10/2/A/2011

JUDGMENT
of 15 March 2011
Ref. No. P 7/09*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Zbigniew Cieślak – Presiding Judge
Maria Gintowt-Jankowicz – Judge Rapporteur
Wojciech Hermeliński
Marek Kotlinowski
Stanisław Rymar,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 1 March 2011, in the presence of the Sejm and the Public Prosecutor-General, a question of law referred by the District Court in Toruń as to whether:

> Article 95(1) of the Act of 29 August 1997 – the Banking Law (Journal of Laws - Dz. U. of 2002 No. 72, item 665, with amendments), as amended by the Act of 26 June 2009 amending the Act on Land Registers and Mortgage as well as certain other acts (Journal of Laws - Dz. U. No. 131, item 1075), in conjunction with Article 244(1) and Article 252 of the Act of 17 November 1964 – the Polish Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended; hereinafter: the Code of Civil Procedure), insofar as it assigns the legal validity of official documents to excerpts from banks' account books in civil proceedings, is consistent with Article 2, Article 20, Article 32(1), first sentence, and Article 76 of the Constitution of the Republic of Poland,

adjudicates as follows:

Article 95(1) of the Act of 29 August 1997 – the Banking Law (Journal of Laws - Dz. U. of 2002 No. 72, item 665, No. 126, item 1070, No. 141, item 1178, No. 144, item 1208, No. 153, item 1271, No. 169, item 1385 and 1387, and No. 241, item 2074, of 2003 No. 50, item 424, No. 60, item 535, No. 65, item 594, No. 228, item 2260, and No. 229, item 2276, of 2004 No. 64, item 594, No. 68, item 623, No. 91, item 870, No. 96,

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* The operative part of the judgment was published on 5 April 2011 in the Journal of Laws - Dz. U. No. 72, item 388.

item 959, No. 121, item 1264, No. 146, item 1546 and No. 173 item 1808, of 2005 No. 83, item 719, No. 85, item 727, No. 167, item 1398 and No. 183, item 1538, of 2006 No. 104, item 708, No. 157, item 1119, No. 190, item 1401 and No. 245, item 1775, of 2007 No. 42, item 272 and No. 112, item 769, of 2008 No. 171, item 1056, No. 192, item 1179, No. 209, item 1315 and No. 231, item 1546, of 2009 No. 18, item 97, No. 42, item 341, No. 65, item 545, No. 71, item 609, No. 127, item 1045, No. 131, item 1075, No. 144, item 1176, No. 165, item 1316, No. 166, item 1317, No. 168, item 1323 and No. 201, item 1540 as well as of 2010 No. 40, item 226, No. 81, item 530, No. 126, item 853, No. 182, item 1228 and No. 257, item 1724), **as amended by the Act of 26 June 2009 amending the Act on Land Registers and Mortgage as well as certain other acts** (Journal of Laws - Dz. U. No. 131, item 1075), **in conjunction with Article 244(1) and Article 252 of the Act of 17 November 1964 – the Code of Civil Procedure** (Journal of Laws - Dz. U. No. 43, item 296, as amended), **insofar as it assigns the legal validity of official documents to banks' account books and excerpts from such books, in the context of rights and obligations arising from banking operations, in civil proceedings against consumers, is inconsistent with Article 2, Article 32(1), first sentence, and Article 76 of the Constitution of the Republic of Poland as well as is not inconsistent with Article 20 of the Constitution.**

STATEMENT OF REASONS

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the question of law. The scope of the allegation and the admissibility thereof.

1.1. The present review proceedings have been commenced by the question of law referred by the court. The review of constitutionality commenced by way of question of law must meet requirements which are set out in Article 193 of the Constitution and specified in greater detail in the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act). There are three basic premisses determining the admissibility of a question of law that follow from those provisions: a) a premiss concerning the scope ratione personae – a question of law may only be referred by a court, defined as a state organ of the judiciary; b) a premiss concerning the scope ratione materiae – a question of law may solely concern the assessment of conformity of a normative act to the Constitution, ratified international agreements or statutes; c) a functional premiss – referring a question of law is justified only when an answer to the question will determine the resolution of a case pending before the court referring the question (for more, see: the decision of the Constitutional Tribunal of 6 February 2007, Ref. No. P 33/06, OTK ZU No. 2/A/2007, item 14 and the jurisprudence cited therein). As it was indicated by the Constitutional Tribunal in its judgment of 12 March 2002, ref. no. P 9/01 (OTK ZU No. 2/A/2002, item 14), the subject

of a question of law may constitute all those provisions whose conformity or non-conformity to the Constitution affects the adjudication of the court referring the question. They do not need to be the basis of the adjudication, unlike in the context of a constitutional complaint, which follows from comparing regulations in Article 79 and Article 193 of the Constitution.

In the present case, all the premisses determining the admissibility of a question of law have been fulfilled. The said question was formulated by a common court, in the course of examining a civil case concerning a payment to be made between a bank and a consumer. The court referring the question requested the Tribunal to review whether part of Article 95(1) of the Act of 29 August 1997 – the Banking Law (Journal of Laws - Dz. U. of 2002 No. 72, item 665, as amended; hereinafter: the Banking Law), in conjunction with Article 244(1) and Article 252 of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended), was consistent with the indicated higher-level norms for the review. The consequences of applying Article 95(1) of the Banking Law, in conjunction with Article 244(1) and Article 252 of the Code of Civil Procedure, will affect the resolution of the case pending before the court referring the question, since by assigning the legal validity of official documents to excerpts from banks' account books, they shift the distribution of the burden of proof. The presumption of accuracy of an excerpt from the account books of a bank may determine the outcome of a trial, taking into account Article 234 of the Code of Civil Procedure, which indicates that the court is bound by legal presumptions. In the case pending before the court referring the question, an excerpt from the account book of the bank constitutes the evidence of a debt and the amount of the debt that the bank is trying to recover.

1.2. The Constitutional Tribunal voiced its opinion on the special evidentiary value of bank documents in its ruling of 16 May 1995, ref. no. K 12/93 (OTK of 1995, Part 1, item 14). The subject of the review commenced by an application submitted by the Polish Ombudsman comprised the following solutions provided for in the Act of 31 January 1989 - the Banking Law (Journal of Laws - Dz.U. of 1992, No. 72, item 359 as amended, hereinafter: the Banking Law of 1989):

– the possibility of deducting debts the time-limit for the payment of which has not yet expired from banks' liabilities (Article 52 of the Banking Law of 1989);

– assigning certain bank documents with the legal validity of official documents constituting the basis of making entries in land registers and public registers (Article 53(1) of the Banking Law of 1989);

– assigning the legal validity of enforceable orders to certain bank documents, without any need for a court to issue enforcement clauses for those documents (Article 53(2) of the Banking Law of 1989) – that allegation was justified in the broadest way in the Ombudsman's application – see the statement of reasons for the ruling in the case K 12/93.

In the ruling of the Constitutional Tribunal, Article 53(1) of the Banking Law of 1989, which comprised an identical regulation to the one in Article 95(1) of the Banking Law, *inter alia,* assigning the legal validity of official documents to banks' account books

and excerpts from such books, was ruled to be consistent with Article 1 of the constitutional provisions, maintained in force on the basis of Article 77 of the Constitutional Act of 17 October 1992 on the Mutual Relations between the Legislative and Executive Institutions of the Republic of Poland and on Local Self-government (Journal of Laws - Dz. U. No. 84, item 426, as amended), which expressed the principle of a democratic state ruled by law. Also, the Constitutional Tribunal deemed that the said provision was not inconsistent with Article 56(1) (the right to a fair trial) and Article 67(2) (the principle of equality) of the said constitutional provisions.

The statement of reasons for the ruling indicated, *inter alia*, that: "(...) When examining the allegation of assigning certain bank documents with the legal validity of official documents constituting the basis of making entries in land registers and public registers (Article 53(1) of the Banking Law of 1989), the Constitutional Tribunal stated that, also within that scope, it might not be deemed that there had been an infringement of the constitutional provisions which had been cited by the applicant. While justifying the application in that point, the Ombudsman drew particular attention to differences between the provision of Article 53(1) of the Banking Law of 1989 and the regulations of the Code of Civil Procedure, and especially Article 244 of the said Code. (...) Regardless of doubts that may arise when comparing procedural provisions with substantive law, it may be stated that Article 53(1) of the Banking Law of 1989, by assigning the legal validity of official documents to certain bank documents, does not actually correspond to Article 244 of the Code of Civil Procedure. However, this is not a sufficient basis for ruling the provision of the Banking Law of 1989, challenged by the Ombudsman, to be unconstitutional. (...) The provisions of the Banking Law, within that scope, constitute the so-called *lex specialis* with regard to principles set out in the Polish Civil Code. A similar assessment should apply to the provisions of Article 53(1) of the Banking Law of 1989, which assign the legal validity of official documents to certain bank documents. This is also an admissible departure from the provisions of the Code of Civil Procedure, and in particular Article 244 of the said Code. Without evaluating the substantive aptness of the above regulation, and even despite doubts that arise with relation thereto, the Constitutional Tribunal states that the legislator did not cross the borderlines set out in that regard by the constitutional principles of a democratic state ruled by law, arising from Article 1 of the constitutional provisions". Therefore, the affirmative ruling as regards the legal validity of bank documents, to a large extent, stemmed from the Tribunal being bound by the principle which states that the Tribunal may adjudicate only within the scope of a given application. The way of justifying the allegations and the arguments presented by the Ombudsman were not sufficient to rule that the solution was unconstitutional.

Taking the above into consideration, in the present case, there are no grounds to discontinue the review proceedings, as the ruling of 16 May 1995 concerned a provision of the Banking Law of 1989 which was in force at that time, the Ombudsman presented different argumentation to support his allegations, and also the review conducted by the Tribunal partly comprised other higher-level norms for review.

One may not overlook the fact that the said ruling was issued before the entry into force of the Constitution of 1997, which is currently in force. This is a vital issue, as the protection of consumers' rights has been included within the scope of that Constitution, in

its Article 76. Thus, it is necessary to perceive banks (and their privileges) in the light of the fact that banks are professional participants in market transactions, and are expected to act with particular caution and due diligence, in particular within the realm of transactions with consumers. The tendency to enhance the protection of consumers, arising from the Constitution, is also re-enforced in Poland due to the influence of the legal solutions of the European Union.

In addition, the normative context which is of significance to the case under review has changed. In particular, in the course of subsequent amendments, the legislator introduced considerable changes in the civil procedure, which enhanced the adversarial character of the procedure and restricted the court's powers to act *ex officio*. Moreover, it should be pointed out that the said ruling was issued at the early stage of significant changes that were made to the banking system in Poland, which has now the character of a free-market system.

Each of the above reasons, taken separately, limits the possibility of applying the evaluation presented in the said ruling to the present case. Therefore, their joint occurrence definitely rules out the premiss of discontinuing proceedings in accordance with the principle of *ne bis in idem procedatur*.

1.3. Article 95(1) of the Banking Law, as amended by the Act of 26 June 2009 amending the Act on Land Registers and Mortgage as well as certain other acts (Journal of Laws - Dz. U. No. 131, item 1075; hereinafter: the amending Act), stipulates that:

"A bank's account books and excerpts from such books, as well as other statements signed by persons authorised to make statements with respect to the financial rights and obligations of the bank, with the bank's seal affixed, as well as the receipts of receivables drawn up in this manner, shall have the legal validity of official documents, with regard to financial rights and obligations arising from banking operations as well as collaterals for the bank, and may constitute a basis for making entries in land registers."

Article 95(1) of the Banking Law assigns the legal validity of official documents to certain types of bank documents specified in that provision, in the context of rights and obligations arising from banking operations as well as collaterals for the bank.

An amendment made to Article 95(1) of the Banking Law has narrowed down the scope of the application of that provision, since previously the scope of bank documents which were assigned the legal validity of official documents was not correlated with the character of a banking operation that was documented. Apart from the banking operations defined in Article 5(1) and (2) of the Banking Law, banks may carry out other operations specified in Article 6 of the said Act. They comprise *inter alia* transactions involving immovable properties and debts, activity involving purchasing and holding shares, as well as the provision of other financial services.

Thus, by the amendment, the right to issue documents that have the legal validity of official documents, which had been granted to banks, has been restricted. The said change is a response to the criticism of the previous statutory solution expressed in the legal doctrine, which was emphasised in the explanatory note to the amending bill (see the Sejm Paper No. 1562/6th term of the Sejm).

Due to the subject of the present case, it should be deemed that the amendment made to Article 95(1) of the Banking Law was merely editorial in character, since the legal validity of official documents, both in the previous version of the provision as well as in the version which has been in force since 20 February 2011, refers to banks' account books and excerpts from such books. The claim made by the bank has arisen from a banking operation, namely it is related to the use of a bank account.

At the same time, however, the amendment is not irrelevant to the resolution of the case pending before the court referring the question. Indeed, the amending Act does not regulate the case of excerpts from banks' account books issued before the day of entry into force of the Act. In accordance with the principle that a new statute is applied directly, amended Article 95(1) of the Banking Law will constitute the basis of the evaluation of facts when excerpts from banks' account books issued before the entry into force of the amending Act are used in civil proceedings.

The doubts as to the constitutionality of Article 95(1) of the Banking Law, raised by the court referring the question, as well as the arguments presented in the question of law in support of the doubts remained up-to-date also after the said provision was amended, which was emphasised in the statement of reasons for the decision of 3 February 2011, issued by the court referring the question, which included the modified version of the question of law.

1.4. The question of law comprises the part of Article 95(1) of the Banking Law which concerns assigning the legal validity of official documents to excerpts from banks' account books. This means that, in the present case, the remainder of Article 95(1) of the Banking Law is not subject to review by the Constitutional Tribunal.

In the course of examining questions of law, the scope of adjudication of the Constitutional Tribunal is determined by the character of that form of constitutional review as well as by a connection with a particular case pending before a court referring a given question. In the case on the basis of which the question of law under examination has been formulated, the bank that is the plaintiff in the proceedings used an excerpt from its account books in support of its claim. Due to the fact that the Constitutional Tribunal is bound by the scope of the question of law, it may only adjudicate on the special evidentiary value of excerpts from banks' account books. Indeed, such a judgment is sufficient for the court referring the question to resolve the pending case.

However, attention should be drawn to the close connection between excerpts from banks' account books and the books. The version of Article 95(1) of the Banking Law which is currently in force unambiguously indicates that the evidentiary value of official documents is assigned only to excerpts from banks' account books.

Consequently, we deal here with the identical content of documents, as an excerpt from an account book of a bank constitutes a fragment of the book. Both banks' account books and excerpts from the books concern identical information, differing only in its scope. Therefore, the assessment of assigning the evidentiary value of official documents, to the same extent, refers to excerpts from banks' account books and the said books.

In such a case, it would be too formalistic to limit the scope of adjudication solely to excerpts from banks' account books. Such formulation of the scope of allegation may not

be hindered by the character of the question of law as one of the forms of constitutional review (cf. the judgment of the Constitutional Tribunal of 26 June 2008, Ref. No. SK 20/07, OTK ZU No. 5/A/2008, item 86). Therefore, the Constitutional Tribunal has concluded that it is justified to issue a ruling which concerns assigning the special legal validity of official documents to both excerpts from banks' account books and the said books. It should be noted that an analogous request regarding the inclusion of banks' account books, apart from excerpts therefrom, within the scope of adjudication in the present case, was formulated in the letter by the Public Prosecutor-General.

1.5. What requires consideration in the present case is also the scope ratione personae of the ruling. Although the norm contained in Article 95(1) of the Banking Law does not provide for differentiation in the context of the evidentiary value of bank documents as regards the scope ratione personae, one should take into account that the question of law has been posed with relation to a lawsuit brought by the bank against a consumer. For the purposes of the present case, the Constitutional Tribunal has made reference to the definition set forth in Article 22^1 of the Act of 23 April 1964 – the Polish Civil Code (Journal of Laws - Dz. U. No. 16, item 93, as amended, hereinafter: the Civil Code). In accordance with that provision, a consumer shall be deemed to be any natural person who performs acts in law which are not directly connected with his/her economic or professional activity.

Assigning the legal validity of official documents to bank documents has universal application, the effects of which affect both entrepreneurs as well as consumers. However, the position of the two groups varies, which primarily stems from the professional character of the activity conducted by entrepreneurs. In accordance with the definition in Article 43^1 of the Civil Code, an entrepreneur may be a natural person, a legal person, as well as an organisational unit not being a legal person, provided that they carry on economic or professional activity on their own behalf.

Differences in the legal position of consumers and entrepreneurs justify the introduction of different legal regulations for each of these groups. On the one hand, the legislator has made efforts to improve the situation of consumers who, in fact, constitute weaker parties in legal relations with entrepreneurs, by means of special regulations which *inter alia* include the Act of 27 July 2002 on special terms and conditions of retail and on amendments to the Civil Code (Journal of Laws - Dz. U. No. 141, item 1176, as amended). On the other hand, separate proceedings concerning economic disputes between entrepreneurs have been introduced into the civil procedure (Section IVa of Book 1 of the Civil Code). The rights and obligations of professional parties in dispute with each other have been regulated by the legislator in a more restrictive way than in the context of proceedings conducted on general terms. Moreover, it should be noted that, pursuant to the Accounting Act of 29 September 1994 (Journal of Laws - Dz. U. of 2009, No. 152, item 1223, as amended; hereinafter: the Accounting Act), a majority of entrepreneurs are obliged to keep account books, which - in the context of the assessment of assigning the legal value of official documents to bank documents in civil proceedings - makes it easier to potentially produce evidence to the contrary with regard to those documents. Taking into account the unique character of the question of law as an element of constitutional review

conducted with relation to a specific case, as well as the indicated differences in the legal situations of consumers and entrepreneurs, it is justified to issue a ruling declaring partial unconstitutionality. To resolve the specific case by the court referring the question, it suffices that the Tribunal assesses the constitutionality of assigning the legal validity of official documents to excerpts from banks' account books with regard to consumers. Such scope of adjudication arises from the functional premiss. Also, the statement of reasons for the question of law focuses on the effects of applying Article 95(1) of the Banking Law with regard to consumers that have been sued.

1.6. In order to determine the scope of the question of law, it is also necessary to analyse the provisions indicated by the court referring the question in conjunction with Article 95(1) of the Banking Law. Indeed, Article 95(1) makes reference to neither Article 244(1) nor Article 252 of the Code of Civil Procedure. The regulation of the Baking Law does not specify consequences which ensue from assigning the legal validity of official documents to banks' account books and to excerpts from such books. The effects of Article 95(1) of the Banking Law follow from legal solutions provided for in particular procedures and branches of law. The provisions of the Code of Civil Procedure indicated by the court referring the question specify the significance of official documents presented to a court as evidence in civil proceedings. Article 244(1) of the said Code reads as follows: "Official documents, prepared in a prescribed form by the organs of public authority and other organs of the state that are competent in that regard, within the scope of their duties, constitute proof of what has been officially certified therein". The provision sets out formal requirements for an official document (i.e. preparation in a prescribed form by the organs of public authority and other organs of the state that are competent in that regard, within the scope of their duties) as well as introduces the presumptions of authenticity and accuracy of the content of such a document. This means that, first of all, in proceedings before a civil court, an official document is regarded as issued by an authority that has been designated as the issuer of the document, and secondly we deal with the presumption of the accuracy of what has been officially stated in the document, and the mere fact of presenting the document to the court constitutes sufficient evidence in that regard. By contrast, Article 252 of the Code of Civil Procedure stipulates that: "A party that refutes the accuracy of an official document, or claims that statements formulated therein by an authority that has issued the document are not true, should prove these circumstances". Thus, the party questioning the authenticity of the official document, or the accuracy of its content, has the possibility of proving the circumstances, by producing evidence to the contrary.

A comparison between the content of Article 95(1) of the Banking Law, challenged by the court referring the question, and the provisions cited in conjunction with it, i.e. Article 244(1) and Article 252 of the Code of Civil Procedure, indicates that the subject of the question of law is the significance of the evidentiary value of official documents assigned by the legislator to excerpts from banks' account books in civil proceedings. However, the court referring the question challenges neither the legal presumptions which are related to official documents in civil proceedings, nor principles concerning the

distribution of the burden of proof in the event of overturning the above presumptions, which arise from the provisions of the Code of Civil Procedure indicated in conjunction with Article 95(1) of the Banking Law.

Thus, the subject of the question of law is the assessment of assigning the legal validity of official documents to banks' account books and to excerpts from such books only in the situation where they serve as evidence in civil proceedings, as presenting them in court modifies the general principles concerning the distribution of the burden of proof. The main constitutional issue raised by the court referring the question is the weakening of the procedural position of a consumer who, in a situation where an excerpt from the account books of a bank is presented to the court by his/her opponent in court proceedings, in order to cause the dismissal of the petition, s/he has to prove that the content of the document is incorrect, in contrary to the general principles of the burden of proof. Thus, the court referring the question unambiguously indicates the serious procedural consequences of assigning special evidentiary value to excerpts from banks' account books in civil cases. The circumstance mentioned by the Public Prosecutor-General, namely that a bank document might be used as evidence in a dispute with a consumer by a different entity than the bank which has issued the document, is irrelevant to the examination of the present case. However, in every case, presenting an excerpt from the account books of a bank as evidence in court will bring about the same legal effects in civil proceedings for a consumer that has been sued.

2. The assessment of conformity to the following higher-level norms for the review: Article 2, Article 20, Article 32(1), first sentence, and Article 76 of the Constitution.

2.1. The court referring the question indicated four higher-level norms for the review, pointing out that assigning the legal validity of official documents to excerpts from banks' account books in civil proceedings was inconsistent with:

– the principle of social justice, which was to be implemented by a democratic state ruled by law (Article 2 of the Constitution);

– the principle of a social market economy (Article 20 of the Constitution);

– the principle of equality (Article 32(1), first sentence, of the Constitution);

– the principle of the protection of consumers' rights (Article 76 of the Constitution).

In the first place, the Constitutional Tribunal analysed the assignment of special legal validity to bank documents as well as the arguments that might justify the character of the regulation.

In the Polish legal order, for the first time the evidentiary value of official documents was assigned to the account books, and excerpts from the books, of the Bank of Poland in 1924. This privilege was an exception, and was related to the role of the bank as an issuer.

The special evidentiary value of banks' account books and excerpts from those books was extended to include all banks, pursuant to Article 15 of the Decree of 25 October 1948 on the Reform of the Banking System (Journal of Laws - Dz. U. No. 52, item 412, as amended; hereinafter: the Decree on the Reform of the Banking System). It

should be noted that at the same time fundamental changes were introduced in the Polish banking sector. Banks that were established before 1 September 1939 went into liquidation on the basis of Article 1 of the Decree of 25 October 1948 on the Rules and Procedure for the Liquidation of Certain Banking Companies (Journal of Laws - Dz. U. No. 52, item 410, as amended). The Decree on the Reform of the Banking System, in its Article 1, provided for the functioning of state-owned banks, banks in the form of joint-stock companies and credit cooperatives. However, Article 20 of the Decree on the Reform of the Banking System provided for only two banks to be functioning in the form of joint-stock companies, namely the Bank of Poland and Bank Polska Kasa Opieki S.A. (the Polish Savings Bank). This entailed that, in practice, the state took over the banking sector, as all banking institutions became an element of the nationalised economy.

With the change of the political system in 1989, a fundamental transformation also began in the banking market. In the first place, nine regional branches of the National Bank of Poland were isolated and changed into state-owned commercial banks as well as it was possible to establish private banks. In 1992, there were already 98 banks in the form of joint-stock companies (cf. J. Żyżyński, "System bankowy w procesie transformacji", *Raport nr 52 Biura Studiów i Ekspertyz Kancelarii Sejmu*, Warszawa 1993). On-going changes in the banking sector are manifested by statistical data which suggest that in 2008 there were 645 banks operating in Poland, including 70 private banks in the form of joint-stock companies and 579 cooperative banks (see *Monitoring banków 2005-2008*, Główny Urząd Statystyczny, Warszawa 2009, p. 83). At present, there are only two state-owned banks: the National Bank of Poland and Bank Gospodarstwa Krajowego.

Enacted before the beginning of the transformation of the banking sector, the Banking Law of 1989 maintained the equal evidentiary value of bank documents and official documents, but it restricted that special privilege to banks which existed before the entry into force of the Law, i.e. before 10 February 1989 (Article 53(1) of the Banking Law of 1989). Pursuant to Article 9 of the Act of 6 March 1993 amending certain acts which regulate taxation and certain other acts (Journal of Laws - Dz. U. No. 28, item 127), the scope of the said privilege was extended to include all banks, regardless of their legal form and shareholder structure. The Banking Law of 1997, which is currently binding, repeats that solution, although it provides no reasons for maintaining the privilege that constitutes one of the relics of the state-run economy, despite the fact that the banking system has been transformed and now it has a free-market character. What needs to be emphasised is that already in 1993 the Polish Ombudsman, when justifying his application lodged with the Constitutional Tribunal in the case K 12/93, pointed out that extending the scope of the privilege to include all banks had led to the situation where: "(…) the state of affairs from the previous political system has been restored, when all banks played a double role i.e. as a party in contractual relations with customers and as the organs of financial and economic administration of the state, entitled to take actions that had legal effects on its customers". An expert opinion presented in the said case drew attention to an obvious contradiction between banking privileges and the system of law that was binding in Poland. Also, the President of the National Bank of Poland pointed out, in her letter to the Tribunal with regard to the case K 12/93, that special privileges granted to banks should be temporary in character, due to the fact that there were no institutions in the

system of law that would provide appropriate guarantees for actions undertaken by banks. In addition, also the doctrine critically assessed the fact of maintaining the privilege of assigning the legal validity of official documents to bank documents, and deemed that the privilege served to protect banks with the exclusion of customers' interests, which was contrary to the commenced process of transformation in the realm of public law (see Z. Leoński, "Glosa do orzeczenia TK z 16 maja 1995 r.", *Glosa* Issue No. 12/1995, p. 13).

2.2. From the point of view of the subject of the case, one should also pay attention to technical changes that have occurred recently as regards banking operations and the consequences thereof. Cashless transactions have become commonplace, and the activity of banks have become computerised, including their accounting systems. Article 13 of the Accounting Act provides for computerised bookkeeping, and regards digital accounting files as tantamount to traditional account books. This entails *inter alia* that bookkeeping is no longer conducted in a traditional paper form. The development of electronic banking leads to situations where banking operations made by customers are recorded far away from places where they requested them, namely in settlement centres, which additionally hinders the possibility of verifying or supervising the accuracy of entries in account books.

In the view of the participants in the proceedings, assigning special evidentiary value to bank documents is justified by the fact that banks are regarded as institutions evoking public trust. However, the Constitutional Tribunal states that such an attribute is not normative, and is related to the essence of banks' activity as they coordinate financial transactions, and thus are of significance to the functioning of the economic system of the state. The character of institutions of public trust does not arise from trust vested in bankers as a group of professionals, but stems from the perception of banks as institutions under the supervision of the state. Public authorities are obliged to guarantee diligent activity on the part of the banking sector, due to its significance for the economic system of the state and funds deposited in banks. For this particular reason, the state supervises both the process of establishing and functioning of banks. What is necessary to establish a bank is to meet requirements set out in detail in the Banking Law as well as to acquire authorisation (Article 30a of the Banking Law), and its entire activity is subject to supervision by the Polish Financial Supervision Authority in the forms and in accordance with the terms specified in the Banking Law and the Act of 21 July 2006 on the Supervision of the Financial Market (Journal of Laws - Dz. U. No. 157, item 1119 as amended). Banks are obliged to keep their books in accordance with special rules adjusted to the character of their activity, set out by the minister competent in the realm of public finance upon consulting the Polish Financial Supervision Authority, on the basis of Article 81(2)(8) of the Accounting Act. All these regulations manifest the legislator's concern with the proper functioning of banks as well as with maintaining the appropriate quality of services. Analogous forms of supervision are implemented by the Financial Supervision Authority as well as special accounting rules also apply to other entities operating on the financial market, such as: old-age pension funds (the regulation of the Minister of Finance of 24 December 2007 on special accounting rules for old-age pension funds, Journal of Laws - Dz. U. No. 247, item 1847), investment funds (the regulation of the Minister of Finance of 24 December 2007 on special accounting rules for investment funds, Journal of Laws -

Dz. U. No. 249, item 1859), brokerage houses (the regulation of the Minister of Finance of 28 December 2009 on special accounting rules for brokerage houses, Journal of Laws - Dz. U. No. 226, item 1824).

In his letter, the Public Prosecutor-General indicated that justification for the special privilege arising from Article 95(1) of the Banking Law was the protection of capital accumulated by banks in the form of deposits. However, the question of the protection of persons and entities that entrust their funds to banks, including consumers, constitutes a separate issue. The legislator provided for various instruments which are to lower the risk related to deposits. Article 105(4) of the Banking Law provides authorisation for the exchange of information subject to banking secrecy, *inter alia*, so as to determine the credibility of a party contracting with a given bank. This makes it possible to prevent banks from signing agreements with customers who are not credible. A bank, as a professional entity with on-going access to legal services, has a possibility of resorting to all institutions of civil proceedings which are universal in character, and its activity conducted in a diligent way requires the expeditious undertaking of legal measures for the purpose of recovering a debt.

In addition, the above arguments are not confirmed by the experience of countries which have a longer history of developing a banking system in the conditions of the market economy, restricted by the clause of a democratic state ruled by law, than Poland.

In Austria, account books and excerpts from those books are regarded as private documents in civil proceedings. Such documents are not assigned special evidentiary value, and when presented as evidentiary measures are subject to a judge's discretion.

In France, account books are regarded as private documents in civil proceedings. However, there are special solutions concerning the use of account books kept by entrepreneurs as evidence in civil proceedings, regardless of the type of economic activity. Account books have special evidentiary value. However, the said value is limited, depending on a person with regard to whom traders' account books are used as evidence in civil proceedings. Such special privileges are restricted solely to economic disputes, and thus account books may be presented in a dispute with another professional entity, and never a consumer. Nevertheless, they remain private documents, and they do not have the legal validity of official documents. The French law does not provide for any special legal presumption in the context of account books, leaving the assessment of evidence from such books at the discretion of a judge.

In Germany, in the case of civil proceedings, banks' account books and excerpts from such books are regarded as private documents, for they are not issued by the organs of public authority. The Law of 30 January 1877 on Civil Proceedings indicates that only documents issued in a prescribed form by a public authority within the scope of its competence constitute complete evidence of an event or circumstances set out in such document. Consequently, banks' account books have no special evidentiary value.

In Italy, the account books of entrepreneurs and excerpts from such books are regarded as private documents in civil proceedings. Official documents may be issued by a notary public or a public official. The Italian Civil Code stipulates that the account books of an entrepreneur constitute evidence of what has been stated therein, if they are used against the entrepreneur by a party to proceedings. Account books may be used by

entrepreneurs for evidentiary reasons to their advantage only in civil proceedings against another professional entity.

Drawing parallels to countries with a more developed market economy confirms the conclusion that the solution under assessment should be regarded as a relic of the state-run economy, which should not be linked with the character of banks.

Therefore, the non-normative attribute of an institution of public trust does not justify the possibility of introducing solutions which enable banks to acquire a privileged position in the economic system, in particular with regard to their customers with whom they have contractual relations. There is no doubt that, in order to preserve the security of the banking system, it is vital, *inter alia*, to equip banks with their own funds, guarantee high qualifications and ethic standards of their managerial staff, or provide a necessary system of guarantees for deposits, and not to create special regulations which introduce privileges.

In the view of the Constitutional Tribunal, it is unjustified to argue for the assignment of the legal validity of official documents to bank statements, due to the possibility of attesting documents by a bank instead of a notary public, which has been pointed out by the participants in the proceedings. Article 101 of the Act of 14 February 1991 – the Law on Notarial Services (Journal of Laws - Dz. U. of 2008, No. 189, item 1158, as amended; hereinafter: the Law on Notarial Services) provides for authorisation to be granted by the Minister of Justice to banks and the organs of local self-government in towns where there are no offices of notaries public, with regard to attestation performed by notaries public. Pursuant to the above authorisation, the Minister of Justice issued the regulation of 7 February 2007 on drafting certain attestation documents by the organs of local self-government and banks (Journal of Laws - Dz. U. No. 27, item 185). Pursuant to Article 1(2) of the said resolution, banks may attest documents authorising the receipt of money or other objects from those banks. However, attention should be drawn to the fact that this is a narrower scope of authorisation than the one granted to mayors of villages, as it pertains merely to the activity of banks alone. Hence, the solution makes the situation a little easier for the customers of banks, but it does not mean that, within that regard, banks acquire the normative status of subjects of public trust, which is assigned to notaries public on the basis of Article 2(1) of the Law on Notarial Services.

2.3. As it follows from the Banking Law, assigning certain bank documents with the legal validity of official documents is not the only power entrusted with banks. The participants in these review proceedings, the Marshal of the Sejm and the Public Prosecutor-General, made reference in their letters to the judgment of the Constitutional Tribunal of 26 January 2005, P 10/04 (OTK ZU No. 1/A/2005, item 7), which concerned the assessment of the constitutionality of the right to issue bank enforcement orders the scope of which comprised banking activities involving customers. In the indicated judgment, the Constitutional Tribunal deemed that Article 96(1) in conjunction with Article 97(1) of the Banking Law was consistent with Article 45(1) in conjunction with Article 76 of the Constitution as well as is not inconsistent with Article 2 of the Constitution.

The possibility of issuing bank enforcement orders by banks triggers the commencement of enforcement proceedings without carrying out court proceedings aimed at ordering a certain amount ensuing from liabilities towards a given bank. Although the power to issue bank enforcement orders is a kind of privilege in its character, similarly to assigning special evidentiary value to banks' account books, still these two solutions of the Banking Law may not be compared. A bank enforcement order makes it possible to conduct enforcement proceedings without a court order issued as to the merits of a given case. However, it constitutes one of legally admissible kinds of enforcement orders, apart from court orders. Civil Proceedings (Article 777(1) point 4 and 5 of the Code of Civil Procedure) provides *inter alia* for voluntary subjection to enforcement, on the basis of a prior statement submitted by a debtor in the form of a notary deed, as a generally applicable measure. The essence of the privilege granted to banks is the lack of obligation to preserve the form of a notary deed for statements made by the debtor. The bank enforcement order may constitute the basis of enforcement, after receiving an enforcement clause, only in the case where a bank's customer previously submits the relevant statement about subjection to enforcement. Such a statement must include both the amount of the debt on the basis of which the bank is to issue a bank enforcement order, as well as a time-limit within which the bank may issue an enforcement clause. This means that the customer of a bank expresses consent to the enforced collection of the debt in the case where s/he does not fulfil contractual obligations, without the necessity to resolve claims in court proceedings. Thus, when signing a loan agreement, the customer is aware of the fact that the recovery of the debt is facilitated for the bank by means of the bank enforcement order. However, assigning special evidentiary value to excerpts from banks' account books occurs *ex lege*, irrespective of the will and knowledge of subjects using banking services, including also consumers.

Since the judgment of 26 January 2005 concerns a different institution regulated in a separate provision of the Banking Law, it may not affect the answer to the legal question. Moreover, there is no possibility of comparing two separate rights granted to banks or applying the arguments from the judgment in the case P 10/04 to the present case by way of analogy.

2.4. The basic allegation raised by the court referring the question concerns the weakening of the position of consumers in civil proceedings, which stems from the fact that excerpts from banks' account books have been assigned with the legal validity of official documents, i.e. it concerns an infringement of the principle of equality.

In the present case, the principle of equality must be referred to the position of parties to civil proceedings, as the subject of the review conducted by the Tribunal is to assign banks' account books with special evidentiary value in such proceedings.

The vital implication of the principle of equality, expressed in Article 32(1) of the Constitution, is the requirement that all subjects of rights and obligations sharing an essential common characteristic are to be treated equally, as well as the inadmissibility of either favouring or discriminating against any of them.

The jurisprudence of the Tribunal indicates that guaranteeing the principle of equality in civil proceedings consists in shaping the rights and obligations of the parties to

the proceedings in an identical way, which is understandable due to, for instance, different procedural roles assumed by a plaintiff and a defendant. To meet the requirement arising from Article 32(1) of the Constitution is to guarantee "the equality of arms" to the parties to the proceedings (cf. the judgment of the Constitutional Tribunal of 12 December 2006, Ref. No. P 15/05, OTK ZU No. 11/A/2006, item 171 and the jurisprudence cited therein). As it was pointed out by the Constitutional Tribunal in the judgment of 19 February 2003, ref. no. P 11/02 (OTK ZU No. 2/A/2003, item 12): "civil-law disputes arising from legal relations based on the principle of equivalence should be examined in court proceedings based on the principle of equality of parties".

Legal scholars point out that the principle of equality outside of the regulation of Article 32 of the Constitution is regarded as one of human rights, which is subject to protection on the basis of both the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993, No. 61, item 284, as amended) as well as the law of the European Union. Moreover, the principle of equality of parties constitutes one of the most important principles of civil proceedings, regarded as the fundamental principles governing the proceedings (see T. Ereciński, K. Weitz, "Prawda i równość w postępowaniu cywilnym a orzecznictwo Trybunału Konstytucyjnego", [in:] *Orzecznictwo Trybunału Konstytucyjnego a Kodeks postępowania cywilnego*, Warszawa 2010, p. 46 and the subsequent pages).

In order to assess the constitutionality of Article 95(1) of the Banking Law, within the scope challenged by the court referring the question, it is necessary to indicate the consequences of assigning special evidentiary value to excerpts from banks' account books as well as the principles of distributing the burden of proof in civil proceedings. With regard to excerpts from banks' account books submitted as evidence in civil proceedings, Article 244(1) and Article 252 of the Code of Civil Procedure should be applied accordingly, which has been pointed out by the court referring the question. This means that in order to prove the existence of a debt that the bank is trying to recover and the amount thereof, without the need to indicate a purpose of the debt or circumstances in which the debt has arisen. Following from Article 244(1) of the Code of Civil Procedure, the presumption of credibility of a bank document entails changing the principle of burden of proof, set out in Article 6 of the Civil Code and Article 232 of the Code of Civil Procedure. Pursuant to Article 6 of the Civil Code, the burden of proof relating to a fact shall rest on the person who attributes legal effects to that fact. And in accordance with Article 232 of the Code of Civil Procedure, parties shall be obliged to indicate proof of facts to which they attribute legal effects. Therefore, in civil proceedings, in principle, it is the plaintiff that needs to prove the existence of the debt which is to be recovered, circumstances in which the debt has arisen and the amount of the debt.

Legal presumptions related to an official document entail introducing an exception to the above principle, for it is the person that negates the validity of such a document, intending to overturn the presumption related thereto, should produce evidence to the contrary. Consequently, the plaintiff is free from the obligation to prove, on general terms, circumstances which have been entered in banks' account books. By contrast, a consumer who has been sued must produce evidence to the contrary. As the doctrine of civil proceedings indicates, the essence of such proof is to determine false information in the

content of bank documents. This is more difficult than producing evidence to the contrary, which consists in indicating that a certain assertion has not been proved by the party with whom *onus probandi* lies (see H. Dolecki, *Ciężar dowodu w polskim procesie cywilnym*, Warszawa 1998, p. 126 and the subsequent pages.). Although from the legal point of view, consumers are free to resort to any evidential measures, in the case of financial claims – and only such are fall within the scope of the present case – possible additional efforts to prove one's arguments are usually illusory. It has been stated in the doctrine of civil proceedings that the presumption of accuracy of an official document that it is the most credible evidential measure in civil proceedings, which most frequently is of decisive significance for a given court (cf. *Kodeks postępowania cywilnego. Komentarz, Część pierwsza. Postępowanie rozpoznawcze,* T. Ereciński (ed.), Vol. 1, Warszawa 2009, p. 706). Also, the scholars of banking law draw attention to the fact that assigning the legal validity of official documents to a document has significant practical consequences, as such a document is regarded as "(...) the so-called complete evidence, which limits or even rules out the application of the principle of free assessment of evidence" (L. Mazur, *Prawo bankowe. Komentarz*, Warszawa 2008, p. 563 and the subsequent pages).

Moreover, it may not be overlooked that, in the case under examination, we deal with a privilege the application of which concerns the relation between a highly professional entity – the bank and an unprofessional client i.e. a consumer.

Consequently, it should be stated that, by means of the regulation in Article 95(1) of the Banking Law with effect which that provision brings about in civil proceedings, the legislator has introduced differentiation in the situation of parties to a court dispute, aggravating the legal situation of consumers. Indeed, in order to dismiss the plaintiff's claims, s/he has to overturn the presumption related to the legal validity of official documents which is assigned to excerpts from banks' account books.

However, it should be taken into consideration that, as it follows from the previous jurisprudence of the Constitutional Tribunal, not in every case the different regulation of the situation of addressees who share a certain common characteristic has to imply the infringement of Article 32(1) of the Constitution. What becomes indispensable is the assessment of the adopted criterion for differentiation. In order to answer the question whether a given criterion may constitute the basis of differentiating among the subjects of rights and obligations that share an essential common characteristic, the following should be determined: 1) is the criterion rationally linked with the purpose and content of a given regulation; 2) does the importance of interest which differentiation is to serve remains in adequately proportionate to the significance of interests which are infringed as a result of the introduced differentiation; 3) is there a link between the criterion for differentiation and other constitutional values, principles or norms which justify the different treatment of similar subjects?

When carrying out assessment in the light of the principle of equality, the admissibility of undermining the position of consumers in civil proceedings by means of assigning the legal validity of official documents to excerpts from banks' account books, one should state that there is no sufficient justification for such a solution, taking into account the purpose of such a regulation.

Pursuant to Article 244(1) of the Code of Civil Procedure, special evidentiary value is granted only to official documents, i.e. those drafted by the organs of public authority and other state organs. A clear intention on the part of the legislator is to link, in the context of civil proceedings, the legal validity of official documents with the realm of the legal effect of the state's action and the fulfilment of public duties.

While evaluating the character of banks from that point of view, it should be stated that these are legal entities which have power to carrying banking operations (Article 2 of the Banking Law). A legal definition of banking operations, set out in Article 5 of the Banking Law, clearly indicate that the said operations do not constitute public duties. Operations carried out by banks do not fall within the scope of exercising public authority, and their attribute of an institution of public trust is of non-legal dimension in their case, as it has been pointed out in point 2.2, and therefore it may in no way be translated into sheer judicial realm i.e. court proceedings. In this case, the Constitutional Tribunal has found no rational justification for assigning the legal validity of official documents to excerpts from banks' account books, which results in a shift in distribution of the burden of proof with regard to consumers who have merely used banking services. The effect of Article 95(1) of the Banking Law is that one of the parties to a legal transaction which is of a civil-law character, being the owner of banking services, gains a privileged position in the event of a court dispute.

As it has been indicated above, the consequences of assigning the legal validity of official documents to excerpts from banks' account books in civil proceedings burdens consumers. The said privilege entails the legal situation of consumers is additionally weakened in civil proceedings in the case of a dispute with a professional entity. Assigning the legal validity of official documents to excerpts from banks' account books serves the interests of the bank in relations with its customers.

The above findings reveal that assigning the legal validity of official documents to excerpts from banks' account books leads to a particularly difficult procedural situation of a consumer – the defendant in civil proceedings. The assessment of constitutionality in the context of Article 95(1) of the Banking Law in conjunction with Article 244(1) and Article 252 of the Code of Civil Procedure depends on whether the said special privilege of the bank is justified in constitutional values or principles to the extent that would justify the infringement of the principle of equality of parties, which is fundamental to civil proceedings, in conjunction with the principle of social justice, arising from Article 2 of the Constitution.

Also, the court referring the question notes that Article 95(1) of the Banking Law may infringe Article 2 of the Constitution. Thus, it is vital to recall the views expressed in the jurisprudence of the Constitutional Tribunal as regards relations between the principle of equality and the principle of social justice. The Constitutional Tribunal has emphasised that those principles are closely linked, and they even overlap. The principle of social justice requires that subjects of rights and obligations sharing an essential common characteristic should be treated equally. Moreover, introducing differentiation in the situation of subjects of rights and obligations may be deemed admissible, in the light of the principle of equality, when this serves the implementation of the principle of social justice

(cf. the judgment of 6 May 1998, Ref. No. K 37/97, OTK ZU No. 3/1998, item 33; the judgment of 28 Match 2007, Ref. No. K 40/04, OTK ZU No. 3/A/2007, item 33).

What constitutes an additional facet of the constitutional issue in the present case is the assessment of fairness of the regulation set out in Article 95(1) of the Banking Law.

It is stressed in the jurisprudence of the Constitutional Tribunal that: "a democratic state ruled by law is not a state which does not implement the principle of justice, construed at least as pursuing balanced social relations and refraining from giving rise to unjustified and objectively groundless privileges for selected groups of citizens" (the judgment of 12 April 2000, Ref. No. K 8/98 (OTK ZU No. 3/2000, item 87)). Hence, what also contradicts the principle of social justice, derived from the clause of a democratic state ruled by law, is to introduce differentiation into the legal situation of certain subjects, which results in their unequal treatment.

In its jurisprudence, the Constitutional Tribunal has also specified the social functions of a fair court procedure. The procedure is of special significance for enhancing citizens' trust in justice and their assurance that their rights are respected (see the judgment of 21 July 2009, Ref. No. K 7/09, OTK ZU No. 7/A/2009, item 113 and the jurisprudence cited therein). The jurisprudence of the Constitutional Tribunal indicates that the infringement of the principles of a fair procedure may lead to non-compliance with Article 2 of the Constitution (see the judgment of 19 February 2008, Ref. No. P 49/06, OTK ZU No. 1/A/2008, item 5).

The solution introduced by Article 95(1) of the Banking Law results in enhancing the already existing advantage of a professional institution which has a strong position on the market with regard to consumers. As it has been pointed out in the doctrine, documents referred to in Article 95(1) of the Banking Law are prepared by banks with regard to their business and their interest, and they concern persons who use banking services (see A. Janiak, *Przywileje bankowe w prawie polskim*, Kraków 2003, p. 145 and the subsequent pages). For these reasons, the Constitutional Tribunal concludes that assigning the legal validity of official documents to excerpts from banks' account books contradicts the principle of social justice, arising from Article 2 of the Constitution.

2.5. Another higher-level norm for the review indicated by the court referring the question is Article 76 of the Constitution, which regards the protection of consumers. The protection of the rights of consumers, users and lessees ensues from the assumption that the market position of those subjects is weaker than the position of entrepreneurs. The constitution-maker took it for granted that the consumer was a weaker party to a legal transaction and therefore it required protection, i.e. certain rights which would make the positions of contracting parties at least relatively equal. The instruments for protecting consumers that arise from the Constitution are developed in the Polish law also under the influence of legal solutions provided for in the European Union. The previous jurisprudence of Tribunal indicates that the said protection is not aimed at favouring consumers, but at devising legal solutions which truly effectuate the principle of equivalence of parties to civil-law transactions. Article 76 of the Constitution is regarded as a guideline for the legislator, but it is a source of subjective rights. The task of the legislator is to specify, in a statute, the forms and means of protecting consumers. The

requirement arising from Article 76 of the Constitution is applicable to all legal regulations concerning consumers, which should not aggravate natural disproportion between their legal position and the position of professional entities and, as it has been indicated above, they are rather to eliminate the differences.

In the judgment of 21 April 2004, ref. no. K 33/03 (OTK ZU No. 4/A/2004, item 31), the Constitutional Tribunal stated that: "the protection of consumers is not patronizing and paternalistic in character, but is aimed at protecting the interests of a weaker participant in the market whose knowledge and sense of direction are limited, in comparison with a professional partner (a salesperson, a provider of services.

First of all, one should bear in mind that in civil proceedings a consumer who is being sued has a weaker procedural position, as s/he is in a dispute with a professional entity. Even if the consumer is assisted by a counsel, s/he still has considerably fewer possibilities of producing proof to confirm his/her assertions. In such a situation, assigning the evidentiary value of official documents to excerpts from banks' account books in civil proceedings conducted against a consumer is inconsistent with Article 76 of the Constitution. The plaintiff making a claim against the consumer does not have to prove, on general terms, a reason why a debt has arisen and the amount there of the debt; it suffices to present the court with an excerpt from a bank's account books which does not contain detailed information. Although in accordance with Article 252 of the Code of Civil Procedure the consumer is no deprived of the possibility of challenging the accuracy of an official document, s/he should produce evidence to the contrary. It should be noted that providing such proof may be difficult due to the fact that, unlike in the case of banks and entrepreneurs, consumers have no obligation to keep account books or to carry out transactions in a cashless form by means of a bank account. This results in weakening the procedural position of consumers, and consequently it may lead to the lack of possibilities of defence or even to a court ruling ordering an amount that is inadequate to an actual debt.

In the situation under analysis, it does not suffice to rely on the idea of the protection of consumers by providing accurate and exhaustive information. Such a regulation has been provided for in Article 4(2)(12) of the Consumer Credit Act of 20 July 2001 (Journal of Laws - Dz. U. No. 100, item 1081, as amended). What is to guarantee the protection of the rights of a non-professional subject is the bank's obligation to present, still before concluding an agreement, all statutory consequences of failing to fulfil contractual obligations. In this case, the protection by means of information does not appear to fulfil its function, as it does not balance the privilege of the bank. It may, at the most, lead to a decision not to conclude a given agreement by a consumer, being aware of the privileges granted to the bank in the event of a court dispute.

2.6. Another higher-level norm for the review pointed out by the court referring the question in the present case is Article 20 of the Constitution. The said principle shapes the economic system of the Republic of Poland and indicates the direction in which the state is heading in that regard, pointing out the fundamental elements of social market economy: freedom of economic activity, private property as well as the dialogue and cooperation of social partners. Privileging the position of professional entities conducting economic

activity with regard to consumers who use services provided by such institutions, in the opinion of the Tribunal, contradicts the essence of social market economy.

Taking into account the scope of adjudication concerning consumers, the indicated higher-level norm for the review is inadequate. In the present case, the constitutional issue is not the fact that banks have been granted a special right, but the effects of that regulation with regard to consumers. Issues of mutual relations between the bank and its non-professional customer may be considered in the context of infringing Article 76 of the Constitution. By contrast, the assessment of the impact of assigning special evidentiary value to bank documents in relations between entrepreneurs falls outside the scope of the present case. The court referring the question has not made it probable that there is a link between Article 95(1) of the Banking Law and the principle of social market economy, expressed in Article 20 of the Constitution.

3. The effects of the judgment.

The Constitutional Tribunal has deemed that what is inconsistent with the indicated higher-level norms for the review is only part of the legal norm assigning the legal validity of official documents to banks' account books and excerpts from the books in evidentiary proceedings in civil cases, conducted with regard to consumers, where Article 244(1) and Article 252 of the Code of Civil Procedure are applicable thereto. This follows from the character of the review commenced by way of question of law and consequently from the limited scope of adjudication. Article 95(1) of the Banking Law contains broader normative content than the content with regard to which the court referring the question has raised doubts. Due to being bound by the scope of the question of law, the Tribunal has adjudicated that Article 95(1) of the Banking Law is partly unconstitutional. This entails that that other types of declarations and statements issued by banks within the scope of rights and obligations arising from banking operations as well as collaterals for the bank do not lose their legal validity of official documents and the significance that has been assigned to those documents by the legislator in particular branches of law (e.g. civil, administrative or criminal law).

Due to the circumstances indicated above, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

Dissenting Opinion
of Judge Wojciech Hermeliński
to the Judgment of the Constitutional Tribunal
of 15 March 2011, Ref. No. P 7/09

I submit this dissenting opinion to the judgment of the Constitutional Tribunal of 15 March 2011, issued in the case P 7/09, for – in my opinion – the review proceedings in the case should have been discontinued, pursuant to Article 39(1)(1) 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), on the grounds that issuing a ruling was not admissible.

The well-established jurisprudence of the Constitutional Tribunal provides for the Tribunal to discontinue review proceedings at any stage, even after the close of a hearing. Throughout the proceedings until a ruling is issued, the Tribunal is obliged to examine whether there occur no negative procedural premisses which require the discontinuation of the proceedings (see e.g. the decision of the Constitutional Tribunal of 14 December 2004, Ref. No. SK 29/03, OTK ZU No. 11/A/2004, item 124; the decision of the Constitutional Tribunal of 5 December 2001, Ref. No. K 31/00, OTK ZU No. 8/2001, item 269).

Therefore, an issue which needs to be resolved in the first place is to determine whether the question of law in the present case meets the formal requirements for the admissibility of such questions. It is an answer to this question that determines whether it is possible to conduct a substantive review of the case and issue a judgment.

What obliges the Tribunal to examine the formal premisses of the question of law is the character of constitutional review conducted with regard to specific cases and commenced by way of questions of law. Pursuant to Article 193, *in fine*, of the Constitution, the content of which is repeated in Article 3 of the Constitutional Tribunal Act, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or statutes, if the answer to such a question of law will determine an issue currently before the court. Article 32 of the Constitutional Tribunal Act specifies formal requirements which should be met by a question of law.

Thus, Article 193 of the Constitution sets forth three premisses which jointly determine the admissibility of referring a question of law to the Constitutional Tribunal:

a) a premiss concerning the scope ratione personae – in accordance with which a question of law may only be referred by a court, defined as a state organ of the judiciary, being separate and independent from the legislative and executive branches of government;

b) a premiss concerning the scope ratione materiae – within the meaning of which a question of law may solely concern the assessment of conformity of a normative act to the Constitution, ratified international agreements or statutes;

c) a functional premiss – which justifies referring a question of law only when an answer to the question will determine the resolution of a case pending before the court referring the question. The last-mentioned requirement is made more specific by Article 32(3) of the Constitutional Tribunal Act, which stipulates that the question of law

shall also indicate the scope within which an answer to the question may affect the resolution of the case in relation to which the question has been asked (cf. the decisions of the Constitutional Tribunal of: 29 March 2000, Ref. No. P 13/99, OTK ZU No. 2/2000, item 68; 12 April 2000, Ref. No. P 14/99, OTK ZU No. 3/2000, item 90; 10 October 2000, Ref. No. P 10/00, OTK ZU No. 6/2000, item 195; 27 April 2004, Ref. No. P 16/03, OTK ZU No. 4/A/2004, item 36; 6 February 2007, Ref. No. P 33/06, OTK ZU No. 2/A/2007, item 14). It should be stressed that review proceedings before the Tribunal which are commenced by a question of law referred by a court constitute the review of a normative act (a provision of law) and are related to a specific case pending before the court. "When accepting a question of law for consideration, the Constitutional Tribunal should examine whether its adjudication on the constitutionality of the provision will affect the resolution of the case. This means that there needs to be a correlation between an answer to the question of law and the resolution of the case pending before the court that has referred the question. However, it is the task of the court referring the question to prove the existence of the correlation (cf. e.g. the decisions of the Constitutional Tribunal of: 15 May 2007, Ref. No. P 13/06, OTK ZU No. 6/A/2007, item 57; 22 October 2007, Ref. No. P 24/07, OTK ZU No. 9/A/2007, item 118; as well as the judgment of 30 May 2005, Ref. No. P 7/04, OTK ZU No.5/A/2005, item 53)" - this is how the Tribunal explained the essence of the functional premiss of a question of law in its decision of 27 February 2008, ref. no. P 31/06 (OTK ZU No. 1/A/2008, item 24).

Provisions do not specify a time-limit that would restrict the possibility of examining the admissibility of a question of law by the Tribunal, in particular there are no formal obstacles to ruling the question to be inadmissible at the stage of a hearing.

In my view, the question of law referred by the District Court in Toruń meets only two out of the three requirements for the admissibility of the substantive review of the question, arising from Article 193 of the Constitution, i.e. the premisses concerning the scope ratione personae and ratione materiae.

However, the functional premiss of the admissibility of a substantive review in the context of the referred question of law has not been fulfilled in the present case. When specifying a constitutional review conducted by the Constitutional Tribunal in the course of review proceedings commenced by way of question of law as a review with regard to a specific case, and not as an abstract review, the legislator has, in Article 32(3) of the Constitutional Tribunal Act, obliged a court referring the question to indicate the scope within which an answer to the question may affect the resolution of the case in relation to which the question has been asked. The essence of the obligation introduced in Article 32(3) of the Constitutional Tribunal Act entails that the court referring the question should specify how a potential ruling declaring a given provision indicated as the subject of the question of law to be inconsistent with the Constitution or a ratified international agreement will affect particular proceedings pending before the court referring the question. In accordance with the well-established line of jurisprudence, it is the court referring the question of law to the Constitutional Tribunal that needs to prove the said correlation (see the decisions in the cases: P 13/99, P 10/00, P 16/03, P 13/06, as well as the judgment of 30 May 2005, Ref. No. P 7/04, OTK ZU No. 5/A/2005, item 53). However, the court referring the question has not explained, in a sufficient way, to what

extent an answer provided by the Constitutional Tribunal to the referred question, whether ruling the challenged provision to be constitutional or unconstitutional, will affect the substantive examination of the case pending before the said court.

The statement of reasons for this judgment, on page 10, makes a brief mention of the fulfilment of the functional premiss, which reads as follows: "The consequences of applying Article 95(1) of the Banking Law, in conjunction with Article 244(1) and Article 252 of the Code of Civil Procedure, will affect the resolution of the case pending before the court referring the question, since by assigning the legal validity of official documents to excerpts from banks' account books, they shift the distribution of the burden of proof. The presumption of accuracy of an excerpt from the account books of a bank may determine the outcome of a trial, taking into account Article 234 of the Code of Civil Procedure, which indicates that the court is bound by legal presumptions. In the case pending before the court referring the question, an excerpt from the account book of the bank constitutes the evidence of a debt and the amount of the debt that the bank is trying to recover."

The well-established and extensive jurisprudence of the Constitutional Tribunal concerning the formal premisses of questions of law, and in particular the functional premiss, does not allow one to accept such a laconic and meaningless statement that in the course of proceedings, in the context of which the present question of law has been raised, the plaintiff used an excerpt from its account books. The fulfilment of the obligation to indicate the scope within which an answer to the question may affect the resolution of the case with relation to which the question has been asked, as provided for in Article 32(3) of the Constitutional Tribunal Act, may not consist in repeating the general statutory formulation (cf. the judgment of the Constitutional Tribunal of 7 November 2005, Ref. No. P 20/04, OTK ZU No. 10/A/2005, item 111). Nor may it amount merely to stating that "resolving this issue (...) is of significance in the case under discussion" (cf. the judgment of the Constitutional Tribunal of 7 October 2008, Ref. No. P 30/07, OTK ZU No. 8/A/2008, item 135 as well as M. Wild, *Wymagania formalne pytań prawnych w praktyce orzeczniczej Trybunału Konstytucyjnego,* Instytut Wymiaru Sprawiedliwości, Warszawa 2010, p. 24 and the subsequent pages).

In my view, the court referring the question failed to exhaust all possibilities of scrutinising the case in the examination proceedings. A thorough analysis of court files (Ref. No. I C 486/08) has revealed that during the proceedings, including also the hearing, there was no necessity to refer to the presumption arising from Article 95 of the Act of 29 August 1997 – the Banking Law (Journal of Laws - Dz. U. of 2002 No. 72, item 665, as amended; hereinafter: the Banking Law) in conjunction with Article 244 of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended). Indeed, this was not requested by any of the parties, and the bank being the petitioner (and later on the plaintiff), in its petition for a payment order as well as in the subsequent procedural letters (see e.g. the letter of 19 August 2008), clearly indicated that its claim was based on Article 485(3) of the Code of Civil Procedure, which provided that a court had an option of issuing a payment order in a situation where a bank made payment claims on the basis of an excerpt from the bank's account books, and not on the basis of Article 485(1)(1) of the Code of Civil Procedure, which required a court to

issue a payment order if a claim was made on the basis of official documents. Thus, no alternative emerged which the court – in accordance with the supplementary statement of reasons for the question of law, dated 19 January 2009 – was supposed to face, namely: if Article 95 of the Banking Law was constitutional, then the case would be won by the plaintiff; however if the challenged provision was inconsistent with the Constitution, the case would be won by the defendant (the Public Prosecutor-General, in his letter on page 17, appears to aptly consider such a correlation to be "an *a priori* assumption, adopted in the abstract and in isolation from the particular case").

Due to evidence from the court files, there were no obstacles to continuing evidentiary proceedings in order to further examine the case, for example by questioning the representative of the plaintiff, pursuant to Article 299 of the Code of Civil Procedure, in the context of the amount of the claim and the basis thereof (a debit balance or a bank loan), thus at the same time requiring his/her presence at the hearing, in accordance with Article 216 of the Code of Civil Procedure. Additionally, pursuant to Article 232, second sentence, of the said Code, which stipulates that a court may consider evidence that has not been indicted by a party, the court had the right to request documentation presenting all operations carried out in the defendant's bank account which resulted in the debt, or the court had the right to designate an expert for the purpose of determining the amount of the defendant's debt. Indeed, the defendant does not deny – as the court indicated in the statement of reasons for the question of law (page 2 of the question: "Indeed, she did not prove that she had not been the plaintiff's debtor) – that she has a legal relation with the bank and a potential debt, but she raises doubts as to the amount of the debt and the basis thereof (see the minutes from the hearing of 5 June 2008). Undeniably, the court did not consider the gathered (incomplete) evidence on the basis of Article 233(1) of the Code of Civil Procedure. The fact that the defendant's attorney was passive in that regard was no obstacle for the court to produce the above evidence *ex officio*. Hence, there were no obstacles for the court to resolve the case on its own, on the basis of the gathered evidence. Therefore, Article 95 of the Banking Law and Article 244 of the Code of Civil Procedure were of no relevance in that context.

What clearly follows from the above is that the court had the right to take initiative in gathering evidence, although the said initiative was subject to restriction. The Supreme Court has emphasised a number of times that "in special cases, the court has jurisdiction to admit evidence which has not been indicated by any of the parties (solely with regard to crucial and disputable circumstances that the parties make allegations about) if, on the basis of the court's assessment (which is objective and verifiable on appeal), evidence gathered in the course of proceedings was insufficient to resolve a given case" (cf. the statement of reasons for the judgment of the Supreme Court of 24 October 1996, Ref. No. III CKN 6/96, OSNC No. 3/1997, item 29; see also the judgment of the Supreme Court of 15 September 2006, Ref. No. I PK 97/06, OSNP No. 17-18/2007, item 251, mentioned on p. 28 of the written statement submitted by the Sejm). Such a special case, as referred to by the Supreme Court, has occurred in the present context, if one takes into account doubts that have arisen in the course of the proceedings as to the basis and amount of the bank's claim, which have additionally been increased by imprecise and contradictory information provided in the procedural letters of the bank.

What follows from the court files is that the bank only formally used evidence in the form of an excerpt from an account book, submitting it among other evidence aimed at supporting the bank's claim. Apart from the excerpt, the bank enclosed, in its petition for a payment order, a copy of a bank account agreement concluded with the defendant and a copy of a document terminating the bank account. Moreover, in the course of the examination proceedings, the bank submitted the following to be included in the court files: a copy of the defendant's application for a bank account, a copy of an agreement to grant the defendant a credit limit, a document terminating the agreement to grant the defendant a credit limit, as well as the defendant's request to the bank to allow her pay the debt in instalments and to cancel accrued interest (which contradicts) the thesis presented by the court referring the question that, allegedly, the defendant denied that there was a debt). Therefore, it follows from the above that "regular" examination proceedings were conducted before the court referring the question and that they were not restricted by the rigour of an official document.

As it has been emphasised above, the plaintiff requested that a payment order be issued, pursuant to Article 485(3) of the Code of Civil Procedure, which stipulates that a court has an option of issuing a payment order on the basis of an excerpt from the bank's account books. In the opinion of some scholars (cf. A. Nowak, "Uprzywilejowanie wierzytelności bankowych w postępowaniu nakazowym", *Monitor Prawniczy*, 2001, No. 13, p. 1185 and the subsequent pages), a comparison between the content of Article 485(1)(1) and Article 485(3) of the said Code leads to the conclusion that, in the context of injunctive relief proceedings, excerpts from account books have the evidentiary value of one of numerous private documents. According to another view (presented by A. Januchowski, "Wyciąg z ksiąg funduszu sekurytyzacyjnego jako podstawa wydania nakazu zapłaty w postępowaniu nakazowym"*, Palestra* 2009, Issue No. 7-8, p. 94 and the subsequent pages), an excerpt from account books has the evidentiary value of an official document in civil proceedings, whereas in injunctive relief proceedings its value – as determined by the legislator – is lower than that of other official documents and documents of the value of official documents. Thus, it is even more difficult to argue that the bank in any way "used" an official document, as referred to in Article 485(1) of the Code of Civil Procedure, and definitively the bank did not use it in a substantive way throughout the evidentiary proceedings. Therefore, the court referring the question was faced with no dilemma here, despite its attempts to persuade the Tribunal that it was otherwise. In such a situation, the obligation of the court was to continue the evidentiary proceedings, whereas – for some inexplicable reasons – the court refrained from further action which would be obvious from the point of view of logic and from subsequent examination which of the parties was right. Since the plaintiff had petitioned for the issue of a payment order on the basis of Article 485(3) of the Code of Civil Procedure, the court could, but did not have to, consider the petition (which in fact it did by holding a hearing) and the alternative indicated by the court referring the question, which allowed no other option, would not appear.

Consequently, the question of law was referred to the Tribunal prematurely. Indeed, the court had the possibility of resolving the dispute on its own, applying the provisions of the Code of Civil Procedure accordingly, including those on evidentiary proceedings. This

is emphasised by the Public Prosecutor-General in his written statement (p. 17), where he argues that one might speak of the existence of a functional premiss only when the defendant failed to refute the accuracy of the excerpt from account books presented by the plaintiff. Such a situation could, for instance, take place if the bank, when petitioning for the issue of a payment order, had supporting its claim by referring to the above-mentioned Article 485(1) of the Code of Civil Procedure, which requires the court to issue a payment order on the basis of official documents. However, the plaintiff – as it seems consciously – relied on Article 485(3) of the said Code, which stipulates that a court has an option of issuing a ruling on the basis of submitted excerpts from banks' account books. Therefore, and this should be emphasised, it was even more so inapt for the court referring the question to present the thesis that taking into consideration an excerpt from account books in the case pending before the said court unambiguously and exclusively affects the resolution of the dispute.

In my view, the judgment issued in the present case, accepted by a majority of the bench, constitutes inadmissible abstract adjudication, which is in no way related to the resolution of the case pending before the court referring the question.

The above circumstance that the functional premiss has not occurred entails that the review proceedings need to be discontinued on the grounds that issuing a ruling is inadmissible. However, it seems necessary to indicate a circumstance which, even if does not pose an obstacle to substantive adjudication, at least requires that the effectively broad scope of adjudication, going beyond the intentions of the court referring the question, be narrowed down.

In my opinion, the scope of the operative part of the judgment should have been narrowed down to disputes where a consumer's opponent is a bank which acts only as a party initiating civil proceedings, thus the objective of the court referring the question would have been achieved fully. Indeed, the intention of the court is to eliminate the excessively privileged position of banks in relation to their consumers (in the case I C 486/08 pending before the court referring the question, the dispute is between the bank and the consumer), by depriving an excerpt from account books, used by the bank with regard to the consumer, of its evidentiary value equivalent to that of an official document. In the light of the operative part of the judgment formulated by the majority of the bench, an excerpt from bank account books ceases to have the legal validity of an official document in virtually all types of civil proceedings, regardless of the fact whether such a document is used in civil proceedings with regard to a consumer, or whether a consumer uses it with regard to another party, including another consumer.

It appears that there is no reason why consumers should be deprived of such a privilege which makes their position in court proceedings more equal to that held by the bank. Such formulation of the operative part of the judgment would correspond to the scope of the allegation in the present case. As it has been indicated above, in the case with regard to which the question of law was referred, the bank as the plaintiff is in dispute with the consumer. Therefore, only within the scope of using an excerpt from the account books of a bank in civil proceedings where the bank as the plaintiff is in dispute with a given consumer is an answer to the said question of law relevant to the resolution of the case pending before the court referring the question.

Therefore, the Public Prosecutor-General was right to emphasise in his statement (p. 12) that: “(...) there are however no obstacles for the defendant to also resort to use evidence in the form of a bank document in the course of civil proceedings [cf. Article 248 of the Code of Civil Procedure], thus benefiting from the special value of such evidence, and the presumptions arising therefrom”.

The above-indicated reasons have made it necessary to submit this dissenting opinion.