9/2/A/2009

JUDGMENT

of 18 February 2009

Ref. No. Kp 3/08*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

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

Grażyna Szałygo - Recording Clerk,

having considered, at the hearing on 18 February 2009, in the presence of the Applicant, the Sejm and the Public Prosecutor-General, an application by the President of the Republic of Poland, submitted pursuant to Article 122(3) of the Constitution of the Republic of Poland, to determine the conformity of:

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 - to the extent it authorises 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, as regards the competence of every Polish court to request the Court of Justice to give a preliminary ruling on the questions as referred to in Article 35(3)(b) of the Treaty on European Union - to Article 45(1) of the Constitution,

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* The operative part of the judgment was published on 3 March 2009, Official Gazette - *Monitor Polski* No. 13, item 170.

a d j u d i c a t e s:

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, granting consent for 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, as regards the competence of every Polish court to request the Court of Justice to give a preliminary ruling on the questions as referred to in Article 35(3)(b) of the Treaty on European Union (Annex No. 2 to the Journal of Laws - Dz. U. of 2004 No. 90, item 864) - is consistent with the right to a hearing without undue delay before a court, as set forth in Article 45(1) of the Constitution of the Republic of Poland.

STATEMENT OF REASONS

I

1. In an application of 2 September 2008, submitted pursuant to Article 122(3) of the Constitution, the President of the Republic of Poland (hereinafter: the President or the Applicant) referred to the Tribunal for it to determine the conformity of 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) - to the extent it authorises 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 (hereinafter: the Court of Justice or the CJEC), as regards the competence of every Polish court to request the Court of Justice to give a preliminary ruling on the questions referred to in Article 35(3)(b) of the Treaty on European Union (hereinafter: the EU Treaty) - to Article 45(1) of the Constitution.
In the opinion of the Applicant, enabling all the courts of the Republic of Poland, including the courts of first instance, to request the Court of Justice to give a preliminary ruling on the validity and interpretation of the acts referred to in the EU Treaty, pertaining to police and judicial cooperation in criminal matters, is inconsistent with Article 45(1) of the Constitution which guarantees everyone the right to a hearing without undue delay.

In the substantiation, the President indicated that the legislator was obliged to undertake efforts to ensure adherence to the constitutional principle of efficient hearing of cases by courts, as the swiftness of proceedings is one of the fundamental praxeological values of the judicial application of law as well as one of the prerequisites of the effective functioning of courts, and the effectiveness of the legal system in general. The Applicant stated that at present the examination of a question of law under the preliminary ruling procedure by the Court of Justice takes on average approximately 20 months, which may lead to failure to maintain a reasonable time for hearing the case, and thus may constitute an infringement on the individual’s right to a court. The President pointed out that,

although Article 23a of the Statute of the Court of Justice might provide for an urgent procedure for references for a preliminary ruling relating to the area of freedom, security and justice, however, an urgent preliminary ruling procedure had a special character and did not concern all the cases falling under Title VI of the EU Treaty. The decision to resort to an urgent procedure in the question submitted pursuant to Article 35(2) of the EU Treaty is made by the Court of Justice. In principle, such a decision is made on the basis of an application submitted by a national court, and the CJEC may only in exceptional circumstances decide *ex officio* about examining a question of law under the preliminary ruling procedure.

The Applicant also indicated that Article 23 of the Statute of the Court of Justice obliged the court of a Member State which referred a case to the CJEC to suspend the proceedings until a preliminary ruling is given. Both the request of the adjudicating court for a preliminary ruling by the Court of Justice as well as an order suspending the main proceedings are not subject to appeal. In the above-mentioned situation, the parties to criminal proceedings are forced, as a result of, for example, a decision of a district court, to wait for adjudication for many months. According to the Applicant, taking into consideration the standards of protection of the rights of the individual, such a solution is inconsistent with the principle of a democratic state ruled by law.

The President indicated the practice of administrative courts where, in the case of referring a question for a preliminary ruling pursuant to Article 234 of the Treaty establishing the European Community (hereinafter: the EC Treaty), other courts hearing analogical cases adjourn proceedings and wait for the ruling of the Court of Justice. In the view of the Applicant, a similar situation may occur in the case of a reference for a preliminary ruling, as set forth in Article 35 of the EU Treaty. In such situations, the undue delay may occur in a number of proceedings before Polish courts (the figure is difficult to determine).

Moreover, the President argued that the provisions of the Polish law did not specify the rules and the procedure for referring questions to the Court of Justice for a preliminary ruling. In the current state of law, as a legal basis of initiating proceedings before the Court of Justice, Polish courts regard the provision of Article 234 of the EC Treaty, as well as apply national provisions which are not contrary to that Article, and which provide for referring questions to a national court of a higher instance. The legal institution specified in Article 234 of the EC Treaty and Article 35 of EU Treaty bears resemblance to the Polish legal institution of questions of law – questions of law are referred to the Constitutional Tribunal pursuant to Article 193 of the Constitution and to the Supreme Court by common courts pursuant to Article 390 of the Code of Civil Procedure and Article 441 of the Code of Criminal Procedure - as well as applications for a resolution clarifying legal provisions or determining a legal issue, which are referred to an enlarged panel of the Chief Administrative Court. In the Applicant's view, such legal regulation of the matters falling within the scope of his application raises concerns, in particular as to whether a given case can be heard without undue delay, within the scope of criminal law. The Applicant points out that, in the case of referring questions of law under national procedures, a court of a higher instance may refuse to give a ruling on a question due to an incorrect formulation of

an application. The Applicant sees the same danger as regards the application of the procedure provided for in Article 35 of the EU Treaty.

The President drew attention to the fact that the Court of Justice had not initially been competent within the scope of the Third Pillar of the European Union. A fundamental change, extending the jurisdiction of the Court of Justice, was introduced much later by the Treaty of Amsterdam, which was signed on 2 October 1997. The prolonged lack of jurisdiction of the Court of Justice as regards preserving the uniform interpretation and application of Community law regulating police and judicial cooperation in criminal matters, as well as the permitted discretion of the Member States with regard to authorising national courts to refer questions to the Court of Justice, proved the complexity of the challenged regulation. The President emphasised that the fact that 17 Member States had accepted the jurisdiction of the Court of Justice to give preliminary rulings in the field of police and judicial cooperation in criminal matters might not constitute a vital reason for Poland to extend the jurisdiction of the Court of Justice, due to different traditions and conditions in which judicial authorities operated in the particular EU Member States.

2. In a letter of 17 November 2008, the Public Prosecutor-General took the position that Article 1 of the Act of 10 July 2008 which authorised the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice to give preliminary rulings, as set out in Article 35(3)(b) of the EU Treaty, was consistent with Article 45(1) of the Constitution.

To support his view, the Public Prosecutor-General presented a thorough analysis of the legal institution of questions referred for a preliminary ruling, provided for in Article 234 and Article 68 of the EC Treaty as well as Article 35 of the EU Treaty, stressing that these procedures were aimed at ensuring uniform interpretation and application of provisions of law, including the provisions which grant individuals certain procedural guarantees and rights. In the light of the above analysis, the Public Prosecutor-General referred to the particular aspects of the constitutional right to a court, which is provided for in Article 45(1) of the Constitution, and the imperative that the case should be heard "within a reasonable time", as formulated in the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In particular, he indicated the jurisprudence of the European Court of Human Rights, directly concerning the issue of the duration of the preliminary ruling procedure of the CJEC, where the Strasbourg Court did not state any undue delay in proceedings.

The Public Prosecutor-General emphasised that the requirement to determine a case "without undue delay" or "within a reasonable time" may not be analysed without taking into consideration other essential rights arising from Article 45(1) of the Constitution or Article 6(1) of the Convention, such as the right to a fair hearing. Depriving courts of lower instances of the possibility of referring questions for a preliminary ruling on the validity or interpretation of the law applicable in a given case under examination increases the risk of giving an erroneous ruling, and thus deprives courts of a tool for the proper exercise of the guarantee of a fair hearing. In the event of a potential clash between the requirement of swift adjudication and the necessity for fair and thorough proceedings, the court which raises the questions of law is best prepared for the necessary evaluation, taking

into account the good of the proceedings as well as the rights of the individual. It should be taken into consideration that national courts have so far followed the procedure provided for in Article 35 the EU Treaty in a balanced way, which is confirmed by a small number of questions referred for a preliminary ruling.

Challenging the arguments presented by the Applicant, the Public Prosecutor-General noted that the complexity of issues from the realm of police and judicial cooperation in criminal matters indicated the need to ensure that national courts would have the widest possible access to the preliminary ruling procedure in this regard. An analysis of the previous jurisprudence of the Court of Justice, as regards the interpretation of the fundamental *ne bis in idem* principle within the scope of the Convention implementing the Schengen Agreement and the interpretation of framework decisions, leads to the conclusion that preliminary rulings given by the CJEC are of vital importance for the protection of rights of the parties to criminal proceedings. It follows from the above that eliminating legal uncertainties serves to ensure that court proceedings are conducted in a thorough way as well as facilitates the protection of the rights of individuals, whereas extending the duration of the proceedings due to waiting for a preliminary ruling may not be regarded as an infringement on the right to a court.

The Public Prosecutor-General indicated that the risk of excessive length of proceedings due to the reference of a question for a preliminary ruling had been diminished considerably by the introduction of the so-called urgent procedure to the Statute of the Court of Justice, which might be applied to the cases from the realm of police and judicial cooperation in criminal matters. Making reference to Polish law, the Public Prosecutor-General noted that although the binding provisions of the Code of Criminal Procedure did not explicitly provide for a procedure for referring a question to the Court of Justice for a preliminary ruling, the legal institution of suspending proceedings or adjourning the hearing of a case may however have an analogical application in the present case.

3. In a letter of 27 January 2009, the Marshal of the Sejm, representing the Sejm, took the position that 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 is consistent with Article 45(1) of the Constitution.

Justifying the above stance, the Marshal of the Sejm made reference to the higher-level norm from Article 45(1) of the Constitution as well as to the jurisprudence of the European Court of Human Rights concerning the guarantee that a case should be heard "within a reasonable time", which is provided for in Article 6(1) of the Convention. The Marshal of the Sejm indicated that the requirement to hear a case without undue delay, which is a component of the right to a court, is met by ensuring the organisational efficiency of courts as well as reasonable procedures which enable courts to avoid excessive length of proceedings. The Marshal of the Sejm emphasised that the Strasbourg Court had stated several times in its jurisprudence that the period of waiting for a preliminary ruling of the CJEC should not be counted when specifying the duration of court proceedings, since a different adjudication might have a negative impact on the system of preliminary rulings established by the EC Treaty. Also, in none of the published

adjudications of the European Court of Human Rights had the Marshal seen undue delay caused by the interlocutory proceedings carried out to determine the interpretation of the law to be applied in the main proceedings.

Challenging the Applicant's allegations, the Marshal of the Sejm indicated that the lack of possibility of referring questions to the CJEC for a preliminary ruling pursuant to Article 35 of the EU Treaty, on the part of Polish courts, might in practice result in depriving the individual of the right to a ruling on the interpretation or validity of an act of EU law by the CJEC, i.e. the institution established for that purpose pursuant to the treaties, to which Poland had been a party since its accession to the European Union. In the view of the Marshal of the Sejm, in a democratic state ruled by law, the right to a court may not be construed merely formally, as access to legal action in general, but it should also be understood substantively as a possibility of legally binding protection of rights by means of legal action. The requirement of a fair hearing involves adjusting its principles to the specific character of the examined cases, including also giving a court the possibility of referring a question to the CJEC for a preliminary ruling.

The Marshal of the Sejm pointed out that the Applicant had not referred to the issue of "justifiability" of delay in proceedings. It is hard to argue that delay in proceedings was unjustified where the preliminary ruling procedure is meant to provide assistance to national courts in the cases pending before them. In such a case, one might argue that undue delay is also caused by questions of law referred to the Constitutional Tribunal or the Supreme Court, as well as question the competence of courts to refer questions for a preliminary ruling pursuant to Article 234 of the EC Treaty. In this context, the Marshal of the Sejm recalled the judgment of the Constitutional Tribunal of 11 May 2005, Ref. No. K 18/04, concerning the conformity of the Treaty of Accession to the Constitution (*Official Collection of Constitutional Tribunal's Decisions* - OTK ZU No. 5/A/2005, item 49).

The Marshal of the Sejm went on to discuss the duration of preliminary ruling proceedings before the CJEC, indicating that the data presented by the Applicant referred to the preliminary ruling procedure under the First Pillar of the European Union, which differs from the procedure provide for in Article 35 of the EU Treaty. The Marshal stressed that since 1 March 2008 the so-called urgent preliminary ruling procedure had been in operation with regard to cases in the so-called area of freedom, security and justice, falling under Title VI of the EU Treaty i.e. police and judicial cooperation in criminal matters. The urgent procedure may be applied upon the request of a national court or – in exceptional situations – *ex officio*. The Marshal of the Sejm pointed out that so far three cases had been heard under the urgent preliminary ruling procedure, and that the proceedings before the CJEC took no longer than three months. Therefore, the practice indicates that preliminary ruling proceedings before the CJEC within the so-called area of freedom, security and justice, have been considerably accelerated. As regards the kinds of courts authorised to refer questions for a preliminary ruling, the Marshal of the Sejm indicated that, contrary to Article 234 of the EC Treaty, pursuant to which courts of last instance were obliged to refer questions to the CJEC, Article 35 of the EU Treaty generally provided for the competence of national courts. Thus, Polish courts would have relative independence and freedom of assessment as to the need for a preliminary ruling in a case pending before a national court, and as to the significance of questions which are referred

to the Court of Justice. According to the Marshal of the Sejm, from the point of view of the efficiency of proceedings, it seems more justified to eliminate any legal uncertainties, including those pertaining to the interpretation or validity of an act of EU law, already at an early stage of proceedings. By contrast, authorising only the courts of last instance to refer questions for a preliminary ruling might result in excessive length of court proceedings.

The Marshal of the Sejm did not share the view of the Applicant that the cases of refusal to give a ruling on questions of law due to the non-fulfilment of formal requirements, which had occurred in the practice of Polish courts, allowed to assume that the same situation might happen with regard to the questions referred to the CJEC for a preliminary ruling. The Marshal indicated that, pursuant to Article 104b(1) of the Rules of Procedure of the Court, a request submitted by a national court for the urgent procedure to be applied should set out the matters of fact and law which establish the urgency and justify the application of that exceptional procedure and should, in so far as possible, indicate the answer the national court proposes to the questions referred. Indeed, these are no special requirements, the non-fulfilment of which could be a reason for concern. In its jurisprudence, the Court of Justice has confirmed that the EU Treaty neither explicitly nor implicitly provides for a special form of the request of a national court to be submitted for the issuance of a preliminary ruling.

Referring to statistical figures, the Marshal of the Sejm indicated that the reference of questions to the CJEC for a preliminary ruling by national courts had not been “common”. It follows from annual reports on the activity of the CJEC that throughout the entire European Union, the number of questions remained in particular years at the level of approximately 250. In the years 2005-2007, Polish courts submitted 10 questions in total for a preliminary ruling, and hence this may not be regarded as a cause of excessive length of proceedings.

II

At the hearing on 18 February 2009, the representative of the Applicant, the representative of the Sejm and the Public Prosecutor-General maintained and elaborated on their positions presented in their written statements, and referred to the views of the other parties to the proceedings.

Moreover, the representative of the Applicant pointed out that in the course of legislative work related to the adoption of the Act of 10 July 2008, there might have been a breach of the legislative procedure, caused by the application of an inappropriate procedure for the adoption of the Act. The representative indicated that the legislator qualified submitting the declaration on acceptance of the jurisdiction of the CJEC pursuant to Article 35 of the EU Treaty as a change of the scope of an international agreement – the Treaty on European Union, which had been binding for the Republic of Poland since the ratification of the Treaty of Accession. In the opinion of the representative of the Applicant, the Act granting the consent for submitting a declaration on acceptance of the jurisdiction of the CJEC pursuant to Article 35 of the EU Treaty should have been adopted in accordance with the procedure provided for in Article 90 of the Constitution. Indeed, the

object of the Act is the transfer of competence to give preliminary rulings onto an international institution, i.e. the Court of Justice. The representative of the President stressed that the allegation concerning the breach of legislative procedure did not constitute an extension of the application submitted as part of the preventive review of the Act, but was aimed at pointing out that issue for the Constitutional Tribunal to consider it *ex officio*.

The representative of the Applicant admitted that an amendment to an international agreement in the case of acceptance of the jurisdiction of the CJEC pursuant to Article 35 of the EU Treaty did not consist in concluding a new international agreement. Furthermore, the representative indicated that the President did not challenge the conformity of the Act on International Agreements to the Constitution. The other parties to the proceedings took different positions than the representative of the President. They held the view that the declaration pursuant to Article 35 of the EU Treaty, submitted in accordance with the challenged Act, did not result in transferring the competence of state authorities within the meaning of Article 90 of the Constitution.

III

The Constitutional Tribunal has established as follows:

1. The object and scope of allegations.

1.1. Formulated by the President in accordance with Article 122(3) of the Constitution, the allegation of non-conformity to the Constitution concerns 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. The challenged provision of the Act reads as follows:

"Consent is granted to 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, within the scope referred to in Article 35(3)(b) of the Treaty on European Union (Annex No. 2 to the Journal of Laws - Dz. U. of 2004 No. 90, item 64), pursuant to Article 35(2) of the Treaty on European Union, which brings about a change in the scope of the Treaty on European Union with regard to the Republic of Poland, which has become a party to that Treaty, pursuant to Article 1(1) of the Treaty concerning the accession of (...) the Republic of Poland (...) to the European Union, signed in Athens on 16 April 2003 (Journal of Laws – Dz. U. of 2004 Ref. No. 90, item 864), ratified upon prior consent granted in a nationwide referendum".

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In turn, Article 35(1)-(5) of the EU Treaty reads as follows:

"1. The Court of Justice of the European Communities shall have jurisdiction, subject to the conditions laid down in this Article, to give preliminary rulings on the validity and interpretation of framework decisions and decisions, on the interpretation of conventions established under this Title and on the validity and interpretation of the measures implementing them.

2. By a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter, any Member State shall be able to accept the jurisdiction of the Court of Justice to give preliminary rulings as specified in paragraph 1.

3. A Member State making a declaration pursuant to paragraph 2 shall specify that either:

(a) any court or tribunal of that State against whose decisions there is no judicial remedy under national law may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment, or

(b) any court or tribunal of that State may request the Court of Justice to give a preliminary ruling on a question raised in a case pending before it and concerning the validity or interpretation of an act referred to in paragraph 1 if that court or tribunal considers that a decision on the question is necessary to enable it to give judgment.

4. Any Member State, whether or not it has made a declaration pursuant to paragraph 2, shall be entitled to submit statements of case or written observations to the Court in cases which arise under paragraph 1.

5. The Court of Justice shall have no jurisdiction to review the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security".

To begin with, the Constitutional Tribunal draws attention to the fact that the Applicant does not formulate an allegation of unconstitutionality of the whole Article 1 of the Act of 10 July 2008. Indeed, he does not challenge the authorisation to submit a declaration on the acceptance of the jurisdiction of the European Court of Justice, pursuant to Article 35(2) of the EU Treaty, as regards giving preliminary rulings within the scope of Article 35(1) of the EU Treaty. The Applicant challenges the above provision which authorises the President to submit a declaration on acceptance of the jurisdiction of the CJEC, within the scope set out in Article 35(3)(b) of the EU Treaty, i.e. as regards the competence of every Polish court to refer questions for preliminary rulings in the field of police and judicial cooperation in criminal matters. According to the Applicant, the scope ratione personae of the authorisation to refer questions for preliminary rulings, as indicated in Article 1 of the challenged Act is too broad, and thus infringes on the individual's right to a hearing without undue delay, as expressed in Article 45(1) of the Constitution.

1.2. At the hearing, the representative of the Applicant expressed his reservations, indicating that the legislative procedure might have been breached by the application of an inappropriate procedure for the adoption of the challenged Act, and left this issue for the Constitutional Tribunal to consider *ex officio*. These reservations were not included in the application.

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), 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. The cited provision of the Constitutional Tribunal Act thus indicates three criteria for review: a substantive criterion, a criterion concerning jurisdiction and a procedural criterion. In accordance with Article 188(1) of the Constitution, the Constitutional Tribunal shall adjudicate on the conformity of statutes to the Constitution; in the case of substantive review, this involves juxtaposing the content of the challenged statutory norm with the constitutional norm which has been indicated as a higher-level norm for constitutional review, whereas in the case of a procedural review – what is examined is the conformity of the procedure applied for the adoption of the challenged provisions with the requirements arising from the provisions regulating the legislative procedure and the constitutional provisions concerning these matters. Substantive allegations must always arise from the content of the application, whereas the allegations of unconstitutionality, with regard to the procedural criterion and the criterion concerning jurisdiction, are examined *ex officio* by the Constitutional Tribunal, regardless of the content of the application (cf. *inter alia* the judgment of 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/2007, item 129).

The Constitutional Tribunal indicates that the review of adherence to the procedure required by law for the adoption of a normative act consists in examining whether the authorities involved in adopting a statute fulfilled the requirements arising from the provisions which regulate the legislative procedure. The Tribunal states that during the process of adopting the Act of 10 October 2008, the requirements regarding all the elements of the legislative procedure were met, both at the constitutional as well as statutory level. Therefore, there are no grounds for recognising the reservations raised by the Applicant's representative at the hearing.

2. The jurisdiction of the Court of Justice of the European Communities to give preliminary rulings on questions, as specified in Article 35 of the EU Treaty.

2.1. The preliminary ruling procedure constitutes a fundamental mechanism of European Union law aimed at ensuring uniform interpretation and application of that law in all the Member States and enabling cooperation between national courts and the Court of Justice. Upon the accession of the Republic of Poland to the European Union, Polish courts have been given a possibility (and in some cases an obligation) of referring questions to the CJEC for preliminary rulings, pursuant to Article 234 of the EC Treaty, as regards the interpretation of the Treaty, the validity and interpretation of acts of the institutions of the Community and of the ECB as well as the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

It should be noted that Article 234 of the EC Treaty was the object of adjudication by the Constitutional Tribunal in the judgment of 11 May 2005 in the case K 18/04 (OTK ZU No. 5/A/2005, item 49, points 10.1-11.4), in which the Tribunal adjudicated that the indicated provision was consistent with Article 8(1), Article 174, Article 178(1), Article 188 in conjunction with Article 190(1), Article 193 and Article 195(1) of the Constitution. The Constitutional Tribunal stated that the obligation to refer a question for a preliminary ruling constituted a legal consequence of the international (Community)

commitments which had been assumed sovereignly by the Polish State as a Member State of the European Union. By ratifying the Treaty of Accession and the Act concerning the conditions of accession, the Republic of Poland accepted the separation of functions within the framework of the system of the EU bodies. An element of that separation is the jurisdiction of the Court of Justice of the European Communities to interpret Community law and ensure the uniformity of that interpretation. Such an obligation is a legal consequence of ratification of international agreements, in conformity with the Constitution (and pursuant to it), which were concluded with other Member States of the European Union. What remains an element of those agreements is Article 234 of the EC Treaty and the fact that the Court of Justice have jurisdiction as regards giving preliminary rulings on questions and providing valid interpretation of acts of Community law.

2.2. The preliminary ruling procedure which the President's application refers to, regulated in Article 35(1)-(5) of the EU Treaty, varies in many respects from the procedure provided for in Article 234 of the EC Treaty (cf. generally on the said procedure: A. Grzelak, "Aspekty prawne jurysdykcji Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w III filarze UE", [in:] *Postępowanie prejudycjalne w Przestrzeni Wolności, Bezpieczeństwa i Sprawiedliwości Unii Europejskiej*, (eds.) J. Barcz, Warszawa 2007, p. 19 and the subsequent pages). It refers to the matters regulated under the Title VI of the EU Treaty, i.e. provisions on police and judicial cooperation in criminal matters, in other words the area of the so-called Third Pillar of the European Union. This justifies the use of the term "EU law" in this context, rather than "Community law". The Constitutional Tribunal already pointed this out in the judgment concerning the European arrest warrant of 27 April 2005, Ref. No. P 1/05 (OTK ZU No. 4/A/2005, item 42).

It should be emphasised that, pursuant to Article 46(b) of the EU Treaty, the provisions of the EC Treaty concerning the jurisdiction of the Court of Justice and the exercise thereof – which include the provision of Article 234 of the EC Treaty – apply to the provisions of Title VI of the EU Treaty, in accordance with the conditions laid down in Article 35 of the EU Treaty. It follows from the above that the procedure provided for in Article 234 of the EC Treaty is subject to certain modifications arising from the provisions of Article 35 of the EU Treaty (cf. also on the subject - the judgments of the CJEC of: of 16 June 2005 in the case C-105/03 Pupino, ECR I-5285, points 19 and 28, and 28 June 2007 in the case C-467/05 Dell'Orto, ECR I-5557, point 34).

2.3. The scope of the preliminary ruling procedure with regard to police and judicial cooperation in criminal matters has been specified in Article 35(1) of the EU Treaty, cited above, and as regards a negative perspective - in Article 35(5) of the EU Treaty. It follows from the wording of the indicated provisions that the scope of competence of national courts to refer questions for a preliminary ruling under the Third Pillar is considerably limited. The courts may raise questions concerning merely the strictly specified sources of the secondary (derivative) EU law, namely: the validity and interpretation of framework decisions and decisions, the interpretation of conventions established under Title VI of the EU Treaty and the validity and interpretation of the measures implementing those conventions. Pursuant to Article 35(5) of the EU Treaty, the

jurisdiction of the CJEC under the Third Pillar of the European Union may not encompass reviewing the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. At the same time, as in the case of the procedure governed by Article 234 of the EC Treaty, it is inadmissible to refer questions concerning the interpretation or validity of national law as well as the conformity of the national law to the EU law.

2.4. The Constitutional Tribunal indicates that, unlike in the case of the jurisdiction of the Court of Justice with regard to giving primary rulings within the scope of Community law, as specified in Article 234 of the EC Treaty, which directly ensues from the Treaty obligations which have been assumed by the Member States, the jurisdiction provided in Article 35 of the EU Treaty has a non-obligatory character. Pursuant to Article 35(2) of the EU Treaty, a Member State accepts the jurisdiction of the CJEC to give preliminary rulings by a declaration made at the time of signature of the Treaty of Amsterdam or at any time thereafter. Accepting the jurisdiction of the Court of Justice by the Member States, pursuant to the indicated provision is a characteristic measure for international public law, and not for Community law; it resembles the wording of Articles 36-37 of the Statute of the International Court of Justice. The EU law does not regulate the form in which such a declaration should be submitted, leaving that at the discretion of particular Member States.

The declaration, which the President has been authorised to submit pursuant to the Act of 10 July 2008, constitutes a unilateral act which has legal effects both in the realm of EU law as well as Polish law. The legislator qualified such a declaration as a change in the scope of the Treaty on European Union with regard to the Republic of Poland, which has become a party to that Treaty pursuant to Article 1(1) of the Treaty of Accession signed in Athens on 16 April 2003 (Journal of Laws - Dz. U. of 2004, No 90, item 864, as amended).

The Act of 10 July 2008 made use of the mechanism provided for in Article 23(2) and Article 25(2) of the Act of 14 April 2000 on International Agreements (Journal of Laws - Dz. U. of 2000 No. 39, item 443, as amended). The indicated provisions provide for a special procedure for a change in the scope of an international agreement by unilateral actions whose initiator is the Polish party to the agreement. Article 23(2) of the Act on International Agreements refers to the situations where a change in the scope of an international agreement does not consist in concluding a new agreement. The decision about a change in the scope of a ratified international agreement is made by the President of the Republic of Poland, upon a motion of the Council of Ministers. Article 25(2) of the Act on International Agreements provides for a further proviso, namely that a change in the scope of an international agreement, as referred to in Article 89(1) and Article 90(1) of the Constitution, requires a prior consent granted by statute (cf. more on the subject in: A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, p. 468 and the subsequent pages).

2.5. The Constitutional Tribunal points out that the issue of the qualification of the declaration referred to in Article 35(2) of the EU Treaty has been an object of discussions for the last few years. At times a different position was taken to that presented in the challenged Act, namely that the declaration on acceptance of the jurisdiction of the CJEC should be submitted by the Council of Ministers, pursuant to Article 35(2) of the EU Treaty, without any need for passing a statute, as this is not the case of a change in the scope and application of an international agreement within the meaning of Article 25 of the Act on International Agreements. The advocates of that view argued that consent for a possible submission of the declaration has already been expressed in the Treaty of Accession signed in Athens on 16 April 2003 (Journal of Laws - Dz. U. of 2004 No. 90, item 864, as amended; hereinafter: the Treaty of Accession), pursuant to which Poland has become a party to the Treaty on European Union (cf. the opinion of the Legal Advisory Committee to the Minister of Foreign Affairs, noted by T. Ostropolski, "Prace nad uznaniem przez Polskę jurysdykcji Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w III filarze UE", [in:] *Postępowanie prejudycjalne* ..., p. 67, and also W. Czapliński, "Glosa do wyroku Trybunału Konstytucyjnego z 27 kwietnia 2005 r. w sprawie P 1/05", *Państwo i Prawo* 2005, Vol. 9, p. 111)

The Constitutional Tribunal has no jurisdiction to examine *ex officio* whether the legal character of the declaration to be submitted by the President of the Republic of Poland, pursuant to Article 35(2) of the EU Treaty, is correctly specified in the challenged Act.

2.6. The Constitutional Tribunal does not share the view presented at the hearing by the Applicant's representative that the result of the said declaration is the transfer of competence of courts or – as it was also put – the narrowing down of the scope of the competence of Polish courts for the sake of institutions of an international organisation, i.e. the Court of Justice. Such qualification would result in a requirement to adopt the challenged Act pursuant to the procedure set forth in Article 90 of the Constitution. The competence to submit to the preliminary ruling procedure within the Third Pillar law of the European Union was accepted, by the Republic of Poland, together with the entire Treaty on European Union, via the Treaty of Accession. The declaration submitted pursuant to Article 35(2) of the EU Treaty means only an update of that competence, and not its emergence. The EU law on police and judicial cooperation in criminal matters is binding in Poland and is applied by Polish authorities directly or indirectly, as a result of its implementation into Polish law. In the situation where Polish courts are not authorised to refer questions to the Court of Justice for a preliminary ruling, pursuant to Article 35 of the EU Treaty, they need to rely on themselves with regard to the interpretation and assessment of validity of the sources of EU law, set out in Article 35(1) of the EU Treaty. It is worth quoting here the opinion of the President of the Polish Supreme Court, who in a resolution of 20 July 2006, Ref. No. I KZP 21/06, (OSN KW 2006, No. 9, item 77), providing an interpretation of the Framework Decision 2002/584/JHA on the European arrest warrant, explained that: "Unfortunately, Polish courts are deprived of a legal possibility of referring questions to the CJEC for a preliminary ruling pursuant to Article 35 of the EU Treaty, since Poland has not yet submitted the declaration on acceptance of the jurisdiction the CJEC, as regards the measures adopted under the Third

Pillar, pursuant to Article 35(2) of the Treaty. (…) taking into consideration this normative determinant, the Supreme Court must, in the said case, take an independent position”. Paradoxically, Polish courts rely on the rulings of the Court of Justice, made in response to questions referred for a preliminary ruling by other Member States, but they themselves may not initiate the issuance of such rulings. Creating a possibility of referring questions to the CJEC for a preliminary ruling broadens, rather than narrows down, the scope of the competence of Polish courts. In the judgment K 18/04, the Constitutional Tribunal established that referring to a competent Community authority with a question about the validity of an act of Community law – which, in accordance with the ratified Treaty obligations, should be applied - does not preclude the application of Article 174 of the Constitution of the Republic of Poland (...). There is, in particular, no functional obstacle to adjudicating “in the name of the Republic of Poland”. Also, referring questions pursuant to Article 35 of the EU Treaty is merely the competence of the courts, and not their obligation. The declaration submitted pursuant to Article 35(2) of the EU Treaty does not have a character of an international agreement, which additionally excludes the possibility of referring to Article 90 of the Constitution.

2.7. Article 35(3) of the EU Treaty provides that a Member State’s declaration on acceptance of the jurisdiction of the CJEC to give preliminary rulings should specify the categories of courts authorised to refer questions to the Court of Justice for a preliminary ruling. Two options are available here. A narrower option, indicated in Article 35(3) of the EU Treaty, assumes that such authorisation is granted only to those national courts against whose decisions there is no judicial remedy under national law. A broader option, indicated in Article 35(3)(b), involves granting the said authorisation to each national court, regardless of the fact whether a given case is heard by a court of lower or higher instance. In the provision of Article 1 of the Act of 10 July 2008, which has been challenged by the Applicant, the latter option has been adopted, as referred to in Article 35(3)(b) of the EU Treaty. It concerns authorising every court of the Republic of Poland to be able to refer a question for a preliminary ruling if that court considers that a decision on the question is necessary to enable it to give judgment.

2.8. It is worth noting that the declaration on acceptance of the jurisdiction of the CJEC under the Third Pillar has so far been submitted by seventeen Member States of the European Union: Austria, Belgium, Finland, Greece, Spain, the Netherlands, France, Luxembourg, Germany, Portugal, Sweden, Italy, and - among the newer Member States also – the Czech Republic, Lithuania, Latvia, Slovenia and Hungary. Among those Member States, it was only Spain that made the proviso that questions for a preliminary ruling may only be referred by the courts of last instance (cf. the state of the declarations concerning acceptance of the jurisdiction of the Court of Justice to give preliminary rulings pursuant to Article 35 of the EU Treaty, was published in OJ L 70 of 14.3.2008, p. 23 and OJ C 69 of 14.3.2008, p. 1).

2.9. What is worth emphasising is another characteristic of the wording in Article 35 of the EU Treaty. Pursuant to the third paragraph of Article 234 of the EC

Treaty, national courts against whose decisions there is no judicial remedy under national law are obliged to refer questions of law to the Court of Justice, if a ruling on the question by the CJEC is necessary to enable a given national court to give judgment; by contrast, it follows from Article 35(3) of the EU Treaty that national courts are authorised, but not obliged in that regard. The Treaty of Amsterdam was supplemented with Declaration No. 10, pursuant to which the Member States were given a possibility of introducing such an obligation into national law. On that basis, in the submitted declarations, Austria, Belgium, the Czech Republic, Spain, the Netherlands, France, Luxembourg, Germany and Italy reserved the right to make provision in their national law that when a question concerning the validity or interpretation of an act referred to in Article 35(1) is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law, that court is obliged to bring the matter before the Court of Justice.

3. A higher-level norm for constitutional review.

3.1. Pursuant to Article 45(1) of the Constitution, "everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court". As it has been indicated on numerous occasions by the Constitutional Tribunal, the meaning of the right to a court encompasses the following: (1) the right of access to a court, i.e. the right to initiate a procedure before a court – an authority of certain characteristics (impartial and independent); (2) the right to a court procedure which conforms to the requirements of a fair and public hearing; (3) the right to a court's decision, i.e. the right to be granted a binding ruling in a given case by a court; (4) the right to have cases examined by the authorities with an adequate organisational structure and position (cf. the judgment of 10 July 2000, Ref. No. SK 12/99, OTK ZU No. 5/2000, item 143, the judgment of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108). It follows from the above that the individual's right to a court is exercised by the entirety of the principles which lead to a hearing that is fair and proper with regard to the subject matter as well as carried out within a reasonable time (see the judgment of 16 March 1999, Ref. No. SK 19/98, OTK ZU No. 3/1999, item 36).

3.2. As regards the assessment of constitutionality of the regulation provided for in Article 1 of the Act of 10 July 2008, to the extent it has been challenged by the Applicant, it is vital to determine the normative content of the constitutional imperative that a case should be heard "without undue delay".

The Constitutional Tribunal indicates that the said imperative, arising from Article 45(1) of the Constitution, belongs to procedural guarantees which are of special significance to the individual. However, this concept is difficult to define when contained in a norm of such great generality as the constitutional norm. The assessment whether a delay is justified or not may be carried out only in a given case, taking into account the character of the case (criminal, civil or administrative), the procedural provisions which are appropriate for its examination, the degree of difficulty (complexity) and the circumstances surrounding the case, *inter alia*, the behaviour of the parties to the proceedings (cf. Z. Czeszejko-Sochacki, "Prawo do sądu w świetle Konstytucji RP", *Państwo i Prawo*

1997, Vol. 11-12, p. 103). The requirement for court proceedings to be carried out "without undue delay", it corresponds to the principle of swift proceedings which has been conceived on the basis of particular procedural statutes. It is noted in the literature on the subject that the said requirement should be construed as an imperative, meant for the legislator, that the procedure for examining cases by courts should be structured in such a way that proceedings will carried out efficiently and, if possible, swiftly. The imperative of swift proceedings may not justify the overlooking of the procedural guarantees contained not only in Article 45(1), but also in other provisions of the Constitution (cf. P. Hofmański, "Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego", [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, Warszawa 2006, p. 276). Therefore, the Constitutional Tribunal emphasises that Article 45(1) is infringed in the case of delay in proceedings where there are no sufficient grounds for such delay, or those grounds may not be approved from the point of view of effective judicial protection.

3.3. When interpreting the said excerpt from Article 45(1) of the Constitution, one may refer to the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention), which ensures that "everyone is entitled to a fair and public hearing within a reasonable time", as well as to the extensive jurisprudence of the European Court of Human Rights (hereinafter: the ECHR or the Strasbourg Court), which has emerged on the basis that provision. The Constitutional Tribunal has indicated a number of times that Article 45(1) of the Constitution, to the extent it concerns the right to a court procedure which conforms to the requirements of a fair and public hearing, takes into account the content of the first sentence of Article 6(1) of the Convention (see the judgment of 2 April 2001, Ref. No. SK 10/00, OTK ZU No. 3/2001, item 52, the judgment of 7 September 2004, Ref. No. P 4/04, OTK ZU No. 8/A/2004, item 81, the judgment of 19 February of 2008, Ref. No. P 49/06, OTK ZU No. 1/A/2008, item 5).

On the basis of Strasbourg jurisprudence concerning the indicated provision, it may be stated that the excessive length of proceedings is not determined merely by their duration, but also other considerations which should be taken into account during the assessment as to whether the proceedings were carried out within a reasonable time. The ECHR indicates that the duration of proceedings ought to be assessed, considering the circumstances of a particular case, taking into account the degree of complexity of the case, the behaviour of the applicant and the competent authorities, as well as the significance of the determination of the case to the applicant (see the judgment of 15 October 1999, Humen v. Poland; No. 26614/95, the judgment of 4 April 2000, Dewicka v. Poland, No. 38670/97). The principle expressed in Article 6(1) of the Convention is infringed only by such proceedings where - in the light of the above criteria – there was no justification for the inactivity of the authorities involved in court proceedings.

On a number of occasions the ECHR has assessed the course of proceedings in particular criminal cases, in the context of meeting the requirement of carrying them out "within a reasonable time", within the understanding of Article 6(1) of the Convention. At the same time, it should be noted that identical wording is included in Article 2(1)(4) of the

Act of 6 June 1997 – the Code of Criminal Procedure, Journal of Laws - Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure). The assessment carried out by the ECHR with regard to the length of criminal proceedings is very rigorous when the accused is deprived of liberty during the period when the case is pending (e.g. the judgment of 25 November 1992 in the case of Abdoella v. the Netherlands, No. 12728/87); the judgment of 25 March 1996 in the case of Mitap and Müftüoglu v. Turkey, No. 15530/89). To a certain extent, the fact that proceedings take a long time may be justified by the behaviour of accused persons; namely, if they exercised their procedural entitlements, and lodged, for example, more and more applications to submit evidence, requests for the exclusion of judges or applications for referring the case to a different court (see the judgment of 16 July 1971 in the case of Ringeisen v. Austria, No. 2614/65; the judgment of 28 June 1978 r. in the case of König v. Germany, No. 6232/73; the judgment of 25 February 1993 r. in the case of Dobbertin v. France, No. 13089/87; the judgment of 4 May 1999 r. in the case of Ledonne v. Italy, No. 35742/97). According to the ECHR, when assessing whether particular proceedings were carried out within a reasonable time, the entire proceedings should be taken into account, including the investigation stage, together with the appellate and cassation procedures, if in the end they lead to indictment in a criminal case. Considering these criteria, it should be recognised that the said imperative is infringed by the proceedings where there is no justification for the inactivity of the authorities involved in court proceedings (cf. P. Hofmański, commentary to Article 2 of the Code of Criminal Procedure, point 9, [in:] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007).

3.4. The Constitutional Tribunal stresses that the swiftness of court proceedings has a considerable impact on the effectiveness of protection of the rights and freedoms of the individual, which are enshrined in the Constitution. Striving for the swift determination of proceedings should however be without prejudice to the correct application of legal norms. The Constitutional Tribunal points out that the parties to court proceedings have the right to a prompt hearing of their case, but at the same time they are entitled to be granted a proper determination, corresponding to the norms of substantive law. Article 45(1) of the Constitution requires that court proceedings meet the requirement of a fair procedure. Explaining the essence of that requirement, the Constitutional Tribunal has stated in its previous jurisprudence that "a fair judicial procedure should ensure parties the procedural entitlements which would be adequate to the object of pending proceedings" (the judgment of 11 June 2002, SK 5/02, OTK ZU No. 4/A/2002, p. 554) ,and also that "in accordance with the requirements of a fair trial, the parties to proceedings must have a real possibility of presenting their arguments, and a court is obliged to consider them" (the judgment of 13 May 2002, SK 32/01, OTK ZU No. 3/A/2002, p. 409).

3.5. The Constitutional Tribunal points out that the swiftness of proceedings should not have a negative impact on the procedural guarantees of the parties to criminal proceedings. The principle of swift proceedings should neither clash with the pursuit of truth during a court trial nor restrict the procedural entitlements which are guaranteed to the parties to proceedings by statute.

Pursuant to Article 2(1) of the Code of Criminal Procedure, the purpose of the Code is to establish rules which will secure that:

(1) the perpetrator of a criminal offence shall be detected and called to penal responsibility, and that no innocent person shall be so called,

(2) by a correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favoured the commission of the offence, the tasks of criminal procedure shall be fulfilled not only in combating the offences, but also in preventing them as well as in consolidating the rule of law and the principles of community life,

(3) legally protected interests of the injured party shall be secured, and

(4) determination of the case shall be achieved within a reasonable time.

The rules enumerated in the above provision, specifying the aims of criminal proceedings, constitute a certain *ratio legis* of the Code as a whole. Article 2(1)(1) and (2) of the Code of Criminal Procedure introduces the principle of an adequate criminal law response. In accordance with that principle, the procedural rules should be interpreted in such a way that a person called to penal responsibility is the person who committed a given crime and that the measures provided for by criminal law are applied correctly, and that an innocent person is not held responsible. It is worth noting that the ECHR also draws attention to the principle of an adequate criminal law response, by stating that although the swiftness of criminal proceedings (conducting them within a reasonable time, within the meaning of Article 6(1) of the Convention) is an important procedural guarantee, the task of state authorities is to strike a fair balance between the imperative of swift proceedings and the general principle of proper administration of justice (cf. the judgment of 12 October 1992 in the case of Boddaert v. Belgium, No. 12919/87). It should be noted that following the imperative of swift proceedings in a one-sided way may at times jeopardise the exercise of procedural guarantees of the parties to criminal proceedings. Therefore, the authorities involved in court proceedings are forced to seek compromise so that, on the one hand, the proceedings would not be excessively long and, on the other hand, the parties to proceedings would not be disadvantaged (cf. P. Hofmański, commentary to Article 2 of the Code of Criminal Procedure, points 4 and 10, [in:] *Kodeks* …)

4. The assessment of conformity of Article 1 of the Act of 10 July 2008 to Article 45(1) of the Constitution.

4.1. The basic constitutional problem in the present case is whether granting all Polish courts the competence to refer questions to the Court of Justice for a preliminary ruling, with regard to the validity and interpretation of acts from the realm of police and judicial cooperation in criminal matters, as referred to in Article 35(1) of the EU Treaty, may constitute the source of undue delay in the hearing of cases by courts, and at the same time may infringe on Article 45(1) of the Constitution. The determination of that issue depends on the determination of a more general issue, namely whether the application of a procedure (by the court hearing a given case) which is provided by law and which is aimed at eliminating doubts as to the validity or interpretation of law, as well as any discrepancies in jurisprudence, may be regarded as undue delay in proceedings.

In the President's application, it is aptly indicated that there are various procedures available under Polish law that allow the court adjudicating in a case, whose intention is to explain legal issues that raise interpretative doubts, to refer a question of law to a court (or an enlarged panel of that court) occupying the highest position in the judicial hierarchy. Therefore, Article 390(1) of the Code of Civil Procedure (Journal of Law - Dz. U of 1964 No. 43, item 296, as amended) provides for the possibility of referring questions of law which raise serious doubts, and have arisen in the course of examination of appellate measures, to the Supreme Court. Likewise, Article 441(1) of the Code of Criminal Procedure stipulates that the Appellate Court may refer a question to the Supreme Court for resolution if, in the course of the examination of appellate measures, a question of law is disclosed requiring a "substantial interpretation of the law". An analogical procedure of referring questions of law by the Supreme Court to an enlarged panel of seven judges of that court where there are "serious doubts as to the interpretation of the law" during the examination of a cassation appeal or any other appellate measure provided for in Article 59 of the Act on the Supreme Court (Journal of Law - Dz. U. of 2002 No. 240, item 2052, as amended). Also, within the meaning of Article 187(1) of the Act – Law on proceedings before administrative courts (Journal of Laws - Dz. U. of 2002 No. 153, item 1270, as amended), the Chief Administrative Court may refer a question to a panel of seven judges for resolution if, in the course of examination of a cassation appeal in civil proceedings, a question of law emerges which "raises serious doubts".

Despite the slightly different definition of the object of questions of law, their purpose is, generally speaking, the same, namely the aim is to eliminate serious doubts as to the interpretation of the law applied by courts. In the light of the jurisprudence of the Supreme Court and the doctrine, such an interpretation is required with regard to provisions which cause interpretative difficulties as they are not clearly formulated or there are discrepancies as to their interpretations in judicial practice or in the doctrine (see the decision of the Supreme Court of 27 October 2005, Ref. No. I KZP 30/05, OSN 2005, No. 11, item 107, L. Morawski, *Wykładnia w orzecznictwie sądów*, Toruń 2002, pp. 63-73). Carried out in the said manner by the Supreme Court or the Chief Administrative Court, the interpretation of the provisions indicated by the adjudicating court is aimed at reconstructing the legal norm which is relevant to the case under examination.

With reference to the above considerations, Article 193 of the Constitution should also be mentioned here, which allows any court to refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statute. However, the procedure for referring questions of law to the Constitutional Tribunal has a special character. Indeed, the Tribunal has been established to review acts of lower rank with acts which are higher in the hierarchy, and not to eliminate doubts with regard to the interpretation of provisions whose content is not unequivocally interpreted when applying them in practice (cf. the judgment of 3 December 2002, Ref. No P 13/02, OTK ZU No. 7/A/2002, item 90).

In the context of the present case, it should be emphasised that the reference of questions to the Supreme Court, the Chief Administrative Court or the Constitutional Tribunal by the adjudicating courts inevitably results in extending the duration of proceedings that are pending before those courts. However, the procedures for the

reference of questions of law have never been challenged, in the practice of the Constitutional Tribunal, from the point of view of their conformity to Article 45(1) of the Constitution. However, the Constitutional Tribunal has adjudicated about the conformity to the Constitution of other untypical procedural solutions, which entailed occurrence of a certain sequence or interdependencies between the proceedings conducted by courts and other authorities (cf. the judgment of 14 June 2006, Ref. No. K 53/05, OTK ZU No. 6/A/2006, item 66, the judgment of 9 February 2008, Ref. No. P 49/06, OTK ZU No. 1/A/2008, item 5).

4.2. The Constitutional Tribunal states that, in the context of the indicated provision of the Constitution, which constitutes the higher-level norm for review in the present case, the preliminary ruling procedure regulated in the EC Treaty and the EU Treaty should be assessed in an analogical way to the procedures presented above which consist in referring questions to the Supreme Court, the Chief Administrative Court or the Constitutional Tribunal by Polish courts. Since Poland's accession to the European Union, the EU law has been part of the current legal system in Poland. Ratifying the Treaty of Accession, Poland accepted the separation of functions within the framework of the system comprising the institutions of the European Communities and the European Union. What remains an element of that separation is the jurisdiction of the Court of Justice of the European Communities to interpret Community (EU) law and ensure the uniformity of that interpretation (cf. the judgment indicated above Ref. No. K 18/04).

The structure of questions referred for a preliminary ruling, as referred to in Article 35 of the EU Treaty, facilitates giving proper rulings by national courts, which take into account the interpretation and assessment of validity of EU legal acts provided by the Court of Justice. Avoiding irregularities before rulings become final, and are referred for execution, is of special significance in the realm of criminal law, as making an erroneous judgment by a court often brings about grievous consequences which are difficult to remedy. Therefore, the Constitutional Tribunal states that commencing a procedure aimed at eliminating doubts as to the interpretation or validity of an EU legal act may not be regarded as a cause of delay which would be unjustified within the meaning of Article 45(1) of the Constitution. It should be noted that the assessment of the preliminary ruling procedure by the CJEC in the context of excessive length of court proceedings has already been dealt with by the ECHR. The Strasbourg Court adjudicated that extending the duration of court proceedings due to the reference of a question for a preliminary ruling may not be regarded as excessive length of proceedings. Thus, the period of waiting for a preliminary ruling on a given question may not be counted when specifying the duration of proceedings for which the state may be held responsible (cf. the judgment of 26 February 1998, Pafitis v. Greece, No. 20323/92, the judgment of 30 September 2003, Koua Poirezz v. France, No. 40892/98; cf. W. Czapliński, "Pytanie prejudycjalne w świetle art. 6 EKPC", [in:] *Pytanie prejudycjalne w orzecznictwie ETS*, (eds.) C. Mik, Toruń 2006, pp. 178-179).

5. The significance of the preliminary ruling procedure provided for in Article 35 of the EU Treaty for the course of proceedings and the protection of the rights of individuals.

5.1. The Applicant fears that the excessive length of proceedings, arising from the fact that all Polish courts are to be authorised to refer questions for a preliminary ruling pursuant to Article 35 of the EU Treaty, may have a negative impact on the parties and other participants of criminal proceedings.

According to the Constitutional Tribunal, such an allegation is not justified. An analysis of preliminary rulings of the Court of Justice given within the scope of the Third Pillar of the European Union leads to a conclusion that the discussed procedure facilitates enhancing the protection of the rights of individuals. So far the CJEC, when replying to questions of law referred by national courts pursuant to Article 35 of the EU Treaty, mainly voiced opinions on two issues: firstly, as to the interpretation of the *ne bis in idem* principle within the meaning of Article 54 of the Convention implementing the Schengen Agreement of 14 June 1985 on the gradual abolition of checks at their common borders, signed on 19 June 1990 (OJ L 239, 6.9.2000, p. 19; hereinafter: the implementing Convention), and secondly, as to the validity and interpretation of framework decisions. Not only does eliminating interpretative doubts in the said cases constitute assistance for national courts, but it is also beneficial to all the participants of proceedings: accused persons, injured parties as well as witnesses.

5.2. Article 54 of the implementing Convention stipulates that a person whose trial has been finally disposed of in one Contracting Party may not be prosecuted in another Contracting Party for the same acts (cf. B. Nita, *Rozstrzyganie problemów wiążących się z kolizją jurysdykcji karnej pomiędzy państwami członkowskimi Unii Europejskiej w oparciu o zasadę ne bis in idem*, Warszawa 2006). This norm formulates a fundamental right of individuals under the Third Pillar of the European Union. In this context, one may indicate the judgment of the CJEC of 11 February 2003 in the joined cases C-187/01 and C-385/01 - criminal proceedings against Hüseyin Gözütok and Klaus Brügge ([2003] ECR I-1345) and the judgment of 10 March 2005 in the case C-469/03 - criminal proceedings against Filomeno Mario Miraglia ([2005] ECR I-2009), in which the Court of Justice voiced its opinion with regard to the forms of completing criminal proceedings which allow for the application of the *ne bis in idem* principle. In particular, in the first of the indicated judgments, the CJEC already extended the scope of application of the said principle to prosecutor's proceedings ending a given case. Also, the judgment of 28 September 2006 in the case C-150/05, Jean Leon Van Straaten v. the Netherlands and Italy ([2006] ECR I-1345), concerning the application of the *ne bis in idem* principle in the case of acquitting the accused. It follows from the above that the interpretation assumed by the Court of Justice, as regards the principle provided for in Article 54 of the implementing Convention, ensures a given person the possibility of full mobility within the territory of the EU, after the completion of criminal proceedings without any fear that criminal proceedings will be carried out against him/her in another Member State.

5.3. Pursuant to Article 34(2)(b) of the EU Treaty, framework decisions shall be adopted for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. These States are obliged to carry out correct transposition of framework decisions into the national legal system. A uniform and consistent interpretation of the instruments of secondary law under the Third Pillar of the European Union is therefore vital for maintaining comparable level of protection of the rights of individuals in the entire territory of the EU. As an example of a preliminary ruling which fulfils the said functions, one could mention the judgment of the CJEC of 16 June 2005 in the case C-105/03 – proceedings against Maria Pupino ([2005] ECR I-5285) concerning the interpretation of the Council Framework Decision 2001/220/JHA of 15 March 2001 on the standing of victims in criminal proceedings (OJ L 82 of 22.03.2001, p.1). In the above-mentioned case, the Court of Justice adjudicated that the national court should interpret national law, so far as possible, in the light of the wording and purpose of the Framework Decision, which granted victims and witnesses of crimes essential procedural guarantees preventing the secondary victimisation of those persons. In particular cases, this entailed allowing under-aged victims and witnesses of crimes to give their testimonies in a manner that would guarantee the protection of their dignity, morals and personality. Another judgment related to that Framework Decision was the judgment of 28 June 2007 in the case C-467/05 - the criminal proceedings against Giovanni Dell'Orto ([2007] ECR I-5557), in which the CJEC determined the definition of the term "victim" with regard to legal persons who have suffered harm directly caused by acts or omissions that are in violation of the criminal law of a Member State.

5.4. The Applicant holds the view that undue delay in proceedings is caused by authorising the courts of lower instances to refer questions for a preliminary ruling, pursuant to Article 35 of the EU Treaty.

The assessment of the choice of one of the options provided for in Article 35(3) of the EU Treaty, concerning the kinds of courts to be authorised to refer questions to the CJEC for a preliminary ruling, remains outside the jurisdiction of the Constitutional Tribunal in the present case. However, the consequences of choosing the narrower option should be pointed out, which is provided for in Article 35(3)(b) of the EU Treaty. They are related to the established jurisprudence of the CJEC concerning the wording "any court (…) of that State against whose decisions there is no judicial remedy under national law". What is subject to appeal in this context is also an extraordinary measure which is equivalent to a cassation appeal in criminal proceedings (or such an appeal in civil proceedings) in Polish procedural statutes, regardless of the fact whether there is a procedure for admitting such an extraordinary measure for examination (the Supreme Court's preliminary examination of cassation appeals) (cf. the judgment of 4 June 2002 in the case C-99/00 Lyckeskog, ECR I-4839, point 16; the judgment of 12 December 2008 in the case C-210/06 Cartesio, not yet published, point 76). In the event of a question referred for a preliminary ruling by an unauthorised court, it may be rightly expected that the CJEC will issue an order stating that it has no jurisdiction to give a ruling on such a question (cf. the order in the case C-555/03,

Warbecq v. Ryanair Ltd., [2004] ECR I-6041, points 11-16). The above ruling was given in the proceedings commenced pursuant to Article 68 of the EC Treaty which provides for referring questions to the CJEC for a preliminary ruling only by courts against whose decisions there is no judicial remedy under national law.

Referring the above conclusions which arise from the jurisprudence of the Court of Justice to the realm of Polish law, it should be stated that in the context of the narrower option, provided for in Article 35(3)(b) of the EU Treaty, the competence to refer questions for a preliminary ruling within the scope of the Third Pillar of the European Union would be reserved solely to the Supreme Court. A cassation appeal may be filed to the Supreme Court against a legally effective judgment - issued by an appellate court - which concludes criminal proceedings, provided one of the so-called absolute grounds for cassation appeal has occurred (cf. Article 439 in conjunction with Article 523 of the Code of Criminal Procedure).

Also, the Constitutional Tribunal notes that granting the competence to refer questions to the CJEC for a preliminary ruling to all courts examining a given case may be beneficial, from the point of view of the efficiency of proceedings and the rights of parties to proceedings. It is rightly indicated in the substantiation to the draft of the challenged Act that adopting the option provided for in Article 35(3)(b) of the EU Treaty will allow to avoid a situation where a correct interpretation of the provisions which are relevant to a given case could be determined by the court against whose decisions there is no judicial remedy. Referring a question of law by a court of lower instance will allow for eliminating doubts as to the interpretation or validity of the EU law at an early stage of proceedings, which may lead to completing the proceedings without resorting to any appellate measures. As a result of a preliminary ruling of the CJEC given on a question referred by a court against whose decisions there is no judicial remedy, the decision appealed may be reversed and the case may be referred to a court of competent jurisdiction for re-examination. Therefore, it is not clear how the fact which courts are authorised to refer questions for a preliminary ruling affects the duration of proceedings until their completion. From the point of view of the efficiency of proceedings, it would thus not be justified to deprive the courts of lower instances of the competence to assess if there is any need for referring a question to the CJEC for a preliminary ruling. A situation like that might also result in weakening the court protection of an accused person or an injured party, for there would be a risk of extending the duration of proceedings, and often also the risk of incurring additional costs, until the proceedings would reach the stage when a court could refer to the Court of Justice.

5.5 It is aptly stated in the President's application that the provisions of Polish law do not set out the rules and procedures for referring questions to the Court of Justice. However, this does not entail, despite the view presented in the application, that there is no possibility of hearing a case in criminal proceedings without undue delay. A Polish court referring a question for a preliminary ruling will be able to apply, by analogy, various procedural solutions applicable when a question is referred to the Supreme Court, pursuant to Article 441 of the Code of Criminal Procedure, or the Constitutional Tribunal, pursuant to Article 193 of the Constitution. Article 23 of the Statute of the Court of Justice

(published in Annex 2 to the Journal of Laws - Dz. U. of 2004 No. 90, item 864, as amended; hereinafter: the Statute of the CJEC) specifies the obligation of a national court, in the case where a question is referred for a preliminary ruling, to suspend its proceedings until the CJEC gives its ruling. It should be assumed that the term "suspend" (French *suspend*, German *aussetzen*) has been used here broadly, and refers to different forms of temporary adjournment of court proceedings. Hence, the procedural consequences of reference for a preliminary ruling are not determined here, as this is determined by the national law of the Member States.

The provision of Article 93(1) of the Code of Criminal Procedure, in such a case, provides for the issuance of an order by the adjudicating court. The literature on the subject suggests different possibilities in that regard (see M. Wąsek-Wiaderek, "Wystąpienie sądu krajowego z pytaniem prejudycjalnym w sprawach karnych", [in:] *Pytanie prejudycjalne do Trybunału Sprawiedliwości Wspólnot Europejskich*, (eds.) M. Wąsek-Wiaderek, E. Wojtaszek-Mik, Warszawa 2007, pp. 156-157). Firstly, in order to refer a question for a preliminary ruling, a court may issue an order adjourning the hearing of a given case and referring the question to the Court of Justice for a preliminary ruling. Such a model is applied in the case where courts refer questions of law to the Supreme Court pursuant to Article 441 of the Code of Criminal Procedure. Secondly, in accordance with Article 22 of the said Code, a court may issue an order suspending proceedings and referring a question to the Court of Justice for a preliminary ruling. This provision usually serves as a basis for suspending criminal proceedings in order to refer a question of law to the Constitutional Tribunal (see B. Nita, "Zawieszenie postępowania w związku z postępowaniem przed Trybunałem Konstytucyjnym", *Przegląd Sądowy* 2000, No. 1, p. 3). The Constitutional Tribunal does not suggest which of the above procedures is to be applied. The latter out of the presented solutions is more beneficial for the protection of the rights of the individual, due to the fact that an order suspending proceedings before a court of first instance is subject to appeal, pursuant to Article 22(2) of the Code of Criminal Procedure.

6. The risk that a common application of the preliminary ruling procedure may develop in a way that will result in the excessive length of proceedings.

6.1. The Constitutional Tribunal indicates that the further allegations contained in the application concern the Applicant's predictions as to how the future application of law will develop, rather than the content of the provision which is the object of allegations in the present case.

In accordance with the jurisprudence of the Constitutional Tribunal, "if an established and consistent application of law has in a definite way determined an interpretation of a given legal provision, and at the same time the established interpretation is not challenged by the representatives of the doctrine then the object of the constitutional review is a legal norm decoded from the provision, in compliance with the established application" (the decision of 4 December 2000, Ref. No. SK 10/99, OTK ZU No. 8/2000, item 300; the judgment of 3 October 2000, Ref. No. K. 33/99, OTK ZU No. 6/2000, item 188). In the case of a preventive review of a statute, the above situation however may not take place, as the challenged provision is not yet binding, and thus one may not speak

of its application. Therefore, the Constitutional Tribunal regards the Applicant's allegations, indicated below, as predictions about the development of a common application, which will in the future determine the content of the norm contained in the challenged provision.

6.2. The Applicant made reference to the practice of administrative courts. In accordance with that practice, administrative courts which conduct analogical proceedings to the case where another administrative court referred a question for a preliminary ruling, pursuant to Article 234 of the EC Treaty, suspend their proceedings in anticipation of a ruling from the CJEC. Therefore, the Applicant predicts that referring a question for a preliminary ruling, pursuant to Article 35(3)(b) of the EU Treaty, by a court in a criminal case may result in suspending proceedings conducted in analogical cases by other courts. In such a situation undue delay could occur in the proceedings pending before Polish courts, the number of which it is difficult to determine.

The Constitutional Tribunal regards the above allegation as groundless. Firstly, the described practice of administrative courts has not been common (cf. *Informacja o działalności sądów administracyjnych w 2007 r.*, Warszawa, 28 April 2008, p. 258). Secondly, one of the vital principles in the Polish criminal procedure is the principle of jurisdictional independence of a court, set forth in Article 8(1) of the Code of Criminal Procedure. In accordance with that principle, a criminal court shall, at its own discretion, determine the factual and legal matters of each ruling. Therefore, binding a criminal court by determinations of another court is an exception to that rule and may only be introduced by a provision of a statute which may not be interpreted in a broad way (cf. the order of the Supreme Court of 5 February 2003, Ref. No. IV KKN 617/99, OSN 2003, item 284). Consequently, a criminal court is obliged, at its own discretion, to determine the interpretation of the provisions it intends to use as a basis for its ruling, and in the case of any doubts as to the interpretation thereof – independently refer an appropriate question of law (cf. P. Hofmański, commentary to Article 8 of the Code of Criminal Procedure, points 11-13, [in:] *Kodeks* …). Where the doubts concern the matters specified in Article 35(1) of the EU Treaty, the question is referred to the CJEC. However, there are no legal grounds to adjourn the hearing or suspend the proceedings in the case where another court refers a question.

6.3. The Applicant expressed reservations that, due to the incorrect formulation of requests for a preliminary ruling within the scope of the procedure provided for in Article 35 of the EU Treaty, the Court of Justice would refuse to give rulings on the referred questions. This way the goal of the preliminary ruling procedure will not be achieved, despite the delay in proceedings. These reservations are based on the observation provided by the Applicant that questions of law referred pursuant to Polish law are sometimes turned down, due to the non-fulfilment of formal requirements.

The Constitutional Tribunal notes that the Applicant's reservations have a purely hypothetical character and there are no grounds for predicting the risk of occurrence of the said situations on a larger scale, although obviously one cannot rule out single instances where a preliminary ruling will not be given.

It should be emphasised that acts of Community law which regulate the proceedings before the CJEC do not pose special requirements as to the form of the reference of a question for a preliminary ruling. The information note of 2005 concerning questions to be referred by national courts for a preliminary ruling (OJ C 143 of 11.6.2005, p. 1), which constitutes non-binding guidelines of the CJEC, merely stipulates that the request should be formulated in a simple, clear and precise way and should include all vital information which allows for correct understanding of the factual and legal framework of the proceedings before a national court. The previous practice indicates that in the case of questions referred for a preliminary ruling which are incorrectly formulated or which go beyond the scope of examination, the Court of Justice may select, from the materials presented by a national court, these elements of Community (EU) law that allow for giving a preliminary ruling. The CJEC may also rephrase the wording of the questions referred by a national court, as it is not bound by their wording. Such a position has consistently been taken by the Court of Justice, beginning with the classic judgment of 15 July 1964, in the case 6/64 Flamino Costa v. ENEL, ECR 1964, item 585. Moreover, also in the case of reservations as to the content of the question referred by a national court, the competence of the CJEC to give a preliminary ruling is not excluded. Indeed, pursuant to Article 104(5) of the Rules of Procedure of the CJEC, the Court of Justice may, after hearing the Advocate General, request clarification from the national court.

6.4. Also, another reservation is expressed in the President's application; namely, that Polish courts, including courts of lower instances will widely use the preliminary ruling procedure provided for in Article 35 of the EU Treaty, which may result in the excessive length of proceedings on a larger scale. The Constitutional Tribunal indicates that such a reservation has no justification in the light of the previous practice of the CJEC. The courts of the Member States do not resort to that competence very often. From the moment the Treaty of Amsterdam entered into force on 1 May 1999 until the issuance of this Judgment, the Court of Justice gave sixteen preliminary rulings pursuant to Article 35(1) of the EU Treaty, and one case is pending. It is also worthwhile to consider the data on the instances of questions referred for a preliminary ruling by Polish courts, pursuant to Article 234 of the EC Treaty, in the area of community law, i.e. within a much broader scope of the subject matter. As it follows form the information of the CJEC and particular courts, from the moment of Poland's accession to the European Union on 1 May 2004 until the issuance of this judgment, sixteen requests were submitted to the Court of Justice for a preliminary ruling (one request was made by the Supreme Court, eleven requests were made by administrative courts and four were made by common courts). The above data also suggests that so far common courts have been less willing to refer questions for a preliminary ruling.

The assessment of the above data allows one to expect that authorising all Polish courts to refer questions for a preliminary ruling pursuant to Article 35 of the EU Treaty will not result in the practice of frequent reference of such questions to the Court of Justice, and thus it will not cause numerous delays in proceedings in criminal cases.

6.5. Another allegation made by the Applicant regards the considerable duration of the preliminary ruling proceedings before the Court of Justice. The Constitutional Tribunal draws attention to the fact that the data pertaining to the average duration of particular proceedings before the Court of Justice, as presented in the application, concern the preliminary ruling proceedings pursuant to Article 234 of the EC Treaty (which has been indicated by the Applicant), hence no automatic reference may be made to the procedure pursuant to Article 35 of the EU Treaty.

Furthermore, the Constitutional Tribunal indicates that since 1 March 2008, with regard to the cases in the area of freedom, security and justice, under Title VI of the EU Treaty (police and judicial cooperation in criminal matters), "an urgent procedure" has been applicable. The above procedure was introduced by the Council Decision of 20 December 2007 amending the Protocol on the Statute of the Court of Justice (OJ L 24 of 29.1.2008, p. 42). Detailed solutions accelerating the preliminary ruling procedure are set out in Article 23a of the Statute of the CJEC and Article 104b of the Rules of Procedure of the Court of Justice (OJ L 176 of 4.7.1991, p. 7, as amended; hereinafter: the Rules of Procedure of the CJEC).

The urgent procedure differs from an ordinary preliminary ruling procedure in three ways. Firstly, all the cases concerning police and judicial cooperation in criminal matters are referred to a panel of five judges, especially appointed to ensure the swift hearing of cases. If the panel decides to take into consideration a request for the urgent procedure, then it adjudicates after hearing the case and hearing the Advocate General. Secondly, in order to guarantee the swiftness of proceedings, the urgent procedure entails limiting the number of parties to the proceedings that are authorised to submit written observations; they are obliged to do this within a short period of time and in the language of the proceedings. Other interested persons, and in particular other Member States than the Member State of the court (i.e. the legislation of which the court referring a question for a preliminary ruling is subject to) have the possibility of presenting their observations only at the hearing. Thirdly, the exchange of correspondence between the CJEC and the participants of the proceedings will be conducted, whenever possible, via fax or email.

The Constitutional Tribunal indicates that the urgent procedure may regard all the cases under Title VI of the EU Treaty. Indeed, pursuant to Article 104b(1) of the Rules of Procedure of the CJEC, a request for the urgent procedure may concern a reference for a preliminary ruling "which raises one or more questions in the areas covered by Title VI of the Union Treaty or Title IV of Part Three of the EC Treaty". Both the Statute and the Rules of Procedure of the CJEC do not provide for any exclusion within the scope of the preliminary ruling procedure. Initiating the urgent proceedings will depend on the national court referring a question for a preliminary ruling, for it is best suited to assess whether in a given case there is a need for swift action. Moreover, if the national court does not submit an appropriate request for the urgent procedure, the Court of Justice will be able to decide *ex officio* whether to hear the case, by applying that procedure.

6.6. Referring to the previous practice of the CJEC, it should be indicated that from the date of 1 March 2008, when the urgent preliminary ruling procedure entered into force, until the day of issuance of this judgment by the Constitutional Tribunal, three cases were

heard under that procedure. The first one, the judgment of 11 July 2008 in the case C-195/08 PPU Rinau (not yet published), issued within the scope of Title IV of the EC Treaty – “Visas, asylum, immigration and other policies related to free movement of persons”, pursuant to Article 68 of the EC Treaty – was made within a period shorter than 2 months, counting from the day when the question was referred for a preliminary ruling by the national court. The remaining two judgments were issued pursuant to Article 35 of the EU Treaty. On 12 August 2008, the judgment was made in the case C-296/08 PPU Santesteban Goicoechea (not yet published), i.e. was issued six weeks after the day when the question was referred for a preliminary ruling by the national court. In turn, the judgment of 1 December 2008 in the case C-388/08 PPU Leymann and Pustovarov (not yet published) was made within a period shorter than three months. It follows from the above that the introduction of the urgent procedure to a large extent has facilitated hearing the cases referred for a preliminary ruling in the area of freedom, security and justice. So far only in one case – the case C-123/08 Wolzenburg, referred in 2008 in accordance with Article 35 of the EU Treaty - the CJEC has refused to adopt the urgent procedure.

It should be noted that, in its statement addressed to the Court of Justice with regard to the urgent preliminary ruling procedure (OJ L 24, 29.1.2008, p. 44), the Council of the European Union calls upon the Court to ensure that the deadlines in this regard are not, in principle, less than 10 working days[*] and that the urgent preliminary ruling procedure should be concluded within three months. Therefore, the expectations that judgments made under that procedure will be issued within that period are highly justified.

The information note supplement of 2008 (OJ C 64, 8.3.2008, p. 1), issued by the CJEC following the implementation of the urgent preliminary ruling procedure, presents exemplary situations determining the application of the urgent procedure. In particular, these are the cases of a person detained or deprived of his/her liberty where the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under Community law depends on the answer to the question referred for a preliminary ruling. The CJEC stressed that it was not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of Community rules governing the area of freedom, security and justice.

In the President’s application and in the address of the Applicant’s representative, the terms “urgent procedure” and “accelerated procedure” procedure are used interchangeably. In the context of the analysis of the ways of shortening the duration of proceedings before the Court of Justice, the Constitutional Tribunal draws attention to the need to distinguish between these two terms. The urgent procedure belongs to the framework of general preliminary ruling procedure, and is governed by Article 23a of the Statute of the CJEC and by Article 104a of the Rules of Procedure of the CJEC. It may be applied by the Court of Justice, upon the request of a national court where the circumstances of a given case indicate that giving a preliminary ruling on the submitted question is a matter of exceptional urgency. Shortening the duration of proceedings

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[*] [Editorial remark. The Polish text of the statement of the Council of the EU, unlike the versions of the statement published in other EU official languages, contains the following wording: “deadlines in this regard are, in principle, no more than 10 working days”.]

involves setting a date for the hearing forthwith, shortening the deadlines for submitting the pleadings as well as restricting the matters raised in the statements of case to the essential points of law raised by the question referred.

It is worth noting that where it is not possible to apply the urgent procedure, the Court of Justice may, in the case heard pursuant to Article 35 of the EU Treaty, decide about the application of an accelerated procedure. Such a situation occurred in the case C-66/08 Kozłowski, referred for a preliminary ruling by a German court before 1 March 2008, i.e. prior to the entry into force of the provisions concerning the urgent procedure. After hearing the case under the urgent procedure, the Court of Justice issued a judgment on 17 July 2008 (not yet published), within a period shorter than five months.

Therefore, the urgent preliminary procedure, as well as the accelerated procedure, definitely contribute to the shortening of the duration of the discussed proceedings before the Court of Justice. In the relevant literature, in this context, it is emphasised that the swiftness of proceedings may not constitute the sole value. In particular, it is pointed out that there is a need for guarantees, within the urgent preliminary ruling procedure, as regards carrying out proceedings in a thorough way and issuing a proper ruling (see P. Koutrakos, "Speeding up the preliminary reference procedure – Fast but not too fast", *European Law Review* 2008, Vol. 33, No. 5, pp. 617-618).

For the above reasons, the Constitutional Tribunal has adjudicated that 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 - granting consent for 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, as regards the competence of every Polish court to refer questions for a preliminary ruling in accordance with Article 35(3)(b) of the Treaty of the European Union – is consistent with the regulation that courts shall hear cases without undue delay, as stipulated in Article 45(1) of the Constitution.