshal of the Sejm, have not been justified. The Marshal of the Sejm has pointed out that these provisions clearly specify that the Council or the Council of the European Union acts upon the unanimous consent of all the Member States, including Poland.

The Marshal of Sejm does not share the doubts of the applicant as to the non-conformity of the provisions concerning criminal matters (Article 82(2), second subparagraph, and Article 83(1), third subparagraph, in the consolidated version of the Treaty on the Functioning of the European Union) to the Constitution, since the provisions of the Treaties "may not constitute an independent (exclusive) basis of criminal

responsibility. These are not self-executing provisions. Therefore, even their possible carte blanche nature is not a threat to the rights and freedoms of the individual".

The Marshal of the Sejm has concluded that it is unjustified to state by the applicant that Article 69e(4) of the Treaty on the Functioning of the European Union (Article 86 in the consolidated version) contains out-of- treaty extension of powers of the European Public Prosecutor's Office (Article 86 in the consolidated version), for if such extension took place, it would be a result of several consultations and would reflect the will of all the Member States.

In the opinion of the Marshal of the Sejm, the procedure for the change of a statute and the possibility of active participation of a few of the EU institutions in that process do not allow to regard the challenged provisions as inconsistent with the indicated higher-level norms for constitutional review.

The Marshal of the Sejm does not agree with the applicant that the decision with regard to the Accession Agreement of the European Union to the European Convention for the protection of Human Rights and Fundamental Freedoms does not specify the premisses of adoption and the goal of such a decision.

According to the Marshal of the Sejm, the wording "until it is approved by the Member States in accordance with their respective constitutional requirements", used in the challenged provisions, is precise and does not raise any reservations. The equivalent of approval in the Polish legal system is the procedure for granting consent to confer the competences regulated in Article 90(2) of the Constitution.

In the opinion of the Marshal of the Sejm, the Declaration No. 17, challenged by the group of Deputies, does not have a normative character, but only a political one, which ensues from Article 51 of the Treaty on European Union (consolidated version), and thus it may not constitute the object of review of the Constitutional Tribunal.

Bearing in mind the fact that the Treaty of Lisbon focuses on amendments, the Marshal of the Sejm does not agree with the applicant that the provisions of that Treaty are contrary to the principle of appropriate legislation expressed in Article 2 of the Constitution.

5. The Minister of Foreign Affairs, in a letter of 15 April 2010, requested the Tribunal to determine the conformity of the challenged provisions of the Treaty of Lisbon to the Constitution. As regards the assessment of conformity of the Declaration No. 17 and the Act on the Ratification of the Treaty of Lisbon to the Constitution, he requested that the proceedings be discontinued on the grounds that the pronouncement of a judgment was inadmissible.

In the opinion of the Minister of Foreign Affairs, the challenged provisions of the Treaty of Lisbon do not authorise the European Council and the Council to grant the European Union the competences that would be conferred on it in a treaty ratified by all the Member States. The conferral of the competences of state organs in some matters takes place solely by an international agreement, i.e. in accordance with Article 90(1) of the Constitution. In such an agreement, the Member States, including Poland, have clearly provided that the way the Council exercises the competences conferred upon it may be

changed, on the basis of a decision by the European Council or the Council provided for in the same ratified international agreement.

In the view of the Minister of Foreign Affairs, Article 90(1) of the Constitution - allows, on the basis of an international agreement and in accordance with the procedure provided therein - for further specification or modification of some of the elements of conferral of the competences, although these may not be fundamental elements.

The Minister of Foreign Affairs holds the view that the procedure for statutory authorisation of the President to ratify international agreements, provided for in the Constitution, may be applied also with regard to legal acts of international law, not being typical international agreements.

In the opinion of the Minister of Foreign Affairs, an amendment to the provisions which authorise the Council to amend certain provisions of the Statute of the Court of Justice of the European Union and the Statute of the European Investment Bank may entail neither conferring new competences on the bodies of the European Union nor the extension of competences that have already been conferred.

The Minister of Foreign Affairs states that the provisions in point I of the *petitum* of the application, challenged by the group of Deputies, authorising the European Council or the Council to take decisions consisting in enacting legal acts of secondary legislation in some areas, are typical provisions governing competence, even if they concern special areas such as criminal law or defence policy.

As regards the challenged Declaration No. 17, the Minister of Foreign Affairs has drawn attention to the fact that the declarations do not form an integral part of the Treaties, and therefore they were included in a separate act and were not subject to ratification by the Member States. Examining a declaration which is neither a separate international agreement nor a part of such an agreement, and does not have any legal effects, leads to extension of the jurisdiction of the Tribunal.

With regard to the allegation of non-conformity to the Constitution of the Act on the Ratification of the Treaty of Lisbon, the Minister of Foreign Affairs has pointed out a special attribute of the Act on the Ratification of the Treaty of Lisbon, which is characterised, *inter alia*, by its "disposable" nature. Such a parliamentary act authorises the President to take certain action, and thus it exhausts its legal effects. As to the content of the Act on the Ratification of the Treaty of Lisbon, it is assumed that it should merely grant consent to the ratification of an international agreement. Therefore, the Minister has concluded that the allegation that there are no treaty-related provisions in the Act on the Ratification of the Treaty of Lisbon is inapt, as it concerns an incorrect legal act.

6. The President of the Republic of Poland, in a letter of 25 May 2010, requested the Tribunal to determine the conformity of Article 1 of the Treaty of Lisbon, to the extent it concerned Article 9 C(3), Article 15b(2), Article 28(3), Article 28 D(2) and Article 28 E(2)-(4) of the Treaty on European Union, as well as Article 2 of the Treaty of Lisbon, to the extent it concerned Article 188 C(4), Article 188 K(1), Article 188 N(8), Article 251(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble of the Constitution, as well as to Article 8(1)

and Article 90(1)-(3) of the Constitution. By contrast, he regarded Article 2 and Article 4 of the Constitution in relation to the enumerated provisions as inappropriate higher-level norms for constitutional review.

The President of the Republic of Poland regarded Article 1, to the extent it concerned Article 15b(3), Article 28 A(2), Article 190(1), Article 229a, Article 245, Article 266, Article 269, Article 270a(2), Article 280 H(1) and (2), Article 308(1) of the Treaty on the Functioning of the European Union, as consistent with the indicated higher-level norms for constitutional review. Moreover, in the opinion of the President of the Republic of Poland, Article 1, to the extent it concerned Article 48 of the Treaty on European Union, in conjunction with Article 2, to the extent it concerned Article 2 A(2), Article 2 B(2), and Article 2 F as well as Article 308 of the Treaty on the Functioning of the European Union, was consistent with the indicated higher-level norms for constitutional review.

The President held the opinion that the proceedings in the other regard should be discontinued on the grounds that the pronouncement of a judgment is inadmissible.

The President drew attention to the fact that the regulations challenged by the applicants, firstly, did not refer to all the cases of decision-making by a qualified majority which were provided for in the Treaty on European Union and the Treaty on the Functioning of the European Union, and secondly the mechanism for decision-making, *inter alia*, by a qualified majority had already been reviewed by the Constitutional Tribunal, which had considered it, with regard to the Treaty of Accession, to be consistent with the Constitution.

The President stated that the allegation of unconstitutionality of the provisions of the Treaty of Lisbon which authorised the institutions of the European Union to carry out out-of-treaty extension and modification of the competences was inapt, since all the Member States, when ratifying the Treaty of Lisbon, adopted - for pragmatic reasons – the possibility of modifying, in accordance with a simplified procedure, the manner of exercising the competences of the EU bodies. The provisions of the Treaty of Lisbon did not grant any new competences to the EU bodies. It was merely permissible to modify them and that was to be done within specified limits.

Moreover, the President of the Republic requested that the proceedings be discontinued as regards the examination of conformity to the Constitution of: the Declaration No. 17 due to the fact that the document did not have a normative character; Article 1 of the Act on the Ratification of the Treaty of Lisbon due to the allegation of legislative negligence which fell outside the jurisprudence of the Constitutional Tribunal.

7. The Public Prosecutor-General, in a letter of 2 June 2010, requested the Tribunal to determine the conformity of the challenged provisions of the Treaty of Lisbon to Article 90(1) and (2) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution, and he considered Article 90(3) and Article 8(2) of the Constitution to be inappropriate higher-level norms for constitutional review in this context. In addition, he requested that the proceedings with regard to the examination of conformity to the Constitution of the Declaration No. 17 and Article 1 of the Act on the Ratification of the Treaty of Lisbon be discontinued.

The Public Prosecutor-General pointed out that the Declaration No. 17 did not have a normative character, but a political one. It consisted of two parts: the first one being an informative part, and the second one containing an opinion by the Council Legal Service. The content of the Declaration No. 17 did not introduce new value, it only confirmed the continuity of the jurisprudence of the Court of Justice of the European Union.

As regards the Act on the Ratification of the Treaty of Lisbon, the applicant did not challenge the content of the provision but the lack of regulation that, in his view, would strengthen the role of the Parliament in the decision-making process at the forum of the EU bodies. Such a way of rendering the object of allegation, in the opinion of the Public Prosecutor-General, indicates a legislative omission, and, in accordance with the well-established jurisprudence of the Constitutional Tribunal is not subject to its jurisdiction.

Next, the Public Prosecutor-General recalled both the stance of the Constitutional Tribunal as well as of the representatives of the legal doctrine with regard to the higher-level norms for constitutional review indicated by the applicants. In the opinion of the Public Prosecutor-General, the fact of choosing a statute enacted pursuant to Article 90(2) of the Constitution, by the Sejm, as a form of expressing consent to ratification, fulfilled the requirements set out in Article 90(2) of the Constitution; thus, the provisions of the Treaty challenged by the Deputies, being a fragment thereof, are consistent with that higher-level norm for review. Since the Sejm, as a body which is competent with regard to expressing consent to the ratification of the Treaty of Lisbon (Article 90(4) of the Constitution), indicated the procedure set out in Article 90(2), and not in Article 90(3) of the Constitution, then the latter provision may not constitute an adequate higher-level norm for constitutional review in this case. Moreover, in the opinion of the Public Prosecutor-General, the infringement of Article 90(2) and (3) of the Constitution has not been sufficiently justified.

The Public Prosecutor-General indicates the intentions of the applicant for the ratification procedure set out in Article 90(2) and (3) of the Constitution to be applied to the legal acts enacted by the EU bodies which are binding for Poland, "against the stance of the Republic of Poland". At the same time, he regarded such reasoning as inappropriate, since both indicated provisions constitute complements to the authorisation arising from Article 90(1) of the Constitution. The provision does not provide for the ratification procedure of the acts of law enacted by an international organisation, on which Poland has already once conferred the competences of state organs in relation to certain matters.

The Public Prosecutor-General stated that Article 8(2) of the Constitution, indicated by the Senators, was an inadequate higher-level norm for review. Indeed, there is no indispensible substantive link between that higher-level norm for review and the challenged provisions which do not concern the manner of application of constitutional provisions in Poland.

In the opinion of the Public Prosecutor-General, one may not speak of violating Poland's sovereignty by the indicated provisions of the Treaty of Lisbon, as the ratification of that Treaty resulted in completely voluntary self-limitation on the part of Poland as regards exercising its own competences in certain matters. Moreover, he stressed that in the Treaty of Lisbon, the provisions governing the competences of the European Union

were subordinate to the principle of conferral (delegation) expressed in Article 5 of the Treaty on European Union.

With regard to the challenged Article 48 of the Treaty of European Union, which provides for revision procedures of the Treaties constituting the basis of the Union, the Public Prosecutor-General stated that the constitutionality of an ordinary revision procedure of the Treaties had not been effectively challenged. By contrast, as regards the simplified revision procedures of the Treaties, the Public Prosecutor-General analysed particular challenged provisions and stated that each amendment to the procedure for enacting EU law, provided for in those provisions, was accompanied by guarantees which allowed the Member States to effectively protect their national interests.

With regard to the provisions concerning the possibility of decision-making by a qualified majority, the Public Prosecutor-General pointed out that currently the procedure concerned 43 cases, but only some of them had been challenged, not focusing on their content, but on the specified mechanism for enacting EU law by a qualified majority. He also drew attention to the fact that the mechanism was known, at the moment of the accession, and the Treaty of Lisbon only extended its scope. Moreover, the scope of this procedure comprised the so-called safety break – in the case of taking a decision by a qualified majority, the Member State might indicate that the draft of a legal act infringed on important interests, which led to the suspension of the legislative procedure.

II

At the hearing on 10 November 2010, the representatives of the group of Deputies, having presented their application, requested that the hearing be adjourned due to the fact that the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union – the so-called Cooperation Act had not yet entered into force. In the opinion of the applicant, the lack of that statute made it impossible to refer to some of the regulations of the Treaty of Lisbon for more complete assessment of its conformity to the Constitution.

The participants in the proceedings presented their stances on the case.

After the deliberation, the Constitutional Tribunal decided not to consider the motion for the adjournment of the hearing. In the substantiation presented by the Presiding Judge, the Tribunal explained that it found no grounds for taking the motion into consideration. The object of constitutional review in the case under examination comprised the regulations of the Treaty of Lisbon, indicated by the applicants, to the extent the Deputies had referred to them in their allegations. The provisions of the Cooperation Act were part of the national legislation and they were not included in the application by the group of Deputies in the case under examination, and they did not constitute the object of constitutional review by the Tribunal. The participants in the proceedings were familiar with them and, in due time, if the group of Deputies only wished to do so, they could be the object of constitutional review by the Tribunal, provided that the applicant submitted an application in accordance with the procedure specified in Article 188 of the Constitution.

The Tribunal proceeded to the further stage of the proceedings – the participants' comments on each other's stances.

The representative of the group of Deputies stated that in those circumstances he would not participate in the hearing. Referring to the question of the Presiding Judge whether his decision not to participate in the hearing should be understood as withdrawal of the application, the Deputy stated that he would not withdraw the application and left the courtroom.

After a break in the hearing and the deliberation, due to the exit of the representative of the group of Deputies and his further absence, the Presiding Judge announced that the following decision of the Tribunal:

"Pursuant to Article 60(2) of the Constitutional Tribunal Act of 1 August 1997, the Tribunal has decided to discontinue the proceedings with regard to the examination of the application by the group of Deputies, due to the absence of the applicant at the hearing".

In the substantiation, it stated that the provision of Article 60(2) of the Constitutional Tribunal Act provided for obligatory presence at the hearing. This principle had been infringed by the act of leaving the courtroom by the representative of the applicant, which made it impossible to further conduct the hearing with regard to the scope of the application – without his presence which was obligatory by statute.

In the subsequent part of the hearing, the object of the Tribunal's examination of conformity of the challenged provisions to the provisions of the Constitution comprised the regulations of the Treaty of Lisbon, to the extent they had been included in the application by the group of Senators and within the scope of the higher-level norms for constitutional review indicated in the application.

The participants in the proceedings maintained their stances presented in the pleadings and the argumentation delivered at the hearing.

III

The Constitutional Tribunal has considered as follows:

1. The object and scope of constitutional review.

1.1. The object of review versus the scope of jurisdiction of the Constitutional Tribunal. The application by the group of Senators, submitted on 18 December 2009, as the object of review, indicates the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, 13 December 2007 (Journal of Laws - Dz. U. of 2009 No. 203, item 1569; hereinafter: the Treaty of Lisbon). The numbers and content of the cited provisions of the Treaties, the Tribunal provided on the basis of the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union published in the OJEU C 290 of 30.11.2009, p. 1 (Polish version).

1.1.1. Granted to the Constitutional Tribunal in Article 188(1) of the Constitution, the jurisdiction to adjudicate regarding "the conformity of statutes and international agreements to the Constitution" does not differentiate among the indicated competences of

the Tribunal, depending on the manner of granting consent to ratification. The Constitutional Tribunal is therefore competent to examine the constitutionality of international agreements whose ratification requires prior consent granted by statute. Neither Article 188(1) of the Constitution nor any other provision excludes that type of agreements from the scope of jurisdiction of the Constitutional Tribunal. This also pertains to the regulations which are subject to constitutional review in this case.

1.1.2. The object of examination of conformity to the Constitution is the text of the Treaty of Lisbon, to the extent it was ratified by the President of the Republic of Poland, published on 2 December 2009 in the Journal of Laws of the Republic of Poland.

The Constitutional Tribunal carries out the assessment of constitutionality of the Treaty of Lisbon, ratified by the President of the Republic of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Constitution. The Treaty of Lisbon, ratified in accordance with that procedure enjoys a special presumption of constitutionality. It should be emphasised that enacting the statute granting consent to the ratification of that Treaty occurred after meeting the requirements which were more stringent than those concerning amendments to the Constitution. The Sejm and the Senate acted under the conviction that the Treaty was consistent with the Constitution. The President of the Republic of Poland, who is responsible for ensuring observance of the Constitution, ratified the Treaty, without exercising his powers with regard to referring the application to the Constitutional Tribunal for it to determine the constitutionality of the Treaty prior to its ratification. As it follows from the previous jurisprudence of the Constitutional Tribunal, the President of the Republic of Poland is obliged to commence the procedure for preventive review with regard to the statute which he considers to be inconsistent with the Constitution (cf. the decision of 7 March 1995, Ref. No. K 3/95, OTK of 1995 r., Part 1, item 5). The President of the Republic of Poland acts within the scope of and in accordance with the law, and ensures observance of the Constitution, which obliges him to undertake all possible actions in this regard, due to the provisions of Article 7 and Article 126 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution.

Based on the above grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution. The Constitutional Tribunal may not overlook the context of the effects of its judgment, from the point of view of constitutional values and principles, as well as the consequences of the judgment for the sovereignty of the state and its constitutional identity.

1.2. Inadmissibility of adjudication on the constitutionality of some of the norms indicated by the applicant.

1.2.1. Pursuant to Article 66 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), the Tribunal, while adjudicating, is bound by the limits of the application, question of law or complaint. When interpreting that provision, it has been assumed in

constitutional jurisprudence that "for the view [expressed by the applicant] to be regarded as the basis for stating the unconstitutionality of the challenged provision, it should contain substantiation specifying the relations among the challenged provisions and constitutional norms in the way indicating a high degree of probability that the allegation of unconstitutionality is justified. Acting on application by the participants in the proceedings, and not *ex officio*, the Constitutional Tribunal is bound by the limits of the application (... and the result of such a concept of constitutional review of the law is the obligation to prove the grounds for alleging the unconstitutionality of the challenged provisions, imposed on the participants in the proceedings (parties). Such a concept of constitutional judiciary is a derivative of (...) the presumption of constitutionality of the law and the principle of stability of the legal order" (the judgment of 27 May 2003, Ref. No. K 11/03, OTK ZU No. 5/A/2003, item 43).

The applicant has not proved how the provisions of the Treaty of Lisbon, challenged in the application, infringe on Article 8(2) of the Constitution, within the meaning of which the provisions of the Constitution apply directly, unless the Constitution stipulates otherwise. Therefore, pronouncing a judgment in that regard is inadmissible.

Pursuant to Article 39(1) of the Constitutional Tribunal Act, if the pronouncement of a judicial decision is useless or inadmissible, the Tribunal discontinues the proceedings. In the view of the Constitutional Tribunal, such premisses occur in this case with regard to the allegations which the applicants have not justified, or it follows from the analysis of the challenged provisions of the Treaties that those allegations are groundless, as is the case here in the indicated regard.

According to the applicant, the fundamental cause of unconstitutionality of the Treaty of Lisbon is the lack of a treaty-related regulation as regards the procedure for granting consent to amendments to the primary EU law. In the view of the applicant, only the introduction of a treaty-related norm will give the possibility of the application of the Treaty of Lisbon which is consistent with the Constitution. Due to the lack of such a treaty-related regulation, the Treaty of Lisbon does not meet the requirement of conformity to the Constitution. Such a regulation should provide for the obligation to veto, by the representative of the Polish government, the amendments to the primary EU law in the case of non-conformity to the Polish constitutional order. Expressed in Article 9 of the Constitution, the principle stating that the Republic of Poland respects international law which is binding for the Republic, may not be contrary to Article 8 of the Constitution, which stipulates the primacy of the Constitution in the Polish legal order.

The applicant regards the lack of participation of competent constitutional organs in the legislative process to be an infringement of the Constitution, which is – in his opinion – an indispensible requirement for admissibility of an amendment made to the primary EU law by means of treaties.

The applicant, in fact, accuses the legislator of legislative omission. The omission is alleged to consist in the lack of appropriate regulation of the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland at the forum of the European Council and the Council (of the European Union). The applicant states that: "Until there is no norm in the internal Polish law which has impact on the binding force in the procedures governing the EU competences and the scope of

jurisdiction of the EU judiciary, we challenge the conformity of the Treaty of Lisbon to the content and scope of the binding force of the Polish Constitution". In the opinion of the Constitutional Tribunal, the applicants formulated that allegation, without taking into account the special character of the Act on the Ratification of the Treaty of Lisbon, and in isolation from the previous constitutional jurisprudence concerning the subject of legislative omission and negligence, as well as without making reference to the binding legal order.

The Constitutional Tribunal wishes to point out that, pursuant to the well-established jurisprudence, a legislative omission under constitutional review occurs when the legislator regulated a certain issue, but did this in an incomplete way. Then the object of allegation may be what the legislator "omitted, although – acting in accordance with the Constitution – he should have regulated" (cf. e.g. the judgment of 8 November 2005, Ref. No. SK 25/02, OTK ZU No. 10/A/2005, item 112, p. 1313 and the jurisprudence cited therein). Thus, this is about the situation in which an integral and functional part of the content of a norm should be an element which is missing and, due to affinity to the existing regulations, its presence should be expected (see the decision of the Constitutional Tribunal of 14 May 2009, Ref. No. Ts 189/08, OTK ZU No. 3/B/2009, item 202, p. 545). The situation is different in the case of legislative negligence which means that the legislator has not regulated a given matter, even if the obligation to regulate it arises from the provisions of constitutional rank (see e.g. the judgments of the Constitutional Tribunal of: 9 October 2001, Ref. No. SK 8/00, OTK ZU No. 7/2001, item 211, p. 1033; 2 June 2009, Ref. No. SK 31/08, OTK ZU No. 6/A/2009, item 83, p. 845). The jurisdiction of the Constitutional Tribunal does not encompass adjudicating about legislative negligence construed in this way. Its constitutionally specified scope of jurisdiction encompasses only existing normative acts.

1.2.2. Bearing the above in mind, the Constitutional Tribunal holds the view that the applicant's allegation actually concerns legislative negligence which, in this case, consists in the lack of a specific regulation as regards the mechanism of cooperation between the Council of Ministers and the Sejm and the Senate in matters related to Poland's membership in the European Union, after the reform introduced by the Treaty of Lisbon. The applicant did not specify that allegation in the *petitum* of the application, although he expressed and described it in the substantiation. The catalogue of higher-level norms for constitutional review of law, formulated in the *petitum* of the application, does not correspond to the structure adopted in the substantiation of the application and the argumentation presented therein.

However, the Constitutional Tribunal states that, in the European legal culture, the principle of *falsa demonstratio non nocet* is well-established, pursuant to which the essence of the case is of fundamental significance, and not its description (cf. also the judgments: of 19 March 2001, Ref. No. K 32/00, OTK ZU No. 3/2001, item 50). The allegation of unconstitutionality of law should be reconstructed on the basis of the whole content of an application, a question of law or a constitutional complaint. Indeed, the *petitum* only systematises the reservations and given higher-level norms for review. The essence of an allegation comprises the content of *petitum* as well as that of the substantiation of the application (cf. the judgment of the Constitutional Tribunal of

2 September 2008, Ref. No. K 35/06, OTK ZU No. 7/A/2008, item 120).

In this context, it should be noted that the allegation of unconstitutionality was made with regard to the lack of a proper regulation which would guarantee respect for the "primacy of the binding force of the Polish Constitution" (p. 7 of the substantiation) in relation to matters concerning European integration – without making any reference, in the substantiation of the application, to a specific statute in the legal order, whereas this issue is the object of the Act of 11 March 2004 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (Journal of Laws - Dz. U. No. 52, item 515, as amended). The Act was subsequently replaced by the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (Journal of Laws - Dz. U. No. 213, item 1395).

In this situation, the pronouncement of a judgment concerning the scope of application would be inadmissible and, therefore, the proceedings in the regard covered in the substantiation of the application are subject to discontinuation (Article 39(1)(1) of the Constitution Tribunal Act).

1.2.3. In the opinion of the applicant, it is indispensible to introduce a treaty-related regulation concerning mutual acknowledgement of judicial and extra-judicial decisions in civil cases, as well as to introduce a relevant restrictive clause in that regard. However, the applicant has not explained the connection between that allegation and the scope of allegation and the higher-level norms for constitutional review. For that reason, the proceedings with regard to that part of the application are subject to discontinuation (Article 39(1)(1) of the Constitution Tribunal Act).

1.3. The essence of the applicant's allegations. Higher-level norms for review.

The Constitutional Tribunal states that the essence of the applicant's allegations amounts to challenging the competences of EU bodies, in the light of the new decision-making mechanisms and revision procedures of the Treaties. The applicant indicates that the application of those mechanisms "leads to carte blanche competences of the European Union to extend its competences, infringing on the internal constitutional procedures of Poland as a Member State. As a result, what takes place is an infringement on the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union" (p. 8 of the substantiation in the application by the Senators), and consequently an infringement of Article 8(1) and Article 90(1) of the Constitution, which have been indicated as higher-level norms for review in the application by the Senators.

The judgment of the Constitutional Tribunal concerning the Treaty of Accession contains the view that there is a close relation between the principle of primacy of the Constitution with the sovereignty of the Republic of Poland (cf. K. Działocha, commentary to Article 8 of the Constitution of the Republic of Poland, [in:] *Konstytucja RP. Komentarz*, L. Garlicki (ed.), Vol. 5, p. 34, Warszawa 2007). In the opinion of the Constitutional Tribunal, the norms of the Constitution constitute "the manifestation of the sovereign will of the nation", and therefore "they may not lose their binding force or undergo a change due to an irremovable contradiction between certain provisions (EU legal acts and the Constitution)" (as stated in the statement of reasons for the judgment

dated 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/2005, item 49). The view of the relation between the primacy of the Constitution and the principle of sovereignty is concurrent with the stance of the doctrine, according to which the preservation of the primacy of the Constitution in the context of European integration must be considered tantamount to preservation of the sovereignty of the state (as in K. Wójtowicz, "Suwerenność w procesie integracji europejskiej", [in:] *Spór o suwerenność*, W. Wołpiuk (ed.), Warszawa 2001, p. 174), and Poland's accession to the European Union changes the point of view as regards the principle of the supreme legal force of the Constitution (its primacy), but it does not challenge it (cf. K. Działocha, op.cit., p. 22).

Thus, the assessment of constitutionality of the challenged Treaty norms requires the Constitutional Tribunal to specify the constitutional principles concerning the state of Poland's sovereignty in the context of European integration, in the light of Polish *acquis constitutionnel*, and also from the perspective of the jurisprudence of the EU Member States' constitutional courts referring to the Treaty of Lisbon.

2. The concept of conferral of competences "in certain matters" versus the primacy of the Constitution in the light of the jurisprudence of the Constitutional Tribunal.

2.1. Sovereignty, independence, constitutional identity, national identity versus European integration.

The question of sovereignty constitutes the object of numerous analyses in the doctrine of international and constitutional law. In the view of the Constitutional Tribunal, the concept of sovereignty as the supreme and unlimited power, both as regards the internal relations within the state and its foreign relations (cf. K. Działocha, commentary to Article 4 of the Constitution of the Republic of Poland, *op. cit.*), is subject to changes corresponding to developments that have been taking place in the world in the last few centuries. The changes stem from the democratisation of the decision-making process in the state, due to the replacement of the principle of sovereignty of the monarch with the principle of supremacy of the nation, bound by the human rights which arise from the inviolability of human dignity. They also stem from the increase of the role of international law, as a factor shaping international relations; they result from the development of the process institutionalisation of international community, as well as they are a consequence of globalisation and a consequence of European integration. As a result of the said changes, sovereignty is no longer perceived as an unlimited possibility of exerting influence on other states or as manifestation of power that is free from external influences – on the contrary, freedom of activity of a state is subject to international law restrictions. At the same time, however, from the perspective of the contemporary Polish doctrine of international law, sovereignty is an indispensible quality of the state which allows to distinguish it from other subjects of international law. The attributes of sovereignty include: having the exclusive power of jurisdiction as regards the territory of a given state and its citizens, conducting foreign policy, deciding about war and peace, freedom as to recognising other states and governments, maintaining diplomatic relations, deciding about military alliances and membership in international political organisations, conducting an independent financial, budget and fiscal policies (cf. W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 135 and subsequent pages). In the

doctrine of international law, there is the view that the concept of absolute, unrestrained sovereignty is a thing of the past. A distinction is drawn between the limitation of sovereignty, arising from the will of the state, being in accordance with the international law, and the infringements of sovereignty which occur against the will of the state and which are inconsistent with international law. In the literature on the subject, it has been stressed that, due to incurring liabilities, the state does not necessarily limit its freedom of activity, but at times it extends its activity on the fields where it has not been present before, and the ability to incur international liabilities is what international law implies in the legal character of the state, and what constitutes the identity of the state in international law. Therefore, this is not a factor that limits sovereignty, as it originally serves as the proof of sovereignty (cf. R. Kwiecień, *Suwerenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*, Kraków 2004, p. 128). Viewed from that perspective, it is debatable whether the procedure of majority vote limits sovereignty, since this neither limits nor infringes on the sovereignty of the Member States, but it merely channels the conducting of the duties of the state (*ibidem*, p. 141).

From the point of view of the influence of integration processes on the scope of sovereignty, what differentiates the legal order of the European Union, when juxtaposed with the law enacted by international organisations, is the broader scope of competences of the Union in comparison with other international organisations, the binding character of substantial part of the EU law, and direct impact of the EU law in internal relations between the Member States. The Constitutional Tribunal shares the view expressed in the doctrine that, as regards the conferred competences, the states have renounced their powers to take autonomous legislative actions in internal and foreign relations, which however does not lead to permanent limitation of sovereign rights of these states; as the conferral of competences is not irrevocable, and the relations between exclusive and competitive competences have a dynamic character, the Member States merely assumed the obligation to jointly conduct state duties in areas of cooperation, and as long as they maintain full ability to specify the forms of conducting state duties, which is concurrent with the competence to "determine competences", they remain - in the light of international law - sovereign subjects. There are complicated processes of mutual dependences among the Member States of the European Union, related to conferring part of the competences of state organs on the Union. However, these states remain the subjects of the integration process, maintain "the competence of competences", and the model of European integration retains the form of an international organisation.

In the view of the Constitutional Tribunal, incurring international liabilities and managing them do not lead to the loss or limitation of the state's sovereignty, but it is its confirmation, and the membership in the European structures does not, in fact, constitute a limitation of the state's sovereignty, but it is its manifestation. For the assessment of the state of Poland's sovereignty after its accession to the European Union, it is vital to create the basis for the membership in the Constitution, as a legal act of the nation's sovereign power. Moreover, the basis of the membership in the European Union is an international agreement, ratified – in accordance with the constitutional requirements – upon consent granted in a nationwide referendum. In Article 90, the Constitution provides for conferring the competences of state organs only relation to certain matters, which - in the light of the

Polish constitutional jurisprudence - means a prohibition to: confer all the competences of a given organ of the state, confer competences in relation to all matters in a given field and confer the competences in relation to the essence of the matters determining the remit of a given state organ; a possible change of the manner and object of conferral requires observance of the requirements for amending the Constitution (as the Constitutional Tribunal stated in the statement of reasons for the judgment in the case K 18/04).

The Constitutional Tribunal shares the view expressed in the doctrine of constitutional law that accession to the European Union is perceived as some sort of limitation of sovereignty of a given state, but it does not mean its loss and is related with the compensatory effect in the form of a possibility of partaking in the decision-making process in the European Union (as stated, in particular, in L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2009, p. 57). The EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state's sovereignty, retain their significance.

In the view of the Constitutional Tribunal, the sovereignty of the Republic of Poland and its independence - construed as the separateness of Poland's statehood within its present borders, in the circumstances of the membership in the EU in accordance with the rules specified in the Constitution - mean confirmation of the primacy of the Polish Nation to determine its own fate. The normative manifestation of that principle is the Constitution, and in particular the provisions of the Preamble, Article 2, Article 4, Article 5, Article 8, Article 90, Article 104(2) and Article 126(1), in the light of which the sovereignty of the Republic of Poland is expressed in the inalienable competences of the organs of the state, constituting the constitutional identity of the state. The principle of sovereignty has been reflected in the Constitution, not only in the provisions of the Preamble. The manifestation of that principle is the sole existence of the Constitution, as well as the existence of the Republic of Poland as a democratic state ruled by law (Article 2 of the Constitution). Article 4 of the Constitution stipulates that supreme power in the Republic of Poland "shall be vested in the Nation", which excludes the possibility of conferring it to another entity. Within the meaning of Article 5 of the Constitution, the Republic of Poland safeguards the independence and integrity of its territory, and ensures the freedoms and rights of persons and citizens. The provisions of Articles 4 and 5 of the Constitution in conjunction with the Preamble set the fundamental relation between sovereignty and the guarantee of the constitutional status of the individual, and at the same time exclude the possibility of surrendering sovereignty, the regaining of which the Constitution regards as the premiss of the Nation's independence to determine its own fate.

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on (cf. L. Garlicki, "Normy konstytucyjne relatywnie niezmienialne", [in:] *Charakter i struktura norm Konstytucji*, J. Trzciński (ed.), Warszawa 1997, p. 148). Therefore, constitutional identity is a concept which determines the scope of "excluding - from the competence to confer competences – the matters which constitute (...) «the heart of the matter», i.e. are fundamental to the basis of the political system of a given state" (cf. K. Działocha, *op. cit*., s. 14), the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the

difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences (cf. K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 284 and subsequent pages).

The guarantee of preserving the constitutional identity of the Republic of Poland has been Article 90 of the Constitution and the limits of conferral of competences specified therein. Article 90 of the Constitution may not be understood in a way that it exhausts its meaning after one application. Such an interpretation would arise from the assumption that conferral of competences on the European Union in the Treaty of Lisbon is a one-time occurrence and paves the way for further conferral, bypassing the requirements specified in Article 90. Such understanding of Article 90 would deprive that part of the Constitution of the characteristics of a normative act. The provisions of Article 90 should be applied with regard to the amendments to the provisions of the Treaties constituting the basis of the European Union, which take place in a different manner than by virtue of international agreements, if the amendments lead to the conferral of competences on the European Union (as in the draft amendment to the Constitution, prepared by a team led by Prof. K. Wójtowicz; cf. *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej*, the Bureau of Research of the Chancellery of the Sejm, Warszawa 2010, p. 28).

An equivalent of the concept of constitutional identity in the primary EU law is the concept of national identity. The Treaty of Lisbon in Article 4(2), first sentence, of the Treaty on European Union, stipulates that: "The Union shall respect the equality of Member States before the Treaties as well as their national identities, inherent in their fundamental structures, political and constitutional (...)". The constitutional identity remains in a close relation with the concept of national identity, which also includes the tradition and culture.

One of the objectives of the European Union, indicated in the Preamble of the Treaty on European Union, is to satisfy the desire "to deepen the solidarity between their peoples while respecting their history, their culture and their traditions". The idea of confirming one's national identity in solidarity with other nations, and not against them, constitutes the main axiological basis of the European Union, in the light of the Treaty of Lisbon.

2.2. The membership in the European Union and the sovereignty of Poland. The principle of protection of the state's sovereignty in the process of European integration.

The Constitutional Tribunal states that Poland's membership in the European Union is linked with the complex political and economic transformations which have

occurred in the last two decades. The accession to the European Union creates unique possibilities, in our history, of carrying out modernisation projects in the conditions of stability arising from the membership in the community of values and traditions, in which the Polish national identity is rooted.

The Constitution of 2 April 1997 constitutes the basis of accession to the European Union; the Constitution specifies "the scope and essence of integration" (L. Garlicki, *op. cit.*, p. 410), allowing for conferral of the competences of state organs with regard to certain matters upon the subjects indicated in the Constitution. The National Assembly, when enacting the Constitution, provided for a possibility of limited and conditioned conferral of competences, with all its consequences, also related to the conferral on international organisations which, "due to founding agreements, have the competences interfering with the scope of competences of the Polish state organs, especially the power to enact law which will be directly applied in the national legal order" (K. Działocha, commentary to Article 90 of the Constitution, *op. cit.*, p. 5). Creating constitutional bases of the accession to the European Union, with the preservation of the state's constitutional and national identity, as a solemn constitutional clause, but without connections with the content of a particular international agreement in that regard – was accepted by the Nation in the nationwide referendum held on 25 May 1997, and then was again approved by the Nation in the nationwide referendum concerning consent to the ratification of the Treaty of Accession, which was held on 7 and 8 June 2003. The Treaty establishing the European Community stipulated that "the Community shall act within the limits of the powers conferred upon it by this Treaty and of the objectives assigned to it therein" (Article 5, first subparagraph). Analogical provision is contained in the binding Treaty on European Union, which stipulates in Article 5(2), that "(...) the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein". The conferral of competences is the basic consequence of the process of European integration, being supported by the provisions of the Constitution, and the directly expressed will of the Nation. Generally, the process of European integration meets the standards of constitutionality as well as the requirements related to the democratic legitimacy of such actions. They also have a historical dimension and context, connected with the European roots of our national identity.

The Treaty of Lisbon, with regard to amendments to be made to the provisions of the Treaties in a different manner than by means of an ordinary revision procedure, preserves the principle of unanimity as a guarantee of respect for the sovereignty of the EU Members States, to some extent manifested in the possibility of notifying opposition, within a set time limit, by the Parliaments of the Members States. The provisions of the Treaty in that regard constitute a compromise between the efforts to enable the EU to react to transformational challenges which require modification of the primary law and the preservation of constitutional identity of the Member States. The said provisions of the Treaty of Lisbon should strike balance between preserving the subjectivity of the Members States and the subjectivity of the EU. The guarantees of that balance in the Constitution are "normative anchors", which serve the protection of the state's sovereignty, in the form of Article 8(1), Article 90 and Article 91 of the Constitution. In the view of the Constitutional

Tribunal, the indicated constitutional provisions have not been infringed by the provisions of the Treaty of Lisbon challenged in the application.

The accession to the European Union and the relevant conferral of competences do entail surrendering sovereignty to the European Union. The limit of conferral of competences is determined in the Preamble of the Constitution by recognising the state's sovereignty as a national value; and the application of the Constitution – *inter alia* with regard to the realm of European integration – should correspond to the meaning which the introduction to the Constitution assigns to regaining sovereignty understood as a possibility of determining the fate of Poland. The Preamble determines the manner of interpretation of the provisions of the Constitution of the Republic of Poland concerning the independence and sovereignty of the state and the Nation (Article 4, Article 5 and Article 8, as well as Article 104(1), Article 126(2) and Article 130 of the Constitution), and also the provisions applicable to the membership in the European Union (Article 9, 90 and 91 of the Constitution), which allows the Constitutional Tribunal, adjudicating in this case, to derive from the provisions of the Constitution - the principle of protection of the state's sovereignty in the process of European integration. The bases for formulating such a principle are the said Articles of the Constitution as well as the provisions of the Preamble confirming the value of sovereign and democratic determination of our Homeland's fate.

The provisions of the Preamble of the Constitution concerning the position of Poland in the contemporary world are, as it is stated in constitutional law studies, "of significance as regards determining the rules for and limits of the processes of Poland's integration with the EU bodies (as in L. Garlicki, commentary to the introduction to the Constitution of the Republic of Poland, [in:] L. Garlicki, *op cit*., p. 14). It is on the basis of those provisions and Article 9 of the Constitution that the Constitutional Tribunal, in the statement of reasons for the judgment in the case K 11/03, has recognised the existence of "the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States" and has stated that "the constitutionally correct and preferred interpretation of law is the one which serves the implementation of the indicated constitutional principle". In the statement of reasons for the judgment in the case K 18/04, the Constitutional Tribunal has emphasised that the basic constitutional principles indicated in the Preamble (democracy, respect for the rights of the individual, cooperation between the public powers, social dialogue as well as the principle of subsidiarity) "are at the same time among the fundamental assumptions of the functioning of the European Communities and Union". In constitutional law studies, there is a view that "this allows to derive from the provisions of the Introduction, general reference to the common tradition of European states (as in L. Garlicki, *op.cit*., p. 14)

In its jurisprudence, the Constitutional Tribunal has, on numerous occasions, made reference to the provisions of the Preamble, in particular when reviewing the conformity of specific provisions to the provisions of the Preamble, within the scope of the principles that arise from the Preamble: the sovereignty of the Polish Nation, cooperation between the public powers, social dialogue, subsidiarity as well as diligence and efficiency in the work of public bodies (cf. the judgments of the Constitutional Tribunal of: 11 May 2005, Ref. No. K 18/04; 18 July 2006, Ref. No. U 5/04, OTK ZU No. 7/A/2006, item 80; 3 November 2006, Ref. No. K 31/06, OTK ZU No. 10/A/2006, item 147; 12 March 2007,

Ref. No. K 54/05, OTK ZU No. 3/A/2007, item 25; 16 December 2009, Ref. No. Kp 5/08, OTK ZU No. 11/A/2009, item 170; also cf.: "Preambuła Konstytucji Rzeczypospolitej Polskiej", [in:] *Studia i Materiały Trybunału Konstytucyjnego*, Vol. 32).

The principle of protection of the state's sovereignty in the process of European integration requires respecting, during that process, the constitutional limits of conferral of competences set by limiting the said conferral only to certain matters, and thus striking proper balance between the conferred competences and the retained ones; the balance entails that, in the case of competences constituting the essence of sovereignty (including, in particular, the enactment constitutional rules and the control of observance thereof, the judiciary, the power over the state's own territory, armed forces and the forces guaranteeing security and public order), the deciding powers are vested in the relevant authorities of the Republic of Poland. Making this principle more specific consists in not assigning "a universal character" to the conferral of competences, in prohibiting conferral of "all the most vital competences" (L. Garlicki, *op cit*., p. 56) and, moreover, in making the conferral of competences contingent upon observance of special procedure, specified in Article 90 of the Constitution. The said principle excludes the statement that the subject, upon which the competences have been conferred, may independently extend the scope of the competences. In the doctrine it has been stressed that "the Constitution does not grant authorisation to confer, in a general way, control in a given regard, leaving the subject (onto which the competences have been conferred) to exhaustively specify the competences on its own" (K. Wojtyczek, *op.cit*., p. 120).

Both the modifications of the scope of the conferred competences and its extension are possible "only by means of signing an international agreement and on the condition of its ratification by all the states concerned" (L. Garlicki, *op. cit*., p. 57), if they have not renounced this in the content of the signed agreement, which implies the necessity of approval of possible changes in the scope of competences, in accordance with the requirements specified in Article 90 of the Constitution.

As it has been indicated in the reasoning of the decision by the Constitutional Council of the French Republic, the provisions of the Treaty are not a proper basis of conferral of competences on the Union. In France, there is necessity for an amendment to the French Constitution (the amended European clause stipulates that the Republic "participates in the European Union on the conditions provided for in the Treaty of Lisbon"). In Poland – due to the provisions of Article 90 of the Constitution – this role is fulfilled by a statute, on the basis of which the competences of state organs may be conferred on an international organisation, which is enacted pursuant to the requirements specified in Article 90 of the Constitution. The consent to the ratification of an international agreement in that regard may be granted in a referendum.

The limit of conferral of competences is also axiologically determined in that sense that the Republic of Poland and "an organisation" or "an institution", onto which the competences have been conferred, must embody "common system of universal values, such as the system of democratic governance, observance of human rights" (K. Działocha, *op.cit*., p. 5).

The values being expressed in the Constitution and the Treaty of Lisbon determine the axiological identity of Poland and the European Union. The draft of economic, social

and political systems contained in the Treaty, which stipulates the respect for dignity and freedom of the individual, as well as respect for the national identity of the Member States, is fully consistent with the basic values of the Constitution, confirmed in the Preamble of the Constitution, which includes the indication of historical, traditional and cultural context that determines national identity, which is respected in the EU within the meaning of Article 4(2) of the Treaty on European Union. These values include the most important aims which the Constitution serves, i.e. the concern for "the existence and future of our Homeland". The aim of the Union – within the meaning of Article 3(1) of the Treaty on European Union - aim is to promote peace, its values and the well-being of its peoples. The Preamble enumerates the following aims which the Constitution is to serve: "to guarantee the rights of the citizens for all time" and "to ensure diligence and efficiency in the work of public bodies", as well as to pay "respect to the inherent dignity of the person, his or her right to freedom, the obligation of solidarity with others". These aims, and at the same time the basic constitutional values, fully correspond to the aims of the Union, specified in the Preamble of the Treaty on European Union as well as in Articles 2, 3 and 6 of that Treaty, and in particular correspond to the preoccupation with "the principles of liberty, democracy and respect for human rights and fundamental freedoms and of the rule of law" and the desire to "enhance further the democratic and efficient functioning of the institutions", as well as the approach that the EU is based on the foundation of "values of respect for human dignity" (Article 2), the inclusion of the national security within the scope of "the sole responsibility of each Member State" (Article 3), the assumption that the fundamental rights which are guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and which arise from the constitutional traditions common to the Member States, "shall constitute general principles of the Union's law" (Article 6(3)). The Treaty on European Union stipulates, in Article 6(1), that "the Union recognises the rights, freedoms and principles" set out in the Charter of Fundamental Rights of the European Union, "which shall have the same legal value as the Treaties". Within the meaning of Article 6(2) of the Treaty on European Union, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms.

The provisions of the Preamble of the Constitution are also, at the same time, a premiss of formulating the principle of favourable predisposition towards the process of European integration and the cooperation between States. From that perspective, the interpretation of constitutional provisions concerning the membership in the EU should be carried out.

Adjudicating with regard to the application requires taking into account both the principle of protection of the state's sovereignty in the process of European integration and the principle of favourable predisposition towards the process of European integration and the cooperation between States (see the statement of reasons for the judgment dated 27 May 2003, Ref. No. K 11/03). From the point of view of that principle, reconstructing a higher-level norm, in the light of which the assessment of constitutionality is carried out, one should not only refer to the text of the Constitution, but also – to the extent the said text refers to the terms, concepts and principles present in the EU law – refer to those meanings (see the statement of reasons for the judgment dated 28 January 2003, Ref. No.

K 2/02, OTK ZU No. 1/A/2003, item 4). However, on no account may an interpretation which favours the EU law lead to "the results which are contrary to the explicit wording of constitutional norms and are impossible to reconcile with the minimum of the guarantee functions fulfilled by the Constitution" (the statement of reasons for the judgment in the case K 18/04).

The model of the European Union, which has been presented in the Treaty of Lisbon, is to ensure respect for the principle of protection of the state's sovereignty in the process of integration, as well as respect for the principle of favourable predisposition towards the process of European integration and the cooperation between States. This finds confirmation in the full compatibility of values and aims of the Union, determined in the Treaty of Lisbon, as well as the values and aims of the Republic of Poland, determined in the Constitution of the Republic of Poland, and in specifying the principles of allocation of competences between the Union and its Member States.

Article 3 of the Treaty on European Union, which sets out the aims of the Union, mentions "peace, its values and the well-being of its peoples". Working for "the sustainable development of Europe based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and a high level of protection and improvement of the quality of the environment", the Union "shall combat social exclusion and discrimination, and shall promote social justice and protection, equality between women and men, solidarity between generations and protection of the rights of the child". The aims of the European Union fully correspond to the aims of the Republic of Poland, indicated in the Constitution.

The basis of full axiological compatibility comprises identical axiological inspiration of the Union and the Republic of Poland, confirmed in the Preamble to the Treaty on European Union and the Preamble to the Constitution, identical focus on the observance of the principles of freedom and democracy, human rights and fundamental freedoms, as well as social rights, and also the efforts to enhance the democratic character of institutions and the effectiveness of their activities. Part of the EU law is constituted by fundamental rights, as general legal provisions, guaranteed in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and which are also reflected in the Constitution. Both Article 3 of the Treaty on European Union and Article 2 of the Constitution show equivalent preoccupation with social justice. The Constitution explicitly states in Article 1 that the Republic of Poland is "the common good of all its citizens".

As regards the allocation of competences between the Union and the Member States, the most significant, from the point of view of the Treaty of Lisbon, is the statement in Article 3(6) of the Treaty on European Union that the Union "shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties" and competences "not conferred upon the Union in the Treaties remain with the Member States" (Article 4(1) of the Treaty on European Union). Therefore, the principle of conferral, in its essence, constitutes the confirmation of the sovereignty of the Member States in relation to the Union, which may not act outside the competences conferred upon it and thus, in its activities, enhances the sovereignty of the Member States, since its aim is to promote the well-being of its peoples. Pursuant to Article 4(2) of the Treaty on European Union, the Union respects the equality of Member States before the

Treaties as well as "their national identities, inherent in their fundamental structures, political and constitutional"; it respects "their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State". However, the Member States "shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives" (Article 4(3), third subparagraph, the Treaty on European Union). Moreover, Article 2(5) of the Treaty on the Functioning of the European Union indicates that when the Union carries out actions to support, coordinate, or supplement the actions of the Member States, it does so "without thereby superseding their competence in these areas". Also, it should be stressed that the Protocol on the exercise of shared competence stipulates that when the Union has taken action in a certain area, "the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area".

Therefore, in the view of the Constitutional Tribunal, from the point of view of the basic principles of the Union, an interpretation of the Treaty provisions aimed at undermining the state's sovereignty or endangering national identity, and at taking over sovereignty - in a non-contractual manner – within the scope of the competences which have not been conferred, would be inconsistent with the Treaty of Lisbon. The Treaty clearly confirms the significance of the principle of protection of the state's sovereignty in the process of European integration, which fully corresponds with the principles determining the culture of European integration in the Constitution.

A vital characteristic of the culture of European integration is mutual loyalty between the Member States and the Union, which they cherish. European integration proves its value, providing balance between modernity, which is indispensable in the contemporary world, and the preservation of national traditions based on supranational cultural community.

2.3. Constitutional bases of cooperation among the subsystems of legal regulations developed in different legislative centres.

The membership in the European Union causes a constitutional problem for each Member State – the question of relation between the national law and the EU law. This is connected with the limits of opening the national legal order to the EU law, and the ensuing constitutional doubts as to the guarantees of sovereignty, which is also the basis of the application in this case.

The Constitutional Tribunal states that at present the legal order in Europe is – for the states belonging to the Union – a multi-faceted order which comprises treaty norms, norms enacted by the EU institutions, and those enacted in the national legal order. At the same time, this is a dynamic system - the relation between the EU order and the national order is subject to evolution, together with changes in the EU law.

Legislative competences constitute an attribute of a sovereign state. This fact – in conjunction with a dynamic character of European integration, which results in changes in the EU law, especially those concerning the changes in the ways of enacting that law – is a source of fears whether the system of guarantees, specified and regarded in the Member

State as effective at a given point in time (e.g. at the time of accession to the Union), is sufficiently efficient to safeguard the national legal order against actions going beyond the limit and scope endangering sovereignty. Therefore, it is logical that the accession to the Union itself as well as particular subsequent changes in the procedures (mechanisms) for enacting EU law cause the Member States to commence constitutional review in the light of the national constitutions. The relation between the EU law and the national law is a mechanism, within which the authorities of the Member States operate (in different ways and at different stages), by formulating the future EU law, on the one hand, and by taking decisions on enforcement of the said law, on the other. Hence, at the EU level, on the one hand, and in the national order, on the other hand, what emerges are bases for competences, mechanisms and procedures which ensure involvement in creating EU law and, at the same time, provide guarantees of maintaining the desirable balance. Each change of an EU mechanism requires checking the system of mechanisms and guarantees in the national law, which is correlated therewith. Review of constitutionality provides such verification which is confirmed by the jurisprudence of European constitutional courts and tribunals (cf. point 3 of that part of the reasons of statement).

In Poland, the Treaty of Accession passed the test of constitutionality (see the judgment K 18/04). The constitutional review conducted on the basis of the present application concerns the Treaty of Lisbon, which *inter alia* changes the mechanism for enacting EU law, both the primary and secondary law. In that situation, a question arises whether the existing national guarantee mechanisms are sufficiently efficient and effective in order to provide desirable balance, both as to the principle of sovereignty itself, and as to the guarantee of Poland's (its authorities') impact on the content of draft EU law under the new rules. This requires answering the following question: does the principle of sovereignty allow for conferral of legislative competences as regards its scope, object and manner, as it has been done in the Treaty of Lisbon.

At the same time, it should be remembered that the issue of accession to the European Union and conferral of competences, pursuant to Article 90 of the Constitution, has already been the object of constitutional review, in the case K 18/04. Thus, in the present case, the issue is only "normative novelty" which the Treaty of Lisbon introduces, to the extent it has been challenged by the applicants.

The statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04 includes the view that the constitution-maker ensures the uniformity of the legal system, regardless of the fact whether the legal acts constituting that system result from the activities of the national legislator, or whether they have originated as international regulations (of various scope and character) set out in the constitutional catalogue of sources of law.

The Constitutional Tribunal maintains the view presented in the previous jurisprudence and, in particular, in the statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04, that the legal consequence of Article 9 of the Constitution is the assumption that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national legislator, the regulations (provisions) originating outside the national (Polish) system of legislative bodies also apply. The constitution-maker has decided that the system of law which is binding in the territory of

the Republic of Poland will have a multi-faceted character, and will encompass, apart from legal acts constituted by Polish legislative bodies, acts of international and Community law (cf. E. Łętowska, „Multicentryczność" systemu prawa i wykładnia jej przyjazna, [in:] *Rozprawy prawnicze* L. Ogiegło, W. Popiołek, M. Szpunar (eds.), Kraków 2005).

In the light of the doctrine, (cf., e.g., S. Biernat, "Prawo Unii Europejskiej a prawo państw członkowskich", [in:] *Prawo Unii Europejskiej. Zagadnienia systemowe*, J. Barcz (ed.), Warszawa 2006) and jurisprudence (cf. the statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04), the Community law is not completely external law with regard to the Polish state. As regards the primary law, the Treaty law is created when the Treaties, concluded by all the Member States (including the Republic of Poland), are approved. As regards the secondary Community law (derivative law), it is created with the participation of the representatives of governments of the Member States (including Poland) – in the Council and the representatives of EU citizens (including Polish citizens) – in the European Parliament.

It is the legislator's task to indicate – within constitutional limits – the principles, in accordance with which the Polish government will determine its stance on European matters, in cooperation with the Sejm and the Senate. The Constitutional Tribunal maintains the view expressed in the statement of reasons for the judgment of 12 January 2005, with regard to European matters, it is crucial that "the Polish stance, whenever possible, should be a result of cooperation between the legislative powers", which entails that "the prerogatives of the constitutional organs constituting the legislative power should be properly adjusted".

What should be emphasised is the significance of the of the Protocol on the role of national parliaments in the European Union (OJEU C 115 of 9.5.2008, p. 201), annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. The Protocol indicates that the Union aims at enhancing the ability of the national Parliaments "to express their views on draft legislative acts of the European Union" (the Preamble).

Pursuant to Article 2 of the said Protocol, draft legislative acts sent to the European Parliament and to the Council shall be forwarded to national Parliaments, which may send to the Presidents of the European Parliament, the Council and the Commission a reasoned opinion on whether a draft legislative act complies with the principle of subsidiarity, in accordance with the procedure laid down in the Protocol on the application of the principles of subsidiarity and proportionality (Article 3). Moreover, if the European Council intends to make reference to Article 48(7), first or second paragraphs, the national Parliaments shall be notified about such initiative of the European Council at least 6 months before any decision is adopted (Article 6). Those considerations allow the Polish Parliament to affect the content of the EU law, to the extent it is possible to narrow down the scope of its "external character" in relation to the Polish state. It is not the Constitutional Tribunal's task to propose possible legal solutions in that regard.

Consequently, as the Constitutional Tribunal has stated, in particular, in the judgment in the case K 18/04, in the territory of Poland, subsystems of legal regulations, coming from different legislative centres, coexist. They should coexist in accordance with the principle of mutually friendly interpretation and cooperative coexistence. This

circumstance sheds different light on the potential clash of norms and the primacy of one of the indicated subsystems. The assumption about the multi-faceted structure of the binding legal system in Poland has a general character. Due to the regulations contained in Article 9, Article 87(1) and Articles 90 to 91, the Constitution recognises the multi-faceted structure of the binding regulations in the territory of the Republic of Poland, and provides for a special procedure for its introduction. The said procedure resembles the procedure for amending the Constitution.

The views of the Constitutional Tribunal, presented in the judgment in the case K 18/04, have remained valid, regardless of the changes that have occurred in the primary EU law, due to the validity of the higher-level norms for constitutional review. Pursuant to the predictions of the representatives of the doctrine, the said judgment has considerable impact on subsequent jurisprudence of the Constitutional Tribunal" (as in S. Biernat, commentary to the judgment of the Constitutional Tribunal of 11.05.2005 [conformity of the Treaty of Accession to the Constitution of the Republic of Poland] K 18/04, *Kwartalnik Prawa Publicznego* No. 4/2005, p. 205), primarily due to "the explicit wording of Article 8 and its place in the Constitution", and also due to the fact that emphasis on the primacy of the Constitution may not endanger "the uniform binding force and application of the EU law, and harmonious performance of duties by Poland as a Member State" (S. Biernat, *ibidem*).

2.4. The constitutional rules for ratification of international agreements concerning the conferral of competences by the organs of the state.

Within the meaning of Article 91(1) of the Constitution, a ratified international agreement, after its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), constitutes part of the domestic legal order of the Republic of Poland. It is also applied directly (unless its application depends on the enactment of a statute). Provided for in Article 90(1) of the Constitution, international agreements on conferring the competences of organs of the state "in relation to certain matters" upon an international organisation or international institution constitute one of the categories of international agreements that are subject to ratification.

The ratification of those agreements is carried out pursuant to a procedure with substantially stringent requirements in comparison with the procedure for ratification of other agreements, carried out upon prior consent of the Sejm and the Senate expressed by statute. The Constitution requires, in that case, consent of a qualified majority (at least two-thirds majority) of the national representative bodies: the Sejm and the Senate of the Republic of Poland, representing the Nation (being vested with supreme power) or – alternatively – gaining consent of the Nation, expressed by way of a relevant nationwide referendum. Substantial safeguards have been introduced against conferring competences too easily or without proper legitimacy outside the system of state organs of the Republic of Poland. These safeguards concern all the cases of conferring competences on the bodies of the European Union.

2.5. Conferral of competences in certain matters in the light of the Constitution.

The Constitutional Tribunal maintains the view presented in the well-established jurisprudence, and in particular in the statement of reasons for the judgment in the case K 18/04, that the conferral of competences "in relation to certain matters" should be understood as prohibition against the conferral of all the competences of a given state organ, the conferral of competences in relation to all the matters in a given area, and also the conferral of competences regarding the nature of matters specifying the remit of a given organ of the state. Thus, it is necessary to precisely determine the areas and indicate the scope of competences which are subject to conferral.

Also, it is not possible to understand the conferral of competences in such a way that would entail allowing a possibility of determining any competences that may be presumed to be conferred. In its jurisprudence, the Constitutional Tribunal has stressed a number of times that it is impossible in a democratic state ruled by law to create presumed competences. This also refers to the relations within the European Union, which not being a state, uses the law, and therefore must meet relevant standards in that regard. The conferral of competences may not result in gradual deprivation of the state of its sovereignty, due to allowing the possibility of conferring the competences "in relation to certain matters". As an exception to the principle of independence and sovereignty (cf. L. Garlicki, *op. cit.*, p. 55 and subsequent pages), the conferral of competences may not be interpreted in a broad sense.

On no account may the conferral of competences be understood as a premiss of allowing for a presumed amendment to the Constitution which consists in a possibility of bypassing the requirements set out in Article 90(1) of the Constitution. Such a bypass of constitutional rules would take place in the case of recognising a broad interpretation of the scope of conferred competences, in particular by allowing for a possibility of conferring competences to a subject other than an international organisation or international institution, alternatively including, within the scope of conferred competences, the competences which are not subject to conferral to be recognised as conferred. The institution of conferral of competences does not create a possibility of amending the Constitution in accordance with the interpretation which favours European integration.

The Constitutional Tribunal maintains its stance presented in the statement of reasons for the judgment in the case K 18/04, pursuant to which neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or adopt decisions which would be inconsistent with the Constitution of the Republic of Poland upon an international organisation or international institution. In particular, the provisions indicated here may not be used to confer competences within the scope which would prevent the Republic of Poland from functioning as a sovereign and democratic state.

As it has been stated in the statement of reasons for the judgment in the case K 18/04, guaranteed in Article 91(2) of the Constitution, precedence of agreements on conferral of competences "in relation to certain matters" over the provisions of statutes if such statutes cannot be reconciled with such agreements, does not lead to recognising analogical precedence of those agreements over the provisions of the Constitution. Thus, the Constitution remains – due to its unique status – "the supreme law of the Republic of Poland" with regard to all international agreements which are binding for the Republic of Poland. This also concerns ratified international agreements about conferral of

competences “in relation to certain matters”. Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as to the binding force and application in the territory of the Republic of Poland.

2.6. Article 90(1) of the Constitution versus the issue of systemic changes in the European Union and the question of binding the Republic of Poland with the law enacted by a majority vote.

Needless to say, the system of the European Union has a dynamic character, which may lead to changes in the rules of its functioning. However, this does not mean that the conferral of competences provided for in the Constitution implies unconditional acceptance of the future systemic changes and, in particular, that may be understood as the premiss of adjustment of Article 90(1) of the Constitution to those changes, by means of interpretation which assumes giving up the restriction consisting in allowing the conferral of competences only “in relation to certain matters”.

An amendment to an international agreement being a basis of conferral of competences, as referred to in Article 90(1) of the Constitution, requires consent pursuant to the provisions of Article 90 of the Constitution. The ratification of such an agreement would not be possible without meeting constitutional requirements. The essence of Article 90 of the Constitution is the safeguarding character of the restrictions contained therein, as regards the sovereignty of the Nation and the state. In accordance with the restrictions, conferring the competences of state organs is admissible: 1) only on an international organisation or international institution, 2) only in relation to certain matters, and 3) only upon consent by the Polish Parliament, alternatively the Nation by way of a nationwide referendum. The said triad of constitutional restrictions must occur in order to ensure the conformity of conferral to the Constitution. Article 90(1) of the Constitution provides for the conferral of competences “by virtue of international agreements”. This means that the conferral of competences may be done by an international agreement, as well as by an international agreement which amends the provisions of that agreement. It is also possible to confer competences in accordance with a simplified revision procedure of the provisions of the agreement, provided the triad of constitutional requirements occurs, being the *sine qua non* requirement of constitutionality of the conferral. An international agreement - allowing for a simplified revision procedure of its provisions which concern the competences of state organs - will be deemed constitutional, provided that the said procedure does not exclude the possibility of applying the requirements constituting the triad of constitutional restrictions on conferral of competences. Therefore, the agreement allowing for a simplified procedure for conferral of competences will be consistent with the Constitution if the fact of allowing does not exclude granting consent to the conferral of competences, in relation to certain matters, by statute, pursuant to the requirements specified in Article 90(1) of the Constitution, or by way of a nationwide referendum.

However, within the scope of conferral, the Republic of Poland allows for legal acts to be enacted, by the EU bodies, in accordance with the rules set out in the Treaty of Lisbon, which will be in force in the territory of the Republic of Poland or which will bind Poland in foreign relations. Understanding the conferral of competences in a different way would entail that Article 90 of the Constitution is void of legal content and does not

provide for conferral of competences at all, whereas it follows from its content that conferral is possible – pursuant to the rules set out in the Constitution and specified in the Treaty.

In the statement of reasons for the judgment in the case K 18/04, the Constitutional Tribunal has pointed out that, by approving the binding Constitution, the Nation itself decided that it agrees to the possibility of binding the Republic of Poland with the law enacted by an international organisation or international institution, i.e. with the law other than the treaty law. This is carried out within the limits provided for in ratified international agreements. Moreover, the Nation also granted its consent, in the said referendum, to the fact that the said law would be directly binding in the territory of the Republic of Poland, taking precedence over statutes in the event of a clash of laws. The consent to bind the Republic of Poland with the law enacted in accordance with the rules specified in the primary law has been expressed in the Treaty of Accession, accepted by way of a nationwide referendum; and the constitutionality of the Treaty of Accession was the object of assessment carried out by the Constitutional Tribunal in the case K 18/04.

The conferral of competences may not infringe on the provisions of the Constitution, including the principle of primacy of the Constitution in the system of sources of law. The Constitutional Tribunal maintains the view, presented in the statement of reasons for the judgment in the case K 18/04, that the Constitution remains - due to its unique status – "the supreme law of the Republic of Poland" with regard to all international agreements which are binding for the Republic of Poland. This also concerns the ratified international agreements on conferral of competences "in relation to certain matters". Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as regards binding force and application in the territory of the Republic of Poland. The Constitutional Tribunal holds the view that neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or make decisions which would be inconsistent with the Constitution of the Republic of Poland on an international organisation or international institution. In particular, the provisions indicated here may not be used to confer the competences in the regard in which they would prevent the Republic of Poland from functioning as a sovereign and democratic state. From the point of sovereignty and the protection of other constitutional values, what is significant is the limitation of conferral of competences "in relation to certain matters" (and thus without infringing the "core" competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland, pursuant to the Preamble of the Constitution.

The provisions of the Treaty of Lisbon indicate which competences are subject to conferral. With regard to conferred competences, the EU bodies may constitute law which is binding for the Member States, in accordance with the rules set out in the Treaty.

The Constitutional Tribunal shares the view, expressed in the doctrine that accession to an international organisation entails conferring competences for the exercise of power necessary to carry out the activities of the organisation, by relevant national bodies, on the bodies of the organisation (cf. C. Mik, "Przekazanie kompetencji przez Rzeczpospolitą Polska na rzecz Unii Europejskiej i jego następstwa prawne" (commentary to Article 90(1) of the Constitution), [in:] *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a*

członkostwo Polski w Unii Europejskiej, C. Mik (ed.), Toruń 1999, p. 145). At the same time the stance of the Constitutional Tribunal, formulated in the statement of reasons of the judgment in the case K 18/04, remains relevant: "the Polish legislator should make a decision either about amending the Constitution or amending the Community regulations, or – ultimately – about seceding from the European Union".

The allegations of the applicant regard the possibility of applying the provisions of the Treaty in a way that broadens the scope of competences that have already been conferred, and therefore they refer to the ideas of the applicants concerning the way of applying the Treaty in the future. The Constitutional Tribunal is not competent to assess hypothetical way of applying the Treaty of Lisbon. Such practice remains outside the jurisdiction of the constitutional court as long as it does not take the form of concrete regulations subject to review by the Constitutional Tribunal, pursuant to Article 188 of the Constitution. The conclusions concerning the potential application of the Treaty, in a way which would be inconsistent with the Treaty, fall outside the jurisdiction of the Constitutional Tribunal.

It should be emphasised that the Constitution provides for conferral of competences by means of an international agreement, and this means that the object of conferral may only be the competences indicated in the agreement. Despite the allegations of the applicant, conferral of competences may not have carte blanche nature, although the limits of competences are not, and may not, be sharp. Within the meaning of the Constitution, it is possible to confer competences "in relation to certain matters", which excludes conferral of competence to determine competences. And therefore, each instance of extending the catalogue of conferred competences requires an appropriate basis in the content of an international agreement and consent, as referred to in Article 90(1) of the Constitution.

It is not the task of the Constitutional Tribunal to specify the content of the statute granting consent to ratification of an international agreement, as referred to in Article 90 of the Constitution, neither is it to specify the rules of participation of the parliament and government as regards the implementation of the Treaty of Lisbon. The applicant has voiced an expectation that the Constitutional Tribunal – by analogy to the Federal Constitutional Court of Germany, which adjudicated that the Treaty of Lisbon was consistent with the Basic Law for the Federal Republic of Germany, whereas some of the provisions concerning the powers of the Parliament with regard to European matters, which had been challenged together with the Treaty, did not meet the constitutional standards – will specify the tasks of the legislator related to the ratification of the Treaty of Lisbon. However, this expectation does not take into account the vital differences between the Constitution of the Republic of Poland and the Basic Law for the Federal Republic of Germany, when it comes to regulating the systemic foundations of European integration. It is the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union.

A democratic state ruled by law, as referred to in Article 2 of the Constitution, being an EU Member State, fully retains its constitutional identity, due to the fundamental homogeneity of the role the law fulfils in the political systems of the Member States and in the organisations they form. Article 90 of the Constitution, understood in the light of the

principles and values derived from Article 2 of the Constitution, and concerning the assumption that there are no competences that do not arise from an explicit legal provision (as the Constitutional Tribunal stated in the Resolution of 10 May 1994, Ref. No. W 7/94, OTK of 1994, Part 1, item 23), excludes conferral of competences without conformity to a legal basis provided for therein and the democratic procedure for enacting it. Amendments to the content of the Treaties, without observing the procedure for ratification which leads to the conferral of competences on the Union, require – due to the fact that Article 2 of the Constitution is binding – a relevant statutory basis pursuant to the rules contained in Article 90 of the Constitution.

The object of cooperation of public powers, with regard to European matters, also comprises the issues going beyond the scope of granting new EU competences and modifying the already existing ones, which are regulated in the Act on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

The application alleges that there is no proper regulation of the manner of expressing the stance of the Republic of Poland which would be presented at the forum of the European Union, by the representatives of Poland in the Council and the European Council, and in particular that there is insufficient participation of the legislative branch.

The ratification of the Treaty of Lisbon was carried out in accordance with Article 90 of the Constitution. It also encompassed the approval of the provisions which make the decision-making processes more flexible in the EU institutions. At the same time, the changes to the decision-making procedures require approval by the Polish constitutional organs of the state. The Treaties provide for several forms of such approval. Some of those forms, falling within the scope of the provisions challenged by the applicants, are going to be presented in greater detail below, in point 4 of that part of the statement of reasons. For the time being, it can be mentioned that the issues here are as follows: first of all, the requirement of unanimity when taking decisions on introducing changes to the decision-making procedures; secondly, the competences of the Member States as regards approving certain decisions of the European Council and the Council; thirdly, the competences of the national Parliaments to notify their opposition; fourthly, the procedures of the so-called safety break applied when adopting a decision by a qualified majority, in the case where a given Member State recognises that the draft of a legal act infringes on important aspects of its legal system.

The Constitutional Tribunal points out that, already after the applications had been submitted in this case, there was a significant change in the legal system. It involved the enactment of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (Journal of Laws - Dz. U. No. 213, item 1395; hereinafter: the so-called Cooperation Act). The Act shall enter into force 3 months after its publication. The said Act repeals the Act of 11 March 2004, with the identical title (Journal of Laws - Dz. U. No. 52, item 515, amended). The Cooperation Act is not the object of review by the Constitutional Tribunal. However, the tribunal takes it into account as an element of the legal order which will be binding in a few weeks' time from the date of adjudication in this case. Its enactment and subsequent entrance into force entail that the allegations of the

applicants, concerning the lack of a treaty-related regulation, will cease to be up-to-date. After its entrance into force, the Cooperation Act will enjoy the presumption of conformity to the Constitution. Obviously, this does not rule out the possibility of subjecting its provisions to constitutional review.

It should be noted that the new Cooperation Act considerably strengthens, in comparison with the previous Act, the role of the Sejm and the Senate in the matters concerning the object of adjudication in this case. The Act of 2004 granted both houses of the Polish Parliament the competences to provide opinions on the drafts of EU law acts and on the stances presented by the Republic of Poland at the forum of EU institutions, whereas the Act of 2010 also grants the legislative branch, to some extent, the powers of enactment. This undoubtedly remains in connection with strengthening the role of the national Parliaments and representative democracy (cf. Article 12 of the Treaty on European Union as well as the Protocol on the role of national Parliaments in the European Union and the Protocol on the application of the principles of subsidiarity and proportionality).

The Cooperation Act imposes on the Council of Ministers the obligations of notification and reporting related to Poland's membership in the European Union (Articles 3-10 of the Cooperation Act), as well as provides the Sejm and the Senate with the instruments which allow the two houses of the Polish Parliament to influence the process of enacting EU law. In this context, one should also mention the requirement that the Council of Ministers should seek consultation, the result of which will constitute the basis of the stance of the Republic of Poland (Article 7(4), Article 10(2), Article 11(1), Article 12(1) and (2), as well as Article 13 of the Cooperation Act).

It should be noted that the requirement, arising from the Cooperation Act, that there should be consent expressed by statute or ratification before the Republic of Poland takes a stance at the forum of the European Union – concerns, in many cases, the instances of decisions adopted on the basis of the challenged solutions.

Guaranteeing the participation of the Republic of Poland (and its constitutional organs of the state) in decision-making process in the Union is based both on the Treaty on European Union and the Treaty on the Functioning of the European Union, as well as on the Polish law.

3. The Treaty of Lisbon in the jurisprudence of European constitutional courts.

3.1. The matters related to the assessment of constitutionality of the Treaty of Lisbon have been covered in the judgments of the constitutional courts of the Czech Republic, Germany and Hungary, as well as in the decision of the Constitutional Council of the French Republic and the decision of the Constitutional Court of Austria (cf. *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, K. Zaradkiewicz (ed.), Warszawa 2010).

A common characteristic of those adjudications is the emphasis on the openness of the constitutional order with regard to European integration, and the focus on the significance of constitutional and systemic identity – and thus sovereignty – of the Member States, the respect for which excludes the possibility of any presumed amendment to a

national constitution and, in particular, as regards the rules of conferral of competences which arise from a given constitution. On the basis of those Treaty provisions which regard the Union as an international organisation, and not as a federal state, they stress the significance of the principle of conferral, and the principle of subsidiarity; they refer to granting the Parliaments of the Member States the final word, the absence of which hinders the EU activities; and moreover, they make the effectiveness of the Union conditional on internal constitutional procedures of its Member States. European constitutional courts confirm the significance of the principle of sovereignty reflected in the provisions of the state's constitution, due to which the assessment of the Treaty of Lisbon is carried out in the regard indicated by the applicants.

3.2. It is best reflected by the Decision of the Constitutional Council of the French Republic dated 20 December 2007, preceding the ratification of the Treaty, which made the possibility of ratification contingent – due to the formulation of the European clause in the Constitution of the French Republic – upon the previous amendment to the Constitution. At the same time, the Constitutional Council points to the numerous Treaty provisions repeating the solutions contained in the Constitution for Europe, rejected in a referendum; however, it does not indicate that the inclusion of those solutions in the Treaty of Lisbon is inadmissible. The Constitutional Council indicates in the motives for its decision that the solutions provided for in the Treaty may "not suffice to preclude any transfers of powers authorised by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercise of national sovereignty" (thesis 16). The "powers inherent in the exercising of national sovereignty" in particular include, according to the Constitutional Council, competences as regards the fight against terrorism and related activities, the fight against trafficking in human beings, as well as judicial cooperation on civil and criminal matters, which are connected with the establishment of the office of European Public Prosecutor (theses 18 and 19). In the view of the Constitutional Council, what is inconsistent with the French Constitution of that day is "any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by depriving France of any power of acting on its own initiative" (thesis 20). Interpreting the constitutional European clause in the wording which was binding at the time of adjudicating, and in particular Article 88-1 ("The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common"), the Constitutional Council states that the clause confirms "the place of the Constitution at the summit of the domestic legal order", and at the same time it enables "France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States".

3.3. Also, in the judgment of the Federal Constitutional Court of Germany of 30 June 2009, the issue of "constitutional identity" constitutes an essential reason for recognising that the European Union, being "a union of sovereign states under the Treaties", may not lead to the situation where there will be not enough room for the political debate in the Member States, which in reference to amendments of the Treaties constituting the Union does not have the binding force of a revised treaty, but pursuant to other legal regulations (the so-called bridging clause) which are not subject to ratification; this means that the federal government and legislative bodies bear special "responsibility for integration", which is generally manifested in the form of expressing consent by relevant statute. Therefore, there is no possibility of assuming that the membership in the European Union, for its effectiveness, requires allowing for almost automatic acceptance of conferral of competences needed by the Union by way of simple exercise of the Treaty. In the light of the said judgment, constitutionally accepted accession to that type of organisation does not mean that it may grant itself the necessary competences falling within the remit of the Member States and gradually undermine the significance of their sovereignty. What is worth noting at this point is the fact that the Federal Constitutional Court redefined its own role as a guard of "constitutional identity", in the light of the Treaty of Lisbon; courts with a constitutional function may not be deprived of the responsibility "for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity" (thesis 336). In the opinion of the Federal Constitutional Court, its competences arise from the sovereignty of Germany as a Member State of the Union. Due to the fact, the Court declares the inapplicability of an EU legal instrument in Germany, in the clear absence of a constitutive order to apply the law (thesis 339). The German law is the source of the principle of primacy of the EU law over the German law. The Federal Constitutional Court also stated in that judgment that failure to meet the requirements provided for in the German law concerning the participation of the houses of Parliament in the course of determining the stance of Germany in the European Council and the Council of the European Union, in the process of transferring "sovereign powers" would be an infringement on "constitutional identity" of the state, which indeed is not undermined by the constitutional consent to the membership in the EU. The Federal Constitutional Court stated that the principle of primacy of the EU law solely referred to the primacy of its application in relation to the German law, and did not mean the obligation to repeal that law if it endangered the effectiveness of the EU law. The Court indicated that the constitutional court of a Member State might declare the non-conformity of an EU legal instrument to its own constitution, retaining the "right to the final word", but at the same time agreeing to bear "consequences in international relations" (thesis 340). The Court indicated that the infringement on Germany's constitutional identity was inadmissible, since the constitution-maker had not granted the right to decide about sovereignty to the representatives and bodies of the Nation. It is the Federal Constitutional Court that should ensure the respect for that restriction, being one of the unchanging provisions in the Basic Law of Germany as a state (theses 234 and 235). Since the Treaty of Lisbon makes reference to the national identity of the Member States, then, according to the Federal Constitutional Court, the essential areas

of democratic formative action comprise: citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing, encroachments on fundamental rights (such as deprivation of liberty in the administration of criminal law), the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology. The understanding of the elements of identity arises from the context of historical and cultural experiences (thesis 249).

In the judgment of the Federal Constitutional Court of Germany dated 6 July 2010, it was stated that, making reference in its jurisprudence to the legal acts of the EU institutions, the said Court should follow the jurisprudence of the European Court of Justice, which determines the binding interpretation of the EU law. At the same time, the Federal Constitutional Court stated that the judgment of the European Court of Justice in the Case C-144/04 (the judgment of 22 November 2005, Werner Mangold v. Rüdiger Helm) did not go beyond the scope of competence of the Union in a way that would raise constitutional doubts. It was determined in the judgment that prohibition of discrimination on the grounds of age was a general principle of the EU law, arising from the constitutional tradition of the Member States; moreover, it was stated therein that it was the obligation of a national court to guarantee full effectiveness of the general principle of non-discrimination on the grounds of age, by not applying any provisions of the national law which would clash with it, when the deadline for the transposition of that directive had not yet elapsed.

3.4. The judgment of the Constitutional Court of the Czech Republic of 26 November 2008 refers to the previous German constitutional jurisprudence, by indicating in the reasoning that, after the entry into force of the Treaty of Lisbon, the Member States still remain "the masters of the treaties". This view reflects the importance the Court assigns to the constitutional order of the Czech Republic, which remains the criterion for the assessment of admissibility of conferral of competences and determines the scope of such conferral. The Constitutional Court stressed that it would be the obligation of the Czech legislator to adopt the legal provisions which would correspond with the requirements of the constitutional order, which the Treaty of Lisbon referred to. It also drew attention to the fact that the said Treaty did not change the concept of European integration, which meant that the Union remained an international organisation, and the Member States retained their constitutional identities, and thus the Czech Constitution remained the supreme law of the state. Emphasising the significance of the state's sovereignty, the Court pointed out that it played the role of the supreme body for protection of constitutionality of the Czech law, also in the context of possible exploitation of competence by the EU bodies and the EU law. The EU law which is inconsistent with the essence of constitutionality and of a democratic state ruled by law, both understood substantively, could not have a binding character in the Czech Republic. In the judgment of 3 November 2009, the Constitutional Court stated that the Treaty of Lisbon and its ratification were not inconsistent with the constitutional order of the Czech Republic.

3.5. Moreover, the issues related to the ratification of the Treaty of Lisbon constituted the object of interest of the Constitutional Court of the Republic of Latvia. In that country, the applicants alleged that the Treaty of Lisbon infringed on their right to participate in the work of the State and of local government, and to hold a position in the civil service, guaranteed by Article 101 of the Constitution of the Republic of Latvia, since the said Treaty should only be ratified upon consent granted by way of a referendum. In the judgment of 7 April 2009, Ref. No. 2008-35-01, the Constitutional Court of the Republic of Latvia did not share the view of the applicants and adjudicated that the challenged statute had been enacted in accordance with the procedures set out in the Constitution, and therefore was consistent with Article 101(1) of the Constitution.

3.6. The Constitutional Court of Hungary, in the judgment of 12 July 2010, referring to the issue of conformity of the Treaty of Lisbon to the Constitution of the Republic of Hungary, stressed that the provisions of the Constitution that provided for the membership in the European Union might not be interpreted in a way that the principle of the state's sovereignty and the principle of a democratic state ruled by law should be deprived of their substance. These principles may not be infringed upon by possible amendments to the Treaties.

3.7. The significance of the rules of internal legal order of a Member State was pointed out by the Constitutional Court of Austria, in the judgment of 30 September 2008, refusing to determine the unconstitutionality of the Treaty of Lisbon before its publication in the the Federal Law Gazette.

3.8. The jurisprudence of European constitutional courts concerning the Treaty of Lisbon remains varied in respect of the scope of allegations, which stems from different constitutional requirements of admissibility as regards challenging the Treaty in the Member States.

The object of adjudication of the Federal Constitutional Court of Germany also included the issues regulated in the national legislation. The adjudication of the Constitutional Court of Hungary was initiated by a constitutional complaint, whereas the Constitutional Court of Austria did not examine the constitutionality of the Treaty due to the fact that the allegation was filed too early, before the publication of the Treaty in the Federal Law Gazette, in accordance with the requirements of the Austrian law.

Despite such circumstances, arising from the variety of constitutional regulations, the jurisprudence of European constitutional courts concerning the Treaty of Lisbon confirms the solemn character of constitutional traditions, which are common to the Member States, and which constitute a vital premiss of adjudicating in the present case.

The jurisprudence of European constitutional courts included the view that the provisions of the Treaty of Lisbon were consistent with the national constitutions. At the same time, the focus was also placed on the significance of the constitutions and statutes of the Member States, as regards guaranteeing their sovereignty and national identity, which is clearly reflected in the judgment of the Federal Constitutional Court of Germany (of 30 June 2009). The Court stated that, in the situation where the Treaty of Lisbon was

binding, the European Union remained an association of sovereign states, and not a federation. The Member States of the Union, as an international organisation, retain full sovereignty and are the "masters of the treaties". The limits of permitted development of the Union are set by the circumstances where the Member States would begin to lose their constitutional identity (cf. *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, the Office of the Constitutional Tribunal, Warszawa 2010).

The constitutional courts of the Member States share - as a vital part of European constitutional traditions – the view that the constitution is of fundamental significance as it reflects and guarantees the state's sovereignty at the present stage of European integration, and also that the constitutional judiciary plays a unique role as regards the protection of constitutional identity of the Member States, which at the same time determines the treaty identity of the European Union.

4. Assessment of the conformity of the Treaty provisions challenged in the application to the Constitution.

4.1. General remarks.

The allegations of the applicant amount to the statement that the Treaty of Lisbon entails granting the EU bodies the competence to freely determine their own competences, which infringes on Article 90(1) and Article 8(1) of the Constitution.

The applicant states that there is a need for enacting provisions in the Polish law, the lack of which - in his opinion – causes the unconstitutionality of the Treaty of Lisbon. Sharing the view of the applicant as to the necessity for amendments in the national law in relation to Poland's membership in the European Union in the EU present systemic shape, the Constitutional Tribunal emphasises that it is the legislator's task to shape the rules of the internal law which concern the procedural rules of public authorities with regard to European matters. The application reflects the fears of the Senators that the ratification of the Treaty of Lisbon will undermine the strong position of the national legislative branch. However, the addressee of those fears should be the Sejm and the Senate, and not the Constitutional Tribunal. As it is known, the work on the Commission's draft led to the enactment of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

Determining the unconformity of an international agreement to the Constitution may not consist in determining negligence or omission in the national legislation, or in the Constitution, since the agreement does not contain the obligation to amend the Constitution. Consequently, such an obligation does not constitute the object of adjudication.

Enacting a statute which grants consent to the ratification of an international agreement is an element of the national ratification procedure. Stating the unconstitutionality of the statutory omission or negligence may not be effective, with regard to the consequences of binding the Republic of Poland with that agreement (until the time of its expiry, withdrawal from the agreement or its termination) due to the

provisions of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (Journal of Laws - Dz. U. of 1990 No. 74, item 439), pursuant to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27).

The allegations of the applicant amount to the statement that some of the decisions-making procedures, provided for in the Treaty of Lisbon, and in particular those concerning a possibility of changing the provisions of the Treaties, are without appropriate democratic legitimacy. However, in the view of the Constitutional Tribunal, in the light of the Constitution, it is the constitution-maker and legislator who have the power to take actions aimed at reducing that deficit by enacting the national law.

The Treaty of Lisbon contains provisions aimed at strengthening the position of national Parliaments as a basis for strengthening the democratic legitimacy of the Union. This intention has been expressed in Article 12 of the Treaty on European Union, pursuant to which national Parliaments "contribute actively to the good functioning of the Union": (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them; (b) by seeing to it that the principle of subsidiarity is respected; (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities; (d) by taking part in the revision procedures of the Treaties; (e) by being notified of applications for accession to the Union; (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament. It is the Polish Parliament which decides to what extent and for the implementation of which European policies, as well as with what intensity, and what consequences, it will make use of the possibilities provided for in the Treaty of Lisbon.

The applicant indicates that an ordinary revision procedure of the Treaties does not take into account the significance of the consent of the Member State with regard to the amendments concerning "the public security clause", which, however, is not confirmed by the revision procedure challenged by the applicant. Indeed, in the case of that procedure – as Article 48(4) of the Treaty on European Union stipulates – the amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements. Moreover, pursuant to Article 48(5) of the said Treaty, if two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council. Thus, the ordinary revision procedure provides for considerable safeguards against ignoring the stance of a Member State. The allegation of the applicant is not justified also due to the fact that, within the meaning of Article 4(2) of the Treaty on European Union, national security remains the sole responsibility of each Member State.

Therefore, the Treaties provide for safeguards against the danger of Poland's loss of control over the amendments to the primary EU law, which the applicant fears. The Treaties express the principle of making the effectiveness of an amendment contingent upon the stance of a Member State, which takes a different form depending on the type of the revision procedure. It is the task of each Member State to devise national procedures

for evaluation of amendments. It should be stressed that Article 90(1) of the Constitution does not allow for conferring any competences of state organs if the requirements set out therein are not met, which means that the allegation of the applicants that the revision procedure of the Treaties is unconstitutional is groundless.

4.2. The assessment of constitutionality of the challenged provisions of the Treaty on European Union in conjunction with the provisions of the Treaty on the Functioning of the European Union (as amended by the Treaty of Lisbon).

4.2.1. The group of Senators indicates, as the object of constitutional review, Article 48 of the Treaty on European Union concerning the revision procedures of the Treaties which constitute the basis of the European Union. Pursuant to Article 48(1) of the Treaty on European Union, the Treaties may be amended in accordance with an ordinary revision procedure (provided for in Article 48(2)-(5) of the Treaty on European Union) as well as in accordance with simplified revision procedures (provided for in Article 48(6) and (7) of the Treaty on European Union). The allegations of the applicant as regards the particular provisions will be considered one by one.

4.2.2. The provisions of Article 48(2)-(5) of the Treaty on European Union, which are challenged by the applicant, concern the ordinary revision procedure of the Treaties and read as follows:

Article 48: "2. The Government of any Member State, the European Parliament or the Commission may submit to the Council proposals for the amendment of the Treaties. These proposals may, *inter alia*, serve either to increase or to reduce the competences conferred on the Union in the Treaties. These proposals shall be submitted to the European Council by the Council and the national Parliaments shall be notified.

3. If the European Council, after consulting the European Parliament and the Commission, adopts by a simple majority a decision in favour of examining the proposed amendments, the President of the European Council shall convene a Convention composed of representatives of the national Parliaments, of the Heads of State or Government of the Member States, of the European Parliament and of the Commission. The European Central Bank shall also be consulted in the case of institutional changes in the monetary area. The Convention shall examine the proposals for amendments and shall adopt by consensus a recommendation to a conference of representatives of the governments of the Member States as provided for in paragraph 4.

The European Council may decide by a simple majority, after obtaining the consent of the European Parliament, not to convene a Convention should this not be justified by the extent of the proposed amendments. In the latter case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States.

4. A conference of representatives of the governments of the Member States shall be convened by the President of the Council for the purpose of determining by common accord the amendments to be made to the Treaties.

The amendments shall enter into force after being ratified by all the Member States in accordance with their respective constitutional requirements.

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered

difficulties in proceeding with ratification, the matter shall be referred to the European Council".

4.2.3. The ordinary revision procedure of the Treaties, challenged by the applicant, which requires concluding a revised treaty ratified by all the Member States, resembles the procedure for revising treaties which is specified in former Article 48 of the Treaty on European Union prior to the Treaty of Lisbon. The Treaty of Lisbon introduced three additional requirements which are aimed at strengthening the role of national Parliaments and the European Parliament, as well as are based on the experience with previous revision procedures of the Treaties. Firstly, the national Parliaments of the Member States must be notified about proposals for the amendments to the Treaties, submitted by the governments of the Member States, the European Parliament or the European Commission. Secondly, provided that the European Council decides in favour of examining the proposed amendments to the Treaties, the President of the European Council convenes a Convention preceding a conference of representatives of the governments of the Member States which, by way of consensus, adopts recommendations to the conference. The European Council, upon the consent of the European Parliament, may however make a decision not to convene a Convention if this is not justified by the extent of the proposed amendments. In such a case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States. Thirdly, a procedure for monitoring progress during the ratification of a revised treaty has been introduced – if, after the lapse of two years, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

4.2.4. With regard to the indicated revision procedure of the Treaties, the applicant challenges the lack of participation of the Sejm and the Senate as a preliminary requirement for amendments to the primary EU law. The Constitutional Tribunal indicates that the allegation of the applicant is inapt. Pursuant to Article 48(2), second sentence, of the Treaty on European Union, the national Parliaments must be notified about the proposals for applying the ordinary revision procedure of the Treaties which constitute the basis of the European Union. This entails that even at the initial stage of the revision procedure, the national Parliaments, including the Sejm and the Senate, have the possibility of looking into the submitted proposals, as well as they may take a stance on those proposals, as part of cooperation with other organs of the state with regard to European matters. Moreover, under the ordinary revision procedure, the European Council convenes a Convention composed of *inter alia* representatives of the national Parliaments (Article 48(3) of the Treaty on European Union). In such a case, a national Parliament takes part in adopting recommendations for a conference of representatives of the governments of the Member States which prepares given amendments to the Treaties. The Sejm and the Senate have a guaranteed right to vote in the event of a decision not to convene a Convention. Pursuant to Article 16(1) of the Cooperation Act, before the European Council makes a decision not to convene a Convention, as referred to in Article 48(3) of the Treaty on European Union, the Prime Minister requests the Sejm and the Senate for an opinion which should constitute the basis for the stance of the Republic of Poland.

Additionally, it should be indicated that, pursuant to Article 48(4) of the Treaty on European Union, the amendments to the Treaties enter into force after being ratified by all the Member States, in accordance with their respective constitutional requirements. The participation of the Sejm and the Senate in the procedure for the ratification of revised treaties is specified in Article 90 of the Constitution.

4.2.5. The group of Senators indicates, as the object of constitutional review, Article 48(6) and (7) of the Treaty on European Union, concerning the simplified revision procedures of the Treaties which constitute the basis of the European Union. The provisions of the Treaty on European Union which have been challenged by the applicant read as follows:

Article 48(6) of the Treaty on European Union: "The Government of any Member State, the European Parliament or the Commission may submit to the European Council proposals for revising all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union.

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

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

Article 48(7) of the Treaty on European Union: "Where the Treaty on the Functioning of the European Union or Title V of this Treaty provides for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. This subparagraph shall not apply to decisions with military implications or those in the area of defence.

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

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

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

4.2.6. In the opinion of the group of Senators, the lack of participation of competent constitutional state organs as a preliminary requirement for an amendment to the primary EU law is inconsistent with the principle of primacy of the Constitution. The applicant

pointed out that, although Article 48(6) of the Treaty on European Union provides for the possibility that decisions of the institutions of the European Union do not enter into force until they are approved by the Member States in accordance with their respective constitutional requirements, but this refers solely to institutional changes in the monetary area. As higher-level norms for the constitutional review, the group of Senators indicates Article 8(1) and Article 90(1) of the Constitution.

4.2.7. The Constitutional Tribunal indicates that the Treaty of Lisbon, apart from an amended ordinary revision procedure of the Treaties which has been regulated in Article 48(1)-(5) of the Treaty on European Union, has introduced simplified revision procedures provided for in Article 48(6) and (7) of the Treaty on European Union, which have been challenged by the applicants. In accordance with the procedure regulated in the challenged provisions of the Treaty on European Union, an amendment to the Treaties requires neither a Convention nor a conference of representatives of the governments of the Member States to be convened. The simplified revision procedures of the Treaties are to ensure greater flexibility to the political system of the Union, as they allow to amend the provisions of the Treaties with regard to particular areas (set out in detail in Article 48(6) and (7) of the Treaty on European Union) without the necessity to apply a complicated revision procedure. This is, above all, aimed at enhancing the effectiveness of the EU decision-making process. The first of the procedures set out in Article 48(6) of the Treaty on European Union provides for a simplified revision of the provisions of Part Three of the Treaty on the Functioning of the European Union relating to the internal policies and action of the Union. The proposals for the amendments in that regard may be submitted to the European Council by the governments of the Member States, the European Parliament and the Commission. On the basis of that, the European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. Pursuant to Article 48(6), third subparagraph, the indicated decision may not increase the competences conferred on the Union in the Treaties. The European Council acts by unanimity (i.e. upon consent of all the Member States), after consulting the European Parliament and the Commission, and the European Central Bank in the case of institutional changes in the monetary area. The decision of the European Council does not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements.

In the light of the Polish law, for the legal acts referred to in Article 48(6) of the Treaty on European Union, Article 12(2a) of the Act of 14 April 2000 on International Agreements (Journal of Laws – Dz. U. No. 39, item 443, as amended; hereinafter: the Act on International Agreements), amended by the Cooperation Act, requires ratification. An international agreement is submitted to the President of the Republic of Poland for ratification after the consent referred to in Article 89(1) and Article 90 of the Constitution, or after notification of the Sejm of the Republic of Poland pursuant to Article 89(2) of the Constitution (Article 15(5) in conjunction with Article 15(3) of the Act on International Agreements).

The other of the simplified revision procedures of the Treaties has been provided for in Article 48(7) of the Treaty on European Union. That provision allows for a possibility of introducing amendments to the decision-making procedures regulated in the

Treaty on the Functioning of the European Union, as well as in Title V of the Treaty on European Union, i.e. the area of freedom, security and justice. The indicated procedure may be applied solely to the introduction of two kinds of amendments. Firstly, where the provisions of the Treaties provide for the Council to act by unanimity in a given area or case, the European Council may adopt a decision authorising the Council to act by a qualified majority in that area or in that case. However, the said procedure does not apply to decisions with military implications or those in the area of defence. Secondly, where the Treaty on the Functioning of the European Union provides for legislative acts to be adopted by the Council in accordance with a special legislative procedure, the European Council may adopt a decision allowing for the adoption of such acts in accordance with the ordinary legislative procedure. Any initiative taken by the European Council is notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision of the Council is not adopted. For the adoption of the aforementioned decisions, the European Council acts by unanimity after obtaining the consent of the European Parliament, which is given by a majority of its component members.

Pursuant to Article 14(1) of the Cooperation Act, the decision in the case of the Republic of Poland with regard to a draft of an EU legal act, as referred to in Article 48(7) of the Treaty on European Union, is made by the President of the Republic of Poland, upon a motion of the Council of Ministers, upon consent granted by statute.

4.2.8. The Constitutional Tribunal indicates that the simplified revision procedures of the Treaties provided for in Article 48(6) and (7) of the Treaty on European Union have been accepted by the Republic of Poland, which has ratified the Treaty of Lisbon, pursuant to Article 90 of the Constitution. The decisions of the European Council, as referred to in Article 48(6) and (7) of the Treaty on European Union, are adopted unanimously by the head of states or governments of the Member States, as well as by the President of the European Council and the President of the European Commission.

The entrance into force of a decision adopted pursuant to Article 48(6) of the Treaty on European Union is to be approved by the Member States in accordance with their respective constitutional requirements. In the Polish legal order, the said legal acts of the European Council require ratification in accordance with the relevant provisions of the Constitution. Therefore, the allegation of the group of Senators concerning the lack of participation of constitutional organs of the state in the indicated procedures is groundless. Any amendment to the procedure of constituting law within the framework of the European Union, provided for in Article 48(6) and (7) of the Treaty on European Union, is accompanied by guarantees which allow the Member States to effectively protect their national interests. Moreover, the allegation of the applicant as to expressing consent exclusively to amendments to the Treaties in the case of institutional changes in the monetary area stems from inaccurate interpretation of the wording of Article 48(6), second subparagraph, of the Treaty on European Union. The indicated requirement pertains to all decisions adopted pursuant to Article 48(6) of the Treaty on European Union, whereas institutional changes in the monetary area are additionally consulted with the European Central Bank.

Adopting a decision pursuant to Article 48(7) of the Treaty on European Union depends on the absence of opposition voiced by a national Parliament within the period of six months.

4.2.9. Article 48(6), second subparagraph, of the Treaty on European Union provides that "the European Council may adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. The European Council shall act by unanimity after consulting (...). That decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements". It follows from the challenged provision of the Treaty that the amendment which the said provision concerns does not enter into force unless it is "approved" by the Republic of Poland, in accordance with the constitutional requirements of the Republic of Poland. It is within the remit of the constitution-maker to specify such requirements.

In the opinion of the Constitutional Tribunal, possible conferral of competences of state organs in relation to certain matters, as a result of this amendment, would be possible only in accordance with the rules set out in Article 90 of the Constitution, which concern the conferral of competences of state organs by virtue of international agreements. However, any conferral of competences in that regard is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision "shall not increase the competences conferred on the Union in the Treaties". Therefore, there will be no conferral of "competence of organs of State authority in relation to certain matters". Thus, the point is not the conferral of competences.

The challenged provision of Article 48(6), second subparagraph, of the Treaty on European Union is consistent with the indicated higher-level norm for constitutional review.

4.2.10. The European Council decides by unanimity whether to apply the procedure specified in Article 48(7), second subparagraph, of the Treaty on European Union, which means that the Republic of Poland may block such a decision in the case where the solution would infringe on the principles of conferring the competences set out in Article 90 of the Constitution, to the extent indicated by the applicant as a higher-level norm for constitutional review. And thus, public authorities that are competent in that regard are not deprived of their ability to observe the provisions of the Constitution. The application of this procedure depends on the stance of the Polish Sejm and Senate, for – in the light of Article 48(7), third subparagraph – the initiative in that case is "conferred" on national Parliaments, which may notify their objections within the time-scale set; as a result, the decision to apply the said procedure is blocked. The national legislator has the power to specify the mechanism for determining the stance of the Parliament on matters "conferred" pursuant to Article 48 of the Treaty on European Union, which contains measures safeguarding sovereign rights of the Republic of Poland.

In the view of the Constitutional Tribunal, Article 48(7), second subparagraph, is consistent with the higher-level norms for constitutional review indicated by the applicant.

Article 48(7), third subparagraph, of the Treaty on European Union stipulates that any initiative taken by the European Council on the basis of the first or the second subparagraph is notified to the national Parliaments. If a national Parliament makes known

its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph is not adopted. In the absence of opposition, the European Council may adopt the decision.

The conferral of competences is only possible in accordance with the rules set out in Articles 90(1)-(3) of the Constitution, and with the application of those rules for possible conferral of competences by virtue of an international agreement, and not by amending an international agreement, but by implementing its provisions, which the challenged Article 48(7) refers to. In the view of the Constitutional Tribunal, Article 48(7), third subparagraph, is consistent with the indicated higher-level norm for constitutional review.

4.2.11. The application by the group of Senators concerns Article 48(6) and (7) of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union, and in particular Article 2(2) of that Treaty, which stipulates that "when the Treaties confer on the Union a competence shared with the Member States in a specific area, the Union and the Member States may legislate and adopt legally binding acts in that area. The Member States shall exercise their competence to the extent that the Union has not exercised its competence. The Member States shall again exercise their competence to the extent that the Union has decided to cease exercising its competence". Article 3(2) of the Treaty on the Functioning of the European Union grants the Union "exclusive competence for the conclusion of an international agreement when its conclusion is provided for in a legislative act of the Union or is necessary to enable the Union to exercise its internal competence, or in so far as its conclusion may affect common rules or alter their scope". Article 7 of the Treaty on the Functioning of the European Union stipulates that "the Union shall ensure consistency between its policies and activities, taking all of its objectives into account and in accordance with the principle of conferral of powers".

It is pointed out in the substantiation of the application by the group of Senators that Article 48 of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union "does not take into account the primacy of consent of a given Member State with regard to the national public security clause". This allegation is not justified in the context of the explicit wording of Article 4(2) of the Treaty on European Union, which stipulates that "national security remains the sole responsibility of each Member State". The applicant indicates that "only adoption" of the clause indicated by him "eliminates the clash between the post-Treaty institutions and procedures of the European Union and the constitutional legal order which is binding in Poland". But, in fact, the indicated clause has already been adopted in the Treaty on European Union.

In the opinion of the applicant, "the lack of legislative participation of competent constitutional state organs as a preliminary requirement for an amendment to the primary EU law by means of treaties". However, the participation is provided for both in Article 48 of the Treaty on European Union, as a requirement for the said amendment, as well as in the Protocol on the role of national Parliaments in the European Union.

4.2.12. In the opinion of the applicant, Article 352 of the Treaty on the Functioning of the European Union may serve, almost within the entire scope of application of the primary law, as a basis of competence that allows for activity at European level, which

raises reservations as to "the prohibition against conferring carte blanche authorisation or competence to determine competences" and allows for introducing significant amendments to the treaty base of the European Union, "without the necessity of constitutive participation of legislative organs, apart from the participation of the governments of the Member States", which means "exceeding the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union".

Article 352(1) of the Treaty on the Functioning of the European Union stipulates that: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament".

Article 352(2) of the Treaty on the Functioning of the European Union stipulates that: "Using the procedure for monitoring the subsidiarity principle referred to in Article 5(3) of the Treaty on European Union, the Commission shall draw national Parliaments' attention to proposals based on this Article".

The group of Senators points out that Article 352(1) of the Treaty on the Functioning of the European Union allows for creating competence of the Union to specify the competences which have not been conferred on it by the Member States. The Senators pointed out the lack of participation of constitutional organs of the state in the said procedure, and in particular the organs of the legislative branch. In the opinion of the applicants, such participation is not guaranteed by Article 352(2) of the Treaty on the Functioning of the European Union, since it provides only for a requirement of necessary notification of national Parliaments about the proposals adopted in accordance with Article 352 of the Treaty on the Functioning of the European Union.

Challenged by the applicant, Article 352(1) and (2) is, to a large extent, equivalent to Article 308 of the Treaty establishing the European Community (the EC Treaty), which used to be binding prior to the entrance into force of the Treaty of Lisbon. The indicated provision has already been reviewed by the Tribunal in the judgment in the case K 18/04 (point 18.6.). The Constitutional Tribunal, *inter alia,* stressed the fundamental significance of the requirement of unanimous action by the Council. This means that actions provided for in Article 308 of the EC Treaty may not be taken without obtaining the consent of any of the Member States, including the consent of the Republic of Poland. The Constitutional Tribunal indicates that in comparison with former Article 308 of the EC Treaty, Article 352 of the Treaty on the Functioning of the European Union, challenged by the applicants, may find a wider application, namely, "within the framework of the policies defined in the Treaties". There are also procedural differences. Instead of the Council's consultation with the European Parliament, the requirement of the Parliament's consent is introduced. Moreover, Article 352 of the Treaty on the Functioning of the European Union contains additional paragraphs 2 to 4, which limit and complement the scope of application of the flexibility clause. Pursuant to Article 352(2) the Treaty on the

Functioning of the European Union within the framework of the procedure for the review of the application of the principle of subsidiarity, specified in Article 5(3) of the Treaty on European Union, the Commission draws the attention of national Parliaments to the proposals which are based on Article 352 of the Treaty on the Functioning of the European Union. In this regard, the national Parliaments exercise their powers in accordance with the Protocol No. 2 on the application of the principles of subsidiarity and proportionality, and in particular Article 7 thereof. Moreover, the measures adopted on the basis of Article 352 of the Treaty on the Functioning of the European Union may not entail harmonisation of Member States' laws or regulations in cases where the Treaties exclude such harmonisation (Article 352(3) of the Treaty on the Functioning of the European Union). Neither can the indicated provision serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second subparagraph, of the Treaty on European Union, which concerns the scope of the implementation of the policies listed in Articles 3 to 6 of the Treaty on the Functioning of the European Union (Article 352(4) of the Treaty on the Functioning of the European Union). The Declaration No. 41, annexed to the Treaty of Lisbon, additionally specifies that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to the objectives of the Union refers to the objectives as set out in Article 3(2), (3) and (5) of the Treaty on European Union, and therefore legislative acts may not be adopted in the area of the common foreign and security policy.

4.2.13. The Constitutional Tribunal indicates that Article 352 of the Treaty on the Functioning of the European Union is subsidiary to the other provisions of the Treaties which set out the competences of the Union. Its application as a legal basis of a measure (a legal act) is justified only when no other provision of the Treaty grants the EU institutions the competence which is necessary for the adoption of the said measure (cf. the judgment in the ECJ Case 45/86 Commission v Council [1987] ECR 1493). The indicated provision is aimed at supplementing the lack of competences to take action which have been granted to the EU institutions explicitly or implicitly in particular provisions of the Treaties, in the situation where this proves indispensible for the Union to fulfil its tasks and attain one of the objectives set out in the Treaties. Article 352 of the Treaty on the Functioning of the European Union, being part of the institutional order based on the principle of conferred (granted) competences, may not constitute the basis of extending the scope of EU competences outside the general framework which arises from the entirety of the Treaties, in particular specifying the tasks and the actions of the Union. The provision may not serve as a basis for entacting provisions, the result of which would be an amendment to the Treaties bypassing the procedure provided for that purpose. Such a stance has been confirmed in the Declaration No. 42, annexed to the Treaty of Lisbon. A similar view had already been expressed by the Constitutional Tribunal (cf. the Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I-1759).

In the view of the Constitutional Tribunal, the allegations of the applicant concerning conferral of competences to create additional competences on the basis of Article 352(1) and (2) of the Treaty on the Functioning of the European Union are unjustified. Pursuant to Article 4(1) and Article 5(2) of the Treaty on European Union, the

Union operates within the limits of the competences conferred upon (granted to) the Union by the Member States in the Treaties, whereas any competences which have not been conferred on the Union remain the responsibility of the Member States. Article 352 of the Treaty on the Functioning of European Union formulates the requirements for its application: an action of the Union is necessary (indispensible) to attain one of the objectives of the Union, falls within the scope of the policies set out in the Treaties (with the exclusion of the common foreign and security policy), and the Treaties have not provided for authorisation to act in the way required in that regard. The evaluation whether the indicated premisses have been satisfied is the task of the EU courts (cf. the aforementioned Opinion 2/94). Also, it is groundless to allege that the indicated procedure overlooks constitutional organs of the state. Pursuant to Article 352 of the Treaty on the Functioning of the European Union, the Council acts unanimously, i.e. upon consent of the representatives of all the Member States. Additional guarantees for the national Parliaments are provided for in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality. Pursuant to Article 7(2), in the case where justified opinions on the non-conformity of a draft legislative act to the principle of subsidiarity constitute at least one third of the votes granted to the national Parliaments, the draft of the legal act is subject to another analysis.

Specific guarantees, as regards the participation of the Sejm and the Senate in the process of enacting legal acts pursuant to Article 352 of the Treaty on the functioning of the European Union, are provided for in Article 7(1) and Article 11 of the Cooperation Act. The Council of Ministers provides the Sejm and the Senate with draft EU legal acts, forthwith after their receipt, adopted in accordance with Article 352(1) of the Treaty on the Functioning of the European Union. The Council of Ministers submits draft stances of the Republic of Poland, with regard to the draft EU legal acts, to the Sejm and the Senate, taking into account the deadlines which arise from the EU law, no later however than within the period of 14 days from the date of receipt of those drafts. Before the Council examines a draft EU legislative act or a draft EU legal act, adopted pursuant to Article 352(1) of the Treaty on the Functioning on the European Union, the Council of Ministers consults an authority which is competent in that regard on the basis of the rules of procedure of the Sejm, and an authority which is competent in that regard on the basis of the rules of procedure of the Senate, presenting the information on the stance of the Republic of Poland which the Council of Ministers intends to take during the examination of the draft at a session of the Council. The Council of Ministers supplements the information with the substantiation of the stance of the Republic of Poland as well as the evaluation of forecast consequences of an EU legal act for the Polish legal system and the social, economic and financial consequences for the Republic of Poland.

Although the requirement of unanimity of the Council and the dependence of its action on the Commission’s proposal, as well as the necessity of acquiring consent from the European Parliament constitute the guarantees of protection of subjectivity of the Member States, it should be emphasised that in accordance with the principle of conferral, the Union acts only within the competences conferred on it by the Member States. Article 352(1) of the Treaty on the Functioning of the European Union may not be understood as the basis for granting competences to the Union which have not yet been

conferred, and thus the provisions referred to in Article 352(1) of the Treaty on the Functioning of the European Union may not create any competences which have not yet been conferred.

4.2.14. Article 90(1) of the Constitution, indicated as a higher-level norm for review, concerns concluding a Treaty of Accession or revised treaties and does not regulate the issues of replacing the requirement of unanimity with the requirement of a qualified majority as well as replacing a special legislative procedure with an ordinary legislative procedure, which may have impact on the competences of the organs of the state. Also, the Constitution does not regulate the manner of authorising a representative in the European Council to act within the scope of decisions provided for in Article 48(7) of the Treaty on European Union. The lack of constitutional regulation with regard to this issue is not, however, tantamount to the non-conformity to the Constitution of the Treaty mechanism of conferral or modification of the competences, the enactment of which does not clash with the indicated higher-level norms for constitutional review. Only the comparison of the decision of the European Council with the scope of competences granted by the Treaty may constitute a premiss of evaluation of their conformity to the Constitution in its present form. Depending on that evaluation, it would be possible to introduce an appropriate amendment to the Constitution, the modification of the scope of conferral of the competences arising from that decision, a possible change of the decision or taking the decision about seceding from the European Union.

Challenged by the applicant, Article 48 of the Treaty on European Union does not exclude the possibility of applying the triad of constitutional restrictions as regards conferral of competences (cf. point 2.6. of this part of statement of reasons), and thus it does not exclude granting consent as regards the conferral of competences in certain matters by statute, in accordance with the requirements specified in Article 90(2) of the Constitution, or by way of a nationwide referendum.

It is the Parliament that devises appropriate solutions concerning the fulfilment of constitutional requirements which are indispensible due to the principle of protection of the state’s sovereignty in the process of European integration and possible specification of requirements which allow to avoid the consequences of the difference of opinions in that regard between the government and the Parliament; this is to be facilitated by the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union.

The binding constitutional provisions (in particular Article 90) allow for the interpretation of the Constitution which makes it possible to assume that the modification of Treaty provisions without amending the Treaties, entailing the conferral of competences on an international organisation or international institution, pursuant to an international agreement, although not by way of changing its provisions in the course of revising the Treaties, requires meeting the same criteria which Article 90 of the Constitution specifies for an international agreement.

For the above reasons the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Mirosław Granat
to the Judgment of the Constitutional Tribunal
of 24 November 2010, Ref. No. K 32/09

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the statement of reasons for the judgment by the Constitutional Tribunal dated 24 November 2010, Ref. No. K 32/09, as I partly disagree with the argumentation presented in the said statement of reasons.

1. The statement of reasons for the judgment contains the view (point 1.1.2.) that the Treaty of Lisbon, ratified in accordance with the procedure set out in Article 90 of the Constitution, enjoys a special presumption of constitutionality. The view is supported with basic arguments: the requirement to follow a specified procedure when ratifying such a treaty (being more stringent than the requirements for amending the Constitution) and the participation of the President of the Republic of Poland in the ratification procedure, who is obliged to commence the procedure for preventive review of such a treaty if he considers it to be inconsistent with the Constitution.

The argument of "a special presumption of constitutionality" with regard to the Treaty of Lisbon does not convince me for a number of reasons. First of all, it may suggest that a normative act enjoying such a presumption may not be deemed unconstitutional, as long as the applicant applying for a constitutional review does not present special (unique) arguments for such adjudication. I wish to point out that even the stringent requirements of Article 90 of the Constitution do not guarantee that a ratified treaty will be consistent with the Constitution. The procedure for ratifying an international agreement does not directly determine whether a given agreement will be constitutional. The special procedure set out in Article 90 is to safeguard the constitutional order against defective and negligent conferral of competences. However, the explanation of "conferral of competences" is provided in jurisprudence and the doctrine. Moreover, it seems that emphasising here the fact of the requirements being more stringent than the requirements for amending the Constitution, it is easy to confuse the question of constitutionality or unconstitutionality of the law passed (enacted) pursuant to the Constitution with the issue of the so-called rigidity of the Constitution itself. Secondly, a preventive review initiated by the President, in fact, comprises not only international agreements (the cited argument would suggest that statutes should also enjoy the presumption of constitutionality). At the same time, it should be stressed that, in the light of Article 133 of the Constitution, initiating a preventive review by the President is always optional and contingent upon the will of the President. Thirdly, the Constitution itself does not provide bases for grading the presumption of constitutionality of normative acts which are binding in the Polish legal order (this is not

contradicted by the fact that, within the framework of preventive review, the Tribunal assumes a stronger presumption of constitutionality of the statute that has not yet entered into force).

Regardless of the discussion provoked by the presentation of the presumption of constitutionality in this case (an international agreement ratified in accordance with Article 90 of the Constitution), I do not assign much significance to the problems related to the said presumption in my polemics with the arguments in the statement of reasons. I only wished to point out that the presumption of constitutionality of the Treaty, "ratified by the President of the Republic of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Constitution" (point 1.1.2.), may be challenged and is subject to revocation according to, in a way, "ordinary" rules. The construct of presumption entails that if it is not proved otherwise, we recognise the validity of a given fact or assumption. It seems that it is likewise with the presumption of constitutionality: every normative act is regarded as consistent with the Constitution, as long as it is not proved otherwise.

2. The Constitutional Tribunal draws attention to the guarantees for the interests of the Member States as an important factor influencing the assessment of constitutionality of the challenged provisions of the Treaty (point 4.1. and point 4.3.3.). And therefore, for instance, the mechanism for "monitoring" progress in the ratification of revised treaties by the Member States is presented as one of such safeguards (Article 48(5) of the Treaty). In my opinion, this mechanism primarily serves as a guarantee of the interests of the European Union as a whole (it may be used, *inter alia*, to persuade particular Member States which would be unwilling to ratify the signed revised treaties to change their stances). In no way does the "monitoring" from Article 48(5) extend the protection of interests of the Member States interested in blocking the entry into force of the signed revised treaties.

In another fragment of the statement of reasons, the mechanism of dependence of the action of the Council on the Commission's proposal as well as the necessity of acquiring consent from the European Parliament have been presented as the guarantees of protection of subjectivity of the Member States. However, within the meaning of the provisions of the Treaties, the Commission promotes the general interest of the Union (Article 17(1) of the EU Treaty), and the European Parliament is composed of representatives of the Union's citizens (Article 14 of the EU Treaty). The European Parliament represents all the nations of the Members States of the European Union. The solution mentioned in the statement of reasons for the judgment corresponds with the idea of a supranational organisation and serves the interests of the entire European Union.

The Constitutional Tribunal also states that "it is pointed out in the substantiation of the application by the group of Senators that Article 48 of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union «does not take into account the primacy of consent of a given Member State with regard to the national public security clause». This allegation is not justified in the context of the explicit wording of Article 4(2) of the Treaty on European Union, which stipulates that «national security remains the sole responsibility of each Member State»"

(point 4.2.11.). The quoted view of the Tribunal may raise certain doubts, as the term "national security" from Article 4(2) of the EU Treaty is not tantamount to "public security" (which the applicants have used). Within the meaning of Title V of the TFEU, the realm of "security" falls within the scope of the European Union, which constitutes "an area of freedom, security and justice". Therefore, the issues of "public security" fall within the scope of the European Union. The aforementioned Article 4(2) of the EU Treaty does not, on its own, constitute the guarantee of the interests of a given Member State as regards public security.

3. In my view, determining the conformity of the challenged provisions to Article 90 of the Constitution, first of all, requires precise determination of the meaning of that provision. Secondly, Article 90 of the Constitution, which constitutes the basis for Poland's conferral of competence of state organs, should be interpreted in a broader context of constitutional axiology.

The Constitution specifies fundamental values which are the basis of the legal system and indicate basic public duties which are to be carried out by the state. In the present circumstances, in the face of the states' diminishing ability to solve their economic and social problems, it is indispensible to seek instruments for implementation of constitutional values and for carrying out public duties. According to the constitution-maker, such an instrument is, *inter alia*, Poland's membership in international organisations which are competent as regards public authority.

From the point of view of the Constitution, "conferral of competences" is one of the means of implementing constitutional values and fulfilling the duties assigned to the state. The conferral of competences makes sense only when it leads to better implementation of constitutional values and better fulfilment of constitutional duties. On the one hand, Poland has a constitutional obligation to refrain from conferring competences on an international organisation if such conferral does not serve better implementation of constitutional values and better fulfilment of constitutional duties (likewise, if membership in an organisation equipped with the competences of state organs ceases to serve the implementation of constitutional values and the fulfilment of constitutional duties). On the other hand, it is possible to derive, from the constitutional norms protecting certain values and specifying the duties of the state, the obligation of the state to undertake action aimed at the implementation of the values and the fulfilment of the duties, by means of the most adequate constitutional measures. The constitutional duties which are better fulfilled at a supranational level may and should be assigned to international organisations equipped with the relevant competences. Thus, Article 90 of the Constitution should serve the effective implementation of constitutional values and the effective fulfilment of constitutional duties, but the application of that Article is subject to evaluation from the point of view of those values and duties.

After determining the meaning of Article 90 of the Constitution, it is essential to interpret the conferral of "competence of organs of State authority". In the light of the doctrine, this term does not denote a simple transfer of competences from the level of the state to a supranational level, but describes a complex legal situation with regard to the state's membership in international organisations and institutions equipped with some

competences that have legal effects. The conferral of "competence of organs of State authority" means a situation where a given authority has been vested with competences under the following conditions: 1) these competences have legal effects; 2) the competences regard issues falling within the scope of competence of the Republic of Poland; 3) those subject to the competences are individuals or other private entities being under the rule of the Republic of Poland; 4) the competences authorise a given international organisation or international institution to enact legal acts imposing obligations directly on those subject to the competences. In other words, as a result of the conferral of competences, a given organisation or institution gains direct public power over private entities being under the rule of the Republic of Poland. Granting such power to an international organisation or international institution requires the fulfilment of the substantive and formal requirements set out in Article 90 of the Constitution. The said provision authorises the conferral of "competence of organs of State authority", which entails that legal measures of an international organisation or international institution will be precisely specified. The Constitution does not stipulate about the conferral of "state authority", "territorial sovereignty" or "sovereign powers", not being specified by precisely indicated competences. Thus, Article 90 of the Constitution assumes that an international agreement constituting the basis for conferral of competences will be sufficiently specific. The international agreement referred to in Article 90 of the Constitution must, with adequate precision, determine particular competences of the bodies of an international organisation or the competences of an international institution (this is going to be further discussed later on in this dissenting opinion).

Article 90 of the Constitution provides for a special procedure for ratification of international agreements constituting the basis of conferral of competences of state organs. With regard to that provision, there are various doubts as to the scope of its application.

Firstly, a question arises as to the meaning of the wording "by virtue of international agreements". In the literature on the subject, there is a view that, under the provisions of the Constitution, conferral of competences may occur not only in an international agreement itself, but also by means of various legal acts enacted on the basis of the said agreement. This means that a legal act enacted on the basis of an international agreement ratified in accordance with Article 90 of the Constitution, and conferring the competences of organs of the state, needs to be neither ratified nor approved, in any other way, in accordance with the procedure specified in that provision, provided a given international agreement, with adequate precision, specifies particular competences which may be conferred by a legal act enacted on its basis. Therefore, an international agreement ratified in accordance with Article 90 of the Constitution may provide for the conferral of particular competences, specified in advance, conferred by a legal act issued on the basis of the agreement, without any need to resort again to the procedure specified in the said provision.

Secondly, another question arises as to whether any changes to the agreement ratified in accordance with Article 90 of the Constitution require applying that procedure again. If, pursuant to that provision, the object of conferral is to be particular competence, then the scope of application of the provision must encompass not only the conferral of competences as such, but also any significant amendments to the regulations concerning

the competence conferred earlier. Significant amendments should include, in particular, amendments to the manner of exercising those competences (e.g. amendments to the provisions regarding the majority required for the exercise of conferred competences). This means that an amendment to the provisions of an international agreement (ratified in accordance with Article 90 of the Constitution) which regard essential elements of the conferred competences requires concluding a new international agreement, subject to ratification in accordance with Article 90 of the Constitution. It is also admissible to amend the international agreement under analysis by virtue of another legal act which is subject to approval in accordance with the procedure specified in the said constitutional provision. By way of exception, in the light of the above arguments, an international agreement ratified pursuant to Article 90 of the Constitution may authorise the introduction of amendments, on the basis of that agreement, by means of legal acts that are not subject to approval in accordance with the procedure set out in Article 90 of the Constitution, provided that the content of the admissible amendments has been sufficiently specified in the said agreement.

In my opinion, the meaning of Article 90 of the Constitution has not been explained by the Tribunal, to the extent it is indispensible for correct substantiation of the adjudication in the present case. As a consequence, the substantiation of that part of the judgment is not free from certain inconsistencies.

3.1. In point 2.6. of the statement of reasons, the Tribunal states that "an amendment to an international agreement being a basis of conferral of competences, as referred to in Article 90(1) of the Constitution, requires consent pursuant to the provisions of Article 90 of the Constitution", which seems to suggest that any, even the tiniest amendment to the Treaties constituting the basis of the functioning of the European Union requires the application of the procedure specified in the said constitutional provision.

By contrast in point 4.2.9., justifying the view that Article 48(6), third subparagraph, of the EU Treaty is consistent with the Constitution, the Tribunal states that "any conferral of competences in that regard is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision «shall not increase the competences conferred on the Union in the Treaties». Therefore, there will be no conferral of «competence of organs of State authority in relation to certain matters». Thus, the point is not the conferral of competences". This suggests that Article 90 of the Constitution applies to the cases of conferral of competences, whereas other amendments to the Treaties constituting the basis of the functioning of the European Union did not fall within the scope of application of the constitutional provision under consideration (which appears to contradict the view cited above).

There is also inconsistency in point 4.2.7., where the Constitutional Tribunal states that: "In the light of the Polish law, for the legal acts referred to in Article 48(6) of the Treaty on European Union, Article 12(2a) of the Act (...) on International Agreements (...), amended by the Cooperation Act, requires ratification. An international agreement is submitted to the President of the Republic of Poland for ratification after the consent referred to in Article 89(1) and Article 90 of the Constitution, or after notification of the Sejm of the Republic of Poland pursuant to Article 89(2) of the Constitution (Article 15(5)

in conjunction with Article 15(3) of the Act on International Agreements)". In this statement, the Tribunal permits different procedures for ratification of amendments to the Treaties constituting the basis of the functioning of the European Union, which seems to contradict the above-mentioned firm statement that amendments to those Treaties require the application of Article 90 of the Constitution.

Still, in another place (point 2.6.), the Tribunal presents the view that "Article 90 of the Constitution (...) excludes conferral of competences without conformity to a legal basis provided for therein and the democratic procedure for enacting it. An amendment to the content of a treaty, without observing the procedure for ratification which leads to the conferral of competences on the Union requires – due to the fact that Article 2 of the Constitution is binding – a relevant statutory basis pursuant to the rules contained in Article 90 of the Constitution".

The quoted statements raise reservations. I wish to point out that Article 90 of the Constitution applies both to the case of conferral of competences as well as to the case of significant amendments to the Treaties, concerning the competences already conferred. However, the scope of application of that provision does not encompass amendments to the Treaties which do not concern essential elements of the competences already conferred as well as amendments which do not, at all, refer to the competences of an international organisation or international institution, but which concern other provisions contained therein. In my view, in the light of the above argumentation, it is possible to confer competences by means of a legal act issued on the basis of an international agreement ratified pursuant to Article 90 of the Constitution, without any need for another approval of the said act amending the Treaties, in accordance with the procedure set out in that provision.

3.2. Article 48(7) of the EU Treaty regulates one of the simplified revision procedures of the Treaties constituting the basis of the functioning of the European Union. I agree with the view presented in the judgment that the above provision is consistent with the Constitution. However, in the case under examination, it is vital to correctly qualify the content of that provision, from the point of view of Article 90 of the Constitution. In my view, the said Treaty provision does not constitute the basis for conferral of competences, but it authorises amendments to the essential elements of the procedure for the exercise of competences already conferred. The said provision precisely determines the content of admissible amendments which may be introduced on the basis thereof. For the above reasons, legal acts issued on its basis constitute an example of conferral of competences by virtue of an international agreement, ratified pursuant to Article 90 of the Constitution. In my opinion, in the light of the views presented in the doctrine, in the context of the binding Constitution, those legal acts require neither prior consent pursuant to Article 90 of the Constitution nor approval in accordance with the procedure regulated in that constitutional provision.

At the same time, the Tribunal considers the issue of potential clash between an amendment to the Treaties adopted pursuant to Article 48(7) of the EU Treaty and the Constitution, and possible ways of eliminating such a clash (relevant amendments to the Constitution, modification of the scope of conferral of competences arising from that

decision, alternatively working out a change of the said decision, or a decision to secede from the Union. Such an approach raises reservations, as Article 48(7) of the EU Treaty narrowly and unambiguously specifies the content of amendments which may be introduced on its basis. Such amendments, as long as they fall within the scope specified in Article 48(7) of the EU Treaty, should be regarded as consistent with the Constitution (there is no need, in the statement of reasons, to consider the question of potential clash between the content of those amendments and the content of constitutional norms).

4. I share the view that Article 352 of the TFEU (the so-called flexibility clause) is consistent with the Constitution. However, I have reservations as to the substantiation of that view. Article 352 of the TFEU authorises the European Union to enact laws to attain the objectives set out in the Treaties, within the framework of the policies defined in the Treaties. The procedure at the same time regulates the procedure for enacting law on its basis. The structure of the flexibility clause may raise reservations from the point of view of the principle of a state ruled by law, in particular from the point of view of the principle of adequate specificity of legal regulations. It should also be noted that our legal doctrine prohibits the presumption of legislative competences, as well as prohibits derivation of competences of state organs from the provisions which set out the duties of the said state organs. By contrast, the flexibility clause has a wide scope of application and grants general authorisation to undertake action which is not *expressis verbis* provided for in the Treaties. Thus, the EU bodies find here a broad competence basis to undertake action aimed at attaining the objectives set out in the Treaties.

It is worth noting that in the judgment of 30 June 2009, Ref. No. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, the Federal Constitutional Court of Germany expressed its reservations with regard to the flexibility clause, drawing attention to the fact that the Treaty of Lisbon considerably extended the scope of application of that clause (former Article 308 of the EC Treaty) to comprise almost entire realm of the primary EU law, with the exclusion of common foreign and security policy (thesis 327). In the view of the Federal Constitutional Court of Germany, the flexibility clause considerably relaxes the principle of conferral (thesis 326) and makes it possible to substantially amend the treaty foundations of the European Union without the constitutive participation of legislative bodies of the Member States (thesis 328).

Coming back to the Polish law, it should be stated that if one juxtaposed the Polish standards concerning the national law with the flexibility clause, then the constitutionality of the clause would raise serious doubts. In my view, when applying the principle of adequate specificity of legal regulations, one should take into consideration the nature of international law. International agreements are formulated in a different way than national statutes, usually in a less detailed way. The principle of adequate specificity of legal regulations, with regard to international agreements, must leave greater freedom of regulation to the bodies conducting the treaty policy than to the legislator and other public authorities entrusted with legislative competences. Only then may it be stated that Article 352 of the TFEU still falls within the scope of regulatory freedom reserved to the Polish public authorities, in the light of Article 90 of the Constitution.

For the above reasons, I have found it necessary to submit this dissenting opinion to the statement of reasons of the judgment dated 24 November 2010, Ref. No. K 32/09.