

Judgment of 9th November 2005, [Kp 2/05](#)
**FINANCIAL CONTROL AND INTERNAL AUDIT
 IN JUDICIAL ORGANISATIONAL UNITS**

Type of proceedings: Preliminary review of an Act Initiator: President of the Republic of Poland	Composition of Tribunal: Plenary session	Dissenting opinions: 0
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Legal provisions under review	Basis of review
<p>Provisions of the Public Finance Act 2005, submitted to the President of the Republic of Poland for signature, insofar as they refer to courts and the Constitutional Tribunal in establishing:</p> <ul style="list-style-type: none"> - an obligation for the internal auditor within a unit of the public finance sector to prepare a report from the implementation of the audit plan and an audit plan for the subsequent year, as well as to present them to the head of such unit and the Main Inspector of Internal Audit (Article 53(5)), - the Minister of Finance's authorisation to issue a regulation regarding the procedure of preparing the aforementioned report and the specimen report (Article 53(6)), - an obligation for the head of a unit of the public finance sector to notify the Main Inspector of Internal Audit and the internal auditor about failure to undertake actions recommended within the internal audit report, together with an explanation of such failure (Article 56(3)), - the Minister of Finance's competences in matters regarding the coordination of financial control and internal audit in units of the public finance sector, exercised with the assistance of the Main Inspector of Internal Audit subordinate to the Minister (Article 62(1)–(3)), - the Minister of Finance's competences in assessing application of the Act's provisions in the field of financial control and internal audit, as well as the functioning of standards of financial control and internal audit (Article 63(3) and (4)), - the authorisation of employees of a Ministry of Finance unit, headed by the Main Inspector of Internal Audit, to assess compliance with the aforementioned standards in units subject to internal audit, on the basis of an authorisation issued by the Inspector (Article 65(1)), - the authorisation of the aforementioned Ministry employees to enter buildings and premises of the assessed units, to view their documents and other materials, as well as to obtain explanations from employees of a given unit (Article 66), - the authorisation of the aforementioned Ministry employees to present, in writing, the results of the assessment to the head of the assessed unit and, via the Main Inspector of Internal Audit, to the Minister of Finance; the possibility for the head of the assessed unit to submit objections as to the results of the assessment to the Minister of Finance, via the Inspector (Article 67) 	<p>Principle of the separation of powers</p> <p>Separateness and independence of the judicial power</p> <p>[Constitution: Articles 10(1) and 173]</p>

Within public sector organisational units – including, as of 2001, the courts and the Office of the Constitutional Tribunal – functions the so-called internal audit, understood as an independent review of management and supervision systems within any given unit, especially as regards financial control procedures, intended to provide the head of the unit with an objective assessment of these systems and to make suggestions as to how they could be improved. The internal audit is performed by an internal auditor, em-

ployed by a given unit and possessing officially declared qualifications to exercise this function. The internal auditor's assessment aims to assist the head of the unit in improving the rational use of public funds. By assumption, internal audit complements the external financial control system, exercised by the services of the appropriate government financial department services.

The new Public Finance Act, reviewed by the Constitutional Tribunal in the present case within the preliminary review procedure, was finally adopted by the Sejm (i.e. first chamber of Polish Parliament) on 30th June 2005, following consideration of the Senate amendments. The Act contains elements (see table above) causing the President of the Republic of Poland to question their conformity with the principles of the separation of power and independence of the judicial power (Articles 10(1) and 173 of the Constitution), the latter of which is, in Poland, exercised by courts and tribunals (Article 10(2) of the Constitution). The President's application does not relate to the Tribunal of State since this organ's activity is financed from the Supreme Court's budgetary funds and the Tribunal also has its office and secretarial services provided for by the latter (Article 20e of the Tribunal of State Act 1982, in its wording following the Tribunal of State Amendment Act 2003).

The essence of the challenged modifications, insofar as they concern organisational units strictly connected with the functioning of the judicial power, consists in directly linking the internal auditor's activities with the Main Inspector of Internal Audit, subordinate to the Minister of Finance.

The judicial power enjoys a *sui generis* autonomy concerning budget planning, similar to that enjoyed by certain other entities independent of the government. Such autonomy is regulated at the level of ordinary statute (cf. point 6 below). More specifically, when presenting the Council of Ministers with the draft Budget Act (before the latter reaches the Sejm), the Minister of Finance incorporates into this draft an unaltered plan of the revenues and expenditures of judicial organisational units (Article 121(2) of the challenged Act). Furthermore, the Council of Ministers itself is unauthorised to correct the plan contained within the draft budget presented to the Sejm, but it does provide the Sejm with an opinion on this matter (Article 122(2) of the discussed Act).

The judicial decision regarding unconstitutionality in point 2 of the ruling of the judgment summarised herein is a so-called "scope" decision: it refers neither to a provision in its entirety nor to a severable part thereof, but rather to a certain, constitutionally impermissible, scope of application of such a provision. This is important from the perspective of the fate of the Act subjected to the preliminary review procedure. As is stated in Article 122(4) of the Constitution, whenever a finding of unconstitutionality concerns only particular provisions within a statute subjected to preliminary review and the Tribunal finds that those provisions are not inseparably connected with the entire statute (cf. point 3 of the ruling), the President, after seeking the opinion of the Marshal of the Sejm, shall sign the statute with the omission of those provisions considered as unconstitutional or shall return the statute to the Sejm for the non-conformity to be removed. In this instance, the President decided to sign the Act without altering its wording, but attaching footnotes to the provisions found unconstitutional by the Tribunal (as to their "scope") with information referring to judgment summarised herein, together with a notation next to his signature which said: "Pursuant to Article 122(4) of the Constitution of the Republic of Poland, I sign this Act having taking into account the Consti-

tutional Tribunal judgment...” (the notation goes on to summarise point 2 of the ruling of the Constitutional Tribunal judgment); see the Journal of Laws No. 249 of 21st December 2005, item 2104. This was the first time that such a solution was utilised.

RULING

1. Articles 53(5) and (6), 56(3), 62(1)–(3), as well as 63(3) and (4) of the Public Finance Act 2005 conform to Articles 10(1) and 173 of the Constitution.

2. Articles 65(1), 66 and 67 of the aforementioned Act, insofar as they concern the Supreme Court, common courts, administrative courts and the Constitutional Tribunal, do not conform to Articles 10(1) and 173 of the Constitution.

3. The provisions indicated in point 2 above are not inseparably connected with the whole Act.

PRINCIPAL REASONS FOR THE RULING

1. The separateness and independence of courts and tribunals vis-à-vis other branches of power, as guaranteed in Article 173 of the Constitution, are not intended to serve the judicial power *per se* (i.e. the organs exercising such power) but, rather, realisation of an individual’s constitutional right to court (Article 45(1) of the Constitution).
2. The activity of courts and tribunals, in its totality, does not merely comprise their activity as public authority organs established to exercise the judicial function, but also their organisational and administrative activity, serving to realise the judicial function.
3. The administration of justice, as exercised by courts, and the Constitutional Tribunal’s judicial competences fall within the State’s basic functions and, as such, should be financed from public funds. Organs of the judicial power and their accompanying organisational structures are entirely maintained from the State budget and are obliged to transfer to the budget all revenues obtained from their activity, e.g. in the form of court fees.
4. In light of the Constitution, the legislative power has a democratic mandate to decide upon the destination of public funds originating from the imposition of public levies on citizens. Concomitantly, the Council of Ministers, as an executive organ, occupies a very strong position within the constitutional system as regards financial policy. This position is specified by Article 221 (vesting the Council of Ministers with the exclusive right to initiate legislative proceedings regarding the Budget Act), Article 220(1) (prohibiting the Sejm from increasing the budget deficit above that envisaged in the draft Budget Act), and Article 219(4), read in conjunction with Article 146(4) point 6, of the Constitution (vesting the Council of Ministers with exclusive competence to pursue the State’s financial policy and to manage implementation of the budget on the basis of the Budget Act). *Ipsa facto*, it is permissible from the constitutional perspective for the Council of Ministers to undertake actions to survey the uniformity of public funds management within all public finance sector units, including judicial units. The regulation of financial control and internal audit within the courts and Constitutional Tribunal must, however, take account of the specific nature of these units, given

the separateness and independence of the judicial power vis-à-vis the executive (Article 173 of the Constitution).

5. Matters concerning the division of tasks between the executive and judicial powers in the course of budget implementation must be regulated by statute (conclusion derived from Article 219(2) of the Constitution). Statutes regulating such matters should fulfil a series of requirements stemming from the Constitution. Firstly, such statutes must correspond to the requirements of sufficient specificity so as to categorically guarantee the judicial power that the Council of Ministers will not interfere authoritatively in areas concerning important prerogatives of the judicial power. Secondly, these statutes must deal with conflicts of competence, including potential conflicts, and introduce appropriate instruments to prevent such conflicts and contribute to the resolution thereof. Thirdly, each of the instruments through which the executive influences the judicial power (including control) should be precisely regulated; in particular, it must be indicated who possesses the right to exert such influence, which matters are subject to such influence and what are the effects of such influence. Fourthly, statutes regulating such matters must be characterised by particularly diligent fulfilment of requirements concerning the legislative procedure, since in essence they represent a supplementation and extension of parts of the Constitution.
6. Insofar as concerns the “separateness” of the judicial power’s position in relation to the drafting and implementation of the Budget Act, and supervision of such implementation, the Constitution endows the legislative power with considerable discretion. The limits of such discretion are: on the one hand – the need to ensure uniformity of the public finances system, as required by the constitutional provisions, and the inviolability of the Council of Ministers’ obligations and competences as the sole organ established to pursue the State’s financial policy on the basis of the Budget Act; and, on the other hand – the prohibition on making the position of judicial organisational units completely equal with that of units subordinate to the executive power.
7. The Council of Ministers’ “supervisory”, informational and evaluative functions vis-à-vis judicial organisational units are not autonomous in nature but are auxiliary to its primary function of managing and implementing the State budget. The Constitution entrusts supervision, understood as an autonomous function, to the Supreme Chamber of Control (Article 204(1) point 1). The Public Finance Act may only regulate those Council of Ministers’ functions connected with management and implementation of the budget which do not duplicate functions of the Supreme Chamber of Control and which, simultaneously, are crucial for performance of the government’s constitutional activities.
8. Whilst the provisions enumerated in point 1 of the ruling significantly strengthened the institutional link between internal auditors within judicial organisational units, employed by the heads of such units, and the Minister of Finance, via the Main Inspector of Internal Audit, it is difficult to identify a direct infringement of the separateness and independence of the judicial power thereby, as regards the pursuit of financial policy.
9. The purpose for which the provisions indicated in point 2 of the ruling were introduced is not clearly and unambiguously stated. The competences vested in subordinates of the Main Inspector of Internal Audit may, in the future, be differently interpreted and applied. These provisions create a potential threat to the constitutional in-

dependence of the judicial power. In particular, such independence argues against the ability of the executive power's representatives to review documents directly connected with exercising the administration of justice, e.g. concerning the preconditions for exemption from court costs or costs connected with the institution of a court-appointed counsel. Furthermore, if Ministry of Finance employees were to enter judicial organisational units to view documents and other materials, with no substantive or temporal limitations and in the absence of any sufficiently justified supervisory need, this would threaten the so-called public image of the administration of justice, since it could cause citizens to make false assumptions about the government's institutional, authoritative influence on the manner in which justice is administered.

Provisions of the Constitution

Art. 10. 1. The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.

2. Legislative power shall be vested in the Sejm and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.

Art. 45. 1. Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court.

Art. 122. [...] 3. The President of the Republic may, before signing a bill, refer it to the Constitutional Tribunal for an adjudication upon its conformity to the Constitution. The President of the Republic shall not refuse to sign a bill which has been judged by the Constitutional Tribunal as conforming to the Constitution.

4. The President of the Republic shall refuse to sign a bill which the Constitutional Tribunal has judged not to be in conformity to the Constitution. If, however, the non-conformity to the Constitution relates to particular provisions of the bill, and the Tribunal has not judged that they are inseparably connected with the whole bill, then, the President of the Republic, after seeking the opinion of the Marshal of the Sejm, shall sign the bill with the omission of those provisions considered as being in non-conformity to the Constitution or shall return the bill to the Sejm for the purpose of removing the non-conformity.

Art. 146. [...] 4. To the extent and in accordance with the principles specified by the Constitution and statutes, the Council of Ministers, in particular, shall:

[...]

6) supervise the implementation of the State Budget and pass a resolution on the closing of the State's accounts and report on the implementation of the Budget;

[...]

Art. 173. The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

Art. 204. 1. The Supreme Chamber of Control shall present to the Sejm:

1) an analysis of the implementation of the State Budget and the purposes of monetary policy;

[...]

Art. 220. 1. The increase in spending or the reduction in revenues from those planned by the Council of Ministers may not lead to the adoption by the Sejm of a budget deficit exceeding the level provided in the draft Budget.

Art. 221. The right to introduce legislation concerning a Budget, an interim budget, amendments to the Budget, a statute on the contracting of public debt, as well as a statute granting financial guarantees by the State, shall belong exclusively to the Council of Ministers.