63/5/A/2013

JUDGMENT

of 26 June 2013

Ref. No. K 33/12*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Mirosław Granat
Leon Kieres
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja – Judge Rapporteur
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 26 June 2013, in the presence of the applicants, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

* The operative part of the judgment was published on 18 July 2013 in the Journal of Laws - Dz. U., item 825.

the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748) to Article 90 in conjunction with Article 120, first sentence, Article 88, Article 146 and Article 219 of the Constitution as well as Article 48(6) of the Treaty on European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended),

adjudicates as follows:

The Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748) **is not inconsistent with Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution of the Republic of Poland as well as with Article 48(6) of the Treaty on European Union** (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended)**.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal 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, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[…]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the allegation.

1.1. A group of Sejm Deputies (the 7th term of the Sejm) questioned the procedure applied to enact the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the Act on the ratification of the European Council Decision 2011/199/EU). The Act on the ratification of the European Council Decision 2011/199/EU was signed by the President of the Republic of Poland on 26 June 2012, and was subsequently published in the Journal of Laws of 2 July 2012 and entered into force on 17 July 2012.

The wording of the challenged Act reads as follows:

"Article 1. Consent shall be granted to the President of the Republic of Poland to ratify the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91, 6. 4.2011, p. 1).

Article 2. The Act shall enter into force after the lapse of 14 days from the day of its promulgation".

The challenged Act expresses consent to the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the European Council Decision 2011/199/EU). Amended Article 136 has been included in Part Three, Title VIII, chapter 4 of the Treaty on the Functioning of the European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), entitled "The Provisions Specific to Member States Whose Currency is the Euro".

Pursuant to Article 1 of the European Council Decision 2011/199/EU, the following paragraph shall be added to Article 136 of the TFEU:

"The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

The European Council Decision 2011/199/EU amending Article 136 of the TFEU

has been adopted by "having regard to" Article 48(6) of the Treaty on European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended; hereinafter: the TEU). On the basis of 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), the EU legal acts referred to in Article 48(6) of the TEU are subject to ratification; this fulfils the requirement indicated in Article 48(6) of the TEU, which states that decisions should be adopted in this way in compliance with relevant constitutional requirements of the Member States. The President of the Republic of Poland ratified the European Council Decision 2011/199/EU on 25 October 2012.

Pursuant to Article 2 of the European Council Decision 2011/199/EU: "Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements. This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph". The European Council Decision 2011/199/EU entered into force after it was approved by all the Member States in accordance with their constitutional provisions. The set deadline (1 January 2013) was not met, as the Czech Republic ratified the said Decision on 3 April 2013, and hence the said Decision entered into force on 1 May 2013 (see the Government's Statement of 26 April 2013 on the binding force of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU); Journal of Laws - Dz. U. item 783).

1.2. The constitutional issue in the light of the raised allegations.

1.2.1. In the view of the applicants, the challenged Act on the ratification of the European Council Decision 2011/199/EU created procedural bases for conferring competences vested in the organs of state authority, in relation to certain matters, upon an international organisation – the European Stability Mechanism (hereinafter: the ESM). Therefore, consent to the ratification of the European Council Decision 2011/199/EU should have been granted in accordance with the procedure set out in Article 90 of the Constitution, and not in accordance with the procedure provided for in Article 89(1) of the Constitution. In the context of that allegation, the applicants indicated the infringement of Article 90 in

conjunction with Article 120, first sentence, of the Constitution, and additionally the infringement of Article 219 and Article 146 of the Constitution, due to "creating legal bases for restricting the powers of the Sejm to implement a budgetary policy as well as the power of the Council of Ministers to implement an economic policy, by way of granting the European Commission the competence to specify the terms of a mechanism correcting the financial economy of the state".

In the applicants' view, the Act on the ratification of the European Council Decision 2011/199/EU is also inconsistent with Article 48(6) of the TEU, due to the fact that the said Decision was issued without a legal basis, and the ratification thereof not only leads to the adoption thereof in a way that is inconsistent with Article 90 of the Constitution, but also results in a situation where "provisions that have been introduced into the Treaty on the Functioning of the European Union have entered the legal order in an illegal way and, for that reason, they may not constitute a source of universally binding law, which additionally infringes Article 88 of the Constitution".

1.2.2. The allegation formulated by the applicants in point 1 of the *petitum* of the application required that it be determined whether the enactment of the Act on the ratification of the European Council Decision 2011/199/EU entails – within the meaning of Article 90 of the Constitution – conferring competences vested in the organs of state authority, in relation to certain matters, upon an international organisation or international institution. In the context of the present case, an important question has emerged, namely whether the procedure for enacting a statute that grants consent to ratification, as provided in Article 90 of the Constitution, is also required when 'the conferral of competences of organs of state authority' due to ratification of an international agreement may occur only potentially, in an unspecified future. Indeed, the applicants have alleged that the Act "provides" a basis for conferring competences, and not that such conferral took place at the moment of ratifying the European Council Decision 2011/199/EU. What suggests such reasoning on the part of applicants is their assertion that it is necessary to interpret the amendment to Article 136 of the TFEU in conjunction with the provisions of the Treaty Establishing the European Stability Mechanism (hereinafter: the ESM Treaty), as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic

of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, done at Brussels on 2 March 2012 (hereinafter: the Fiscal Compact).

Another allegation - the alleged infringement of Article 48(6) of the TEU by the Act on the ratification of the European Council Decision 2011/199/EU – is only indirectly linked with the main issue. The procedure in accordance with which the European Council Decision 2011/199/EU has been adopted has no direct connection with assessing the constitutionality of the Act on the ratification of the European Council Decision 2011/199/EU in the light of Article 90 in conjunction with Article 120, first sentence, of the Constitution.

2. The special character of a constitutional review in the case of a statute on ratification.

2.1. A statute granting consent to the ratification of an international agreement is a special statute, due to its normative content. There are no doubts that it is admissible for the Constitutional Tribunal to examine the Act on the ratification of the European Council Decision 2011/199/EU. In its judgment of 11 May 2005, ref. no. K 18/04 (OTK ZU No. 5/A/2005, item 49), the Tribunal has stated that: "Examining the constitutionality of a statute providing for the ratification of an agreement that confers competences falls within the scope of the jurisdiction of the Constitutional Tribunal (indeed, the said act remains a statute within the meaning of Article 188 of the Constitution). The President of the Republic of Poland may refer a bill authorising ratification to be examined in the course of *a priori* review by the Tribunal; other authorities specified in Article 191 of the Constitution (including 50 Deputies and 30 Senators) may request the Tribunal to review a statute authorising ratification after it has been passed by the Parliament".

Pursuant to Article 42 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 shall, while adjudicating on the conformity of the normative act or ratified international agreement to the Constitution, examine both the contents of the said act or agreement as well as the power and observance of the procedure required by provisions of the law to promulgate the act or to conclude and ratify the agreement. Despite its unique subject and normative content, a statute on ratification is still a statute, and no provision delineating the scope of jurisdiction of the Constitutional Tribunal excludes that statute from the

possibility of being reviewed by the Tribunal. A constitutional review of a statute on ratification may concern all elements of the statute: the content of the statute, powers to enact it, as well as a procedure for enacting it (Article 42 of the Constitutional Tribunal Act). In practice, not the succinct wording of such a statute, but the existence of powers to issue the statute as well as compliance with a procedure for enacting the said statute (due to doubts arising in the doctrine and the practice of applying the law as to the understanding of some of its elements) may be of most significance (see K. Działocha, comment 6 on Article 89 of the Constitution [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 1999).

2.2. The Constitutional Tribunal has expressed its views (although in a different constitutional context) on the character and scope of review in the case of a statute granting consent to ratification. In its resolution of 30 November 1994, ref. no. W 10/94 (OTK in 1994, part 2, item 48), the Tribunal stated that this was a statute specifying competence and that its content comprised not only the indication of an organ of the state that was authorised to act, but also the character of that action; the said action is the ratification of an international agreement indicated in the statute. An analysis of the content of the statute authorising ratification must be carried out by analysing the content of a given international agreement which that statute concerns. At the same time, the Tribunal underlined that the point was only to review the statute authorising ratification, and not the international agreement as such. The Tribunal also pointed out that there were no doubts as to the jurisdiction of the Constitutional Tribunal to review the constitutionality of statutes authorising ratification – as well as of any normative acts – from the point of view of particular criteria. The Tribunal examines both the content of such an act as well as competence and the compliance with a statutory procedure required to issue such an act.

2.3. The view presented above is also up to date in the light of the Constitution of 1997, which is currently in force. It should be assumed that by reviewing statutes granting consent to ratification, a review of international agreements is indirectly carried out, in accordance with the assumption that if an agreement contains provisions that are inconsistent with the Constitution, then a statute granting consent to the ratification of such an agreement is also inconsistent with the Constitution (see L. Garlicki, comment 13 on Article 188 [in:] *Konstytucja*…, Warszawa 2007). Obviously, this is not a review of the constitutionality of an international agreement within the meaning of Article 188(1) of the Constitution, but an analysis of its content, as a prerequisite for the enactment of a constitutional statute granting consent to ratification. In the case of a formal allegation, the said review is limited to

determining whether a given international agreement belongs to the category of agreements referred to in Article 90(1) of the Constitution, and thus whether the legislator adopted an appropriate procedure for the enactment of the relevant statute concerning ratification.

2.4. The indicated scope of the examination of a statute granting consent to the ratification of an international agreement is justified in the case where the choice of a procedure for the said ratification is alleged to be inconsistent with the Constitution. Hitherto the Constitutional Tribunal has not examined such a statute, but has made reference to issues related to the procedure for enacting a statute that is similar in character in the judgment of 18 February 2009, in the case Kp 3/08 (OTK ZU No. 2/A/2009, item 9). The subject of the proceedings in the said case (instituted on the basis of an application submitted by the President in accordance with Article 122(3) of the Constitution) was Article 1 of the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union (hereinafter: the Act of 10 July 2008). At the hearing, the representative of the applicant raised allegations that the legislative procedure had been infringed by the application of an inappropriate procedure for enacting the challenged Act. He argued that a statue providing authorisation to submit a declaration on acceptance of the jurisdiction of the CJEC on the basis of Article 35 of the TEU should be enacted in accordance with the procedure set out in Article 90 of the Constitution. In the statement of reasons for the said judgment, the Constitutional Tribunal did not share the view that the effect of the said declaration was conferral of the powers of the court or – according to another formulation – the narrowing down of the judicial powers of Polish courts and an increase in powers vested in the bodies of an international organisation, i.e. the Court of Justice, which entails that there was no need to enact the challenged Act in accordance with Article 90 of the Constitution. This conclusion was drawn by the Constitutional Tribunal on the basis of the substantive analysis of the content of the said declaration and the Tribunal held that the declaration submitted pursuant to Article 35(2) of the TEU amounted only to "activating" the said power, and not to the emergence thereof. Thus, in its judgment in the case Kp 3/08, the Constitutional Tribunal carried out an analysis of the content of the declaration that was to be submitted by the President, in the light of the premiss expressed in Article 90 of the Constitution.

2.5. In the view of the Constitutional Tribunal, the character of the Act challenged in these proceedings and the scope of the formulated allegations require taking account not only

of the content of the European Council Decision 2011/199/EU, which is subject to ratification, but also of a broader normative context that is linked to the ratification of the said Decision. However, this is not tantamount to the assessment of the constitutionality of Article 135(3) of the TFEU, the ESM Treaty or the Fiscal Compact.

3. The genesis and *ratio legis* of the European Council Decision 2011/199/EU.

3.1. The deepening of the financial crisis considerably hindered the economic growth and led to an increase in the level of deficit and the debt level of the EU Member States. Consequently, this led to a severe deterioration of the borrowing conditions of several Member States. The EU Member States noticed that the said problem may pose a serious threat to the financial stability of the European Union as a whole. A need arose to undertake stability actions, also within the scope of the EU. The first financial assistance was granted to Greece, which was in the most urgent need, and took the form of bilateral loans granted together with multi-lateral assistance provided by the International Monetary Fund and coordinated by the Commission (cf. Council Decision of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2011/734/EU), (OJ L 296, 2.7. 2011, p. 38).

3.1.1. Further remedial measures taken within the scope of the EU were based on Article 122(2) of the TFEU, which provided for the possibility of awarding financial aid to an EU Member State which was in difficulties or was seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. It was deemed that such difficulties might be caused by considerable deterioration of the economic and financial circumstances. For this reason, the Council Regulation (EU) No. 407/2010 of 11 May 2010 established a European Financial Stabilisation Mechanism (OJ L 118, 11.5.2010, p. 1; hereinafter: the EFSM), the purpose of which was to preserve the financial stability of the European Union. The said mechanism was to allow the Union to respond in a coordinated, rapid and effective manner to acute difficulties in a particular Member State. At the same time, the European Financial Stability Facility was established (hereinafter: the EFSF) as a public limited liability company (FR. *société anonyme*) under Luxembourgish law, with its office in Luxembourg. Funds for loans and lines of credit under the EFSM were acquired by the European Commission by issuing debt instruments on the European market, which were guaranteed by the budget of the European Union. By contrast, assistance provided by

the EFSF was financed from the issuance of bonds or other debt instruments guaranteed by the euro area Member States. The EFSF was authorised to act on the basis of a precautionary programme, to grant loans for capitalising financial institutions to States that had not been included under a macro-economic adjustment programme as well as to intervene in the secondary bond markets (on the basis of a decision of the ECB as well as a unanimous decision of EFSF Shareholders). In extraordinary situations, the EFSF could also intervene in the primary bond market. Hitherto assistance under the temporary rescue mechanism has been provided to the following euro area Member States: Ireland, Portugal, Greece, Spain and Cyprus.

However, there has been no doubt that the financial assistance provided under Article 122(2) of the TFEU is short-term and is inappropriate to prevent different kinds of systemic risks related to the functioning of the common currency. It has been deemed necessary to establish a permanent mechanism that would safeguard financial stability in the euro area under which it would be possible to grant financial assistance to the Member States that experience financial difficulties.

3.1.2. At the meeting of the European Council in October 2010, the Heads of State or Government agreed on the need for the Member States to establish a permanent crisis mechanism. Main findings constituting the basis for establishing the ESM were adopted at the meetings of the European Council on 16-17 December 2010. The European Council concluded that since such a mechanism was to safeguard the stability of the euro area as a whole then it would supplement funds granted so far on the basis of Article 122(2) of the TFEU. The consequence of such a stance was the statement that the establishment of the stability mechanism does not increase the competences conferred on the Union in the Treaties and the introduction of a norm that provides for the establishment thereof was admissible in accordance with Article 48(6) of the TEU.

At its meetings on 24 and 25 March 2010, the European Council unanimously adopted the European Council Decision 2011/199/EU, amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, and requested the Member States to commence national ratification procedures expeditiously – so that the said Decision would enter into force on 1 January 2013. By the European Council Decision 2011/199/EU, paragraph 3 has been added to Article 136 of the TFEU, which explicitly provides that the Member States whose currency is the euro may establish a stability mechanism. Pursuant to Article 48(6) of the TEU, the said

Decision was to be approved by the EU Member States in accordance with their respective constitutional requirements. At the same time, it should be emphasised that Article 122 of the TFEU was not deleted, and the Union has maintained the competence granted to it in that provision.

3.2. The normative significance of Article 136(3) of the TFEU.

3.2.1. Added on the basis of the European Council Decision 2011/199/EU, Article 136(3) of the TFEU, reads as follows: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

First of all, attention should be drawn to the fact that the provision does not in itself establish a stability mechanism that is subject to the EU law; nor does it impose on the EU Member States, nor even on the EU Member States whose currency is the euro, an obligation to establish one. Within that scope, its normative content amounts to recognising the powers of the Member States to establish such a mechanism by means of international law instruments. Indeed, one may not have any doubts that the EU Member States have – within the scope of their sovereignty – competence to conclude international agreements, provided this does not violate commitments assumed by the States in the Treaties on which the European Union is founded, taking into account Article 3 of the TFEU. In this context, the newly introduced norm, in greater detail, specifies that the establishment of the said mechanism, outside the EU institutional framework, neither infringes the sole competence of the Union to carry out the monetary policy of the euro area, nor violates a prohibition expressed in Article 125 of the TFUE. Also, one may not overlook the fact that the norm set out in Article 136(3) of the TFEU does not precisely specify the legal character or the detailed construction of the stability mechanism. It merely contains a very general recommendation that the mechanism established may, first of all, be activated if indispensable to safeguard the stability of the euro area as a whole and will, secondly, be made subject to strict conditionality. The said provision does not oblige the EU institutions to cooperate within the framework of the newly created mechanism; nor does it specify what competences are to be assigned to those institutions.

3.2.2. As it has been mentioned above, before the establishment of the ESM, the legal basis for granting financial assistance within the EU was Article 122(2) of the TFEU. Pursuant to that provision, where a Member State is in difficulties or is seriously threatened

with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. At the same time, the said provision mentions exceptional and extraordinary circumstances; however, no treaty provisions provide for the possibility of establishing a permanent crisis or stability mechanism.

The possibility of establishing a permanent mechanism to safeguard the financial stability of the euro area as a whole, which would be financed by the euro area Member States, by way of an international agreement, raised doubts due to, first of all, violating exclusive competence of the Union in the area of monetary policy for the Member States whose currency is the euro (Article 3(1)(c) of the TFEU), and secondly not going beyond the scope of application of a prohibition included in Article 125 of the TFEU that the Union or the EU Member States shall not be liable for or assume the commitments of other EU Member States (see J. Barcz, *Traktat z Lizbony. Wybrane aspekty prawne działań implementacyjnych*, Warszawa 2012, chapter II, point 5.2). the purpose for introducing Article 136(3) of the TFEU was to eliminate these doubts.

Pursuant to Article 125(1) of the TFEU: “The Union shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of any Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project. A Member State shall not be liable for or assume the commitments of central governments, regional, local or other public authorities, other bodies governed by public law, or public undertakings of another Member State, without prejudice to mutual financial guarantees for the joint execution of a specific project” (the so-called no-bailout prohibition of Article 125 of the TFEU). The prohibition was introduced by the Treaty of Maastricht, and the purpose thereof was to ensure that the EU Member States would carry out a balanced budget policy and would be forced to adjust to the market ways of obtaining funds for financing public debt.

Doubts concerning the meaning of Article 125(1) of the TFEU constituted a significant argument in the context of establishing the ESM. The “requirement” of the introduction of Article 136(3) of the TFUE, referred to in recital 2 of the European Council Decision 2011/199/EU, should be construed, in this context, as satisfying the need to preserve the certainty of law which consisted in a prohibition against taking over liabilities of other Member States as well as a prohibition against establishing mechanisms that discourage the EU Member States from carrying out a balanced budget policy. What serves the last-

mentioned purpose is, in particular, second sentence added to Article 136(3), pursuant to which: "The granting of any required financial assistance under the mechanism will be made subject to strict conditionality". Such a version of Article 136(3) of the TFEU does not contain any new normative content, but merely confirms the fact that the EU Member States, including those whose currency is the euro, are entitled to competence – which is only to an insignificant extent limited by the content of Article 125(1) of the TFEU – to conclude international agreements, also those agreements the purpose of which is the establishment of assistance mechanisms.

3.3. A relation between Article 136(3) of the TFEU and the ESM Treaty.

The Treaty establishing the European Stability Mechanism (hereinafter: the ESM Treaty) was signed by the EU Member States whose currency is the euro on 2 February 2012. Pursuant to its Article 48, it entered into force on 27 September 2012. By contrast, the European Council Decision 2011/199/EU entered into force only on 1 May 2013. The chronology of those events shows that there is no correlation between adding paragraph 3 to Article 136 of the TFEU and the ratification of the said Decision and the ratification of the ESM Treaty. The amendment to Article 136 of the TFEU is mentioned in recital 2 of the Preamble to ESM Treaty.

A mutual relation between Article 136(3) of the TFEU and the ESM Treaty raised doubts of the Irish Supreme Court, which referred a question to the Court of Justice for a preliminary ruling; the question was as follows: whether the entitlement of a Member State to enter into and ratify an international agreement such as the ESM Treaty was subject to the entry into force of the European Council Decision 2011/199/EU (more on that judgment in part III point 7.4 of this statement of reasons). In accordance with the judgment of the Court of Justice (see the judgment of 27 November 2012 in the case *Pringle v Government of Ireland* (C-370/12); hereinafter: the judgment in the case *Pringle v Government of Ireland*) the right of the EU Member State to enter into and ratify the ESM Treaty is not dependent on the entry into force of the European Council Decision 2011/199/EU. Also, the practice of the EU Member States in the realm of international law confirmed that interpretation.

4.1. The character of the ESM Treaty.

4.1.1. In July 2011, the euro area Member States signed the first version of the Treaty establishing the European Stability Mechanism. The final version of the Treaty – after the introduction of changes that arose from intergovernmental agreements aimed at enhancing the

effectiveness of that instrument – was signed on 2 February 2012. The Treaty provides for the Contracting Parties to establish an international institution to be named the "European Stability Mechanism"; the Contracting Parties are to be ESM Members (Article 1 of the ESM Treaty).

The establishment of the ESM is to contribute to raising confidence and ensuring solidarity and financial stability in the euro area. The said mechanism creates a permanent firewall with a broad range of tools and a strong financial basis, to safeguard financial stability in the euro area Member States (see Statement by President of the European Council Herman Van Rompuy on the signature of the European Stability Mechanism Treaty, dated 2 February 2012, EUCO 19/12). The initial maximum lending volume of the ESM is EUR 500 billion. The ESM is to take over the tasks that have hitherto been carried out by the EFSF, which may launch new assistance programmes only until July 2013. However, both institutions will function in parallel until the EFSF is dissolved, which will take place at the moment of the return of the last loan granted by the said subject as well as when operations will be settled with entities financing the activity thereof.

4.1.2. The ESM has been established as an intergovernmental institution that is subject to international law. It is to be financed from authorised capital stock of EUR 700 billion (which comprises EUR 80 billion in paid-in shares and EUR 620 billion in callable shares) contributed by the euro area Member States, in principle, in accordance with the key for the subscription of the ECB's capital (the contribution key of the ESM). The purpose of the ESM shall be to mobilise funding and provide stability support under strict conditionality, appropriate to the financial assistance instrument chosen, to the benefit of ESM Members which are experiencing, or are threatened by, severe financing problems, if indispensable to safeguard the financial stability of the euro area as a whole and of its Member States. For this purpose, the ESM shall be entitled to raise funds by issuing financial instruments or by entering into financial or other agreements or arrangements with ESM Members, financial institutions or other third parties. The financial crisis indicated that the payment problems of one of the Member States of the Economic and Monetary Union lead to systemic solutions and have a significant impact on the evaluation of credit rating of the other States. The negative consequences could only partially be counteracted by making use of possibilities provided for in the EU law. It is the common interest of the Member States whose currency is the euro to resolve the problems quickly, in particular by means of their own instruments, such as the ESM, and without any necessity to resort to assistance provided

by external entities. In the event of experiencing financial difficulties, each Contracting Party of the ESM Treaty has gained a possibility of financial assistance provided under a permanent rescue mechanism that functions on terms set, *inter alia*, by the Contracting Party itself, and thus to minimise risks that arise from the necessity to look for temporary solutions.

The ESM constitutes an intergovernmental institution, with full legal personality (Article 32(2) of the ESM Treaty), with its seat and principal office in Luxembourg (Article 31(1) of the ESM Treaty), which is subject to international law. It has been related to the European Union in such a way that certain tasks have been assigned to the European Commission acting in cooperation with the ECB. After a request for stability support is lodged by a given Member State, the tasks comprise the following:

– assessing the existence of a risk to the financial stability of the euro area as a whole or of its Member States, to assess whether public debt is sustainable, as well as to assess the actual or potential financing needs of the ESM Member concerned (Article 13(1) of the ESM Treaty);

– carrying out negotiations concerning a memorandum of understanding detailing the conditionality attached to the financial assistance facility (Article 13(3) of the ESM Treaty);

– monitoring compliance with the conditionality attached to the financial assistance facility (Article 13(7) of the ESM Treaty).

The European Commission has been authorised to sign the memorandum of understanding on behalf of the ESM (Article 13(4) of the ESM Treaty). The Member of the European Commission and the President of the ECB may participate in the meetings of the ESM Board of Governors as observers (Article 5(3) of the ESM Treaty). However, the main decision-making body shall be the Board of Governors, comprising members of the governments of ESM Member States who have responsibility for finance; the European Commission shall act "as commissioned" by the ESM.

The Court of Justice of the European Union (hereinafter: the CJEU) has been authorised, on the basis of the ESM Treaty, to resolve disputes between particular ESM Members as well as between the ESM Member State and the ESM, as regards the interpretation and application of the ESM Treaty and the statute of the ESM, if an ESM Member contests a decision adopted in that context by the Board of Governors. However, the CJEU will act as an international court, and not as an EU court. The CJEU has clearly confirmed that its competence arises from Article 273 of the TFEU.

4.1.3. Pursuant to recital 7 of the Preamble to the ESM Treaty, all euro area Member States should become ESM Members with full rights and obligations, in line with those of the Contracting Parties. As regards the procedure for acceding to the ESM by new members, Article 2 of the ESM Treaty stipulates that membership in the ESM is open to the other EU Member States as from the entry into force of a decision of the Council of the European Union to abrogate their derogation from adopting the euro. New ESM Members are admitted on the same terms and conditions as the other ESM Members. The said terms and conditions have been specified in Article 44 of the ESM Treaty and provide that, after the Council of the European Union adopts a decision to abrogate a given Member State's derogation from adopting the euro, the said Member State files an application for membership. Such an application is lodged with the ESM, which has legal personality.

The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as adaptations to be made to the ESM Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new ESM Members shall accede upon the deposit of the instruments of accession with the depositary, who shall notify other ESM Members thereof. The contribution key of a new member acceding to the ESM shall be calculated in accordance with rules that bind other ESM Members, i.e. in compliance with the key for the subscription of the ECB's capital (Article 2(3) in conjunction with Article 11 of the ESM Treaty). It should be emphasised that pursuant to Article 47 of the ESM Treaty, the Treaty shall be subject to ratification, approval or acceptance by the signatories.

Despite the applicants' allegations, one may not speak of being bound by the ESM Treaty in a situation where the EU Member States whose currency is not the euro decide to participate on an *ad hoc* basis alongside the ESM in a stability support operation for euro area Member States (see recital 9 of the Preamble to the ESM Treaty as well as Article 5(4) and Article 6(3) of the ESM Treaty). Participation on an *ad hoc* basis alongside the ESM in a stability support operation by a Member State with a derogation is voluntary and takes place on the basis of bilateral agreements. What follows from the provisions of the ESM Treaty is that relevant ESM bodies, i.e. the Board of Governors or the Board of Directors, have an obligation to invite the representatives of a given Member State – as observers – to take part in meetings of the said bodies, which concern financial assistance granted under the ESM and supervision over the use of the assistance exercised by that body.

4.2. Accession upon an application for membership

The applicants have assumed that the acceptance of the amendment to Article 136 of the TFEU in relation with the ESM Treaty will modify terms on which Poland could join the euro area (by automatic membership in the ESM), without any possibility of renegotiating the ESM Treaty.

In the applicants' opinion, the ESM Treaty – for which the legal basis is Article 136 of the TFEU – merely means a legal obligation, with a temporary derogation, for Poland to become a member of a new international organisation called the European Stability Mechanism.

One may not accept such argumentation presented by the applicants. In recital 7 to the Preamble, the ESM Treaty stipulates that as a consequence of joining the euro area, a Member State of the European Union should become an ESM Member with full rights and obligations, in line with those of the other ESM Members. However, the ESM Treaty does not provide for automatic inclusion into the ESM (acquisition of the status of a party to the Treaty) for those States which change their status from a Member State with a derogation (or a State with a special status, such as Denmark and the United Kingdom) to a euro area Member State. As it has been stressed before, in accordance with Article 2 of the ESM Treaty ("New Members"), every EU Member State may become an ESM Member, as from the entry into force of the decision of the Council of the European Union taken in accordance with Article 140(2) of the TFEU to abrogate its derogation from adopting the euro. Thus, the ESM Treaty is an example of an international agreement that is conditionally open, and abrogation of the said derogation is a prerequisite for applying for accession to the ESM Treaty.

What follows from the above is that the accession to the ESM Treaty is possible only on the initiative of a Member State whose derogation from adopting the euro was abrogated. Consequently, one may not agree with the reasoning of the applicants.

At the same time, it should be emphasised that it does not follow from the wording of Article 136(3) of the TFEU, as well as from the ESM Treaty itself, that the functioning of the ESM requires all euro area Member States to be ESM Members. In other words, no obligation arises from Article 136(3) of the TFEU or from the ESM Treaty for a euro area Member State to become an ESM Member. Although in recital 7 of the Preamble to the ESM Treaty, the Contracting Parties have expressed an expectation that all euro area Member States will become ESM Members, this is not a legal condition for the entry into force of the ESM Treaty and the European Stability Mechanism.

Pursuant to Article 48 of the ESM Treaty, the said Treaty was to enter into force on

the date when instruments of ratification, approval or acceptance had been deposited by signatories whose initial subscription represented no less than 90% of the total subscriptions set forth in Annex II to the ESM Treaty. Thus, for the entry into force of that regulation, it was admissible if only some euro area Member States adopted the provisions of the said Treaty. And that was the case. The ESM Treaty entered into force on 27 September 2012, after the completion of the ratification process by 16 out of 17 euro area Member States (see *Bekantmachung über das Inkrafttreten des Vertrags zur Einrichtung des Europäischen Stabilitätsmechanismus (EMS),* BGBI, Part II No. 30 of 9 October 2012; *Bundesgesetzblatt für die Republik Österreich,* Part III No. 138 of 28 September 2012). In the context of Estonia, the ESM Treaty entered into force after the documents of ratification were submitted on 3 October 2012. Thus, only since 3 October 2012, all euro area Member States have been ESM Members.

4.3. The Fiscal Compact.

4.3.1. The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (the so-called Fiscal Compact) is a multilateral international agreement. It is aimed at ensuring that governments would maintain sound and sustainable public finances and at preventing a general government deficit from becoming excessive, and accordingly, requires the introduction of a “balanced budget rule” and an automatic mechanism to take corrective action. Pursuant to Article 1 of the Fiscal Compact, the Contracting Parties agree, as Member States of the European Union, to strengthen the economic pillar of the economic and monetary union by adopting a set of rules intended to foster budgetary discipline through a Fiscal Compact, to strengthen the coordination of their economic policies and to improve the governance of the euro area, thereby supporting the achievement of the European Union's objectives for sustainable growth, employment, competitiveness and social cohesion. However, it does not establish a stability mechanism within the meaning of Article 136(3) of the TFEU, subjected to analysis in these proceedings. Similarly to the ESM Treaty, the Fiscal Compact requires separate ratification. The ratification process in the case of the European Council Decision 2011/199/EU was independent of the process of binding Poland by the provisions of the Fiscal Compact.

4.3.2. The compact is fully applicable to the EU Member States whose currency is the euro. The remaining EU Member States – provided that they have signed the compact – are only bound by the provisions included in Title V (Article 14(4) of the Fiscal Compact). With reference to the Member States with a derogation which have ratified the compact, it

will become fully effective as of the day of abrogating the derogation, unless the Member State concerned declares that it wishes to be bound by all or some provisions of Titles III and IV of the Fiscal Compact.

The recitals of the compact comprise that the objective of the Contracting Parties is to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded. At the same time, pursuant to its Article 2, the Fiscal Compact shall be applied insofar as it is compatible with the Treaties on which the European Union is founded and with EU law, and it shall not encroach on the competence of the Union to act in the area of the economic union.

The Contracting Parties have agreed to apply and interpret the provisions of the Fiscal Compact in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required.

4.3.3. In the view of the Constitutional Tribunal, there are no grounds to indicate a direct relation between consent to the ratification of the European Council Decision 2011/199/EU and the provisions of the Fiscal Compact. In the content of the said Decision, there is no mention of the Fiscal Compact. It is only referred to in the content of the ESM Treaty. Due to a separate legal existence of the said Decision and the ESM Treaty, reference to the provisions of the Fiscal Compact in the content of the ESM Treaty may not have an impact on the character of the said Decision. As it has been emphasised earlier, the process of the ratification of the said Decision is independent with regard to the process of binding Poland by the provisions of the Fiscal Compact. From the formal point of view, the Fiscal Compact - as a separate treaty – may not amend the Treaties constituting the basis of the EU and does not establish an international organisation or institution upon which Poland could confer competences vested in the organs of state authority in relation to certain matters.

It should be stressed that on 20 February 2013, the Sejm adopted the Act on the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic,

the Republic of Finland and the Kingdom of Sweden, done at Brussels on 2 March 2012 (Journal of Laws – Dz. U., item 283).

5. Procedures for the ratification of an international agreement

5.1.1. Ratification is a legal form for the Republic of Poland to bind itself by international agreements and certain special legal acts of the European Union. The Polish Constitution specifies a way in which the Republic of Poland binds itself by international agreements as well as a manner of incorporating the said agreements into the Polish legal system. Pursuant to Article 126(1) of the Constitution, the President of the Republic of Poland shall be the supreme representative of the Republic of Poland. The consequence of the above principle is Article 133(1)(1) of the Constitution, within the meaning of which the President of the Republic shall ratify international agreements. The circumstances that Poland binds itself by an international agreement and incorporates it as an element of national law require ratification by the President. This is a necessary, and sufficient, requirement. If the ratification of an international agreement does not require consent granted by statute, then the Prime Minister shall inform the Sejm of any intention to submit the agreement for ratification by the President of the Republic (Article 89(2) of the Constitution). If premisses set out in Article 89(1) or Article 90(1) of the Constitution are fulfilled, the requirement mentioned in the said provisions is to be met; namely, the ratification of an agreement requires prior consent granted by statute.

Pursuant to Article 89(3) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute. The Act on International Agreements confirms that binding the Republic of Poland by an international agreement requires consent granted by way of ratification or by approval (Article 12(1) of the Act on International Agreements). On the basis of Article 12(2) of the Act on International Agreements, ratification shall apply to international agreements referred to in Article 89(1) and Article 90 of the Constitution, as well as to other international agreements which provide for the requirement of ratification or which allow for ratification, and special circumstances justify that.

By contrast, pursuant to Article 12(2a) of the Act on International Agreements (added on the basis of Article 23(1) 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):

“Ratification shall apply to the legal acts of the European Union referred to in Article 48(6) of the Treaty on European Union as well as Article 25, Article 218(8), second subparagraph, second sentence, Article 223(1), Article 262 or Article 311, third subparagraph, of the Treaty on the Functioning of the European Union”. The said provision has been introduced due to the necessity to specify, by statute, a proper way of proceeding with the legal acts of the European Union. Pursuant to Article 15(5) of the Act on International Agreements, Article 15(1)-(4) of the said Act shall be applied accordingly to resolutions of the Council of Ministers concerning the submission of an EU legal act referred to in Article 12(2a) of the said Act to the President of the Republic for ratification. This entails that the submission of an EU legal act to the President for ratification occurs after consent mentioned in Article 89(1) or Article 90 of the Constitution is obtained or after the Sejm has been informed about such an intention to submit the act for ratification, as stated in Article 89(2) of the Constitution (see Article 15(3) of the Act on International Agreements).

5.1.2. The Constitution provides for three procedures aimed at ratifying an international agreement. Two of them require granting consent to ratification by statute (Article 89(1) as well as Article 90 of the Constitution). The third procedure, concerning international agreements which do not require consent for ratification granted by statute, is limited to imposing an obligation on the Prime Minister to inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute (Article 89(2) of the Constitution).

What determines the choice of one of the above-mentioned procedures to be applied is the content of a given international agreement.

Pursuant to Article 89(1) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such an agreement concerns: 1) peace, alliances, political or military treaties; 2) freedoms, rights or obligations of citizens, as specified in the Constitution; 3) the Republic of Poland's membership in an international organisation, 4) considerable financial responsibilities imposed on the State, 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute. Thus, undoubtedly, Article 89(1) of the Constitution specifies a procedure for the ratification or renunciation of an international agreement the content of which is of special significance to the state as well as the said provision sets out the catalogue of such agreements. The above-mentioned procedure (referred to as complex ratification, large ratification) consists in granting consent, by statute,

to the ratification of an international agreement before it is ratified by the President. This constitutes part of the entire ratification process that takes place at the level of the constitutional law (see K. Działocha, *op. cit.*, comment 2 on Article 89). Due to the lack of special regulations pertaining to a procedure for enacting a statute by means of which consent shall be granted for ratification in accordance with Article 89(1) of the Constitution, it is subject to general requirements outlined in Articles 118-123 of the Constitution. This means that the Sejm shall pass bills by a simple majority vote, in the presence of at least half of the statutory number of Deputies (Article 120, first sentence *in principio*, of the Constitution).

An agreement referred to in Article 90(1) of the Constitution, i.e. an international agreement, by virtue of which the Republic of Poland may confer the competence of organs of state authority in relation to certain matters on an international organisation or international institution, needs to be bound by tighter restrictions. The certain "tightening" of the procedure involves raising the level of a majority in the Sejm and the Senate from a simple majority to the level of a two-thirds majority vote both in the Sejm and the Senate. The said majority required in the Sejm and the Senate, as specified in Article 90(2) of the Constitution, in the case of granting consent to the ratification of an international agreement on the conferral of competences, is considerably higher than a majority required for the enactment of (ordinary) statutes. It is equivalent to the qualified majority in the Sejm and is higher in the context of the Senate, in comparison with a majority required to adopt a bill to amend the Constitution (Article 235(4) of the Constitution). Thus, in quantitative categories, it should be concluded that the requirements under discussion are at least equivalent – from the point of view of representation and legitimacy – to requirements which are to be met in the case of amendments to the Constitution. The said circumstance is an additional argument for the assessment that the conferral of competences vested in the organs of state authority "in relation to certain matters" takes place with the preservation of high standards of representation and the scale of acceptance of solutions to be adopted (see the judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04). It should be stressed that the procedure provided for in Article 90 of the Constitution enhances the position of the Senate in the course of the legislative process. Also, the separate character of that procedure consists in the fact that the two houses of the Polish Parliament have equal rights when it comes to enacting such a bill, as without consent of either of the houses the bill may not be enacted. This means that Article 121 of the Constitution is not applicable; the said Article specifies the competence of the Senate in the course of enacting bills and sets out a procedure for the Sejm to consider the Senate's resolutions concerning bills passed by the Sejm (see the judgment of

the Constitutional Tribunal of 27 May 2003, ref. no. K 11/03, OTK ZU No. 5/A/2003, item 43). The said circumstance is an additional argument for the assessment that the conferral of competences vested in the organs of state authority "in relation to certain matters" takes place with the preservation of high standards of representation and the scale of acceptance of solutions to be adopted. In that regard, the Sejm and the Senate function as the organs of the state that represent the Nation – the sovereign, pursuant to the principle expressed in Article 4(2) of the Constitution.

Direct reference to the sovereign decision of the Nation is even clearer in the case of a nation-wide referendum, which – pursuant to Article 90(3)-(4) of the Constitution – may be held to ratify an international agreement conferring the competence of organs of state authority in certain matters.

By providing for the necessity to enact a bill in which consent is granted for ratification in its Article 89 and Article 90, the Constitution, manifests the fact that international agreements – which are of special significance from the point of view of the Constitution – require greater democratic legitimacy granted by the Parliament, or by the Nation.

5.2. Relations between Article 89(1) and Article 90 of the Constitution.

5.2.1. Article 89(1) of the Constitution explicitly sets out certain categories of cases which an international agreement concerns, whereas Article 90(1) of the Constitution indirectly indicates the category of cases by reference to "the competence of organs of state authority". Thus, the subject of an international agreement may comprise matters which fall within the scope of the regulation of Article 89 as well as Article 90 of the Constitution. In practice, this may hinder drawing a distinction as regards the scope of application of the two provisions.

The catalogue of matters mentioned in Article 89(1)(1)-(5) of the Constitution indicates that a majority of ratified international agreements affect (modify) the way of exercising competences by the organs of state authority. In many cases, the said agreements do not introduce a restriction as to the exercise of competences by the organs of state authority or impose obligations on those organs which do not arise from national law (e.g. agreements on the enforcement of rulings issued by foreign courts). Moreover, the said catalogue indicates that the subject of those agreements may be of particular constitutional significance. However, with reference to those agreements, such a restrictive procedure is not applied as the one in the case of agreements referred to in Article 90(1) of the Constitution.

Therefore, it should be assumed that not every agreement that affects the way of exercising competences vested in the organs of state authority, and restricts or modifies the scope of the said competences by imposing new obligations on the said organs, constitutes the conferral of competences within the meaning of Article 90 of the Constitution. Making a contrary presumption would result in almost complete overlap of the scope *ratione materiae* of Article 89 and Article 90 of the Constitution. This would be inconsistent with the intention of the rational constitution-maker, as he has assumed that, in the case of constitutionally significant matters which lead to the modification of the scope of competences vested in the organs of state authority, the procedure indicated in Article 89(1) of the Constitution is the proper one, and merely in the event of conferring the competences, the proper procedure is the one set out in Article 90 of the Constitution.

The uniqueness of Article 90 of the Constitution should also be recognised in its role that has been historically assigned thereto. There is no doubt that the present version of Article 90 of the Constitution was understood as a provision that was to make accession to the EU possible, although this does not directly follow from its content (see K Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 25, see also R. Chruściak, "Procedury przystąpienia Polski do Unii Europejskiej w pracach nad Konstytucją", *Państwo i Prawo* Issue No. 5/2003, p. 53). Regarded as "an integration clause", Article 90 of the Constitution has introduced a special procedure for the ratification of international agreements on the basis of which Poland intends to "delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters". A ratification statute considered in accordance with the procedure set out in Article 90 of the Constitution constitutes a special type of a statute not only due to strict requirements for the enactment thereof, but mainly due to its objective which is to grant consent to the ratification of agreements that make it possible for Poland to participate in integration processes. The procedure and terms of granting consent to ratification in accordance with Article 90 of the Constitution have been intentionally distinguished by the constitution-maker from the procedure for enacting ordinary bills, including other ratification bills referred to in Article 89 of the Constitution. That distinction is based on agreements concerning participation in integration processes in forms that ultimately affect the practical dimension of the principle of the sovereignty of the state, which is enshrined in chapter I of the Constitution (see Z Kędzia, "Opinia w sprawie wybranych aspektów prawnych ratyfikacji umowy międzynarodowej", *Przegląd Sejmowy* Issue No. 1/2009, p. 184).

5.2.2. Significance assigned to Article 90 of the Constitution by the constitution-maker is reflected in practice. The procedure provided for in the same provision was only applied twice: during the process of ratification of the Treaty of Accession and the Treaty of Lisbon. Thus, what should determine the choice between the ratification procedure set in Article 90 and the one provided for in Article 89 of the Constitution is the content of a given international agreement. If the agreement is related to the conferral of competences vested in the organs of state authority, it is proper to apply a special procedure.

5.3. The procedure for enacting the Act on the ratification of the European Council Decision 2011/199/EU.

5.3.1. The Act on the ratification of the European Council Decision 2011/199/EU was enacted in accordance with the procedure specified in Article 89(1) of the Constitution. In the explanatory note for the government's bill on the ratification of the European Council Decision 2011/199/EU (the Sejm Paper No. 37/7th term), it has been stated that "the European Council Decision 2011/199/EU fulfils premisses specified in Article 12(2a) of the Act of 14 April 2000 on International Agreements (...), in accordance with which ratification comprises EU legal acts referred to in Article 48(6) of the Treaty on European Union. Since the said Decision fulfils the premisses set out in Article 89(1) of the Constitution of the Republic of Poland, as it concerns Poland's membership in an international organisation (Article 89(1)(3) of the Constitution), the binding of the Republic of Poland by the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) should take place in accordance with Article 89(1) of the Constitution, i.e. by ratification upon prior consent granted by statute".

5.3.2. In the applicants' view, the Act on the ratification of the European Council Decision 2011/199/EU should have been enacted in accordance with Article 90(2)-(4) of the Constitution, as it results in the conferral of competences that have legal effects.

It should be noted that, at the stage of legislative work, draft resolution was submitted on the procedure for expressing consent for the ratification of the European Council Decision 2011/199/EU (the Sejm Paper No. 114/7th term). The resolution provided that a statute granting consent to ratification would be enacted in accordance with Article 90(2) of the Constitution. It was pointed out in the explanatory note that the said Decision: "creates a treaty basis for conferring – upon a supranational level - competences vested in the organs of state authority, unless the Government decide to renegotiate the TFEU in that regard before

joining the euro area". The draft resolution was dismissed at the 14th sitting of the Sejm on 10 May 2012. The Sejm began to work on the bill in accordance with the procedure provided for in Article 89(1) of the Constitution.

Reservations as to the procedure for enacting the bill were also raised in the course of legislative work on the Government's bill on ratification (see the first reading in the Committee on the European Union and the Committee on Foreign Affairs – the Bulletin No. 125/7th term of the Sejm, as well as the second reading – Verbatim Record from the 14th sitting of the Sejm on 10 May 2012, pp. 168-181). The Deputies made reference, *inter alia*, to an expert opinion prepared by the Bureau of Research of the Chancellery of the Sejm (see "Opinie w sprawie Decyzji Rady Europejskiej z dnia 16-17 grudnia 2010 r. dotyczącej zmiany art. 136 Traktatu o funkcjonowaniu Unii Europejskiej, w szczególności procedury jej stanowienia w UE oraz procedury jej ratyfikacji", *Przegląd Sejmowy*, Issue No. 2/2012, pp. 147-176; the summaries of the opinions as well as other expert opinions were published in *Przeglądzie Sejmowym*, Issue No. 3/2012, pp. 177-215).

Eventually, the bill on the ratification of the European Council Decision 2011/199/EU was enacted in accordance with the procedure provided for in Article 89(1) of the Constitution. As it follows from the course of legislative work, the discrepancy between opinions regarded the issue whether consent to the ratification of the said Decision should be granted by a statute enacted in accordance with the procedure set out in Article 89(1) of the Constitution, or the one provided for in Article 90(2)-(4) of the Constitution. In the view of the Council of Ministers, the submission of the bill on the ratification of the said Decision correlated with the fulfilment of the premiss of "Poland's membership in an international organisation", and this indicated the adequacy of the procedure set out in Article 89(1) of the Constitution. In the opinion of the applicants, the Act on the ratification of the European Council Decision 2011/199/EU bears the characteristics of an international agreement referred to in Article 90(1) of the Constitution, as it creates the legal and treaty bases for conferring competences vested in the organs of state authority in relation to certain matters on an international organisation – the European Stability Mechanism.

6. Premisses concerning the application of a procedure provided for in Article 90 of the Constitution.

6.1. A special ratification procedure – Article 90 of the Constitution.

6.1.1. From a substantive point of view, the unanimous European Council

Decision 2011/199/EU may be regarded as a special kind of an international agreement. This arises, for instance, from the objective of the said Decision which is to amend the TFEU, being an international agreement. Also, it should be assumed that the said Decision concerns – although not directly – Poland's membership in the EU. This may be justified by indicating that the proposed solution creates a new situation as regards the status of two groups of Member States, namely those whose currency is the euro and those that still use their national currencies. Moreover, the proposed amendment to the TFEU implies vital consequences of adopting the common currency i.e. the euro. In that regard, the legitimacy of applying the legal institution of ratification upon prior consent granted by statute (Article 133(1)(1) in conjunction with Article 89(1) of the Constitution) raises no reservations (see P. Czarny, "Opinie w sprawie Decyzji Rady Europejskiej", *op. cit.*, *Przegląd Sejmowy* Issue No. 2/2012, p. 165).

In the applicants' opinion, the amendment introduced by the European Council Decision 2011/199/EU, read in conjunction with the norms introduced by the ESM Treaty as well as analysed in the context of the Fiscal Compact, leads to conferring - upon an international level - competences that have legal effects, and thus the Act on the ratification of the European Council Decision 2011/199/EU should have been enacted in accordance with the procedure provided for in Article 90 of the Constitution.

6.1.2. It is assumed in the doctrine that Article 90 of the Constitution has been introduced for the purpose of creating a constitutional basis of Poland's accession to the EU (see P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r.*, Warszawa 2000, p. 115; C. Mik, "Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle art. 90 ust. 1 Konstytucji)", [in:] *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej*, C. Mik (ed.), Toruń 1999, p. 145). Hence, with regard to Article 90 of the Constitution, the phrases "a European clause" or "an integration clause" have been used, which indicates a narrow interpretation of Article 90 of the Constitution. Such a role assigned to Article 90 of the Constitution has been confirmed by a bill amending the Constitution submitted by the Polish President (the Sejm Paper No. 3598/6th term of the Sejm), where it was proposed to delete Article 90 of the Constitution and to regulate the issue of Poland's membership in the EU in a new chapter entitled "The Membership of the Republic of Poland in the European Union" (see *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu*,

P. Radziewicz (ed.), Warszawa 2010, p. 28).

The said provision has not, in practice, been applied to international organisations other than the European Union, although such a possibility was considered with regard to Poland's ratification of the Statute of the International Criminal Court (see "Opinie w sprawie ratyfikacji przez Polskę Rzymskiego Statutu Międzynarodowego Trybunału Karnego", *Przegląd Sejmowy* Issue No. 4/2001, pp. 129-172), as well as in the context of an agreement with the United States of America concerning the missile defence system (see R. Piotrowski, *Instalacja systemu obrony przeciwrakietowej w świetle Konstytucji RP*; J. Kranz, A. Wyrozumska, "Kilka uwag o umowie polsko-amerykańskiej w sprawie tarczy antyrakietowej" [in:] "Dwugłos o aspektach prawnych tarczy antyrakietowej w Polsce", *Państwo i Prawo* Issue No. 7/2009, pp. 20-49).

As mentioned before, the ratification procedure provided for in Article 90 of the Constitution has been applied twice: in the course of ratifying the Treaty of Accession and the Treaty of Lisbon. In the explanatory note for the bill on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed in Lisbon on 13 December 2007, it has been stressed that the procedure for the ratification of the Treaty of Lisbon in Poland should be based on the provisions of Article 90 of the Constitution. "Carrying out the ratification procedure on the basis of Article 90, and not on the basis of Article 89, of the Constitution follows from the content of the Treaty of Lisbon, which changes the subject of regulation of the previous Treaties establishing the EU to such an extent that this implies further conferral, or possibly modifications to the conferral, of 'the competence of organs of State authority in relation to certain matters' upon a future unitary international organisation – the European Union" (the Sejm Paper Issue No. 280/6th term of the Sejm).

Thus, when taking a decision about the choice of a procedure for enacting a statute by means of which consent is to be granted for the ratification of an international agreement (Article 89(1) or Article 90(2)-(4) of the Constitution), the legislator must rely on an analysis of the content of the agreement and the effects thereof. What determines the choice of the procedure is the character of the regulations that are to be introduced. Undoubtedly, Article 90 of the Constitution is applicable in the case of the fulfilment of the premiss that "the competence of organs of State authority in relation to certain matters" is to be conferred upon an international organisation or international institution.

Fundamental controversies arise from the "narrow" or "broad" interpretation of that premiss, which means correlating Article 90 of the Constitution – in the first place – with

international agreements, on the basis of which competences are conferred directly (see the Treaty of Accession or the Treaty of Lisbon) and, in the second case, also with agreements that bring about changes within the scope of conferred competences or changes within the scope of exercise of competences conferred earlier.

6.2. The conferral of competences as a premiss determining the application of Article 90 of the Constitution – a doctrinal perspective

Article 90(1) comprises three sequences which contain certain normative content that is closely interrelated: 1) the Republic of Poland may, by virtue of international agreements, 2) delegate to an international organisation or international institution, 3) the competence of organs of state authority in relation to certain matters. "A constitutional norm providing for the conferral of ("may (...) delegate") competences of the organs of state authority in relation to certain matters upon an international organisation or international institution means an act as a result of which the Republic of Poland gives up its exclusive right to exercise its authority within a certain scope, by permitting the application of legal acts issued by an international organisation (international institution) in that regard, i.e. to its internal affairs, and in particular permitting the direct application of law enacted by the said organisations. Thus, the said conferral does not even regard particular (legislative, executive or judicial) powers of the organs of the state, but merely competence in relation to certain matters. «Conferral» in this context does not denote the conferral of sovereignty of the Polish state upon an international entity" (K. Działocha, *op. cit.*, comment 3 on Article 90).

It is emphasised in the doctrine that, on the one hand, conferral of competences involves giving up competences within a certain scope by the state for the sake of a given international organisation and, on the other hand, the said conferral makes it possible for the organisation to enact law that would be directly applicable within a certain scope to the legal order of the state and would take precedence over other norms (including statutory ones) of national law. The conferral of competences takes place if the two requirements are fulfilled. Thus, not every obligation towards an international entity leads to the conferral of competences (see A. Wyrozumska, "Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa" [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, K. Wójtowicz (ed.), Warszawa 2006, p. 78)

According to J. Barcz and J. Kranz, the conferral of competences within the meaning of Article 90 of the Constitution comprises the following elements: 1) opening up the national legal system to exclusive competences that have legal effects and are vested in an

international organisation (international institution), that directly shape legal relations (direct application and direct effects) in the realm of its binding law (with regard to subjects, objects, events or situations – primarily within the scope of jurisdiction of its member states); 2) permanently renouncing some of its competences that have legal effects (in particular law-making competences) by the state in relation to certain matters; 3) conferring competences that have legal effects, also within a broader scope than the competences renounced by the state, upon an international organisation (international institution) (see J. Barcz, J. Kranz, "Powierzenie kompetencji na rzecz UE a Traktat o Europejskim Mechanizmie Stabilności i Traktat o unii fiskalnej. Uwagi w świetle orzecznictwa niemieckiego FTK i wyroku TSUE w sprawie C-370/12", *Przegląd Sejmowy* Issue No. 4/2013, p. 23 and the subsequent pages).

An extensive analysis of the term 'conferral of competences' has been carried out by K. Wojtyczek, who summed up the issue in the following way: "Conferral of competences means delegating certain competences that have legal effects on entities or individuals being subject to the authority of the Republic of Poland, in relation to matters that fall within the scope of Poland's jurisdiction, to an international organisation or international institution. As a result, the said international organisation or institution has sole authority over entities or individuals that are subject to the authority of particular states. At the same time, what emerges is a series of complex correlations regarding competences between the international organisation or institution and its member states; the correlations ensure that the conferred competences are effective. Due to the conferral of competences, the international organisation or institution acquires competences which do not completely correspond to the competences of its member states. The authority of international organisations or institutions goes considerably beyond the sum of corresponding competences of the organs of state authority, and provides a new quality, by making it possible to carry out public tasks that may not be performed single-handedly by particular states or even by traditional means of international cooperation" (K. Wojtyczek, *Przekazywanie kompetencji...,* p. 206).

The interpretation of the term "the competence of organs of State authority" must take account of the objectives of Article 90(1) of the Constitution. On the one hand, the said provision authorises the state to confer competences upon an international organisation or institution; on the other hand, it provides for a special procedure for conferring the competences. The basic law-making objective is to enable the state to effectively act in international relations within the scope of integration. The interpretation may not hinder the state's ability to undertake indispensable actions in international relations, and in particular to join such organisations and enhance integration (*ibidem*, p. 14).

What may be noted from this brief presentation of views held by various representatives of the doctrine is that the understanding of the premiss 'conferral of competences' is not consistent, and thus it leads to different conclusions as regards the legitimacy of applying the procedure set out in Article 90(2) of the Constitution to a given international agreement.

6.3. Article 90 of the Constitution in the jurisprudence of the Constitutional Tribunal.

6.3.1. Although the Constitutional Tribunal has underlined the special character of a statute that grants consent to the ratification of an international agreement, hitherto it has not provided an interpretation of terms used in Article 90 of the Constitution. In its two vital judgments (of 11 May 2005, ref. no. K 18/04, as well as of 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108), the Tribunal assumed that the conferral of competences had already taken place and focused on the questions whether the conferral of competences had at all been admissible in the light of the principle of the sovereignty of the Republic of Poland and whether, in the context of a particular international agreement (the Treaty of Accession, the Treaty of Lisbon) "conferral" had met the criteria set out in Article 90(1) of the Constitution (and in particular, whether competences had been conferred in relation to only "certain matters"). The Constitutional Tribunal held the view that Article 90 of the Constitution manifested the fact that the constitution-maker had, in a sovereign way, opened up to the possible – determined by certain conditions – extension of the catalogue of legal acts that are to be universally applicable in the territory of the Republic of Poland. However, neither Article 90(1) nor Article 91(3) of the Constitution may constitute a basis of conferring, upon an international organisation (or an organ thereof), competence to enact legal acts or take decisions that would be inconsistent with the Constitution.

6.3.2. In the statement of reasons for the judgment of 11 May 2005, ref. no. K 18/04, which concerned the constitutionality of the Treaty of Accession, the Tribunal has stated that the conferral of competences "in relation to certain matters" must be construed as a prohibition against conferring all competences vested in a given organ of state authority, and conferring all competences within a given scope, as well as a prohibition against conferring competences concerning matters that fall within the scope of powers of a given organ of state authority. Therefore, it is necessary to precisely specify areas and the scope of competences that are subject to conferral. At the same time, the Tribunal has made a proviso that Article 90(1) of the Constitution may not constitute a basis of granting an international organisation (or an organ thereof) competence to enact legal acts or make decisions that

would be inconsistent with the Constitution, in particular to the extent that the Republic of Poland could not function as a sovereign and democratic state ("core" powers).

6.3.3. The above stance was also maintained by the Tribunal in its judgment of 24 November 2010 in the case K 32/09, which concerned the constitutionality of the Treaty of Lisbon. At the same time, the Constitutional Tribunal shared the view (expressed in the context of integration processes) that, within the scope of conferred competences, the Member States had renounced the right to undertake autonomous law-making action in domestic and international relations, which however did not lead to the permanent restriction of sovereign rights of the said States, as the conferral of competences was not irreversible, and relations between exclusive and competing powers were dynamic in character. The Member States have assumed only an obligation to jointly exercise state functions in areas that are subject to cooperation and until they maintain full capacity to determine the forms of exercising state functions, which coexists with the power to "specify their own competence", they will remain sovereign entities in the light of international law. There are complex processes of mutual dependability among the EU Member States, which are related to the conferral of some competence of the organs of state authority by the States on the Union. However, the said States remain the subject of the integration process, they maintain 'the competence of competences', and the model of European integration is a form of international organisation.

In the statement of reasons for the judgment in the case K 32/09, the Tribunal has also indicated that Article 90 of the Constitution should be applied with reference to amendments to the provisions of the Treaties that constitute the basis of the European Union and which are introduced in a different way than by an international agreement, provided that the said amendments lead to the conferral of competences on the European Union (point 2.1 in part III of the statement of reasons). Indeed, the essence of Article 90 of the Constitution is the guarantee purpose of restrictions contained therein in the light of the sovereignty of the Nation and the state. The restrictions consist in the fact that the conferral of competences vested in the organs of state authority is admissible: 1) only upon an international organisation or institution, 2) only in certain matters and 3) only upon consent granted by the Parliament, alternatively the sovereign acting by way of a nation-wide referendum. The indicated triad of constitutional restrictions must be preserved in order to maintain the conformity of conferral to the Constitution. Article 90(1) of the Constitution permits the conferral of competences "by virtue of international agreements". This means that the conferral of competences may be carried out by means of an international agreement as well as in an international agreement

that amends the provisions of that agreement. Also, it is possible to confer competence within the scope of the simplified revision procedure for amending the agreement, provided that the triad of the constitutional restrictions, which constitute the *sine qua non* condition for the constitutionality of the conferral, is preserved.

6.3.4. In the jurisprudence of the Constitutional Tribunal, attention has also been drawn to the "activation of competence". Such categorisation was made by the Constitutional Tribunal, by analysing the validity of possible application of Article 90 of the Constitution in the course of enacting the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union (the judgment of 18 February 2009, ref. no. Kp 3/08). The Constitutional Tribunal did not share the view that the effect of the said declaration is the conferral of the competence of Polish courts or – in accordance with another wording – the narrowing down of judicial powers of Polish courts for the sake of an international organisation, i.e. the Court of Justice. What supposed to be the effect of such categorisation was the requirement to enact the challenged Act in accordance with Article 90 of the Constitution. The Constitutional Tribunal has stated that the competence within the scope of the Third Pillar of the European Union was adopted by the Republic of Poland together with the entire TEU, by means of the Treaty of Accession. "The declaration submitted pursuant to Article 35(2) of the EU Treaty means only activation of that competence, and not its emergence". In the doctrine, it has been pointed out that, in practice, in the light of the Act analysed in the case Kp 3/08, there was a situation where the provisions of an international agreement provided for the possibility of conferring competence, but the effectiveness and enforcement of such conferral were dependent on a separate decision of the organs of the Polish state (see P. Czarny, "O niektórych problemach proceduralnych związanych z 'wielką' i 'dużą' ratyfikacją umów międzynarodowych", [in:] *Państwo i prawo wobec współczesnych wyzwań. Zagadnienia prawa konstytucyjnego. Księga jubileuszowa Profesora Jerzego Jaskierni*, R.M. Czarny, K. Spryszak (eds.), Toruń 2012, pp. 365-367).

The Constitutional Tribunal has defined the term 'competence' in the light of Article 189 of the Constitution. In the decision of 20 May 2009, ref. no. Kpt 2/08 (OTK ZU No. 5/A/2009, item 78), the Tribunal stated that the competence of a constitutional organ of the state was the power granted by the constitution-maker or the legislator to act with legally

specified consequences within the specified scope *ratione materiae*; undertaking such action might be a legal obligation or entitlement of a given organ of the state. In this context, the Constitutional Tribunal stressed that the powers understood in this way should not be regarded as tantamount to the systemic roles of state organs (the roles fulfilled within the constitutional system), to the duties (i.e. legally specified objectives and consequences of functioning of particular state organs), or to the scope *ratione materiae* (the areas of actions specified in respect of their objects).

What follows from the above-mentioned rulings issued by the Constitutional Tribunal, assessing the character of an international agreement or the occurrence of premisses specified in Article 90 of the Constitution is carried out by the Constitutional Tribunal *a casu ad casum*. The Constitutional Tribunal has provided the interpretation of Article 90 of the Constitution, taking account of the subject of the allegation in the present case.

6.4. The scope of the application of the procedure provided for in Article 90(2) of the Constitution – the conferral of competences vested in the organs of state authority.

6.4.1. The interpretation of Article 90 of the Constitution should take into account the fact that the said provision was intended by the constitution-maker as a basis for opening up Poland to international law, and in particular – as a clause providing for integration, facilitating accession to the EU. At present, after Poland's accession to the EU, despite its succinctness, the provision has also become a European clause, i.e. a provision that specifies principles in accordance with which Poland functions in the EU. At the same time, it should be remembered that nowadays the legal order in Europe comprises numerous elements for the EU Member States, namely: treaty norms, norms introduced by EU institutions as well as norms existing in the national order. At the same time, this is a dynamic system: a relation between the EU order and the national order is subject to evolution resulting from changes in the EU law. Therefore, a Member State that confers competence must assume that the way of exercising the competence may be subject to changes. This may be required to ensure that a given organisation functions effectively and, at the same time, these are not changes that may be understood as conferral of "competence of organs of State authority" (see the judgment of 24 November 2010, K 32/09).

The Constitution sets out relations between international law and domestic law, primarily in accordance with the principle that the Republic of Poland shall be the common good of all its citizens, the principle of sovereignty, the principle of a democratic state ruled by law as well as the principle that Poland shall respect international law binding upon it. On

the basis of those principles, one may draw a conclusion that Poland opens up to the international law order. The effect of conferral of competences is often a complicated network of dependencies between the state, the organs of the state and an international organisation. Hence, the conferral of competences should always be assessed from the point of view of principles that shape the constitutional identity. The guarantee of preserving the constitutional identity of the Republic is Article 90 of the Constitution and boundaries of conferral of competences set therein (see the judgment of 24 November 2010, ref. no. K 32/09).

Bases for conferring competence vested in the organs of Polish authority on international organisations are the following: the principle of a state ruled by law and the principle of sovereignty. The modern interpretation of the two principles leads to the conclusion that the fulfilment of the state's duties, and in particular those related to the protection of human rights, requires the opening up of the Polish legal order to international law. Without the said opening up, the Polish state would not be able to fulfil its duties. This interpretation is primarily concurrent with the need for cooperation with all countries, as declared in the Preamble to the Constitution, as well as the principle that the freedoms and rights of persons and citizens shall be guaranteed, as expressed in Article 5 of the Constitution, and thus this way constitutional values may be better protected and implemented. Not only does the Constitution specify the main objective that is to be achieved by opening up the Polish legal order to broadly understood international law, but also basic rules determining the way of achieving the said objective. Those principles are, above all, expressed in Article 89, Article 90 and Article 91 of the Constitution.

6.4.2. In the light of Article 90 of the Constitution, two main issues arise: first of all, which of international agreements concern the competence of the organs of state authority (whether conferring competence, modifying it, or restricting the exercise of competence) should be ratified in accordance with Article 90 of the Constitution; secondly, is there any competence that may not be conferred? From the point of view of the case under examination, an answer to the first question is particularly vital.

What undoubtedly follows from the previous jurisprudence of the Constitutional Tribunal is that the application of the special procedure set out in Article 90 of the Constitution is justified in the case of modifying as well as extending the scope of conferred competence (see the judgment of 24 November 2010, Ref. No. K 32/09), but not when competence is activated (see the judgment of 18 February 2009, Ref. No. Kp 3/08). Moreover, the Constitutional Tribunal deemed that Article 90 of the Constitution should also be applied

to amendments to provisions of the Treaties on which the European Union is founded, and which are introduced in a different way than by virtue of an international agreement, if the said amendments result in conferral of competences on the European Union (see the judgment in the case K 32/09). Taking into consideration its previous jurisprudence as well as views concerning the particular role of Article 90 of the Constitution, the Constitutional Tribunal deemed that the necessity to apply Article 90 occurs in the following cases:

1) when the subject of an international agreement comprised competence that has legal effects, on the basis of which the organs of state authority issue legal acts (in particular law-making acts) that are binding to subordinate entities 2) when competence is conferred on an international (supranational) institution or organisation; 3) when the effect of such conferral is the possibility of exercising the said competence by the organisation in such a way that it may issue legal acts (in particular law-making acts) that are binding to subordinate and national entities; 4) when, in general, attributed competence does not constitute a simple sum of categories of conferred competence.

6.5. The competence of the organs of state authority

6.5.1. What constitutes a basic prerequisite for applying Article 90 of the Constitution is determination that the subject of an international agreement comprises the competence of the organs of state authority as well as the conferral thereof upon an international organisation or international institution. If the Constitutional Tribunal determines that the subject of a given international agreement does not at all comprise the competence of the organs of state authority, there is no need to consider what the conferral thereof implies.

In the applicants' opinion, the term 'competence' should be construed as "powers of the supreme authority to enact laws and issue orders safeguarded by enforcement. (...) thus, the point is the formal essence of power, i.e. an intention and the implementation of the intention".

In the context of such a general definition, it is indispensable to indicate more specific characteristics which describe the term 'competence' in categories that make it possible to construct a certain higher-level norm for the review which may constitute a reference point for evaluating whether there has occurred conferral of competences in a specific situation.

6.5.2. The term 'competence' has not been defined in law, and moreover it is rarely used by the legislator in the binding law. By contrast, the term 'competence' has been used in

the legal register for a long time. The way in which ‘competence’ is specified and defined varies in the science of Polish law, both in the light of the theory of law as well as in the context of particular dogmas (see M. Zieliński, *Wykładnia prawa: Zasady, reguły, wskazówki,* Warszawa 2002, pp. 24-31; M. Matczak, “Z rozważań nad koncepcją normy kompetencyjnej” [in:] *Z zagadnień teorii i filozofii prawa: Konstytucja*, A. Bator (ed.), Wrocław 1999, p. 201 and the subsequent pages; A. Bator, *Kompetencja w prawie i prawoznawstwie*, Prawo CCLXXXVII, Wrocław 2004; W. Jedlecka, “Suwerenność państw członkowskich a kompetencje wyłączne Unii Europejskiej” [in:] *Z zagadnień teorii i filozofii prawa. Kompetencja ze stanowiska teorii i filozofii prawa*, W. Jedlicka (ed.), Wrocław 2004, pp. 85-86).

The complexity of the term ‘competence’ as used in Article 90 of the Constitution has been pointed out by K. Wojtyczek, who has indicated that the term ‘competence’ may denote a generally understood right to regulate or determine matters within a given scope that is defined by a certain criterion. Within that meaning, in practice, competence comprises a certain set of competences and is specified by ‘competence’ construed as authorisation for a given entity or individual to take certain action. Competence within that meaning provides for conferring general competence upon a certain entity or individual within a given scope. In such a case, competence is specified in relation to a particular action (K. Wojtyczek, *op. cit.*, pp. 107-108).

However, despite exiting differences, one may indicate elements that comprise the term ‘competence’ as adopted by a majority of the representatives of public law and as used in the jurisprudence of courts. These are: a) the essence of competence, i.e. the capability of action, the possibility of action, authorisation to action; b) the subject of competence, i.e. above all, the organ of public authority that has the said capability or possibility; c) the object of competence, i.e. an act (action, a set of juridical acts, a series of actions).

In order to specify the content of an act, it is vital what matters the said act is to concern. The act may take on diverse forms and may concern the enactment and application of law. It may consist in taking actions. Authorisation to carry out an act (take action) is related to specifying the terms of the validity of the act. Frequently, it is also related to specifying the effects of a legal act.

Specifying competence and determining the content of norms governing competence always entail indicating an individual organ of state authority (e.g. the Council of Ministers) or the type of an organ of state authority (e.g. a court). The specification of the object and the possibility of carrying out an act may be abstract to a greater or lesser extent; however, it always indicates the type of rights and obligations addressed to a given organ of state

authority.

The application of the above specification of competence to the interpretation of Article 90 of the Constitution encounters serious difficulties. The character of the said regulation entails that the conferral may concern not only the conferral of individual elements of competence, but also a certain fragment of state authority exercised by various organs of the state. Moreover, competence taken over by an international organisation (an international institution) does not constitute a simple sum of conferred competences – on the part of an international organisation new competences emerge and they are not exactly equivalent to conferred competences. Finally, it is not always possible to precisely indicate conferred competences and specify the terms of exercising the competences in an international agreement that constitutes the basis of the activity of an organisation. In particular, this concerns situations where Poland is to become a member of an organisation that has already been established. The said lack of precision may stem from the particular character of the organisation, the way its objectives have been formulated, the particular character of its bodies or authorities and, also, from the legal language used in international law.

For the above reasons, the term ‘competence’ (norms governing competence) that is used in the theory of law as well as in the context of particular dogmas does not provide sufficient criteria for reviewing of the appropriateness of applying the procedure indicated in Article 90 of the Constitution. Indeed, the said criteria do not reflect the essence and *ratio legis* of Article 90 of the Constitution which primarily imply conferring some of the competences vested in the organs of state authority upon an international organisation. As a consequence, an international organisation and the bodies or authorities thereof gain the right to exercise powers of the organs of public authority with regard to all Polish citizens and the organs of Polish public authority.

6.5.3. Taking account of views expressed by the representatives of the doctrine and presented in the jurisprudence of the Constitutional Tribunal, it should be stated that ‘competence’ in the light of Article 90(1) of the Constitution entails authorising a given organ of public authority to take certain actions. The said actions, in principle, have legal effects and are related to issuing legally binding acts. The said acts may interfere with the realm of the legally protected personal interests of the individual. In order to determine whether given competence is competence construed in the light of Article 90 of the Constitution, it is required to at least indicate an organ of state authority in which the competence is vested, entities or individuals that are governed by that competence, the content of the rights of the

said organ and the obligations of subordinate entities or individuals which correspond to the said rights. Given that Article 90(1) of the Constitution mentions competence "in relation to certain matters", merely specifying the scope of activity carried out by an organ of state authority or a generally formulated right to regulate a given category of matters does not constitute competence within the meaning of the said provision. Also, it may not be the subject of conferral.

To provide an answer to the question whether the European Council Decision 2011/199/EU should have been ratified in accordance with Article 90(1) of the Constitution, it should primarily be determined whether the said Decision regards the competence within the meaning presented above. Only the occurrence of the above elements in the context of the said Decision could indicate that we are dealing with the competence referred to in Article 90(1) of the Constitution.

When establishing necessary findings, one should bear in mind the complex character of the term 'competence' as used in Article 90(1) of the Constitution as well as requirements concerning the formulation of international agreements that provide for conferral of competences. Since the scope of competences that are to be conferred does not have to be reflected in the content of an international agreement in a simple way, one should assume that the above-indicted elements of competence do not have to be explicitly formulated in a provision of the international agreement. Thus, the criterion that verifies the fulfilment of the premiss concerning Article 90(1) of the Constitution is also the criterion for the effect of an international agreement or an equivalent act, e.g. a decision issued by the European Council under Article 48(6) of the TEU (the bridging clause). If one may conclude from the agreement that the application of the agreement will provide grounds for distinguishing the above-indicated elements, one should opt for the procedure set out in Article 90(1) of the Constitution.

6.5.4. In the view of the Constitutional Tribunal – in the light of analysing the content of the European Council Decision 2011/199/EU from the point of view of elements that must occur if one is to speak of 'competence of an organ of state authority' – there are no grounds to state that the challenged Act, which grants consent to the ratification of the European Council Decision amending Article 136(3) of the TFEU, leads to the conferral of 'the competence of organs of State authority', within the meaning of Article 90 of the Constitution. It does not follow from Article 136(3) of the TFEU that competence which was

previously vested in given organs of state authority would become part of the scope of competence of an international organisation or international institution. The said provision mentions neither an international organisation nor any competence of an organ of state authority which is to be conferred. The amendment to Article 136 of the TFEU has not created a relation of subordination with regard to an international organisation (an international institution). That conclusion eliminates a need to interpret the other terms used in Article 90(1) of the Constitution.

6.6. Amending an agreement on the basis of which competence has been conferred.

6.6.1. A special case that requires evaluation in the light of Article 90 of the Constitution is the case of amending an agreement on the basis of which the competence of organs of state authority has been conferred. Given that agreements which are subject to ratification upon consent granted by statute are not uniform in character, it is justified to make an initial assumption that not every amendment to an agreement on the basis of which competence has been conferred must be ratified in accordance with the same procedure (i.e. the procedure set out in Article 90 of the Constitution).

On the one hand, Article 90(1) of the Constitution clearly states that a special procedure is applied if competence is conferred. On the other hand, however, the said provisions may not be interpreted in a way that limits their application only to such a situation. It may not be ruled out that, as a result of an amendment to an international agreement, the way of exercising competence will change so considerably that the exercise thereof by an international organisation will mean granting it new competence. Even if the said conferral is not provided for in the agreement, it will arise from the interpretation of the agreement arrived at in accordance with rules adopted by the organisation itself as well as by its member states.

However, if the subject of an international agreement does not explicitly comprise the conferral of competences, then recognition that, nevertheless, such conferral has taken place requires indicating the competence vested in the organs of state authority and the rules of interpretation that justify an assertion about the said conferral. Indeed, what does not follow from Article 90 of the Constitution is a presumption within the meaning of which the introduction of an amendment to an agreement concluded in accordance with the procedure set out in Article 90 of the Constitution always requires the same procedure. This would be inconsistent with the wording of Article 90 of the Constitution as well as with its functional

interpretation arrived at on the basis of the above-mentioned fundamental principles of the Constitution, which confirms the fact that Polish law has opened up to international law.

6.6.2. The thesis that a legal act which has been adopted in a certain form should be amended in the same form may not be regarded as a binding principle of law which applies to all legal acts mentioned in the Constitution. Although in the Polish legal order such a regularity may be observed (e.g. in the context of statutes), it is not applicable to the interpretation of Article 90 of the Constitution. The acceptance of the said thesis is admissible if we are dealing with one particular form of a legal act. In such a case, an amendment to the act should be introduced in the same form. As regards international agreements, they are concluded, ratified and renounced in accordance with varied procedures. Moreover, Article 90 of the Constitution introduces a special norm in relation to the above-mentioned thesis. The constitution-maker's intention is that the procedure indicated in Article 90 of the Constitution is to be applied if the subject of an international agreement comprises the conferral of competences. Thus, a linguistic interpretation weighs in favour of applying the said provision only when the premises indicated therein has been fulfilled. The cited provision lacks an additional proviso that the procedure set out in Article 90 of the Constitution also concerns any amendments to that type of an agreement. Relying on *a contrario* reasoning, it should be assumed that if the subject of an amending agreement does not comprise the conferral of competences, the procedure set out in Article 90 of the Constitution is not applicable. *A contrario* reasoning is supported by constitutional axiology as well as by the purposive interpretation of Article 90 of the Constitution. The bases of constitutional axiology indicate that the essence of the constitution-maker's approach rules out the possibility of applying the procedure set out in Article 90 of the Constitution in the case of any amendments to an international agreement.

A similar approach has been adopted by the legislator. In Article 25(2) of the Act on International Agreements, he has provided that an amendment to the scope of application of an international agreement upon consent referred to in Article 89(1) and Article 90 of the Constitution "shall require prior consent granted by statute". Thus, there is no mention here of "the same procedure". Consequently, one may not rule out that an amendment to an international agreement adopted in accordance with Article 89(1) of the Constitution will be introduced in accordance with Article 90(2) of the Constitution if, on the basis of the agreement, the competence of state authority is to be conferred.

It should be added that the acceptance of the thesis about the necessity to apply

Article 90 of the Constitution to an amendment introduced into an agreement concluded in accordance with that procedure would entail assuming that a reverse operation ("the return of competence") would also require the application of such a procedure, but this would be contrary to the *ratio legis* of Article 90 of the Constitution.

Also, the applicants' thesis about preserving the same form is not justified in the light of international law.

6.6.3. The stance presented by the Constitutional Tribunal as regards the interpretation of Article 90 of the Constitution is supported by the principle of favourable predisposition of the Republic of Poland towards the process of European integration and the principle of cooperation with all countries. In its judgment of 27 May 2003, ref. no. K 11/03, the Constitutional Tribunal has stated that interpretation of binding legislation should take account of the constitutional principles derived from the Preamble and Article 9 of the Constitution. What is constitutionally correct, and thus preferred, is such an interpretation of law which serves the implementation of the indicated constitutional principle. In its judgment of 11 May 2005, ref. no. K 18/04, the Tribunal has stressed that 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". In this context, it should be recalled what stance the Constitutional Tribunal has presented in the statement of reasons for the judgment of 12 January 2005, ref. no. K 24/04 (OTK ZU No. 1/A/2005, item 3). The Constitutional Tribunal has held that: "In numerous cases the development of the European Union requires taking a new approach to legal issues and institutions which have been established over the period of many years (and sometimes many centuries), as well as have been enriched with jurisprudence and the doctrine, and which also have been well-known to several generations of lawyers. The necessity to redefine certain – as it may seem, inviolable – institutions and terms arises from the fact that, in a new legal situation stemming from European integration, there may sometimes be conflicts between the well-established understanding of constitutional provisions and new needs for taking action at the forum of the EU that would still be consistent with constitutional principles".

6.6.4. To sum up, even if we assume that in the case of amending an agreement the subject of which has been the conferral of competences vested in the organs of state authority, there exists a certain presumption that, also on the basis of that amendment, the conferral of competences will take place, then this presumption is relative and may not be accepted in the

present case. One may not devise a general rule that consent to an amendment introduced to an agreement ratified in accordance with Article 90 of the Constitution must be granted in accordance with the same procedure. The adoption of an interpretation within the meaning of which any amendment to an agreement conferring competence is to be introduced in accordance with the same procedure, i.e. in accordance with Article 90 of the Constitution, as it has already been indicated, is justified neither by the wording of the said provision nor by the functional interpretation thereof. Also, the above-mentioned constitutional principles that specify relations between international law and national law do not require that Article 90 of the Constitution be applied in the case of any amendment to an agreement conferring competence.

7. An analysis of the allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with the Constitution.

7.1. The allegation and the higher-level norm for the review

In the applicants' opinion, the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 90 in conjunction with Article 120, first sentence, of the Constitution, as regards a procedure in accordance with which the said Act has been enacted, due to creating legal and treaty bases for conferring the competence of organs of state authority in relation to certain matters upon an international organisation – the ESM; "the matters included the terms of Poland's participation in the monetary union, the conferral of competences - on the organs of the ESM - that has legal effects as regards determining the terms of Poland's participation in the monetary union, and the extension of the scope of jurisdiction of the European Court of Justice and the European Court of Auditors with regard to Poland".

First of all, it should be stated that the indication of Article 120, first sentence, of the Constitution as a higher-level norm that is to be read in conjunction with another provision, without any additional explanation, leads to a conclusion that the applicants' arguments for the infringement of Article 90 of the Constitution also refer to Article 120, first sentence, of the Constitution.

In this context, it should be noted that two norms may be derived from Article 120, first sentence, of the Constitution. The first one determines the issues of a majority and the minimal number of Deputies present during a vote; the regulation only refers to the Sejm (it follows from Article 124 of the Constitution that Article 120 of the Constitution is applied

accordingly to proceedings in the Senate). The second norm which may be derived from Article 120, first sentence *in fine*, of the Constitution is the following: bills are not passed by a simple majority vote, where the Constitution provides for a different majority or a different minimal number of Deputies present during the vote. Thus, the first norm constitutes a basic rule which is applied unless another provision of the Constitution provides for a different majority. Such an exception is Article 90(2) of the Constitution. As the Sejm has aptly argued, the joined reconstruction (reading provisions together) of the higher-level norm in the context of the allegation raised by the applicants (the legitimacy of the applying the procedure set out in Article 90 of the Constitution) is therefore possible solely on the basis of Article 90 and Article 120, first sentence *in fine*, of the Constitution. Consequently, the higher-level norm for the review comprises Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution.

7.2. A formal aspect – the bridging clause

The European Council Decision 2011/199/EU has been adopted in accordance with the simplified revision procedure, provided for in Article 48(6) of the TEU, which allows the European Council, acting by unanimity after consulting the European Parliament and the Commission, and in some cases - the European Central Bank, to adopt a decision amending all or part of the provisions of Part Three of the Treaty on the Functioning of the European Union. Such a decision may not increase the competences conferred on the Union in the Treaties, and the entry into force of such a decision depends on the adoption thereof by the Member States in accordance with their respective constitutional requirements. Increasing or reducing the competences conferred on the Union may take place in accordance of the ordinary revision procedure of the Treaties on which the European Union is founded (Article 48(2)-(5) of the TEU).

The Republic of Poland consented to such a revision procedure of the TFEU, by ratifying the Treaties that constitute the basis of the functioning of the EU, and in particular the Treaty of Lisbon. In its judgment of 24 November 2010, ref. no. K 32/09, the Constitutional Tribunal has stressed that the simplified revision procedure, provided for in Article 48(6) of the TEU, corresponds with the requirements set out in Article 90(1) of the Constitution, as it allows for an amendment on the basis of a decision of the European Council only in the cases where this does not lead to an increase in the competences conferred on the Union in the Treaties. Possible conferral of competences of organs of state authority in relation to certain matters as a result of that amendment would be possible only by adhering to

the requirements set out in Article 90 of the Constitution, which concern the conferral of competences on the basis of an international agreement. “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 European Council Decision 2011/199/EU, in its recital 6, emphasises that: “The amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties”.

For obvious reasons, this formal aspect of the regulation may not determine the assessment of constitutionality as regards the Act on the ratification of the European Council Decision 2011/199/EU. However, it is related to the assessment carried out by the Court of Justice in its judgment of 27 November 2012 in the case *Pringle v Government of Ireland,* which, *inter alia*, concerned the legitimacy of applying the simplified revision procedure (Article 48(6) of the TEU) to the amendment to Article 136 of the TFEU (see point 7.4 in part III of this statement of reasons for the Tribunal’s judgment).

7.3. The amendment to Article 136 of the TFEU – no conferral of competences vested in the organs of state authority

7.3.1. The applicants indicate that the subject of conferral of competences on an international organisation, e.g. the European Stability Mechanism, comprises: 1) competences that have legal effects as regards determining the terms of Poland’s participation in the monetary union 2) the extension of jurisdiction of the European Court of Justice and the European Court of Auditors with regard to Poland; 3) the powers of the Sejm to implement a budgetary policy 4) the powers of the Council of Ministers to implement an economic policy.

In the view of the Constitutional Tribunal, the scope of the amendment introduced into Article 136 of the TFEU matches the criterion mentioned in Article 89(1)(3) of the Constitution. At the same time, an analysis of the character of the new regulation leads to the conclusion that the said amendment is not tantamount to the conferral of competences within the meaning of Article 90(1) of the Constitution. The subject of the European Council Decision 2011/199/EU does not comprise the competences of organs of state authority, and thus they could not be conferred. However, since Article 136 of the TFEU was amended on the basis of the said Decision, one may consider whether the amendment – as it has been

argued by the applicant - creates legal and treaty bases for conferring the competences of organs of state authority in relation to certain matters on an international organisation (the ESM) within the meaning of Article 90 of the Constitution. It should be borne in mind that in accordance with Article 136(3) of the TFEU: "The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

7.3.2. Taking the above findings into account, the Constitutional Tribunal did not share the applicant's arguments. Above all, one should underline that the norm added to Article 136(3) of the TFEU indicates neither an international organisation nor a body of such an organisation which would be assigned with the conferred competences of organs of state authority. The said provision is addressed to the EU Member States whose currency is the euro; however, it does not confer new obligations or tasks, and it does not provide for a new realm of activity or responsibility of the European Union as a whole or of its particular institutions (it is worth noting that none of the EU institutions was mentioned in this provision). The relevance of that provision amounts to recognising the said competences of the euro area Member States to enter into treaties with each other. Poland, as a non euro area Member State, is not at the moment an addressee of the norm contained in that provision, it will not (did not) participate in establishing the ESM and may not be a beneficiary of the assistance granted under the said mechanism.

7.3.3. The said norm also lacks another essential element – from the point of view of Article 90(1) of the Constitution – which is the indication of the realm and scope of the conferral of competences. A high degree of generality in the case of the newly-introduced provision does not allow us to state that the Union or rather its institutions have gained new competences to enact law or to take any other action that has legal effects which will affect the Member States or the citizens thereof; none of those institutions has even been mentioned in that provision. It follows from Article 136(3) of the TFEU that this is a basis for the activity of states and not institutions. This is confirmed by the wording of the said provision and the juxtaposition thereof with Article 136(1) of the TFEU.

However, what is left outside of the normative scope of the provision introduced into the TFEU pursuant to the European Council Decision 2011/199/EU, which is referred to in the challenged Act on the ratification of the said Decision, is the question about the participation of the EU bodies in the ESM. Indeed, their competences in this mechanism are

shaped not by the challenged amendment to the TFEU, but by particular provisions of the ESM Treaty. It should be emphasised once again that Article 136(3) of the TFEU only manifests the recognition of competences vested in the Member States to which it is addressed.

7.3.4. The applicants have argued that paragraph 3 added to Article 136 of the European Council Decision 2011/199/EU should be read in conjunction with the provisions of the ESM Treaty, adopted by the euro area Member States, as it is the content of the Treaty that implies the conferral of competences on the European Commission, the ECB and the TFEU.

In the Tribunal's view, the said conclusion is based on an erroneous assumption that Article 136(3) of the TFEU entails that the euro area Member States are obliged to participate in the stability mechanism, and thus at the moment of its accession to the euro area Poland will have a legal obligation to ratify the ESM Treaty. However, one may not assign such far-reaching implications to the said norm; the recognition of competences of the euro area Member States to establish a stability mechanism may not in itself lead one to draw the conclusion about compulsory participation in the said instrument.

Article 136 has been included in Part Three, Title VIII, chapter 4 of the TFEU, entitled "The Provisions Specific to Member States Whose Currency is the Euro". The Constitutional Tribunal notes that the norm of Article 136(3) of the TFEU will become applicable to Poland at the moment of its adoption of the euro, to which Poland has committed in the Treaty of Accession. However, the content of the norm, which has been analysed in greater detail below, will not change and will still amount to a distinction between the competences of the Member States and the exclusive competences of the EU as regards a monetary policy in the euro area.

7.3.5. What the applicants are also concerned about is the wording of recital 7 of the ESM Treaty, pursuant to which all euro area Member States will become ESM Members. As a consequence of joining the euro area, EU Member States should become ESM Members with full rights and obligations, in line with those of the Contracting Parties. However, the said recital may not be read in isolation from the normative provisions included in the ESM Treaty, and in particular its Article 47, which stipulates that the Treaty shall be subject to ratification by the signatories. As it has already been mentioned, accession to the ESM Treaty is possible only on the initiative of a Member State whose derogation from adopting the euro was abrogated (see part III point 4.2 of this statement of reasons).

7.3.6. The Constitutional Tribunal holds that one may not also share the applicants' reservations that refer to a change in rules for adopting the euro, which Poland has committed to do when ratifying the Treaty of Accession. Apart from recognition that the euro area Member States have the competence to enter into an agreement to establish a stability mechanism, treaty rules for the accession to such an agreement have not changed (the criteria of convergence, Article 140 of the TFEU and Protocol No. 13 to the TEU); in particular, paragraph 3 added to Article 136 of the TFEU does not provide for the adoption of the euro to be dependent on (prior) ratification of the ESM Treaty.

Thus, possible conferral of competences upon the European Commission, the ECB as well as the CJEU, on the basis of the provisions of that treaty could only occur by the ratification thereof. Due to the fact that Article 136(3) of the TFEU neither obliges Poland to ratify the ESM Treaty nor constitutes a basis for conferral of competences on the organs of the Union within the scope of the stability mechanism, the evaluation of specific solutions set forth in that Treaty, especially from the point of view of conferral of competences, does not fall within the scope of these proceedings. It should be noted at this point that the most far-reaching reservations raised by C. Mika (see "Opinie…", *Przegląd Sejmowy* Issue No. 2/2012, p. 158) with reference to the competences of the ESM concern the terms of the ESM Members' applications for financial assistance granted under the mechanism, and not the admissibility of establishing such a mechanism or the terms of participation therein.

7.3.7. Even if one was to assume, as asserted by J. Barcz and K. Kubuj (see "Opinie…", op. cit., *Przegląd Sejmowy* Issue No. 2/2012, pp. 163-164), that Article 2 of the ESM Treaty implies an obligation on the part of Member States adopting the euro to also accede to the ESM Treaty, there is no norm in international law or EU law that would require adherence to norms included in an international treaty to which Poland is not a party. The TEU and the TFEU may not constitute such bases as the ESM Treaty is not part of EU law enacted within the scope of law-making competences assigned to the EU. In particular, newly-added Article 136(3) of the TFEU may not be regarded as such a basis. The Constitutional Tribunal emphasises that the norm providing for the competence of the euro area Member States, arising from their sovereignty, to enter into an agreement such as the ESM Treaty may not be interpreted as one that imposes a legal obligation to participate in the mechanism on the part of EU Member States that are not involved in creating the said mechanism.

Since the role of Article 136(3) of the TFEU merely amounts to separating the competence to enter into international agreements that is vested in Member States from exclusive competences to carry out a monetary policy in the euro area conferred on the Union on the basis of Article 3(1)(c) of the TFEU, Article 136(3) of the TFEU must be interpreted in such a way that also the Member States with a derogation still have the competence to enter into and adopt international agreements, which arises from their sovereignty, as long as this does not infringe exclusive EU competences set out in the TFEU.

7.3.8. The analysis of the content of the European Council Decision 2011/199/EU leads to the conclusion that the Act on the ratification of the Decision does not result in the conferral of competences vested in the organs of state authority, within the meaning of Article 90 of the Constitution assumed by the Constitutional Tribunal. The European Council Decision 2011/199/EU merely confirms the competence of the Member States to establish a stability mechanism; the Union itself gains no new competences which it did not have before the entry into force of the said Decision. The fact that the granting of any financial assistance under that mechanism is made subject to strict conditionality is only to ensure that the assistance will be granted in compliance with the EU law. The new treaty provision does not confer any new competences on the Union; it does not create a legal basis for the Union to undertake any actions that were not possible before the entry into force of the amendment to the TFEU.

One may agree that it is the ESM Treaty that provides for such a possibility, but – in the light of the jurisprudence of the Constitutional Tribunal – merely 'providing for such a possibility' is not tantamount to the conferral of competences. The Constitutional Tribunal, in a sense, dealt with a similar issue in its judgment of 24 November 2010 in the case K 32/09. When analysing the Treaty of Lisbon, the Constitutional Tribunal stated that the applicants' allegations regarded the possibility of applying the provisions of the Treaty in a way that broadened the scope of competences that had 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" (see part III point 2.6 of

the statement of reasons for the judgment in the case K 32/09).

The decision whether to accede to the ESM Treaty, and in accordance with what (ratification) procedure will be made in the future. Also, the assessment of the constitutionality of the ESM Treaty may also occur only at the moment of acceding to the international agreement. At the moment, Poland is not a signatory to the ESM Treaty (Poland has not signed it; nor has it commenced the ratification process). Hence, the analysis of the content of the ESM Treaty may not determine the evaluation of the Act on the ratification of the European Council Decision 2011/199/EU. What is of fundamental significance is the regulation provided for in the said Decision, amending Article 136(3) of the TFEU.

Even if one assumed that Article 136(3) of the TFEU, by itself, created bases for modifying the terms on which Poland was to adopt the euro (by the fact of creating the bases of the mechanism and the obligation to accede to the ESM Treaty, without any possibility of renegotiating the Treaty), one should agree that, as regards the formal aspect, the conferral of competences will take place only at the moment of ratifying the ESM Treaty. Considering the dynamic situation in the EU, one may not rule out that in the future the terms of adopting the euro may be changed. Consent to the ratification of the said Decision in accordance with the procedure set out in Article 90 of the Constitution might be interpreted as recognition of the conferral of competences and the expression of consent to 'future' terms of accession that have not yet been fully specified. This would pose a risk of granting 'carte blanche consent' and doubts whether at the moment of adopting the euro there would be grounds for an additional declaration to be made by Poland as regards its accession to the ESM Treaty.

7.3.9. Taking account of the fact that the Act on the ratification of the European Council Decision 2011/199/EU does not result in the conferral of competences vested in the organs of state authority, within the meaning of Article 90 of the Constitution, the application of the procedure provided in that provision would not be justified. The appropriate procedure for enacting the Act on the ratification of the European Council Decision 2011/199/EU should be the procedure provided for in Article 89(1) of the Constitution. The application of the procedure set out in Article 90 of the Constitution may prove to be justified in the future, i.e. at the moment of joining the euro area and making a decision about adopting the ESM Treaty. Any decisions in that regard will also require considering the introduction of amendments to the Constitution that would concern the position of the National Bank of Poland and the Tribunal of State.

7.4. Questions referred for a preliminary ruling to the CJEU in the case *Pringle v*

Government of Ireland

7.4.1. The stance of the Constitutional Tribunal corresponds to the stance presented by the Court of Justice of the European Union in its judgment of 27 November 2012 in the case *Pringle.* It should be emphasised that, when assessing the constitutionality of the Act on the ratification of the European Council Decision 2011/199/EU, the Constitutional Tribunal recognised that the CJEU's statements were binding as regards the fact that the addition of paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union (paragraph 73 of the CJEU's judgment), as well as the validity and interpretation of the European Council Decision 2011/199/EU.

Addressing the doubts raised by the Irish Supreme Court, the CJEU concluded that there were no circumstances that would undermine the validity of the European Council Decision 2011/199/EU, and also stated that the provisions of the Treaties (i.e. Article 4(3) and Article 13 of the TEU as well as Article 2(3), Article 3(1)(c) and Article 3(2), Articles 119-123 and Articles 125-127 of the TFEU) and the general principle of effective judicial protection did not prevent the Member States whose currency was the euro from concluding an agreement such as the ESM Treaty, done at Brussels on 2 February 2012, or from ratifying the said Treaty. The right of a Member State to conclude and ratify the said Treaty was not contingent upon the entry into force of the European Council Decision 2011/199/EU.

7.4.2. The CJEU stated, first of all, that the provisions of the TEU and TFEU did not confer any specific competence on the Union to establish a stability mechanism of the kind envisaged by the European Council Decision 2011/199/EU. Admittedly, Article 122(2) of the TFEU conferred on the Union the power to grant *ad hoc* financial assistance to a Member State which was in difficulties or was seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the Preamble to its Decision 2011/199, Article 122(2) of the TFEU did not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that Decision. The fact that the mechanism envisaged was to be permanent and that its objectives were to safeguard the financial stability of the euro area as a whole meant that such action could not be taken by the Union on the basis of that provision of the TFEU. Even if Article 143(2) of the TFEU also enabled the Union, subject to certain conditions, to grant mutual assistance to Member States, that provision covered only Member States whose currency was not the euro. As regards the question whether the Union could establish a stability mechanism comparable to that envisaged by the

Decision 2011/199 on the basis of Article 352 of the TFEU, the CJEU held that the Union had not used its powers under that article and that, in any event, that provision did not impose on the Union any obligation to act.

7.4.3. With regard to the issue of increasing the scope competences conferred on the Union in the Treaties, by virtue of adding the paragraph by the European Council Decision 2011/199/EU, the CJEU stated that Article 136(3) of the TFEU confirmed that the Member States had the power to establish a stability mechanism and was further intended to ensure, by providing that the granting of any financial assistance under that mechanism would be made subject to strict conditionality, that the mechanism would operate in a way that would comply with European Union law. That amendment did not confer any new competence on the Union, as it created no legal basis for the Union to be able to undertake any action which had not been possible before the entry into force of the amendment to the TFEU. The CJEU pointed out that even though the ESM Treaty made use of the Union's institutions, in particular the Commission and the ECB, that fact was not, in any event, capable of affecting the validity of the Decision 2011/199, which in itself provided only for the establishment of a stability mechanism by the Member States and was silent on any possible role for the Union's institutions in that connection.

The CJEU stressed that since neither Article 122(2) of the TFEU nor any other provision of the TEU and TFEU conferred a specific power on the Union to establish a permanent stability mechanism such as the ESM, the Member States were entitled, in the light of Article 4(1) and Article 5(2) of the TEU, to act in this area. The amendment to Article 136 of the TFEU by Article 1 of the Decision 2011/199 confirmed the existence of competence possessed by the Member States. Accordingly, that decision did not confer any new competence on the Member States. Thus, concluding a treaty such as the ESM Treaty was admissible and was not subject to the entry into force of the Decision 2011/199. At the same time, the CJEU drew attention to the fact that the establishment of the ESM did not affect the power of the Union to grant, on the basis of Article 122(2) of the TFEU, *ad hoc* financial assistance to a Member State when it was found that the Member State was in difficulties or was seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control.

7.4.4. The CJEU also made reference to a relation between the ESM and Article 125 of the TFEU, in accordance with which neither was the Union nor a Member State to 'be liable for (…) the commitments' of another Member State or 'assume [those commitments]'.

In the view of the CJEU, that norm was not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State. The said provision prohibited the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy was diminished. However, Article 125 of the TFEU did not prohibit the granting of financial assistance by one or more Member States to a Member State which remained responsible for its commitments to its creditors provided that the conditions attached to such assistance were such as to prompt that Member State to implement a sound budgetary policy. The activation of financial assistance by means of a stability mechanism such as the ESM was not compatible with Article 125 of the TFEU unless it was indispensable for the safeguarding of the financial stability of the euro area as a whole and was subject to strict conditionality. The instruments for stability support of which the ESM might make use under Articles 14 to 18 of the ESM Treaty demonstrated that the ESM would not act as guarantor of the debts of the recipient Member State. The latter would remain responsible to its creditors for its financial commitments.

7.4.5. To sum up, the CJEU clearly stated that the EU law did not rule out the possibility of concluding an international agreement such as the ESM Treaty by a number of Member States (it also held that this was consistent with the principle of loyalty of the Member States towards the Union). Additionally, the CJEU confirmed that the involvement of the EU institutions (the European Commission, the ECB and the CJEU itself) was consistent with the EU law, did not entail conferring – on the Union – any competences that had legal effects and matched the competences vested in those institutions on the basis of the TEU and the TFEU. Consequently, the establishment of the ESM did not result in granting the ESM any competences that had legal effects.

7.5. The judgment of the Federal Constitutional Court of Germany.

In the context of the application under examination, attention should be drawn to the judgment of 12 September 2012, ref. no. 2 BvR 1390/12, issued by the Federal Constitutional Court of Germany, as the present case is similar (though not identical) to the situation of that Member State, and the scope of issues examined by the Federal Constitutional Court is also similar.

The Federal Constitutional Court examined the constitutionality of a statute which granted consent to the adoption of the European Council Decision 2011/199/EU. The Federal

Government proposed that the said statute should be enacted in accordance with an ordinary procedure (Article 23(1) in conjunction with Article 59(1) of the Basic Law for the Federal Republic of Germany), emphasising in the statement of reasons for its judgment that no sovereign rights were transferred. "Article 136(3) TFEU does not itself put a stability mechanism into effect, but merely gives the Member States the possibility of establishing such mechanisms on the basis of an international agreement. In this way, at all events, no competencies are transferred to the bodies of the European Union; on the contrary, the competencies of Member States are to be taken up and their relationship to the rules and regulations on European Union currency law is to be laid down. At the same time, by way of a stability mechanism in treaty law, it will be guaranteed that the only Member States liable are those which participate in it. Regarded in this light, Article 136(3) TFEU confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established" (paragraph 236)

Declaring the said statute to be constitutional, the Federal Constitutional Court drew analogical conclusions to those presented by the CJEU. First of all, the Federal Constitutional Court underlined that paragraph 3 added to Article 136 of the TFEU introduced a legal basis only for establishing a stability mechanism which might be activated if indispensable to safeguard the stability of the euro area as a whole, and any financial assistance granted under the mechanism would be made subject to "strict conditionality". The Federal Constitutional Court formulated the main conclusion, stating that the provisions of Article 136(3) of the TFEU did not entail any transfer of sovereign rights by the Federal Republic of Germany, and thus one might not, in principle, refer to evaluation criteria arising from to the principle of democracy, expressed in the Basic Law: "The enactment if a statute concerning Article 136(3) of the TFEU does not entail that the *Bundestag* grants other actors any political and budgetary competences. (...) Article 136(3) of the TFEU itself does not establish a stability mechanism, but merely opens up the possibility of establishing such a mechanism for Member States on the basis of international law. Consequently, on no account are competences conferred on the institutions of the European Union" (see J. Barcz, J. Kranz, *Powierzenie kompetencji…*, p. 23 and the subsequent pages).

A similar stance was taken by the Constitutional Court of Austria in its judgment of 16 March 2013, ref. no. SV-2/12-18.

7.6. Conclusions.

7.6.1. Although the ESM Treaty has been concluded by the Members States whose

currency is the euro, outside the legal framework provided for in the Treaties that constitute the basis of the functioning of the European Union, and the normative significance of paragraph 3 added to Article 136 of the TFEU consists in recognising and confirming the admissibility of concluding such international agreements by the EU Member States, the Constitutional Tribunal has noted that the establishment of the ESM has actually changed the architecture of the Economic and Monetary Union. The establishment of that institution has strengthened links between the Member States that are signatories to the ESM Treaty. There is no doubt that the existence of a permanent rescue mechanism for the Member States that have encountered serious financial difficulties will have impact on the ways of solving problems with their solvency. In the case where a Member State affected by the difficulties files an application for financial assistance under the ESM, it will be subject to strict conditions concerning the use of such financial aid, which will also be supervised by certain EU institutions. The Member States that are signatories to the ESM Treaty accept an obligation, at the moment of signing the ESM Treaty, to cover their share of capital in that institution, as well as to provide – upon fulfilment of further premisses – funds to cover the subscribed capital, or even to cover the shares of any insolvent signatories to the Treaty. This implies a substantial burden for the budgets of the Member States involved.

By contrast, the provisions of the ESM Treaty do not concern the Member States that have not joined the Economic and Monetary Union, i.e. those with a derogation. The establishment of the ESM has not changed the rules for adopting the common currency; as the Tribunal has noted earlier on, the treaty provisions concerning the revocation of the derogation have not changed. However, it should be noted that as part of the decision-making process concerning the adoption of the euro, the Member States with a derogation, which in the future may possibly include Poland, will be obliged to consider the necessity to join the ESM. The issue of ratification of the ESM Treaty will become one of the vital elements of a future political decision concerning the adoption of the euro, provided that the said Treaty will still be binding at that time. Due to the dynamic character of changes that have been taking place in the European Union, it is however difficult to evaluate today whether, until the moment of the introduction of the euro by Poland, the ESM Treaty will remain an international agreement that will be binding (on a voluntary basis) for only the Member States whose currency is the euro, or whether attempts will be made to incorporate the Treaty into the EU legal system.

Still, paragraph 3 added to Article 136 of the TFEU has not primarily changed the fact that joining the euro area depends – apart from the necessity to fulfil the criteria of

economic convergence – also on the fulfilment of the criteria of legal convergence. In the case of Poland, this will require the introduction of amendments to many normative acts. Statutes aimed at adjusting Polish law to the requirements of the euro area, as well as a possible statute grating consent to the ratification of the ESM Treaty, will be potential subjects of constitutional reviews to be carried out by the Constitutional Tribunal (Article 188(1) of the Constitution).

7.6.2. The Constitutional Tribunal has deemed that the challenged Act on the ratification of the European Council Decision 2011/199/EU does not result in the conferral of competences vested in the organs of state authority, within the meaning of Article 90(1) of the Constitution. Article 136(3) of the TFEU (included in "The Provisions Specific to Member States Whose Currency is the Euro") does not entail conferring the competences of the organs of state authority upon an international organisation (international institution). The said provision dispels doubts as to whether, in the light of the Treaties, the Members States whose currency is the euro may provide each other assistance. The Member States have accepted that confirmed possibility, by becoming the signatories to the ESM Treaty, which has been concluded outside the EU legal framework, which additionally rules out the thesis about increasing the scope of competences conferred on the EU. This has been confirmed by the CJEU with regard to the EU law, and by the Federal Constitutional Court in the context of national law. There are no grounds to claim that the European Council Decision 2011/199/EU creates legal and treaty bases for conferring the competences of organs of state authority in relation to certain matters on an international organisation – the ESM. There is no chronological correlation between the amendment to the TFEU and the ESM Treaty. Poland is not a signatory to the ESM Treaty, as well as the ESM Treaty does not imposes any obligations on Poland and does not cause any changes in the way the organs of state authority in Poland implement a financial policy. The amendment to Article 136, introduced by the European Council Decision 2011/199/EU, does not also introduce any changes that would be significant from the point of view of the EU systemic structure.

Deeming that the challenged Act is not related to the competence of organs of state authority, the Constitutional Tribunal assumes that the appropriate procedure for the enactment of the said Act is the procedure set out in Article 89 of the Constitution. The statement leads to the conclusion that the higher-level norm indicated by the applicants is inadequate; the application of Article 90 of the Constitution would not have been the

appropriate procedure for granting consent to the ratification. Therefore, the Constitutional Tribunal rules that the Act on the ratification of the European Council Decision 2011/199/EU is not inconsistent with Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution.

7.7. The other higher-level norms for the review

The applicants have also alleged that, due to “creating legal bases for restricting the powers of the Sejm to implement a budgetary policy as well as the power of the Council of Ministers to implement an economic policy, by way of granting the European Commission the competence to specify the terms of a mechanism correcting the financial economy of the state”, the Act on the ratification of the European Council Decision 2011/199/EU additionally infringes Articles 219 and 146 of the Constitution.

The applicants have raised the allegation about the non-conformity of the said Act to Article 219 as well as Article 146 of the Constitution, as if aside from the main allegation. But they have indicated entire Article 219 as well as Article 146 of the Constitution, without justifying their thesis about the non-conformity of the said Act to those higher-level norms.

Pursuant to Article 32(1)(3)-(4) of the Constitutional Tribunal Act, an application submitted to the Constitutional Tribunal must include the formulation of a claim alleging the non-conformity of a given normative act to the Constitution as well as reasons for the claim with the indication of supporting evidence. The Constitutional Tribunal states that the proper formulation and justification of an allegation are of relevance for assessing whether there are no negative procedural premisses, for delineating the scope *ratione materiae* of a given application, and thus – in accordance with Article 66 of the Constitutional Tribunal Act – for determining the scope of the Tribunal’s jurisdiction; and also they are relevant due to the presumption of the constitutionality of law (see Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, pp. 114-115 and the jurisprudence indicated therein).

The lack of justification for the allegation constitutes a negative procedural premiss which rules out the substantive examination of the application and thus results in the necessity to discontinue the review proceedings (see the judgments of the Constitutional Tribunal of: 3 June 2002, ref. no. K 26/01, OTK ZU No. 4/A/2002, item 40; and 15 July 2009, ref. no. K 64/07, OTK ZU No. 7/A/2009, item 110). Pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the Constitutional Tribunal has decided to discontinue its proceedings within

the scope of examining the conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 219 and Article 146 of the Constitution.

8. The allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 88 of the Constitution as well as with Article 48(6) of the TEU.

8.1. According to the applicants, the European Council Decision 2011/199/EU has been issued without a legal basis (as it goes beyond the scope of Article 48(6) of the TEU), and consequently the ratification of that decision by Poland leads not only to the adoption thereof in a way that is inconsistent with Article 90 of the Constitution, but it also results in a situation where provisions introduced illegally into the TFEU will become part of the Polish legal order. For this reason, the provisions may not constitute a source of universally binding law in the Republic of Poland, which additionally infringes Article 88 of the Constitution.

The applicants have assumed that the negative evaluation of the choice of the procedure for adopting the European Council Decision 2011/199/EU would weigh in favour of the non-conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 48(6) of the TEU.

It should be noted at the beginning that the applicants' allegation has been constructed at two levels. Formally, the applicants directly question the conformity of a national statute to a ratified international agreement the ratification of which required prior consent granted by statute, which falls within the scope of the jurisdiction of the Constitutional Tribunal (Article 188(2) of the Constitution). A statute concerning ratification may be subject to review by the Constitutional Tribunal as to its conformity to a legal act that is higher in the hierarchy of acts. At the same time, one may not rule out a review of the statute in respect of its compliance with the elements of the statutory procedure provided for in the Polish law and regulated in EU legal acts (see the judgment of the Constitutional Tribunal of 16 July 2009, ref. no. Kp 4/08, OTK ZU No. 7/A/2009, item 112).

However, in the context of the present case, the applicants expect the Tribunal to determine whether Article 48(6) of the TEU constituted the right basis for adopting the European Council Decision 2011/199/EU, but this aspect of the allegation would require juxtaposing the European Council Decision 2011/199/EU, amending Article 136 of the TFEU, with Article 48(6) of the TEU, which goes beyond the scope of jurisdiction of the Constitutional Tribunal.

What reveals the applicants' intention is their justification of the allegation. Making reference to the judgment of 11 May 2005, issued by the Constitutional Tribunal in the case K 18/04, the applicants argue that: "The EU Member States maintain their right to assess whether Community (EU) law-making bodies, when issuing certain provisions of law, acted within the scope of conferred competences and whether they exercised those competences in accordance with the principles of subsidiarity and proportionality". However, the applicants have overlooked the context of that statement (see point 10.2. in part III of the statement of reasons for the judgment in the case K 18/04). Further on, the Tribunal stated that: "Going beyond that framework results in a situation where legal acts (provisions) issued outside it are not subject to the principle of the primacy of Community law".

The quoted passage from the analysis of the Constitutional Tribunal refers to the allegation of the unconstitutionality of Article 234 of the Rome Treaty (at present Article 267 of the TFEU) – in the part concerning questions referred for a preliminary ruling. The Constitutional Tribunal stressed that the Court of Justice was the main but not exclusive holder of powers within the scope of the application of the Treaties in the legal system of the Communities and the European Union. The Court of Justice had exclusive competence (together with the Court of First Instance – in cases that fell within the jurisdiction of that court) to adjudicate on the validity and interpretation of Community law. In the conclusion, the Constitutional Tribunal stated that: "by ratifying the Treaty of Accession as well as the statute on the terms of accession, the Republic of Poland approved of the division of functions within the system of Community and EU bodies. An element of that division is that the Court of Justice of European Communities is to provide the interpretation of Community law and to ensure that the interpretation is observed consistently in all Member States" (point 10.3 in part III of the statement of reasons for the judgment in the case K 18/04). The above view was maintained in the decision of the Constitutional Tribunal of 19 December 2006, ref. no. P 37/05 (OTK ZU No. 11/A/2006, item 177). The Tribunal stressed therein that the division of competence between the courts of the EU Member States and the ECJ, as regards the interpretation and application of Community law, was the following: the ECJ provided interpretation, and the application of law – construed as the application of the norms of Community law to facts established by a court – fell within the jurisdiction of a given court of the EU Member States, which in a given case was bound by the said interpretation (see point 4.1. in part III of the statement of reasons for the decision in the case P 37/05).

8.2. Therefore, it should be stated that the Constitutional Tribunal has no jurisdiction to adjudicate on the validity of EU acts. In accordance with the Treaties, it is the Court of Justice of the European Union that determines whether the EU or a relevant EU institution, has competence to issue an act; the said Court reviews *inter alia* the validity of EU acts (Article 263 of the TFEU) as well as has jurisdiction to give preliminary rulings concerning the validity of such acts (Article 267 of the TFEU). A reason for ruling that an act is invalid may, *inter alia*, be the lack of competence to issue such an act" (K. Wójtowicz, "Kontrola konstytucyjności aktów Unii Europejskiej podjętych *ultra vires* – między pryncypiami a lojalną współpracą", [in:] *W służbie dobru wspólnemu,* R. Balicki, M. Masternak-Kubiak (eds.), Warszawa 2012, p. 518).

In the judgment of 16 November 2011, ref. no. SK 45/09 (OTK ZU No. 9/A/2011, item 97), the Constitutional Tribunal has stated: "The Member States have competence to bring actions to the Courts of the European Union, for them to review the legality of the acts of EU secondary legislation (Article 263 of the TFEU). Moreover, the courts of the Member States refer questions, in relation to pending proceedings, to the Court of Justice of the European Union for a preliminary ruling concerning the validity of acts of the institutions, bodies, offices or agencies of the Union (Article 267 of the TFEU). The Court of Justice has expressed the view that the national courts have no jurisdiction to declare that the acts of Community institutions are invalid. The Courts of the European Union have exclusive jurisdiction in that regard (cf. the judgment of the Court of 22 October 1987, in the case C-314/85, Foto-Frost, ECR 1987, p. 4199)".

Within the scope of its competence provided for in Article 267 of the TFEU, the Court of Justice of the European Union examined the questions referred by the Supreme Court in Ireland for a preliminary ruling, the application of 3 August 2012 (Case C-370/12). As it has already been mentioned above (see point 7.4 in part III of this statement of reasons), in the case *Pringle*, the CJEU stated – taking a stance with regard to the allegation of the lack of competence, as one question concerned the validity of a provision of the EU primary law – that it fell to the Court, as the institution which, under the first subparagraph of Article 19(1) of the TEU, was to ensure that the law was observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) of the TEU. At the same time, the Court held that the amendment to Article 136 of the TFEU did not confer any new competences on the Union, and thus it could be introduced in accordance with a simplified revision procedure under Article 48(6) of the TEU.

8.3. Making reference to the allegation of the nonconformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 48(6) of the TEU, it should be stated that the indicated higher-level norm for the review is inadequate. The review of a procedure for the enactment of a statute consists in examining the conformity of the procedure for the enactment of the statute (challenged provisions) to requirements arising from provisions regulating legislative proceedings as well as to constitutional provisions that concern those issues. Thus, it should be deemed that there is no relation of adequacy between the challenged Act (the Act on the ratification of the European Council Decision 2011/199/EU) and the indicated higher-level norm for the review (Article 48(6) of the TEU). The content of the European Council Decision 2011/199/EU has been analysed in the present case as the substantive content of authorisation expressed in the Act on the ratification of the European Council Decision 2011/199/EU. Evaluation whether – in the light of Article 48(6) of the TEU – the amendment introduced by the European Council Decision 2011/199/EU increases the scope of competences conferred on the EU and whether it has been adopted in accordance with an appropriate procedure does not fall within the limits of this analysis. Article 48(6) of the TEU may constitute a higher-level norm for the review in the context of assessing the procedure for the adoption of the European Council Decision 2011/199/EU itself (this was the case in the proceedings before the CJEU). The evaluation of the legality of the said Decision was carried out in the case *Pringle*. The CJEU stated then: "Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro".

Taking into account that it proved impossible to derive a common platform for comparing the challenged regulation with the indicated higher-level norm for the review from the context of the application and the justification thereof, the Tribunal has deemed that the Act on the ratification of the European Council Decision 2011/199/EU is not inconsistent with Article 48(6) of the TEU.

8.4. The applicants have also raised the allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 88 of the Constitution. Pursuant to that provision, the condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof (para. 1);

the principles of and procedures for promulgation of normative acts shall be specified by statute (para. 2); international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute (para. 3).

The applicants have not indicated in what way the challenged Act has infringed Article 88 of the Constitution. The lack of justification for the allegation constitutes a negative procedural premiss which rules out the substantive examination of the application and thus results in the necessity to discontinue the review proceedings. Consequently, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the Constitutional Tribunal has decided to discontinue its proceedings within the scope of examining the conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 88 of the Constitution, on the grounds that issuing a judgment in that regard is inadmissible.

9. An application for "an interpretation".

In the final part of their application, the applicants have requested the Tribunal to "provide an interpretation as to the form in which the Republic of Poland binds itself by decisions of an international institution such as the European Council as well as an interpretation concerning a procedure binding for the organs of state authority in Poland as regards the adoption and negotiation of such decisions". The application for "an interpretation", formulated this way, should be regarded as inadmissible. The Constitutional Tribunal has no jurisdiction to determine the universal interpretation of statutes, understood as an abstract reply – issued in a separate procedure – with regard to the meaning and legal content of a given statutory provision. The determination of the universal interpretation of statutes used to fall within the scope of the jurisdiction of the Constitutional Tribunal in the years 1989-1997.

It may be assumed that the applicants are aware of that fact, and thus allege that the Act on International Agreements lacks a certain regulation. However, the applicants do not indicate an appropriate higher-level norm for the review, and the mere application for "providing an interpretation" has not been included in the *petitum* of the letter, but in the final fragment of the reasoning. Thus, it is impossible to treat a claim formulated this way as the subject of the allegation (e.g. Article 2 of the Act on International Agreements, insofar as it does not provide for...). Even if the issue formulated this way was to be examined, the lack of the said regulation would have to be regarded as legislative omission. However, it seems that the reconstruction of the subject of the allegation on the basis of the principle *falsa demonstratio non nocet* is groundless in the present case (cf. the judgment of 24 November 2010, ref. no. K 32/09, point 1.2 in part III of the statement of reasons – the Constitutional Tribunal classified that legislative omission was the lack of a detailed regulation of the mechanism for cooperation between the Council of Ministers and the Sejm and the Senate in matters pertaining to Poland's membership in the EU).

The proceedings within the scope of the application for "providing an interpretation by the Constitutional Tribunal (...) are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act.

Taking the above into consideration, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the Judgment of the Constitutional Tribunal
of 26 June 2013, ref. no. K 33/12

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; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 26 June 2013 of the Constitutional Tribunal in the case K 33/12.

I agree with the argumentation presented by Judge Mirosław Granat in his dissenting opinion to the judgment. I hold the view that the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) is inconsistent with Article 90 of the Constitution (Journal of Laws - Dz. U. item 748; hereinafter: the Act on the ratification of the European Council Decision 2011/199/EU). In addition, I wish to point out that the hearing in the case K 33/12 revealed that there were discrepancies in the interpretations of the basic expressions used in that provision of the Constitution. In particular, this refers to the category of ‘competence’ which constitutes a semantic axis of Article 90 of the Constitution. Hence, there is necessity not so much to re-define as to define the term ‘competence’ for the sake of the application of that provision of the Constitution. As the scope *ratione personae* of state authority is broad and diverse, one should begin (or at least should attempt to do so) with a meaning that is as general as possible, the content of which departs from the typical rendering thereof in administrative law - e.g. competence within the meaning of Article 90 of the Constitution means conferring – on the basis of an international agreement and upon an international organisation or as part of the scope of powers vested in an international institution – an area of legally specified activity of an organ of state authority the constitutive features of which comprise the content and manner of decision-making in matters conferred as well as assigning responsibility to an entity on to which the activity is conferred. Without sorting out the meaning of the above term, it is virtually impossible to correctly understand and apply Article 90 of the Constitution.

Generally, competence may not amount only to actions that have legal effects and it appears to be a special amalgamation of juridical acts and actual actions which are set in particular social, economic, and legal circumstances, but which are characterised by the significance of the effects of the acts and actions carried out.

The hearing held in the present case also did not give a clear answer about normative relations between Article 90 and Article 89 of the Constitution, which is an obvious consequence of terminological disorder in Article 90 of the Constitution.

The amendment made to the Treaty on the Functioning of the European Union (Journal of Laws - Dz. U of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), by adding Article 136(3), brings about – in my view - real and important changes in the legal and actual context of the EU Member States. The ratification of the European Council Decision 2011/199/EU opens up a new chapter as regards the relations of the Polish state the consequences of which are significant and difficult to predict (this also indicates the validity of applying the procedure set out in Article 90 of the Constitution) and at every stage of the process of taking steps to adopt the euro, both before, as well as after, the entry into the system.

At the same time, what should be underlined is the substantive and functional unity of Article 136(3) of the TFEU and the remaining paragraphs of that Article, which establish the legal basis of measures (legal acts) adopted by the European Union to coordinate economic policies implemented by the Member States whose currency is the euro (see A. Nowak-Far, [in:] *Traktat o funkcjonowaniu Unii Europejskiej. Komentarz,*. A. Wróbel (ed.), Vol. 2, Warszawa 2012, p. 803). The consideration of the effects brought by the European Council Decision 2011/199/EU in such a context proves the view presented by the Constitutional Tribunal to be inapt, as the Tribunal stated in the judgment in the present case that the added norm indicated neither an international organisation nor an international institution upon which competences vested in the organs of state authority were to be conferred; it did not confer any new competences on the Union and it did not specify the realm and scope of the conferral of competences. Indeed, all these elements clearly follow from Article 136 of the TFEU, with more specific information in its paragraph 3 of the provision on the scope *ratione materiae* of competences conferred on the Union. Thus, in my opinion, the Act on the ratification of the European Council Decision 2011/199/EU is subject to the procedure provided for in Article 90 of the Constitution.

For the reasons mentioned above, I have felt obliged to submit this dissenting opinion to the judgment of the Constitutional Tribunal of 26 June 2013 in the case K 33/12.

Dissenting Opinion
of Judge Mirosław Granat
to the Judgment of the Constitutional Tribunal
of 26 June 2013, ref. no. K 33/12

A starting point for the discussion of the procedure for ratifying the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91, 6. 4.2011, p. 1) is, in my view, the principle of constitutionalism. Even in the circumstances of the development of the European Union and European law, the Constitution remains the supreme law of the Republic of Poland (Article 8(1)). The primacy of the Constitution among the sources of universally binding law of the Republic of Poland is the main principle of the Constitution, despite the enhancement of international cooperation and European integration. The Constitutional Tribunal has presented that kind of approach to the significance of the Constitution in its jurisprudence related to the different aspects of Poland's membership in the European Union. This took place at the beginning of the integration process, which was manifested in the judgment of 11 May 2005 in the case K 18/04 (OTK ZU No. 5/A/2005, item 49) concerning the Treaty of Accession, as well as in the course of that process. An example of that is the judgment of 24 November 2010 in the case K 32/09 (OTK ZU No. 9/A/2010, item 108) concerning the Treaty of Lisbon. In the context of that case, the Tribunal introduced "constitutional identity" into its *acquis*.

1. In the view of the Constitutional Tribunal, in the light of Article 136(3) of the Treaty on the Functioning of the European Union (Journal of Laws - Dz. U of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), there is no case of 'conferral of competences' within the meaning of Article 90 of the Constitution. Poland is not the addressee of the provision under examination. It imposes no obligation on our country as we are outside the euro area. It is impossible to be subject to the requirements of the European Stability Mechanism (hereinafter: the ESM), since the premiss concerning Poland's membership in the euro area has not been fulfilled. By contrast, in the context of the Member States whose currency is the euro to which Article 136(3) of the TFEU is addressed, the said provision does not impose new obligations or tasks and does not provide for new areas of activity and responsibility whether for the European Union as a whole or for its particular

institutions. In this case, the meaning of that provision amounts to recognising the competence of the euro area Members States to enter into treaties with each other. Article 126(3) of the TFEU. Thus, the Tribunal has regarded Article 136(3) of the TFEU as one that has no legal effects, in particular for a Member State that remains outside the euro area. With regard to the euro area Member States, the said provision confirms their right to enter into treaties with each other.

2. The Tribunal has inaptly interpreted the meaning of the provision under analysis, in particular within the first of the above-mentioned scopes, i.e. with regard to Poland. If one was to agree with the Tribunal that the meaning of the provision is "neutral", then the amendment to the TFEU would have no sense. The aim of the amendment would merely be the confirmation of the fact that the Member States may enter into the Treaty (i.e. the ESM Treaty) as if aside from EU law.

The meaning of Article 136(3) of the TFEU entails that the ESM (and, at the same time, euro area) Member States, by entering into treaties in the light of the provision under examination, co-decide about the functioning of the euro area ("as a whole"), without the participation of Poland, where Poland is obliged to become a euro area Member State by virtue of the Treaty of Accession. The said amendment will bind our country at the moment of joining the euro area, as Poland must accede to the Treaty establishing the European Stability Mechanism (hereinafter: the ESM Treaty). At the moment of accession to the euro area, the said provision will shape the terms of exercising competences vested in the organs of state authority conferred on the basis of the Treaty of Accession. In the light of that provision, there is a functional relation between the European Stability Mechanism and membership in the euro area; where the said membership (in the euro area) is a commitment made at the moment of accession. On that basis, the States determine (the ESM has already been functioning) the terms of Poland's participation in the monetary union. The indicated relation between the ESM membership and the euro area membership determines a relation between the provision under examination and Article 90 of the Constitution. Article 136(3) of the TFEU updates the terms of our membership in the euro area. It sets at least the terms on which competences vested the organs of state authority are to be conferred. The longer the period when Poland is a Member State with a derogation, the longer the period when our country does not participate in the shaping of the euro area, but is obliged to join the said euro area. The said functional relation changes the terms of our membership in the euro area, which were specified at the moment of the ratification of the Treaty of Accession.

Other Members States are also involved in determining the terms of our membership in the euro area. This leads to the conclusion that there is substantive modification of the way in which conferred competences are exercised, to which our country needs to adjust. Therefore, there are no grounds to assert that Article 136(3) of the TFEU "does not concern Poland". In the light of the provision, a change occurs in the terms of Poland's membership in the monetary union (I will refrain here from evaluating whether this change is advantageous or disadvantageous). The ratification of the amendment to the TFEU is actually the only moment when Poland co-decides about the shape of the said new terms of participation in the euro area. At the same time, once again attention should be drawn to the fact that the ESM has already been functioning. It is not at all merely a potential mechanism.

The legal significance of Article 136(3) of the TFEU may also be expressed in this way that it brings about an effect which I perceive as one comprising both an obligation and a requirement. In the light of that provision, Poland is obliged to confer the competences of organs of state authority on the ESM no later than at the moment of abrogating a temporary derogation. The term from Article 136(3) of the TFEU that the Member States "may" establish [...] does not mean freedom to join the ESM, as the Constitutional Tribunal appears to interpret this. In fact, the point is the obligation to adopt the ESM Treaty by the Member States in order to fulfil the obligation assumed by means of the Treaty of Accession. The word "may" merely indicates here the possibility of joining the ESM at different times.

The ESM (activated if this is indispensable to safeguard the stability of the euro area as a whole) in its essence means that the euro area Member States will share competences and will confer them on the ESM (cf. the expert opinion of M. Szydło for the Bureau of Research of the Chancellery of the Sejm). By contrast, exercising those competences by the ESM takes place in the case of Poland, after the abrogation of the said derogation, but the obligation to confer them exists at present. The said obligations have already been binding for Poland, but the effect thereof (entry into force) is deferred.

3. The Tribunal has stated that the applicants' view that Article 136(3) of the TFEU includes an obligation of the euro area Member States to participate in the stability mechanism has too far-reaching implications. The Tribunal has indicated no grounds on which it has deemed the applicants' assumption to be inapt. The Tribunal's view that the provision under examination may not be assigned such far-reaching implications is deprived

of a solid basis. It is questionable when we consider the wording of other provisions of the ESM Treaty. Recital 7 of the Preamble to the ESM Treaty stipulates that "all euro area Member States will become ESM Members". The systemic interpretation of the ESM Treaty provisions seem to indicate that, as regards the meaning of Article 136(3) of the TFEU, the applicants are right.

In the light of Article 136(3) of the TFEU, as a euro area Member State, a given State may not remain outside the ESM. This circumstance affects the understanding of the terms of joining the euro area, as set out in the Treaty of Accession. A Member State that wishes to be a euro area Member State must be an ESM Member. The said correlation leads to the conclusion that Poland subjects itself to strict conditions determining the granting of any indispensable financial assistance under the ESM will be made subject to strict conditionality (as it has been stipulated in Article 136(3) of the TFEU) entails that Article 90 of the Constitution is an adequate higher-level norm for a review of such a provision. If the word "may" from Article 136(3) of the TFEU means only a possibility of choosing when to accede to the ESM, and not complete freedom in that respect on the part of a Member State which aspires to join the monetary union, and the essence of the ESM is to have competences which belong to the Member States, then it should be inferred that, on the basis of Article 136(3) of the TFEU, the Member State accepts an obligation consisting in the conferral of competences vested in the organs of state authority. The assumption that the application of Article 90 of the Constitution is inadequate raises a question if any other treaty may be subject to review under Article 90 of the Constitution. In my opinion, the said higher-level norm for the review has been chosen correctly. By adjudicating in the operative part of its judgment that (let me paraphrase here for the sake of brevity) we do not have a measure in Article 90 of the Constitution for the assessment of that kind of a provision, the Tribunal narrows down the scope of the meaning of Article 90 of the Constitution.

I am certain that Article 90 is applicable not only to agreements that constitute the bases of conferring competences vested in the organs of state authority, but also to agreements that modify the scope of conferred competences, the essential elements of those competences as well as the conditions for conferring those competences. Article 136(3) of the TFEU considerably changes the terms of functioning of the monetary union, and thus it changes the terms of exercising competences conferred by Poland in the realm of financial policy, under the Treaty of Accession. Thus, the said provision falls within the scope of Article 90 of the Constitution.

When the constitution-maker drafted Article 90 of the Constitution, then, in a sense, the horizon line for him was Poland's accession to the EU. Undoubtedly, he did consider the use of the Schengen method by the Union. There was no prediction that the method would be used more broadly. The interpretation of 'conferral of competences' presented in this judgment by the Tribunal seems so narrow that one wonders whether the test for conferral of competences under Article 90 of the Constitution may be failed by a majority of treaties on integration. Due to the coincidence of those factors, European integration understood in a broader way misses the scope of Article 90 of the Constitution. This is also confirmed by a doctrinal view about the presumed role of Article 89 of the Constitution in the review of acts on integration. By contrast, in my opinion, it may not be ruled out that the two procedures for ratification may be parallel here. Hence, in my view, the said provision of the Constitution, by expressing the thought in a very succinct way, loses its significance. I am coming back to the question when the said provision may be applied, since it is known that the Act on the ratification of the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, done at Brussels on 2 March 2012 (Journal of Laws - Dz. U. item 283) has been enacted by way of "small ratification". At this point, one may not overlook the fact that in 2011 the legislator gave up on amendments to the Constitution that had been agreed on by political parties, and which would introduce a "European chapter" as one that would meet the requirements of the functioning of Poland in the EU. It provided for the deletion of Article 90 of the Constitution. Thus, I conclude that the authors of the amendments to the Constitution intended that Article 90 of the Constitution understood as in jurisprudence was "insufficient" for the functioning of Poland in the European Union. However, the constitution-maker did not adopt those draft amendments. This would indicate the up-to-date character of the clause in Article 90 of the Constitution.

4. The statement of the Tribunal that it is not going to undertake a review of Article 136(3) of the TFEU, due to that fact that it "does not speak about the future", does

not persuade me, bearing in mind the constitutional jurisdiction of the Tribunal. Indeed, what does it really mean that the Constitutional Tribunal does not want to speak about the future? Article 136(3) of the TFEU contains a legal norm that has certain content and which brings about certain effects. If the said stance held by the Constitutional Tribunal was correct, it would prevent the Tribunal from expressing its views on a number of subjects of constitutional review. In a majority of cases, when assessing a binding provision or norm, the Tribunal voices its opinion "about today" and "about the future". This takes place in the context of different types of judgments and in varied cases (e.g. when declaring partial unconstitutionality, issuing interpretative judgments, or conducting an *a priori* review where a statute has not yet entered into force).

5. 'Conferral of competences' of organs of state authority in the realm of the economy or finances, which arises from the dynamic character of the integration processes of the European Union (e.g. the ESM Treaty, the Fiscal Compact), may take on a more complex form than this was the case earlier, for instance in the case of the Treaty of Accession or the treaties reforming the Union. Our country was obliged in the Treaty of Accession to confer competences on the EU within the scope of a financial policy. However, it is unknown when, i.e. at which point in time, the obligation will be binding. The conferral of competences vested in the organs of state authority is a two-stage process here (first, the Treaty of Accession; then the introduction of the euro). In any case, competences within the scope of financial policy (covered by the Treaty of Accession) will be exercised in conditions specified, *inter alia*, in Article 136(3) of the TFEU, when the euro area Member States determine the unilateral terms of the functioning of the ESM with regard to the Member States that are about to adopt the euro, thus specifying vital terms of exercising competences conferred within the monetary union.

6. The application of Article 90 of the Constitution should not entail – as stated by the Tribunal in the present case – that the norm which is being examined lacks "the indication of the realm and scope of conferral" or that it does not explicitly mention the European Union. Such qualities of the analysed provision do not have to manifest the lack of 'conferral of competences'. The norm on the basis of which the said conferral takes place does not have to 'show' that. The Tribunal should have analysed the said issue at a deeper level. As an organ of the state that protects the norms of the Constitution, the Tribunal should have indicated – from the point of view of Article 90 of the Constitution – why, in

the provision under analysis, in the Tribunal's view there is no (or there is) conferral of competences. In our case, the Tribunal assumes that since Article 136(3) of the TFEU does not indicate the realm and scope of conferral of competences, nor does it mention the EU, then we do not deal with the conferral of competences. The negative outcome of the test for the conferral of competences could only lead to the conclusion that Article 89 of the Constitution is proper for a given ratification procedure.

7. For the interpretation of Article 90 of the Constitution as an adequate higher-level norm for the review in the present case, it is of significance that majority votes indicated by the constitution-maker in that provision show the role of working out a compromise, on the part of the ruling parties and the opposition in the Polish Parliament, as regards Poland's participation in integration processes. In the view of the constitution-maker, the ruling (party) majority is not sufficient here. The said integration is a complex process. Apart from the Treaty of Accession and the reforming Treaties, there have been treaties based on the Schengen method, which play a role in integration. Requiring cooperation on the part of the ruling majority and the opposition, Article 90 of the Constitution should – in the interpretation of the Constitutional Tribunal - comprise in its content the said treaties if it is determined (as mentioned above) that, in the context of the said method, there is conferral of competences. Commencing such an analysis, the Tribunal must take account of the meaning of the two provisions of the Constitution (i.e. Article 89 and Article 90). Pursuant to the Constitution, in a strict sense, the Council of Ministers conducts the foreign policy of the Republic of Poland (Article 146 of the Constitution). However, when the Council of Ministers enters into treaties the ratification of which requires consent of the Parliament granted in accordance with the procedure set out Article 89 or Article 90 of the Constitution, the relation between the Council of Ministers and the Sejm changes and the Sejm supervises the Government in respect of foreign policy and European matters. I presume that the Council of Ministers, regardless of its political background, will opt for the procedure set out in Article 89 of the Constitution. This is an easier path (the ruling majority does not have to convince the opposition). It may be assumed that every government will prefer it, and the significance of Article 90 of the Constitution will diminish. By contrast, the role of the Constitutional Tribunal is to assess whether the ruling majority correctly interprets the provision of the Constitution.

I mention the issue of conducting foreign policy here as a counterargument to the statement that recognising the adequacy of Article 90 of the Constitution as a higher-level

norm for the review in the present case would be tantamount to entrusting the Sejm with "conducting foreign/European affairs". The Sejm is guaranteed to exercise supervision over them, by virtue of Article 90 of the Constitution. Such was the intention of the constitution-maker. I wished to point out that intention, by submitting this dissenting opinion.

8. The course of the hearing indicates that still another interpretation is also possible as regards showing that, in the present case, Article 90 of the Constitution is an adequate higher-level norm for the review. What I mean here is argumentation related to the procedure for introducing amendments to the treaty which has already been ratified in accordance with the procedure referred to as "large ratification". However, I have found it proper to focus on substantive arguments.

Dissenting Opinion
of Judge Marek Kotlinowski
to the Judgment of the Constitutional Tribunal
of 26 June 2013, ref. no. K 33/12

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 judgment of the Constitutional Tribunal of 26 June 2013 in the case K 33/12.

I agree with the argumentation put forward in the present case by Judge Mirosław Granat and Judge Marek Zubik in their dissenting opinions.

Dissenting Opinion
of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 26 June 2013, ref. no. K 33/12

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 above-indicated judgment as a whole.

Unlike the Tribunal, I hold the view that the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the Act on Ratification) is inconsistent with Article 90 of the Constitution in conjunction with Article 120, first sentence, of the Constitution of the Republic of Poland on the grounds that the procedure applied for the enactment thereof was inappropriate.

STATEMENT OF REASONS

1.1. The challenged Act on Ratification expresses consent on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91 of 6.04.2011, p. 1; hereinafter: the said Decision). The said Decision amends the Treaty on the Functioning of the European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), by adding paragraph 3 to Article 136, and thus creating a basis – by means of an international agreement entered into by be the Member States whose currency is the euro (hereinafter: the euro area Member States)) - for conferral of certain competences of the said States, as regards foreign policy, by establishing an international organisation, which will also pertain to Poland after abrogating our derogation from adopting the euro. For this reason, in my opinion, the said Act should have been enacted in compliance with one of alternative procedures from Article 90(2) and (3) in conjunction with Article 90(4) of the Constitution, and not in accordance with the "ordinary" procedure set out in Article 120, first sentence, of the Constitution, which was actually the case.

1.2. The provision of Article 136(3) of the TFEU should be read in the context of paragraphs 1 and 2, concerning measures which the European Council may adopt with regard to the euro area Member States, to strengthen the coordination and surveillance of their budgetary discipline as well as to set out economic policy guidelines for them. Paragraph 3, added to Article 136 of the TFEU by the said Decision, in fact, introduces a new instrument that serves the same purpose, but which has not been created directly by the organs of the EU, but with – their approval – by the Member States that belong to the monetary union. Certainly, this is not an insignificant amendment to the TFEU, which might be suggested by the fact that it has been introduced in accordance with the simplified revision procedure.

1.3. Article 136(3) of the TFEU actually imposes an obligation on the euro area Member States to establish a stability mechanism. Such a mechanism – the European Stability Mechanism (hereinafter: the ESM) has been established by the Member States by way of an international agreement – the Treaty establishing the European Stability Mechanism (hereinafter: the ESM Treaty) – which was signed by the euro area Member States on 2 February 2012. The fact the Article 136(3) of the TFEU constitutes “the EU basis” for the ESM is confirmed by the decision-making process which led to the adoption of the Decision, recitals 2-6 of the Preamble to the Decision as well as conclusions as to the basic elements of the ESM that were agreed on at the meeting of the European Commission (see points 5-8 of the Conclusions of the Heads of State or Government of the Euro Area Member States, Brussels, 11 March 2011). What follows from the recitals of the Decision (recital 2) is that at the meeting of the European Council of 28 and 29 October 2010, the Heads of State or Government “agreed on the need for Member States to establish a permanent crisis mechanism to safeguard the financial stability of the euro area as a whole and invited the President of the European Council to undertake consultations with the members of the European Council on a limited treaty change **required** to that effect” [the emphasis in bold is by me (T.L.)].

Thus, there is no doubt that the amendment introduced to the TFEU by the Decision that was subject to ratification should be assessed in the context of treaties entered into by the euro area Member States on the basis of Article 136(3) of the TFUE, and especially the ESM Treaty and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between (hereinafter: the Fiscal Compact), signed on 2 March 2012 by all the EU Member States, with the exception of the Czech Republic and Great Britain. Both these treaties are interrelated and both in their preambles make reference to Article 136(3) of

the TFEU. The ESM Treaty provides for an obligatory participation of the Member States in financing the stability fund (in accordance with the terms set therein), whereas the Fiscal Compact imposes numerous obligations on the Signatories thereto, as regards current financial and economic policies, and in particular the obligation to comply with the principle of structural balance in the sector of government and local self-government institutions (a lower limit of a structural deficit of 0.5 % of the gross domestic product at market prices; Article 3(1)(b) of the Fiscal Compact). In the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically (Article 3(1)(e) of the compact), shaped by common principles indicated by the European Commission. The Contracting Parties shall report ex-ante on their public debt issuance plans to the Council of the European Union and to the European Commission (Article 6 of the Compact). Moreover, the Fiscal Compact specifies an excessive deficit procedure and makes it more restrictive (Articles 4 and 5) as well as extends the jurisdiction of the Court of Justice of the European Union (hereinafter: the CJEU) – with regard to the Signatories – as regards fulfilling financial obligations and imposing financial sanctions due to non-compliance the CJEU judgments in that respect.

There is no doubt that both the ESM Treaty and the Fiscal Compact considerably limit the competences of the Signatories thereto in matters of financial policies, by granting some of them to the international organisation (the ESM) as well as to the CJEU, which – in my view – should be regarded as conferral of competences within the meaning of Article 90(1) of the Constitution. The said conferral takes place in two stages: the first stage comprises amendments to the TFEU which allow the euro area Member States to enter into relevant treaties, and the second stage is the treaties themselves.

1.4. Unlike the majority of the bench of the Tribunal adjudicating in the present case, I hold the view that both treaties will become binding for Poland at the moment when Poland joins the euro area. Indeed, making reference to recitals 5 and 7 of the Preamble to the ESM Treaty, Prof. J. Barcz aptly stated that: "Poland – by shifting from the position of a Member State of the Economic and Monetary Union with a derogation – will have to accede to the Treaty establishing the ESM no later than on the date of joining the euro area" (J. Barcz, "Instrumenty międzynarodowe dotyczące kryzysu w strefie euro a spójność Unii i możliwość przystąpienia państw członkowskich UE spoza strefy euro", [in:] *Traktat z Lizbony − wybrane zagadnienia*, M. Kenig-Witkowska, R. Grzeszczak (eds), Warszawa 2012, s. 106). This is even more obvious in the case of the Fiscal Compact. Indeed, pursuant to its

Article 14(5), the Fiscal Compact shall apply to the Contracting Parties with a derogation which have ratified this Compact, as from the date when the decision abrogating that derogation takes effect. Also, attention should be drawn to Article 16 of the Fiscal Compact, which stipulates that within five years, at most, of the date of entry into force of the Fiscal Compact, on the basis of an assessment of the experience with its implementation, the necessary steps shall be taken with the aim of incorporating the substance of the Fiscal Compact into the legal framework of the European Union.

2. An additional argument in favour of the thesis about the non-conformity of the challenged Act on Ratification to Article 90 of the Constitution is the well-established presumption in the Polish doctrine of law that a normative act may be amended by applying an analogical procedure to the one used for the enactment thereof, unless legal provisions provide otherwise. In the context of international agreements that constitute a source of universally binding law, the necessary element of legislative process is ratification. The Constitution does not regulate the ratification of amendments of agreements referred to in Article 90(1) of the Constitution, which means that the ratification of an act amending the said kind of an international agreement should be governed by one of the procedures set in Article 90(1) and (2) of the Constitution.

3. The last issue I would like to raise in this dissenting opinion is the phrasing used in the operative part of the judgment: "the Act (...) is not inconsistent with Article 90 in conjunction with Article 120, first sentence *in fine,* of the Constitution (...)". In "the Tribunal's legal register", this means that the higher-level norm indicated by the applicants is inadequate to the subject of the allegation, i.e. there is no substantive or function relation between them. In my opinion, that phrasing should – and this is usually the case in the jurisprudence of the Tribunal – be used in circumstances where the said inadequacy is visible *prima facie*, without any need to carry out thorough examination, and is not determined *ex post*, after the examination of the case at the moment of formulating the ruling, as this has been done in the judgment in the present case.

The content of the challenged Act on Ratification, analysed in conjunction with the ratified Decision as well as in the context of the ESM Treaty and the Fiscal Compact, have raised doubts, not only on the part of the applicants, as to whether the Decision does not change the TFEU in a way that leads to the conferral of the competences of the Member States on an international organisation (the ESM) or the EU, and in particular the CJEU. Due

to similar doubts, the said Decision was appealed to the constitutional courts of several Member States, including the Federal Constitutional Court of Germany, which adjudicated on the conformity of the said Decision to the Basic Law for the Federal Republic of Germany, and arrived at the conclusion that the amendment to the TFEU, introduced by means of the said Decision (the addition of paragraph 3 to Article 136), might not lead to the conferral of competences. Due to the same doubts, the said Decision – under the allegation of an inadmissible application of the simplified revision procedure to amend the TFEU – was also appealed to the CJEU, which – in its judgment of 27 November 2012 (C-370/12), however found no grounds that would undermine the validity of the said Decision; nor did the CJEU find any obstacles for accession to the ESM Treaty and the ratification thereof, regardless of the entry into force of the Decision.

In the light of the above, in my view, in its judgment, the Tribunal has incorrectly applied the phrasing "the Act is not inconsistent", as Article 90 of the Constitution is undoubtedly an adequate higher-level norm for the assessment of the challenged Act. Such an approach on the part of the Tribunal as regards the issue of assessment of ratified international treaties may result in a situation where the Government, the Sejm and the Senate will at all cost avoid more difficult ratification procedures set in Article 90 of the Constitution, which require consultation with the opposition for the achievement of the required majority or the Nation's say in a nation-wide referendum.

For these reasons, I have considered it necessary to submit this dissenting opinion.

Dissenting Opinion
of Judge Marek Zubik
to the Judgment and Statement of Reasons of the Constitutional Tribunal
of 26 June 2013, ref. no. K 33/12

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; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 26 June 2013 issued by the Constitutional Tribunal in the case K 33/12.

I justify my dissenting opinion, as follows:

1. The ruling of the Constitutional Tribunal regarding the procedure of enacting the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the Act on the ratification of the European Council Decision 2011/199/EU) is the first determination by the Tribunal which actually concerns an international agreement that modifies the content of a treaty, on the basis of which the Republic of Poland has conferred the competences of organs of state authority in relation to certain matters on an international organisation, where the Act was actually ratified in accordance with a procedure other than that set out in Article 90 of the Constitution.

2. I do not agree with the perception of the systemic purpose of Article 90 of the Constitution and the interpretation of that Article, which have been assumed by the Tribunal in the present case, although I am aware that the said theses have been presented earlier in jurisprudence.

Firstly, the said provision constitutes a sole constitutional basis (with potential consideration of Article 55(2) and Article 91(3) of the Constitution) for such far-reaching international cooperation where Poland confers competences (which also arise from the Constitution) vested in the national organs of state a u t h o r i t y in relation to certain matters on an international organisation or international institution. As a result of the said conferral, Poland refrains from exercising relevant competences until the moment of terminating the said international agreement. Without that provision, the integration process that took place

with regard to Poland, on the basis of the Treaty of Accession of 16 April 2003 would, in my view, have been constitutionally inadmissible. This means that the procedure set out in Article 89(1)(3) of the Constitution may not be regarded as an alternative to the special procedure specified in Article 90 of the Constitution. Indeed, the two procedures refer to separate – in the light of national provisions – categories of international agreements concerning Poland's membership in an international organisation, and the scopes of regulating the said provisions are disjunctive.

Secondly, in my view, Article 90 of the Constitution is not merely limited to specifying a procedure for ratifying an agreement on the basis of which Poland has conferred the competences of organs of state authority as part of the process of European integration. The provision has general application, and does not indicate any restrictions within the scope *ratione personae* in that respect.

Thirdly, I hold the view that the very narrow interpretation of Article 90(1) by the Tribunal limited only to the conferral of competences vested in the organs of state authority by the Republic of Poland in relation to certain matters on an international organisation or international institution, and not the entirety of problems related to Poland's membership in such an organisation – is inconsistent with the essence and the purpose of that constitutional solution. Such a reductionist way of interpreting the said provision has led the Tribunal to the conclusion that the procedure set out in the provision would not be applicable to the possible "return" of the competences (point 6.6.2 of the statement of reasons), the extreme case of which would be to renounce membership in the UE by Poland. As I have understood it, the Tribunal has held that it would suffice to apply the procedure set out in Article 89(1)(3) of the Constitution. What is more, such an interpretation of Article 90 of the Constitution may also justify the thesis that the Republic of Poland could confer the competences of its own organs of state authority on an organisation or institution to which it would not belong, since – in the view of the Tribunal - the only premiss of applying that provision is the action of 'conferral of competences', and not the membership in such an organisation.

Fourthly, the meaning of Article 90 of the Constitution is autonomous and complete. It may not be perceived as complementary with regard to Article 89(1)(3) of the Constitution. In my view, it is neither constitutionally admissible nor desirable for an international agreement related to a particular international organisation or institution to be perceived at times in the light of Article 89(1)(3) of the Constitution, and at other times in the context of Article 90(1) of the Constitution. Relying on an argument *a contrario* – as done by the Tribunal – is fallible. Indeed, the said argument may be applied only when - and this is not the

case here - no activity that is different from the one regulated in the provision under interpretation may fall within the scope of application of that provision. Also, reference to the Act on International Agreements is dubious, as this would mean the Tribunal's approval for interpreting constitutional terms and solutions by means of interpreting statutory provisions. Actually, it is not the conferral or modification of conferred competences that is decisive when making a choice about a procedure for ratifying an international agreement, but the character of the international institution or organisation on which the competences of organs of state authority in relation to certain matters have been conferred. At the same time, also every modification of the content of a treaty or the way in which conferred competences are exercised (and not merely the conferral thereof) - in my view - requires from the organs of the Polish state a procedure that would be consistent with Article 90 of the Constitution.

Fifthly, the national procedure set out in Article 90(2) and (3) of the Constitution for granting consent by the President to the ratification of an international agreement indicated in Article 90(1) of the Constitution is not to be applied on a one-off basis. Therefore, it may not be perceived solely as a kind of initial criterion of Poland's membership in a given international organisation. Requirements provided for in Article 90 of the Constitution concern not only the procedure for the ratification of an international agreement in which the Republic of Poland originally confers competences vested in its organs of the state; the said provision also comprises international agreements which regulate issues directly related thereto (implied). In my view, its regulatory scope also comprises creating (establishing) an organisation that requires the conferral of competences vested in Poland's organs of state authority, joining an already existing organisation, modifying the bases of its functioning, as well as other issues related to membership, or seceding from an organisation of that kind. A narrower interpretation of the procedure specified in Article 90 of the Constitution may lead to the situation where the original content of an international agreement, ratified in accordance with a special procedure could be subject to modification on the basis of numerous amendments introduced by international agreements ratified upon consent granted in the light of Article 89 of the Constitution. However, what could be overlooked would be the situation where numerous, though small, amendments to the content, would be transformed into a qualitative amendment which made on its own would undoubtedly require – in the light of a test applied in the present case by the Tribunal – the ratification procedure specified in Article 90 of the Constitution. This could actually lead to depriving Article 90 of its essence and to undermining of the significance of consent granted this way by the Polish state.

Sixthly, Article 90 of the Constitution provides for a procedure which requires cooperation not only among different organs of state authority, but also requires cooperation of a current parliamentary majority with the opposition when carrying out that part of the foreign policy of the state which implies great significance, and a change e.g. in the functioning of organs of state authority. It is worth adding that a statute on ratification (acceptance) within the meaning of that provision is one of the statutes which in accordance with the Constitution must be enacted by the Sejm, as well as the Senate, (unlike in Article 120 of the Constitution). The fulfilment of the requirement of a two-thirds majority vote, specified in Article 90(2) of the Constitution is aimed at achieving support, as extensive as possible, with respect to a specific statute in the two houses of the Polish Parliament. Thus, the point is, *inter alia*, to achieve consensus based on cooperation of the parliamentary majority with the opposition. Finally, in the case of the lack of such agreement, consent to the ratification of an international agreement referred to in Article 90(1) of the Constitution may be passed by a nation-wide referendum. The government majority should, in principle, be capable of making use of the possibility provided in Article 90(4) of the Constitution. Then a conflict between the government majority and the opposition is resolved by the Nation. Hence, the above-mentioned procedure does not block the government's action or Poland's international commitments. The procedure specified in that provision of the Constitution provides social legitimisation of a decision that is of such great significance for the state. This way, the provision falls within the scope if the constitutional requirement for the branches of government to cooperate as well as it is to ensure that, when exercising competences provided for them, the organs of the state would actually implement the will of the Nation, as the only sovereign in the state. Consequently, the procedure set out in Article 90 of the Constitution has a character of a guarantee for the proper functioning of social life as well as for the shaping of the responsibility for the common good resting with all participants of political life (Article 1, Article 25(3) *in fine*, Article 82 of the Constitution – see the judgment of the Constitution of the Tribunal, dated 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108, part III, point 2.6 of the statement of reasons).

Seventhly, even when it is resumed that the constitution-maker has had the most favourable predisposition towards the process of European integration, this does not require the narrow application of constitutional procedures for internal activity of the organs of state authority that pertain to the ratification of a relevant international agreement. In particular, this should not reduce the systemic assumptions, purpose, axiology or content of Article 90 of the Constitution.

3. The judgment of the Constitutional Tribunal in the present case is actually based on – in my view, erroneous – assumption that every decision concerning the choice of a procedure for granting consent to the ratification of an international agreement (between Article 89(1)(3) and Article 90 of the Constitution) should entail carrying out an analysis of the content of such an agreement and indication that the agreement confers further competences on an international organisation (international institution). The assumption is correct only when it concerns an original international agreement, i.e. a treaty of accession to a given organisation or, possibly, a treaty that establishes the said international organisation. In the case of agreements that amend previously concluded international agreements, a procedure for granting consent to ratification should, in principle, be concurrent with the one which was applied to grant consent for the original agreement.

In my view, what should have been regarded as a starting point is a general presumption which functions in the circle of our legal culture and is expressed *inter alia* in the constitutional provisions that any normative acts and, in general, legal juridical actions – as long as this is legally admissible – should, in principle, be amended (changed) in accordance with the same procedure in which they were originally introduced into the system of law or caused a legal effect (in that way e.g. Articles 118-123 of the Constitution is applied to amending statutes; similarly, set out in statutory authorisation referred to in Article 92(1) of the Constitution, the procedure for issuing a regulation is applied accordingly to any modifications or amendments to that regulation, etc. The said thesis is also a basis of the concept of *actus contraries*, which constitutes a variant of analogy in law). The said principle has been a lasting element of the Polish parliamentary law. On numerous occasions the application thereof resulted in overcoming procedural issues in a situation where the law-maker has not clearly specified the way of departing, modifying or undertaking actions which are contrary in their results to those they concern. The principle I have here presented is not merely "a regularity", as assumed by the Tribunal (point 6.6.2 of the statement of reasons). The use of a different procedure in the case of modification or revocation of a normative act (including effects of a legal juridical actions), even if this constitutes the case of making reference to general provisions on proceedings before an organ of state authority, is always unique in character and may only take place when there is a clear and unambiguous legal basis that necessitates a departure from the general principle of law that has been indicated by me here (as stated e.g. in Article 235 of the Constitution, as regards the procedure for drafting and enacting the Constitution of 1997; Article 149(2)(2) of the Constitution – with reference

to a regulation issued by a minister that is to be revoked by the Council of Ministers; Article 231, third sentence, of the Constitution – which determines the procedure for the Sejm to adhere to when annulling a regulation of the President on the introduction of the state of emergency; and with regard to individual actions: Article 158 of the Constitution – which concerns the constructive vote of no confidence that would eliminate the effects of the appointment of the Council of Ministers, or Article 171(3) of the Constitution – which gives the Sejm a possibility to annul the effects of democratic elections in the case of an organ constituting a unit of local self-government). Thus, unlike the Tribunal has concluded in the present case, I believe that Article 90 of the Constitution is applicable not only with regard to a ratification procedure for a new international agreement by means of which the Republic of Poland originally delegated competences that have so far been exercised by the organs of state authority (cf. part III, point 2.6. the statement of reasons for the judgment in the case K 32/09). The provision also concerns every modification of the content of such an international agreement conferring competences, regardless of the scope and depth of changes introduced into the Treaty of Accession and the fact whether it directly concerns conferred competences that used to be vested in the organs of state authority. This way, an amendment to an international agreement ratified on the basis of Article 90 of the Constitution may – in my opinion – be introduced into the national legal order, from the point of view of national legal provisions – only in compliance with the procedure expressed in that provision. At the constitutional level, there is no appropriate legal basis which would justify the application of the procedure. Therefore, I do not share the thesis which negates the presumption of introducing changes in an international agreement in accordance with the same procedure as the one applied to the ratification of the original agreement that has already taken effect.

The above-mentioned principle which concerns proceedings in the case of actions that modify previous determinations of the organs of state authority is of special significance with regard to the procedure for expressing consent to the ratification of an international agreement, on the basis of which the Republic of Poland has conferred competences vested in the organs of state authority in relation to certain matters on an international organisation or institution.

4. The popularisation of the approach accepted by the Constitutional Tribunal in the present case displays yet another important aspect. The Constitution of the Republic of Poland does not provide for an obligatory preventive review of the constitutionality of a statute on ratification or an international agreement, even the one with regard to which there are doubts

as to the choice of a procedure for the ratification thereof. The application of that form of a constitutional review, which allows to review the constitutionality of a statute before it is signed by the President, and the constitutionality of an agreement before Poland binds itself with international commitments, is not without significance for the interpretation of constitutional provisions on the ratification of international agreements.

The way of interpreting Article 90 of the Constitution adopted by the Constitutional Tribunal presupposes that every time a choice of procedure needs to be made in the context of ratification of an agreement that concerns Poland's membership in an international organisation on which competence vested in the organs of public authority is to be conferred. Indeed, this introduces an element of uncertainty into the law. The term 'conferral of competences' is imprecise. In every case, it requires the necessity of reviewing the content of a specific international agreement. This may inevitably give rise to a legal and political dispute in which the organs of state authority are involved – the Council of Ministers, the Sejm, the Senate and the President. This very circumstance would not be a problem, if the procedure provided for in the Polish law guaranteed a procedure that would result in binding Poland with international commitments at an appropriate level of the procedure, and would lead to the resolution of the dispute in the light of the judicial review of constitutionality. And this is not the case.

Possible adjudication on the part of the Tribunal as to the unconstitutionality of the entry into force of a statute of ratification after the ratification of a specific international agreement considerably weakens the international position of Poland and makes it difficult for it to fulfil its international commitments. Therefore, it does not serve the implementation of Article 9 of the Constitution.

Thus, faced with the choice between "competing" interpretations of Article 90 of the Constitution, in my view, the Tribunal has carried out an inapt reconstruction of axiology with regard to the Constitution, and consequently a defective way of weighing out various interests. Also, for that reason, I consider the adjudication in the present case to be inapt.

5. Consequently, I hold the view that consent to the ratification of the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91, 6. 4.2011, p. 1), indicated in the application submitted by the group of Deputies, could only be granted in accordance with the procedure set out in Article 90 of the Constitution. Consent to ratification

of that decision took place contrary to the content of Article 90 of the Constitution. The Act on the ratification of the European Council Decision 2011/199/EU took effect in a way that was inconsistent with Article 90(2) in conjunction with Article 120 of the Constitution.