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**SELECTED RULINGS
OF THE POLISH
CONSTITUTIONAL TRIBUNAL
CONCERNING THE LAW
OF THE EUROPEAN UNION
(2003-2014)**



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INTRODUCTION

1. In this volume, the reader will find a selection of rulings issued by the Constitutional Tribunal of the Republic of Poland relating to Poland's membership in the European Union and the place of EU law in the Polish legal order. The subject-matter has been recurrent in the jurisprudence of the Tribunal and was addressed in a considerable number of rulings. The rulings included here may be regarded as the most important and characteristic. They present issues that have been raised before the Polish constitutional court in the European context.

2. To begin with, a few facts should be mentioned about the powers of the Constitutional Tribunal. This will facilitate the reading of the rulings included in this collection. What constitutes the legal basis of the Tribunal's powers is a number of provisions of the Polish Constitution of 2 April 1997 and the Constitutional Tribunal Act of 1 August 1997. The relevant provisions of the Constitution have been included at the end of this volume.

The basic task of the Constitutional Tribunal is to adjudicate on the hierarchical conformity of legal norms within the scope set out in Article 188 of the Constitution. The Tribunal conducts its review upon applications submitted by authorised persons, and it does not carry out a review *ex officio*.

The Constitutional Tribunal conducts an abstract review and a review instituted in the context of a specific case. The abstract review is not related to any particular cases. It may be initiated by the authorities indicated in Article 191(1)(1) and also in Article 191(1)(2)-(5) of the Constitution. Rulings issued in those cases are assigned with the reference letter 'K'. By contrast, the Tribunal's review conducted in the context of a specific case is commenced by courts which submit questions of law on the basis of Article 193 of the Constitution (rulings marked with the letter 'P'), or by individuals or legal entities that file constitutional complaints on the basis of Article 79 of the Constitution (cases 'SK'). There is also a special category which comprises: cases referred to the Constitutional Tribunal by the President of the Republic of Poland as part of the so-called preventive, or *a priori*, review (ref. 'Kp'), which concern parliamentary bills before they are signed by the President, pursuant to Article 122(3) of the Constitution, or international agreements before their ratification, as set out in Article 133(2) of the Constitution; as well as cases in which the Tribunal resolves disputes over powers between constitutional authorities of the state, on the basis of Article 189 of the Constitution (cases 'Kpt').

The rulings presented in this collection were issued in cases that fall into all those categories.

3. The place of international law and EU law in the Polish legal order is also determined by the norms of the Constitution. This implies the following: the principle that the Republic of Poland shall respect binding international law (Article 9); the "European clause", which made it possible for Poland to accede to the European

Union (Article 90); as well as provisions that specify the position of international agreements, including the treaties that constitute EU primary law (Article 91(1) and (2)) and the acts of EU secondary legislation (Article 91(3)).

4. In this introduction, it is neither possible, nor necessary to summarise the rulings included in this volume. However, it does seem useful to categorise the most vital legal issues related to Poland's membership in the European Union, which were addressed in these rulings:

- the position of the Constitution after Poland's accession to the European Union, the rulings with the reference numbers: K 18/04, P 1/05, K 32/09, and SK 45/09;
- the integration clause provided in Article 90 of the Constitution, the rulings with the reference numbers: K 18/04, Kp 3/08, K 32/09, and K 33/12;
- Poland's membership in the European Union versus its sovereignty, the rulings with the reference numbers: K 18/04, K 32/09, and K 33/12;
- the principle of favourable predisposition towards the process of European integration and the cooperation between States, the rulings with the reference numbers: K 11/03, K 18/04, K 32/09, and K 33/12;
- the examination of the conformity of the EU Treaties to the Polish Constitution, the rulings with the reference numbers: K 18/04, K 32/09, and K 33/12;
- the admissibility of examining the conformity of EU secondary legislation to the Polish Constitution, the rulings with the reference numbers: U 6/08 and SK 45/09;
- an interpretation of Polish law which favours EU law, the rulings with the reference numbers: K 33/03, K 18/04, P 1/05, Kp 4/08, SK 26/08, and K 32/09;
- the principle of the primacy and direct application of EU law, the rulings with the reference numbers: K 18/04, P 37/05, K 32/09, and SK 45/09;
- the impact of Poland's membership in the Union and of EU law on the rights and freedoms of Polish citizens, the rulings with the reference numbers: K 11/03, K 33/03, K 18/04, P 1/05, K 9/05, and SK 45/09;
- electoral law and a referendum, the rulings with the reference numbers: K 11/03, K 15/04, K 18/04, and K 9/05;
- the impact of Poland's membership in the Union on the position of state authorities and relations between the said authorities, the rulings with the reference numbers: K 18/04, K 24/04, Kpt 2/08, and K 32/09;
- the impact of Poland's membership in the Union on the Polish legislative process and the sources of law, the rulings with the reference numbers: Kp 4/08 and P 1/11;
- the obligation to implement EU law and the review powers of the Constitutional Tribunal, the rulings with the reference numbers: K 33/03, P 1/05, SK 26/08, and P 1/11;
- the position of the Constitutional Tribunal and its relations with the CJEU, the rulings with the reference numbers: K 18/04, P 37/05, Kp 3/08, K 32/09, SK 45/09, and K 33/12;
- questions referred to the ECJ for a preliminary ruling, the rulings with the reference numbers: K 18/04, P 37/05, Kp 3/08, and SK 45/09.

The above remarks are merely an overview of this collection, for the content of the rulings is rich and comprises many complex issues. We hope that this collection will introduce the reader to the position of the Polish constitutional court on European matters and its justification thereof.

Prof. dr hab. Stanisław Biernat
Vice-President of the Constitutional Tribunal

**JUDGMENT of 27 May 2003 – Ref. No. K 11/03
(summary)**

[Referendum on Poland's Accession to the EU]

General information

Type of proceedings: abstract review

Initiator: group of Sejm Deputies¹

Composition of Tribunal: full bench

Dissenting opinions: 0

Legal provisions under review: the Act of 14 March 2003 on Nationwide Referendum

Higher-level norms for review: Articles 2,4,7,11(1), 32(1), 48(1), 62, 90, 235 of the Constitution

Key issues: procedure for ratifying a treaty which delegates sovereign rights of the Republic of Poland to an international organisation, principle of sovereignty of the Polish People, rule of law

Introduction

On 16 April 2003, in Athens, the Treaty on the accession of ten States, including the Republic of Poland, to the European Union was signed (hereinafter: the Accession Treaty). On the following day, the Sejm (the lower house of the Polish Parliament) adopted a resolution to hold a referendum on 7 and 8 June 2003 in which the Nation was asked to grant its consent for the ratification of the Treaty by the President of the Republic of Poland. 58.85 % of the citizens having the right to vote took part in the referendum. 77.45% of the valid votes were cast in favour of the ratification of the Treaty. In accordance with the result of the referendum, the President ratified the Accession Treaty. From 1 May 2004 Poland has been a member of the European Union.

The national ratification procedure was accompanied by controversies of a constitutional nature, which were settled by the judgment discussed in this summary. This regards solely the controversies regarding procedural matters; the Constitutional Tribunal did not express its view on the substance of the Accession Treaty in this judgment.

The ratification of international agreements lies within the competence of the President of the Republic of Poland. In certain matters, ratification requires that the Parliament's consent be granted by a statute passed in accordance with the ordinary legislative procedure (Article 89(1) of the Constitution). Different rules – governed

¹ The Polish Parliament comprises two houses: the Sejm (460 Deputies) and the Senate (100 Senators).

by Article 90 of the Constitution – concern the granting consent for the ratification of an international agreement, on the basis of which the Republic of Poland delegates to an international organisation or an international institution the competence of organs of state authority in certain matters. The Accession Treaty represents such an agreement. Consent for ratification of an agreement of this kind may be granted by the Parliament in the form of a statute (the parliamentary procedure) or directly by the Nation in a referendum (the referendum procedure). The choice of one of these procedures is made by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Within the framework of the parliamentary procedure, a statute granting consent for the ratification of the Accession Treaty would have to be passed by a qualified majority vote of two-thirds in both houses of the Parliament (Article 90(2) of the Constitution). Alternatively, for the Nation to make the decision in a referendum, the participation of more than half of the citizens having the right to vote is required (Article 125(3) of the Constitution). The Constitution does not regulate the matter of the kind of majority of votes required for the result of the referendum in respect of ratifying an international agreement, if the condition of participation in it by more than half of the citizens having the right to vote has been met. This matter is settled by the Act of 14 March 2003 on Nationwide Referendum (hereinafter: the 2003 Act): the President receives consent for ratification if the majority of valid votes were cast in favour of the ratification, whereas he is not granted consent if the majority of valid votes were cast against (Article 73 and Article 74 of the 2003 Act).

The 2003 Act comprehensively regulates the principles and procedures of holding a nationwide referendum. The Act is of unlimited duration and its significance is not confined to referenda on the ratification of international agreements described in Article 90 of the Constitution, let alone to the accession referendum held in 2003. However, the 2003 Act was adopted in the final phase of the debate on Poland's accession to the EU with the intention of enacting rules regarding the accession referendum and the referendum campaign preceding it. This explains why the political and legal disputes accompanying the adoption of the Act, as well as the constitutional challenge submitted to the Constitutional Tribunal, were dominated by problems concerning the accession referendum.

One of the fundamental matters in the dispute, subsequently raised in the proceedings before the Tribunal, was the problem regarding the proper interpretation of Article 90 of the Constitution. According to the will of the majority of the Sejm, it was determined from the beginning that a referendum on the Nation's consent for the accession would be held, a formal resolution on the choice of referendum procedure was passed by the Sejm on the 17 April 2003. A question arose, however, in relation to whether the Sejm could later decide to apply, "as an emergency", the parliamentary procedure (the granting of consent for the ratification of the Treaty in the form of a statute adopted by qualified majority vote in both houses of the Parliament) if the accession referendum did not deliver a legally binding result for reasons of an insufficient turnout (i.e. fewer than 50% of those citizens having the right to vote).

In the opinion of some commentators, such a result would be synonymous with the rejection by the Nation of the concept of accession, which would preclude ratification of the Treaty by means of the parliamentary procedure. Others, however, argued that such a result would only mean the lack of acceptance by the Nation of the referendum procedure in the case of accession and, consequently, a decision on the granting of consent for the ratification of the Accession Treaty could be taken by the Parliament. Article 75 of the 2003 Act settled the dispute in favour of the latter of the two options: if the result of the ratification referendum was not binding, the Sejm could again adopt a resolution governing the choice of the procedure for granting consent for ratification and, therefore, could choose whether to hold another referendum or to initiate the parliamentary procedure.

Another fundamental point in the dispute was the question of defining the categories of organisations which were entitled to voice their opinions (conduct agitation) in public radio and television programmes before the referendum, to nominate candidates for district election committees (competent in matters of voting and the counting of votes) and to appoint “persons of trust” to these committees. Such rights are granted by the 2003 Act to political parties, Deputies’ clubs (formal political groups of parliamentarians), associations (and other unions) and foundations, which have been present in public life for at least a year prior to the date of calling the referendum; citizens’ committees created *ad hoc* do not have analogous rights. Such a solution was criticised mainly by the opponents of accession.

The duration of the referendum was also controversial. The Act allowed for the possibility of a two-day referendum and this possibility was used in respect of the accession referendum, which was held on 7 and 8 July 2003. The opponents of accession were rather in favour of a one-day referendum.

The conformity with the Constitution of these, and some other provisions of the 2003 Act, constituted the subject matter of the Tribunal’s review in the current case. The Tribunal considered two applications challenging the constitutionality of the 2003 Act, signed by two different groups of Deputies.

The Tribunal’s ruling consists of 15 points. In points 1-14 the Tribunal declares the conformity of such provisions (i.e. the “...is consistent with...” formula) or the lack of non-conformity (i.e. the “... is not inconsistent with...” formula) of the individual provisions of the 2003 Act with the provisions of the Constitution cited by the applicants. The final point of the judgment (cited below as the Tribunal’s ruling) constitutes a kind of recapitulation of the previous points in relation to the whole Act.

The Tribunal’s ruling

The Act of 2003 on Nationwide Referendum, insofar as it relates to the applicants’ claims, is consistent with the Constitution.

Principal reasons for the ruling

1. The interpretation of binding statutes should take account of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States (this conclusion may be derived from the Preamble and Article 9 of the Constitution).

2. It is not possible to speak of the citizens' right to a referendum in the Polish constitutional system, since neither a citizen nor a group of citizens have a legal possibility to take actions which would directly lead to calling a referendum. Such actions may be taken by the Sejm or – with the Senate's consent – the President of the Republic (Article 125(2) of the Constitution). Citizens have the right to participate in a referendum which has been called, but do not have the right to a referendum *per se*.

3. If the result of the nationwide referendum is not binding, for the reason that less than half of the citizens having the right to vote participated therein (Article 125(3) of the Constitution), then such a referendum is only of advisory significance. Such a result should be treated at the same time as the lack of acceptance by the Nation-sovereign of the proposition to hold a referendum itself (i.e. the Nation-sovereign has chosen not to exercise its right to make a decision in the referendum).

4. The concept of representative democracy as a basic form of democracy in Poland is expressed, in particular, in Article 90 of the Constitution, which regulates the means of authorising the President of the Republic to ratify an international agreement, on the basis of which the Republic delegates to an international organisation or international institution competences of organs of State authority in relation to certain matters. The basic, primary so to speak, form of granting consent for ratification by the President of an agreement of this kind is a qualified parliamentary (legislative) procedure, regulated in Article 90(2) in a different way to the procedure defined in Article 89(1) and Article 121 of the Constitution. The facultative procedure for granting consent for such ratification, as an alternative to the parliamentary procedure, is for the Nation to consent to ratification in a referendum. The application of one of these procedures – parliamentary or referendum – does not preclude the Sejm from making a “back-up” use of the other of the two procedures, which was originally omitted, according to Article 90(3) of the Constitution, if a definitive choice (about whether or not to ratify) was not made by the entitled subject in the originally chosen procedure. It is material that, in each of these procedures, it is the Nation that expresses its will as a sovereign – either directly or through its representatives (cf. Article 4(2) of the Constitution). If therefore the Nation has not – for lack of participation by more than half of the entitled citizens taken a binding decision in a referendum, the Sejm may make the choice once again, at its discretion, of one of the procedures provided for granting consent for the ratification of an international agreement.

5. In the light of the interpretational conclusions contained in paragraphs 2-4 above, the applicant is wrong to allege the unconstitutionality of the solution provided for in Article 75 of the 2003 Act, by which the Sejm may adopt a further resolution choosing the procedure to be used – parliamentary or referendum – to grant consent for the ratification of an international agreement, where the original procedure failed to produce a conclusive result on this. Such a solution is neither incompatible with Article 4 (principle of sovereignty of the Polish People) nor Article 90 of the Constitution. In this respect the Act simply confirms what stems directly from the Constitution and, therefore, Article 235 of the Constitution, which regulates the procedure for amending the Constitution, has no application in respect of the adoption of this Act.

6. The applicant's claim is devoid of constitutional grounds in asserting that the challenged Act, in contrast with the Referendum Act of 1996, is unconstitutional in its failure to prohibit the taking of a decision to put to the vote once more any matter which was settled in a negative way in a previous referendum, unless a specified minimum period of time has lapsed since the previous referendum. On the contrary, it is the provisions of the 1996 Act that have raised concerns in respect of their compatibility with Article 125(1) (the possibility of holding a nationwide referendum) read in conjunction with Article 4(2) of the Constitution (the significance of direct democracy in the realisation of the sovereignty of the Polish People), since the limitation as to the time of the holding of a new referendum on the same matter would have to be contained directly in the Constitution. In the case of an international agreement the possibility of holding a repeat referendum in a time not too distant from the previous one is justified additionally by the need to react flexibly since, by the very fact of signing such an agreement, the State accepts the obligation to take the steps necessary for the agreement to be capable of application.

7. Although the legislator did not provide for the creation of citizens' referendum committees, Article 48(1) of the 2003 Act provided a very wide definition of the category of "entitled subjects" – organisations with the right to participate in the referendum campaign in radio and television programmes emitted by public broadcasters and also to nominate candidates for members of district referendum commissions and to appoint "persons of trust" and their deputies to such commissions (cf. Article 13(1) and (2), Article 19 and Article 48(1)). This provision does not limit the possibilities of individual citizens exercising their rights in respect to participation in the referendum as guaranteed by Article 62(1) of the Constitution. Citizens may participate in a referendum in different ways, including participation in the act of voting or the undertaking of work related to the preparation of the referendum or the referendum campaign. Equally, the provision does not make an individual's possibilities in relation to membership of election commissions or the holding of the post of a "person of trust", or his deputy, conditional upon affiliation with one of the "entitled subjects" defined in the Act.

8. The opinion, that the nomination of candidates for members of district commissions and the appointment of “persons of trust” and their deputies only by the “entitled subjects” could cause individual citizens to doubt the integrity of the voting process, or counting of votes, cannot be viewed as an argument of constitutional significance. The feelings of the applicant as to the potential impression of a voter, or group of voters, could only be considered in this case if there existed convincing arguments confirming a very high level of probability that these processes would lack integrity.

9. It is also unsubstantiated to claim that the inability to create citizens’ referendum committees means that calling a referendum will amount to a “surprise for the individual citizen”. It is not very probable that calling a nationwide referendum on any particular matter could surprise the citizen. A civil society is a society of citizens who are free, conscious, active and engaged in public affairs. They have no legal hindrances in organising themselves in a manner suiting their needs, aims and interests. It is difficult to imagine a matter of nationwide importance which would not be the subject of prior interest of citizens’ groups. If, however, the applicant’s statement is to be understood literally, it would be difficult to find an individual provision incompatible with the Constitution solely for the reason that an individual citizen was surprised.

10. The Act’s inclusion, within the definition of “entitled subjects”, of those political parties which, in the last Sejm elections preceding the referendum, had surpassed thresholds of support specified in the Act (3% individually or 6% in coalition), relates to the differentiation of political parties known in legislation, e.g. as to the enjoyment of budgetary subsidies or broadcast time in public television programmes. It is legitimate to distinguish political parties that receive such a level of support that, whilst insufficient to secure the election of the party’s candidates to the Parliament, confirms a minimum level of social legitimacy. This is why there is no basis for the applicant’s claim that the legislator has acted in an arbitrary manner.

11. The inclusion within the definition of “entitled subjects”, in addition to political parties and other organizations, of Deputies’ clubs which, a year prior to the announcement calling the referendum, had a membership at least half of which was comprised of Deputies or Senators chosen as candidates of election committees, is of derivative character to the mechanism of participation in parliamentary elections of election committees not representing political parties. The challenged provision has no relation to Article 11 of the Constitution (freedom of creation and functioning of political parties). Neither can it be, in reference to Article 32(1) of the Constitution, regarded as an infringement of the right of parliamentarians to equality before the law.

12. In the legal order of the Republic of Poland political parties do not have a monopoly over the use of democratic means to influence State policy. The Constitution,

in Articles 11-13 creates the prerequisites for the functioning of civil society in which the citizens, organised in various formal structures (political parties, associations, social organisations, foundations etc.) may achieve their aims by influencing public affairs. Political parties, however, do have special status with regard to their function in parliamentary democracy, yet they are merely one of many elements of the structure of public life. There is a relationship between, on the one hand, the constitutional principle of sovereignty of the Polish People and the acceptance of the importance of direct democracy (Article 4 of the Constitution) and, on the other hand, the freedom to create organisations of civil society other than political parties (Article 12 of the Constitution) which defines the democratic character of the State and the society.

13. The applicant is unjustified in alleging that the legislator has engaged in “utilitarian” law-making by including in the definition of “entitled subjects” associations and foundations having existed for at least a year from the date of the announcement calling the referendum, where the subject of the referendum relates to the statutory activities of such bodies. This solution aims to include all active citizens in the process of decision making in matters in which they were, or are, active in organisational structures. At the same time, the legislator has the right to counteract the *ad hoc* creation of organisations that wish to participate in the referendum merely so as to take advantage of the privileges that are justified only in respect of organs which permanently participate in public life.

14. The Constitution’s provisions do not create a requirement for the existence of equal rules between, on the one hand, the financing of election campaigns and, on the other hand, the financing of referendum campaigns. The differences in character of both types of campaign permit the legislator to differentiate the manner in which their financing are regulated.

15. The applicant alleges that the absence of any provisions prohibiting the financing of referendum campaigns by funds originating from abroad, in contrast to the existence of such provisions in respect of election campaigns, enables the results of a referendum to be influenced by organs and institutions from outside Poland. The constitutional principle of the sovereignty of the Polish People (Article 4(1)) does not lead to the conclusion that the legislator must enact measures, in respect of referendum campaigns, which are equally stringent to those applying to the financing of election campaigns. It is legitimate for provisions relating to referendum campaigns to be more liberal than those applying to election campaigns, given the relative infrequency of the former and the one-off nature of the result of a referendum which, unlike in the case of elections, is not aimed at conferring the right (for the duration of a certain term of office) to influence State policy and the functioning of public institutions. It is also relevant to note the diversity of “entitled subjects” in referendum campaigns and the differentiation of the regimes of financing their activities related to such campaigns, as well as the inability for persons conducting

election campaigns to claim reimbursement, even in part, of the expenses incurred thereby. Finally, it should also be taken into account that the legislator introduced limitations which were required to be fulfilled by bodies wishing to be treated as “entitled subjects” in referendum campaigns; such limitations include rules relating to the relative permanence of such bodies and the fact that they must conduct their activities within the entire territory of Poland. It is therefore difficult to see a threat to the constitutional position of the Nation as a sovereign in the legal provisions relating to the financing of participation in referendum campaigns.

16. The applicant’s allegation, that the Act’s failure to provide an exhaustive statutory definition of the means of protecting polling stations during the so-called election night (between the first and second days of voting) may raise suspicions that referendum results could be manipulated, would have to be supported by cogent arguments. The “suspicion” of the applicants in this regard, raising doubts as to the principles by which both the legislative and executive powers function, does not amount to such an argument.

17. The applicant argued that the legislator had acted unconstitutionally in failing to ensure the rights of parents to rear their children in accordance with their convictions (Article 48(1) of the Constitution), by failing to prohibit the conducting of referendum campaigns in schools for children and youths ineligible to participate in the referendum. The applicant was convinced that “the self-governments of communes and districts will exert informal pressure on the directors and teachers’ councils in order to force their own concept of conducting the referendum campaign in schools”. The applicant’s convictions may not, however, be accepted as evidence of the alleged constitutional infringement. It is also difficult to assume that any sensible person would wish to engage money, time and energy in conducting a campaign directed at persons who, due to their age, are ineligible to participate in the referendum. The dissemination, in schools, of knowledge and information relating to the European Union is something entirely different to the process of a referendum campaign and may not legitimately be compared. Any such knowledge need not necessarily be inconsistent with the parents’ convictions although, even in such a case, the Constitution does not guarantee that knowledge disseminated in schools will always be consistent with the parents’ convictions.

18. Article 96 of the challenged Act provides for the shortening of some statutory time-periods for executing certain actions related to the organisation of a nationwide referendum to be held for the first time after the entry into force of the Act. This provision is not addressed to citizens and does not demand “assimilation” by them. Furthermore, the applicant’s assumption that the appropriate organs of public authority may prove to be inefficient and will not meet the terms defined on the basis of this provision, does not represent a constitutionally significant argument which

could justify the conclusion that the challenged provisions are inconsistent with Article 2 of the Constitution.

19. The applicants' claims are based on particular provisions of the 2003 Act and, in recognition of the fundamental importance of these provisions to the Act as a whole, he has asked the Tribunal to rule that the whole Act is unconstitutional. Consequently the application, insofar as it concerns the Act as a whole, is a conditional application, which the Tribunal would only examine, in the event it found that certain individual provisions of the Act are inconsistent with the Constitution. The Constitutional Tribunal has found that all of the challenged provisions of the Act of 14 March 2003 on Nationwide Referendum are either in conformity with, or are not inconsistent with, the Constitution. Accordingly, the aforementioned prerequisite for evaluating the conformity of the whole Act with the Constitution was not fulfilled. The Tribunal's consideration of the constitutionality of the whole Act would be justified only if it were to find the nonconformity with the Constitution of one or several of the challenged provisions.

Key legal provisions

CONSTITUTION

[Preamble] Having regard for the existence and future of our Homeland [...] we, the Polish Nation [...] aware of the need for cooperation with all countries for the good of the Human Family (...) hereby establish this Constitution of the Republic of Poland as the basis law for the State [...]

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 4.1. Supreme power in the Republic of Poland shall be vested in the Nation.
2. The Nation shall exercise such power directly or through their representatives.

Art. 7. The organs of public authority shall function on the basis of, and within the limits of, the law.

Art. 9. The Republic of Poland shall respect international law binding upon it.

Art. 11.1. The Republic of Poland shall ensure freedom for the creation and functioning of political parties. Political parties shall be founded on the principle of voluntariness and upon the equality of Polish citizens, and their purpose shall be to influence the formulation of the policy of the State by democratic means.

2. The financing of political parties shall be open to public inspection.

Art. 12. The Republic of Poland shall ensure freedom for the creation and functioning of trades unions, socio-occupational organizations of farmers, societies, citizens' movements, other voluntary associations and foundations.

Art. 13. Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national

hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 48. 1. Parents shall have the right to rear their children in accordance with their own convictions. Such upbringing shall respect the degree of maturity of a child as well as his freedom of conscience and belief and also his convictions.

Art. 62.1. If, no later than on the day of vote, he has attained 18 years of age, a Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government.

2. Persons who, by a final judgment of a court, have been subjected to legal incapacitation or deprived of public or electoral rights, shall have no right to participate in a referendum nor a right to vote.

Art. 89. 1. Ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute – if such agreement concerns:

- 1) peace, alliances, political or military treaties;
- 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
- 3) the Republic of Poland's membership in an international organization;
- 4) considerable financial responsibilities imposed on the State;
- 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute.

Art. 90. 1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

2. A statute, granting consent for ratification of an international agreement referred to in para. 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Art. 121.1. A bill passed by the Sejm shall be submitted to the Senate by the Marshal of the Sejm.

2. The Senate, within 30 days of submission of a bill, may adopt it without amendment, adopt amendments or resolve upon its complete rejection. If, within

30 days following the submission of the bill, the Senate fails to adopt an appropriate resolution, the bill shall be considered adopted according to the wording submitted by the Sejm.

3. A resolution of the Senate rejecting a bill, or an amendment proposed in the Senate's resolution, shall be considered accepted unless the Sejm rejects it by an absolute majority vote in the presence of at least half of the statutory number of Deputies.

Art. 125. 1. A nationwide referendum may be held in respect of matters of particular importance to the State.

2. The right to call a nationwide referendum shall be vested in the Sejm, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of Deputies, or in the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators.

3. A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it.

4. The validity of a nationwide referendum and the referendum referred to in Article 235, para. 6, shall be determined by the Supreme Court.

5. The principles of and procedures for the holding of a referendum shall be specified by statute.

Art. 235. 1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.

2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.

3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.

5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.

6. If a bill to amend the Constitution relates to the provisions Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall call a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

2. After conclusion of the procedures specified in paras. 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

**JUDGMENT of 21 April 2004 – Ref. No. K 33/03
(summary)**

[Bio-Components in Gasoline and Diesel – the Scope of the Obligation
to Implement Directives]

General information

Type of proceedings: abstract review

Initiator: Polish Ombudsman

Composition of Tribunal: bench of 5 judges

Dissenting opinions: 0

Legal provisions under review: Article 12(1) and (6), Article 14(1), Article 17(1)(3) of the Act of 2003 on bio-components used in liquid fuels and liquid bio-fuels

Higher-level norms for review: Articles 20, 22, 31(3), 54(1) and 76 of the Constitution

Key issues: obligation to add bio-components to the liquid fuels, freedom of economic activity, protection of consumers

Introduction

The Act of 2003 on bio-components used in liquid fuels and liquid bio-fuels, adopted on the basis of a government proposal, represents the Polish legislator's second attempt to introduce and regulate a system of inducing producers and distributors of liquid fuels to manufacture and offer gasoline and diesel containing additives of biological origin (bio-components), obtained by processing oilseed-rape, cereal grain or other agricultural resources. It entered into force on 1 January 2004. The previous Act of a similar nature, adopted on 19 December 2002, did not enter into force because of a successful presidential veto. The problem of using bio-components and the means of transposing EC Directives in this field were, from the outset, the subject of political debates and controversy amongst various experts.

The reason for the solutions adopted in the Act was primarily the objective to create new jobs in agriculture and agribusiness, to increase farmers' income by stimulating demand for non-foodstuff agricultural products and to improve the quality of the environment.

General references to "bio-fuels" often mean all liquid fuels containing substances obtained by processing bio-mass (bio-components). It must be noted, however, that the Polish Act recognises three types of fuel to be used in vehicle engines: "liquid fuels", having defined minimum and maximum levels of bio-components; "bio-fuels", having a prescribed minimum bio-component level (higher than "liquid fuels") but no maximum level; and "pure bio-component fuels", containing no mineral hydro-carbons and consisting solely of bio-mass.

The Ombudsman did not challenge the entire Act but, rather, three individual provisions thereof which, in his opinion, constituted substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection.

Article 12(1) made it obligatory for manufacturers to market in any given year the amount of bio-components specified in a regulation issued annually by the Council of Ministers under para. 6 of that Article. Bio-components could be introduced in three different forms: as a component of “normal” liquid fuels; as a component of liquid bio-fuels; or as pure engine fuel (pure bio-ethanol, pure VOME bio-diesel).

According to Article 14(1) of the Act, “normal” liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense (Article 14(2) of the Act, which was not challenged in the present proceedings).

Finally, challenged Article 17(1)(3) prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned regulation. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

The Ombudsman considered that encumbering producers with an obligation to market bio-components restricted the freedom of economic activity in contravention of Article 22 of the Constitution, since it was not justified on the basis of protecting an important public interest and the conditions laid down in Article 31(3) (principle of proportionality) were not fulfilled.

The applicant also challenged the obligation imposed on consumers to purchase fuels containing bio-components, in the absence of any choice, as being incompatible with the principle of consumer protection arising from Article 76 of the Constitution. The Ombudsman emphasised the fact that consumers purchasing “normal” liquid fuels (i.e. non-bio fuels) were denied information as to their bio-component content and therefore do not possess basic knowledge about the product they are purchasing. The applicant alleged that this constituted a breach of the consumers’ right to information regarding the subject matter of the transaction.

All of the provisions challenged in the present proceedings ceased to have effect on the date that the judgment was published in the Journal of Laws (i.e. on 12 May 2004). The remainder of the Act remains in force. Another important provision in this context is § 12(1) of the Regulation of the Minister of Finance of 26 April 2004 on excise duty exemptions. By virtue of this provision, bio-components used in liquid fuels or liquid bio-fuels and fulfilling specified criteria are exempt from excise duty, whilst liquid fuels containing bio-component additives are partially exempt.

The Tribunal’s ruling

1. Article 12(1) and Article 12(6) of the Act are inconsistent with Articles 20 and 22, read in conjunction with Article 31(3), and are inconsistent with Article 31(1) and (2) of the Constitution.

2. Article 14(1) of the Act is inconsistent with Article 54(1), read in conjunction with Article 31(3) and Article 76, of the Constitution.
3. Article 17(1)(3) of the Act is inconsistent with Articles 20 and 22, read in conjunction with Article 31(3), of the Constitution.

Principal reasons for the ruling

1. The criterion of the necessity for imposing restrictions on constitutional rights and freedoms with regard to the values enshrined in Article 31(3) of the Constitution (state security, public order, protection of the environment, public health and morality, the protection of the rights and freedoms of others) is inherent in the principle of proportionality. It implies that the legislator should always choose the least burdensome measures in achieving the stated aims. If the aim may be achieved by means that are less restrictive on rights and freedoms, then the adoption of a more burdensome measure constitutes a breach of the requirement of necessity as contained in the aforementioned constitutional provision.
2. The principle of interpreting national law in a manner that is favourable to European law, based on Article 91(1) of the Constitution, relates in particular to the interpretation of higher-level norms for constitutional review conducted by the Constitutional Tribunal (in this case – the principles of economic freedom and the protection of consumers).
3. The scope of the freedom enjoyed by the legislator in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the phrase “important public reasons”, as contained in Article 22 of the Constitution, must be assessed in the light of Poland’s participation in the European Common Market. This has particular consequences in relation to the constitutional assessment of reverse discrimination – enacting restrictions on economic freedom which apply only to nationals, since their application to other EU citizens is prohibited by Community law. Whilst discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination.
4. The applicant’s challenges to Article 12(1) and (6) and Article 17(1)(3) should be reviewed jointly (cf. paragraphs 5-10 below). This follows from the fact that, by virtue of Article 12, the legislator placed certain obligations on undertakings and, by Article 17, imposed sanctions for non-compliance therewith.
5. The statutory authorisation in Article 12(6) is ambiguous and may be interpreted in two ways. According to one interpretation, every litre of fuel available at a petrol station must contain the amount of bio-component specified in the Regulation. According to the alternative interpretation, the specified levels relate to a given producer’s “global” or total yearly production and the legislator does not require that all fuel placed on the market by that producer must contain a particular level of bio-components. In keeping with the concurring opinions of all the participants in this case, the Constitutional Tribunal adopted the second

(more liberal) interpretation in assessing the reviewed provision. Even in the light of such an interpretation one is forced to conclude that, in obliging producers to add a certain proportion of bio-components to fuels placed on the market, the legislator compelled producers to either change or supplement their product range or to conclude certain civil-law contracts with bio-component manufacturers (cf. Article 12(3) of the Act). In doing so, the legislator arbitrarily made the commencement of manufacturing certain products completely independent of any market survey of consumer interests and thereby drastically limited producers' capability to take market-orientated decisions. Whilst aware of serious reservations regarding the practical qualities of fuels containing bio-components, the legislator chose to enforce demand for such fuels, in practice depriving consumers of their freedom of choice. The absence of choice results from the fact that surveys have shown a complete lack of demand for bio-fuels and bio-components. In order to comply with the legal requirements, producers will have to add the whole prescribed "share" of bio-components to "ordinary" liquid fuels. This in practice creates two coercive situations: on the part of producers – to place on the market (which is free, as a rule) a certain product and, on the part of consumers – to buy this product, even against their will.

6. The primary purpose of the Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transport, with which the reviewed Polish Act is concerned, is readily apparent from its title: it aims to promote the use of bio-fuels in transport, rather than to enforce such usage. An analysis of the Directive's provisions also leads to the conclusion that its implementation does not allow for the possibility to enact national provisions making the use of bio-fuels compulsory. It may not be assumed that alteration of the Directive's aim – from promotion to imposition of an obligation – constitutes the "detailing" of the Directive within the internal legal order, falling within the scope of the State's freedom to choose the form and methods of implementation. Such reasoning is, firstly, incompatible with the principles of implementing directives, as a source of Community law, into the internal legal order and, secondly, contrary to the substance of the Directive itself, which clearly states that internal state policy promoting the use of bio-fuels may not hinder the free movement of fuels.
7. Applying the challenged provisions to all manufacturers (sellers) – not only national, but also foreign, including those established in other EU Member States – would constitute a restriction on the free movement of goods between Member States in contravention of European Community law. From the perspective of Community law, such a situation would be treated as an example of the national legislator imposing restrictions by means of "a measure having equivalent effect" to quantitative restrictions on imports, which is expressly forbidden by Article 28 of the Treaty establishing the European Community. Although such restrictions are allowed in exceptional circumstances, they are only permissible for reasons laid down in Article 30 of the EC Treaty. Employing this possibility, which requires

a special procedure for establishing the derogation, may not amount to arbitrary discrimination or disguised restrictions on trade. In the light of the jurisprudence of the Court of Justice of the European Communities, it is unlawful to enact restrictions, in the internal legal order, which hinder access to the national market of goods failing to comply with qualities or contents specified in national legislation for protectionist purposes. Conversely, limiting the applicability of the reviewed provisions to Polish manufacturers (sellers) – since legislators in other EU Member States have not imposed similar obligations – would lead to reverse discrimination (see paragraph 3 above). Since it is impossible for the reviewed provisions to apply to fuels produced abroad and placed on the Polish market, by reason of the country of origin (a consequence of Articles 28 and 30 of the EC Treaty), it is impossible to regard the obligations imposed thereby as consistent with the “important public reasons” referred to in Article 22 of the Constitution.

8. The creation of jobs must constitute an element of state policy, as provided for by Article 65(5) of the Constitution. There is no constitutional subjective individual right to employment, however, which would justify, on the grounds of the principle of proportionality, the restriction of manufacturers’ and consumers’ rights as necessary to “protect the rights and freedoms of others”. Furthermore, in the light of Article 65(5), state policy must not lead to a decrease in the number of jobs as a result of excessive restraints on economic activity and the hindrance to flexible employment in the private sector.
9. Ensuring all citizens, and farmers in particular, a sufficiently high level of income which they consider to be satisfactory is not one of the constitutional duties of the state.
10. For the reasons discussed in paragraphs 8 and 9 above, it may not be alleged that the provisions currently under examination, which restrict the freedom of economic activity, are necessary in a democratic state for the protection of the rights of others within the meaning of Article 31(3) of the Constitution.
11. The Constitutional Tribunal is not competent to deliver a verdict in the dispute as to the effect of the production and use of bio-components on the natural environment. Having regard, however, to the fact that a variety of opinions have been expressed on this unclear issue, it is impossible to conclude that the restrictions on the freedom of economic activity imposed by the reviewed provisions are necessary in a democratic state in order to protect the environment.
12. Whilst Article 76 does not in itself give rise to a subjective individual right, it does impose specific duties on the state that must be implemented by way of ordinary legislation.
13. The founding principles of the modern protection of consumers, implemented within the framework of the European Common Market, comprise the following: transparency; openness; the availability of clear, full and comprehensible product information. Consumers need not seek the necessary information in any particular way – it must, rather, be made available to them. A cornerstone of the consumer’s constitutional right to be informed is Article 54(1) of the

- Constitution. It would be wrong to limit this provision, especially as regards the scope of “obtaining information”, to the traditionally perceived right to be involved in political discourse. Individuals occupy a variety of social roles in any given society and one of these is the role of the consumer. From this perspective, Article 54 of the Constitution is a guarantee of the realisation of Article 76 of the Constitution in the scope of protecting consumers from unfair market practices.
14. The fact that Article 14(1) of the Act permits trade in liquid fuels without any indication of the levels of bio-components therein – unlike the case with respect to bio-fuels (para. 2 of the same Article) – means that it is only in the latter case that consumers would be aware of the level of bio-components in the fuel being offered. Such knowledge would not be available to purchasers of liquid fuels, which in practice would represent the majority of vehicle fuels consumers. Since producers have no intention to offer bio-fuels in the immediate future, the whole “share” of bio-fuels imposed on them would need to be added to liquid fuels and the preferential treatment of bio-components in excise duty provisions will encourage producers to exceed the minimum levels prescribed by the Act. In the light of the aforementioned standards of consumer protection, the application to declare the non-conformity of Article 14(1) of the Act with the higher-level norms for the review cited in point 2 of the ruling is justified.
15. This judgment does not, as such, resolve the issue of promoting the use of fuels with bio-component additives (blended bio-fuels). The possibility or rationality of producing and trading in such fuels may not be ruled out. For constitutional reasons, this may not, however, be effected in the form of compulsory production or compulsory purchasing.

Key legal provisions

CONSTITUTION

Art. 20. A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

Art. 22. Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

Art. 31.1. Freedom of the person shall receive legal protection.

2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 54. 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

2. Preventive censorship of the means of social communication and the licensing of the press shall be forbidden. Statutes may require the receipt of a permit for the operation of a radio or television station.

Art. 65. [...] 5. Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention.

Art. 76. Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute.

Art. 91. 1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Art. 28. Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Art. 30. The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.

**JUDGMENT of 31 May 2004 – Ref. No. K 15/04
(summary)**

[Elections to the European Parliament – the Right to Stand for Election in the
Case of Citizens of Other Member States]

General information

Type of proceedings: abstract review

Initiator: group of Sejm Deputies

Composition of the Tribunal: bench of 5 judges

Dissenting opinions: 0

Legal provisions under review: Articles 8, 9 and 174 of the Act of 2004
on Elections to the European Parliament

Higher-level norms for review: Article 4(1) of the Constitution

Key issues: right for EU citizens who are not Polish citizens to vote
and to stand as candidates in European Parliamentary elections held
in Poland, extensive legal definition of the term of “Member States of
the EU” in force until 30 April 2004, principle of sovereignty of the
Polish People

Introduction

On 1 May 2004 Poland became a Member State of the European Union. According to framework principles defined in Community legislation and Council decisions, elections to the European Parliament for the term of office 2004-2009 were held in all Member States in June 2004 (in Poland on 13 June). It is the duty of the Member States’ legislatures to enact domestic regulations ensuring the implementation of the principles of the European Community electoral law and to hold European Parliamentary elections (hereinafter: EP elections) at a set date.

In Poland, the aforementioned regulations are contained in the Act of 23 January 2004 on Elections to the European Parliament. Its adoption, and entry into force on 1 March 2004, prior to Poland’s formal accession to the EU, was necessary in order to enable the completion of all preliminary procedures required for the proper holding of elections.

Articles 8 and 9 of the Act define the conditions under which foreigners holding the nationality of other EU Member States may acquire the right to vote and to stand as candidates in EP elections held in Poland.

Article 174 contains an interim terminological regulation: during the period until 30 April 2004 the terms “Member States of the EU” and “EU citizens who are not Polish citizens” were to be interpreted as including not only existing EU Member States and their nationals but also those States that were to accede (and acceded) to the Union together with Poland on 1 May and the nationals of those States. This was

intended to enable such persons to take part in procedures necessary for the exercise of their right to vote and to stand as candidates in EP elections (e.g. registration of voters and candidates) prior to 1 May.

The aforementioned provisions of the Act of 2004 on Elections to the European Parliament were challenged before the Constitutional Tribunal by a group of Deputies of the Sejm (i.e. the lower house of the Polish Parliament). In the same application, an allegation was raised against a decision of the President of the Republic of Poland to call the EP elections; this part of the application, however, was declared inadmissible by the Tribunal before the delivery of the judgment summarised here (cf. the procedural decision of 18 May 2004).

The Tribunal's ruling (summarised below) originally comprises two parts: the first part concerns foreigners' rights to vote and to stand as candidates in EP elections (Articles 8 and 9 of the Act); the second part concerns the aforementioned interim regulation (Article 174). The basis of constitutional review indicated by the applicants, in both respects, comprised the principle of the sovereignty of the Polish People (Article 4(1) of the Constitution).

The Tribunal's ruling

The challenged provisions are not inconsistent with Article 4(1) of the Constitution.

Principal reasons for the ruling

1. The Constitution of the Republic of Poland is the supreme act establishing the legal basis for the existence of the Polish State, regulating the principles of exercising public authority on its territory and the modes of establishing constitutional state organs, together with the functioning and competences thereof. Its provisions may not be directly applied to structures other than the Polish State, through which the Republic realises its interests.
2. Article 4 of the Constitution expresses the principle of the sovereignty of the Polish People, the substance of which is the assertion of the Nation's will as the sole source of power and sole means of legitimising authority. It follows from this principle that an individual, a social group or an organisation may not constitute the source of power in Poland.
3. The Constitution uses the notion of the Nation in a political, rather than an ethnic, sense. When referring in the Preamble to the Constitution to – “we, the Polish Nation, all citizens of the Republic” – the concept of the Nation denotes a community comprised of the citizens of the Republic.
4. The European Union is not a State and therefore all analogies with a state system of government are unfounded.
5. The Nation's decision to accede to the European Union (i.e. to delegate certain aspects of state authorities' competences to an international organisation) is justified in the light of Article 90(1) of the Constitution. The Nation's will,

- expressed in accordance with Article 90(3) of the Constitution, combined with the signing and ratification of the Accession Treaty by Poland's constitutional organs, was conclusive in Poland's acceptance of not merely the substantive norms contained in the Treaty, forming the basis of the integration process, but also the Union's decision-making procedures and institutional structure.
6. The means of legitimising the European Union's organs is not a matter for the Polish Constitution, but rather for EU law and Polish legal provisions enacted in order to implement the Union's principles within the jurisdiction of the Polish State. In particular, this concerns elections to the European Parliament, which is not an organ exercising authority in the Republic of Poland but, rather, an organ performing specified functions within the institutional structure of the European Union. For this reason, it is unfounded to use Article 4(1) of the Constitution as a higher-level norm for the review of the principles and procedure of EP elections.
 7. The right of EU citizens to participate in EP elections, regardless of the Member State in which they reside, is one of their fundamental rights. According to Article 17 (ex Article 8b) of the Treaty establishing the European Community, in the wording as introduced by the Treaty of Maastricht, every person holding the nationality of a Member State shall be a citizen of the Union. The legal basis for EP elections comprises primarily: the provisions of the EC Treaty (in particular Articles 19 and 190); the Act of 20 September 1976 concerning the election of members of the European Parliament by direct universal suffrage, enacted on the basis of the Decision of the Council of 20 September 1976 (76/787/ECSC, EEC, Euratom) and amended by Decisions of the Council of 25 June and 23 September 2002 (2002/772/EC, Euratom); and electoral law regulations of the individual Member States. The Council Directive 93/109/EC of 6 December 1993 provides detailed arrangements for the exercise of the right to vote and to stand as a candidate in EP elections by Union citizens residing in a Member State of which they are not nationals. The Act of 2004 on Elections to the European Parliament implements this Directive, which is clearly stated in the footnote to the Act's title.
 8. The phrase "members of the European Parliament are representatives of the Nations of the States of the European Union" contained in Article 4 of the reviewed Act should be understood in the sense that the constituency of the European Parliament is not a homogenous society, but rather a collective body comprising the various Nations of the Union's Member States. This, however, does not imply that the electoral rights in EP elections may only be exercised exclusively within the national community with which the person is bound by national citizenship.
 9. It is the function of law in a society to resolve conflicts and not to exacerbate them. Therefore, it is unfounded to claim that the entry into force of the reviewed Act was "premature" (i.e. prior to Poland's formal accession to the EU). If the challenged provision had entered into force only on the date of Poland's formal accession to the EU (i.e. on 1 May 2004), it would have proved impossible to

adhere to the election calendar. It is irrelevant to argue that, upon the entry into force of the Act on Elections to the European Parliament, it was not entirely certain whether Poland's accession (i.e. the entry into force of the Accession Treaty) might be delayed since, if such a situation had occurred, the European Parliamentary elections would simply not have taken place. The challenged provision is further supported in this respect by Articles 68 and 69 of the Europe Agreement establishing an association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, concluded in Brussels on 16 December 1991, from which stems Poland's obligation to undertake all measures necessary to ensure the compatibility of its future legislation with Community legislation.

10. Whilst interpreting legislation in force, account should be taken of the constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States.

Key legal provisions

CONSTITUTION

[Preamble] Having regard for the existence and future of our Homeland, [...] We, the Polish Nation – all citizens of the Republic, [...] Aware of the need for cooperation with all countries for the good of the Human Family [...]

Art. 4. 1. Supreme power in the Republic of Poland shall be vested in the Nation.

Art. 8. 1. The Constitution shall be the supreme law of the Republic of Poland.

Art. 90. 1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

TREATY ESTABLISHING THE EUROPEAN COMMUNITY

Art. 17. 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall complement and not replace national citizenship.

2. Citizens of the Union shall enjoy the rights conferred by this Treaty and shall be subject to the duties imposed thereby.

Art. 19. 1. Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission

and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

2. Without prejudice to Article 190(4) and to the provisions adopted for its implementation, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate in elections to the European Parliament in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.

Art. 190. 1. The representatives in the European Parliament of the peoples of the States brought together in the Community shall be elected by direct universal suffrage.

2. The number of representatives elected in each Member State shall be as follows: Belgium 25; Denmark 16; Germany 99; Greece 25; Spain 64; France 87; Ireland 15; Italy 87; Luxembourg 6; Netherlands 31; Austria 21; Portugal 25; Finland 16; Sweden 22; United Kingdom 87.

In the event of amendments to this paragraph, the number of representatives elected in each Member State must ensure appropriate representation of the peoples of the States brought together in the Community.

3. Representatives shall be elected for a term of five years.

4. The European Parliament shall draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States.

The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements.

5. The European Parliament, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.

EUROPEAN AGREEMENT ESTABLISHING AN ASSOCIATION BETWEEN THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES, OF THE ONE PART, AND THE REPUBLIC OF POLAND, OF THE OTHER PART

Art. 68. The Contracting Parties recognize that the major precondition for Poland's economic integration into the Community is the approximation of that country's existing and future legislation to that of the Community. Poland shall use its best endeavours to ensure that future legislation is compatible with Community legislation.

Art. 69. The approximation of laws shall extend to the following areas in particular: customs law, company law, banking law, company accounts and taxes, intellectual property, protection of workers at the workplace, financial services, rules on competition, protection of health and life of humans, animals and plants, consumer protection, indirect taxation, technical rules and standards, transport and the environment.

**JUDGMENT of 12 January 2005 – Ref. No. K 24/04
(summary)**

[The Sejm and the Senate in the European Legislative Process]

General information

Type of proceedings: abstract review

Initiator: group of Senators

Composition of the Tribunal: full bench

Dissenting opinions: 3

Legal provisions under review: Article 9 of the Act of 2004 on cooperation of the Council of Ministers with the Sejm and the Senate on matters related to Poland's membership in the European Union

Higher-level norms for review: Article 10(2) and Article 95(1) of the Constitution

Key issues: exercising legislative power by the Sejm and Senate, the role of the Polish Parliament in the European decision-making process

Introduction

Since 1 May 2004, Poland, as a member of the European Union, has participated in the Union's legislative activities. Existing EU law does not define the organs within a Member State which shall determine the country's position with respect to EU legislative proposals, nor the applicable procedure for adopting such a position. The regulation of such issues remains within the domain of domestic law. Polish legal norms concerning these matters are contained in the Act of 2004 on cooperation of the Council of Ministers with the Sejm and the Senate on matters related to Poland's membership in the European Union (hereinafter: the 2004 Act).

The 2004 Act imposes an obligation on the Polish government (Council of Ministers) to present various types of documents and legislative proposals, connected with Poland's membership of the EU, to the Sejm (the lower house of the Polish Parliament) and Senate (the upper house of the Polish Parliament), or in some cases to their subsidiary organs (as authorised by the rules of procedure of both houses). Article 9(1) of the 2004 Act is of crucial importance in the present case. According to this provision, prior to the consideration of a legislative proposal by the Council of the European Union, the (Polish) Council of Ministers is obliged to seek the "opinion of an organ authorised by the Sejm's rules of procedure" concerning the intended position of the (Polish) Council of Ministers as regards that proposal. At the time the judgment summarised herein was delivered, this organ was the Sejm's European Affairs Committee. Article 9(3) represents a significant limitation of this obligation: this provision authorises the (Polish) Council of Ministers to refrain from seeking the opinion of the appropriate Sejm organ due to "organisation of the activities of

EU organs”, with the exception of matters in which the Council of the European Union is required to act unanimously, and matters “resulting in a significant burden on the State budget”. Where the government takes advantage of this limitation, its representative is obliged to notify the competent Sejm organ about the position taken in the Council of the European Union and explain the reasons for refraining from seeking the opinion.

It must be stressed that challenged Article 9 concerns the stage of activity of drafting an EU legislative proposal when the (Polish) Council of Ministers has already adopted the position it intends to present at the forum of the Council of the European Union; the opinion of the Sejm Committee, which does not bind the (Polish) Council of Ministers, refers, therefore, to a government position which is already “prepared”. Yet, pursuant to Article 6 of the Act (which was not challenged in the present case), the (Polish) Council of Ministers forwards the drafts of EU legislative proposals to both the Sejm and the Senate, immediately upon receiving them, as well as the outlines of the position taken by the (Polish) Council of Ministers with respect to legislative proposals; the committees of both houses, authorised by the rules of procedure, may then voice opinions on these proposals.

A group of Senators challenged Article 9(1) of the 2004 Act before the Constitutional Tribunal, arguing that its failure to provide for the participation of an appropriate Senate organ, in the process of presenting an opinion on the government’s position, resulted in its non-conformity with the Constitution. The applicants alleged an infringement of the principle that legislative power is exercised by both parliamentary houses (Articles 10(2) and 95(1) of the Constitution). They argued that, since Poland’s accession to the EU limited the scope of domestic legislation to the benefit of EU legislation, the domestic legislative organs ought to be guaranteed the possibility to participate in the adoption of EU legislation, as is the case in other European countries.

It is worth adding that, should the Treaty establishing a Constitution for Europe (mentioned in the Constitutional Tribunal’s reasons for the present ruling) enter into force, the position of national parliaments in the process of adopting European law will be strengthened. A particularly significant change will be that all documents will be sent directly to national parliaments, without the intermediation of Member States’ governments; this concerns, in particular, legislative proposals submitted to the European Parliament. National parliaments will also be able to directly present their opinions, as regards the conformity of a legislative proposal with the principle of subsidiarity, at the forum of the European Union. In respect of bi-cameral parliaments, these rules will apply to each house.

The judgment was reached by a majority of votes. Three judges of the Constitutional Tribunal submitted dissenting opinions.

The Tribunal's ruling

Article 9 of the challenged Act, insofar as it omits the obligation to seek the opinion of an organ authorised by the Senate's rules of procedure, is inconsistent with to Articles 10(2) and 95(1) of the Constitution.

Principal reasons for the ruling

1. The legislative competences specified in the Constitution of the Republic of Poland should now be construed in a manner which takes account of the principally new conditions for the adoption of legislation. Since legislation adopted by EU organs will be operative within Poland's territory, in part directly and in part following the adoption of implementing legislation by the Polish Parliament, the expression of opinions by the latter with respect to EU legislative proposals becomes a significant form of the Polish Parliament's joint participation in the adoption of EU law. The presentation of such opinions allows the domestic legislature to exert some influence on the process of the Union's development as a whole. Concomitantly, the participation of national parliaments in the process of adopting EU law constitutes a factor strengthening the credibility and democratic mandate of the Union's organs.
2. The Polish Constitution contains no provisions which directly regulate the role of the Sejm and Senate in the process of adopting EU law. Given this, it is inevitable to attempt to interpret constitutional norms in such a way as to ensure that the influence of Polish State organs (including Parliament) on the adoption of EU law is incorporated into the existing framework of the Polish system of government. Such an approach also conforms to the principle of interpreting the Constitution in a manner that is favourable to the process of European integration.
3. The Sejm's control over Council of Ministers' activity, exercised pursuant to Article 95(2) of the Constitution, is permissible solely insofar as specified by provisions of the Constitution or statute. In the light of the Constitution's provisions, the instruments of such control encompass, primarily: the institution of the vote of no-confidence (Articles 158 and 159); the possibility to appoint a Sejm investigative committee (Article 111); interpellations and Deputies' questions (Article 115(1)); questions on current affairs (Article 115(2)); and the right to review implementation of the Budget Act and to approve, or disapprove, financial accounts (Article 226).
4. The competences and nature of the Senate stem, directly, from the principle of representation and, indirectly, from the principle of sovereignty of the Polish People (cf. Article 4 of the Constitution).
5. The fundamental reason for refusing to grant the Senate (organ authorised by the Senate's rules of procedure) the right to present an opinion on a position which the Council of Ministers intends to take, with respect to a legislative proposal, in the Council of the European Union – a right which is, pursuant to Article 9(1) of the reviewed 2004 Act, vested in the organ authorised by the

Sejm's rules of procedure – was the fear that the Senate would exercise control over the government in a manner which is reserved by the Constitution for the Sejm. However, the Polish Parliament's co-decision procedure in respect of issues connected to the shaping Poland's negotiating position does not fall within the exercise of control (Article 95(2) of the Constitution) but, rather, within executing the legislative function (Articles 10(2) and 95(1) of the Constitution). Failure to include the Senate (organ authorised by the Senate's rules of procedure) infringes the principle of exercising legislative power by both the Sejm and Senate, as expressed in the two legal bases of review. As long as the constitutional legislator wishes to maintain a bi-cameral Parliament, both houses should be guaranteed equal participation in activities concerning the shaping of Poland's position in the field of adopting EU law.

6. The challenged provision's failure to conform to the Constitution relates to its failure to ensure the duty to seek the opinion of the organ authorised by the Senate's rules of procedure. Given the requirement of precision and non-ambiguity, this provision should be subject to legislative intervention as soon as possible, to amend its wording to the decision given in the ruling of the judgment. However, until such time as the relevant amendment has been introduced, there exist no legal obstacles to the Council of Ministers also presenting information, as regards its position in respect of EU legislative proposals, to the competent Senate organ and seeking the latter's opinion on these matters. Furthermore, it is desirable that this should occur.

Main arguments of the dissenting opinions

Judge Jerzy Ciemniewski:

The title of the reviewed Act contains the term “co-operation”. It is rather a descriptive category of a praxeological nature, as opposed to a legal category. The Act primarily describes parliamentary practice and refers to the forms of contact between the government and houses in the parliamentary-cabinet system to actions of state organs stemming from Poland's membership of the European Union. It does not, however, establish the rights and obligations of the specified organs.

The challenged Article 9 of the Act does not regulate the competences of the Sejm and Senate as constitutional state organs, but refers to the activities of their subsidiary organs – the authorised committees. Accordingly, Articles 10(2) and 95(1) of the Constitution may not represent the bases of constitutional review of this provision.

The presentation of opinions on legislative proposals does not fall within the scope of exercising legislative power, since it is not authoritative in nature. Pronouncing opinions which cause no legal effects and do not even have in their background any explicitly specified political consequences, may not be recognised as a realisation of state authority in the constitutional-legal sense.

Judge Ewa Łętowska:

The Tribunal correctly identifies the existence of a constitutional lacuna. Accordingly, there exists no basis upon which to declare the unconstitutionality of the reviewed statutory provision on the grounds that it contradicts such a lacuna.

The constitutional basis of review of the norm examined by the Constitutional Tribunal need not be expressed *à la lettre* in the text of the Constitution. It may be reconstructed from several constitutional provisions; the entire process of such reconstruction must, however, be carried out. The Tribunal, nevertheless, did not derive a norm from the provisions of the Constitution such as would require granting the Senate competences mirroring those of the Sejm, following the example of the legislative competences. If the Tribunal succeeded in reconstructing such a basis, then it would not be possible to speak of the existence of a constitutional lacuna.

An allegation of unconstitutionality must be distinguished from allegations of legislative incoherence, lack of efficiency, counter-productivity, inoperativeness of the created mechanism, incorrectness of legislative policy etc.

The competence concerned in the present case is not a clearly legislative competence. The challenged provision concerns an opinion regarding how the government should behave (Parliament's control function) in the procedure of adopting Community law (the legislative function). However, the two indicated constitutional bases of review concern the participation of both houses in the process of directly adopting Polish law.

Judge Janusz Niemcewicz:

It is not possible to agree with the statement that the competence envisaged by the challenged provision constitutes an element of Parliament's legislative function, exercised by both the Sejm and the Senate, and not the control function, vested solely in the Sejm. The legislative function consists in adopting legal acts of statutory rank and the control function – in acquiring information regarding the activity of the government and the administration subordinate thereto, as well as forwarding opinions and suggestions to the government. The examined competence relates to acquiring information about a position already adopted by the Council of Ministers and to the possible presentation of an opinion on this matter and, accordingly, it falls within the control function.

Since Articles 10(2) and 95(1) of the Constitution concern the legislative function of both houses, the exercise of which remains unregulated by the challenged Article 9, they do not constitute appropriate higher-level norms for the review of this provision's constitutionality.

Key legal provisions

CONSTITUTION

Art. 4. 1. Supreme power in the Republic of Poland shall be vested in the Nation.

2. The Nation shall exercise such power directly or through their representatives.

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. 95.1. Legislative power in the Republic of Poland shall be exercised by the Sejm and the Senate.

2. The Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.

Art. 111. 1. The Sejm may appoint an investigative committee to examine a particular matter.

2. The procedures for work by an investigative committee shall be specified by statute.

Art. 115. 1. The Prime Minister and other members of the Council of Ministers shall furnish answers to interpellations and Deputies' questions within 21 days.

2. The Prime Minister and other members of the Council of Ministers shall furnish answers to matters raised in the course of each sitting of the Sejm.

Art. 158.1. The Sejm shall pass a vote of no confidence by a majority of votes of the statutory number of Deputies, on a motion moved by at least 46 Deputies and which shall specify the name of a candidate for Prime Minister. If such a resolution has been passed by the Sejm, the President of the Republic shall accept the resignation of the Council of Ministers and appoint a new Prime Minister as chosen by the Sejm, and, on his application, the other members of the Council of Ministers and accept their oath of office.

2. A motion to pass a resolution referred to in para. 1 above, may be put to a vote no sooner than 7 days after it has been submitted. A subsequent motion of a like kind may be submitted no sooner than after the end of 3 months from the day the previous motion was submitted. A subsequent motion may be submitted before the end of 3 months if such motion is submitted by at least 115 Deputies.

Art. 159. 1. The Sejm may pass a vote of no confidence in an individual minister. A motion to pass such a vote of no confidence may be submitted by at least 69 Deputies. The provisions of Article 158, para. 2 shall apply as appropriate.

2. The President of the Republic shall recall a minister in whom a vote of no confidence has been passed by the Sejm by a majority of votes of the statutory number of Deputies.

Art. 226. 1. The Council of Ministers, within the 5-month period following the end of the fiscal year, shall present to the Sejm a report on the implementation of the Budget together with information on the condition of the State debt.

2. Within 90 days following receipt of the report, the Sejm shall consider the report presented to it, and, after seeking the opinion of the Supreme Chamber of Control, shall pass a resolution on whether to grant or refuse to grant approval of the financial accounts submitted by the Council of Ministers.

**JUDGMENT of 27 April 2005 – Ref. No. P 1/05
(summary)**

[European Arrest Warrant (I)]

General information

Type of proceedings: question of law referred by a court

Initiator: Circuit Court in Gdańsk

Composition of the Tribunal: full bench

Dissenting opinions: 0

Legal provisions under review: Article 607t(1) of the Code of Criminal Procedure

Higher-level norms for review: Article 55(1) of the Constitution

Key issues: admissibility of surrendering a Polish citizen to another Member State of the European Union on the basis of the European arrest warrant, prohibition on extraditing Polish citizens

Introduction

On 13 June 2002, the Council of the European Union issued the Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA). The aforementioned decision constitutes a source of EU secondary legislation within the framework of the so-called Third Pillar of the European Union (cf. Article 34 [ex-Article K.6] (2) point b of the Treaty on European Union).

The Framework Decision of 13 June 2002 represents a reaction of the EU Member States to the undesirable side-effects of the free movement of persons between those States, which involves a new form of cooperation in counteracting more serious criminal offences.

According to the definition contained in Article 1(1) of the Framework Decision of 13 June 2002, the European arrest warrant is “a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order”.

The obligation to execute a European arrest warrant (EAW) also exists, in principle, when a person to whom the EAW relates is a citizen of a Member State where the warrant was received. Such a Member State is entitled to refuse to surrender one of its citizens, against whom an EAW has been issued, only where the warrant was issued for the purpose of executing a previously imposed custodial sentence or detention order, and where that State undertakes to execute the custodial sentence or detention order in accordance with its domestic law (Article 4 point 6 of the Framework Decision). Where the EAW was issued for the purpose of prosecuting

an offence which has not yet been adjudged, the Member State obliged to execute the warrant may subject the surrendering of its citizen to the condition that such person is returned to that Member State in order to serve the custodial sentence or detention order there (Article 5 (3) of the Framework Decision).

Furthermore, the Framework Decision departs from the principle of the so-called double criminalisation – a feature of the “classic” institution of extradition in inter-state relations. This principle makes extradition conditional on whether the extraditing State recognises an act committed by an accused or convicted person as a criminal offence. However, in the case of many acts enumerated in the Framework Decision of 13 June 2002, it is sufficient, in order to require a person’s surrender on the basis of an EAW, that the act must be recognised as an offence in the State where the warrant was issued. Furthermore, the political nature of an offence does not constitute an obstacle to executing an EAW.

The surrender procedure on the basis of an EAW is simpler than in the case of “classic” extradition. This is demonstrated, for example, by the fact that the said warrants are passed directly between appropriate judicial organs without the participation of diplomats or other intermediaries.

When Poland acceded to the European Union on 1 May 2004, it accepted the obligation to implement, in full, the Framework Decision of 13 June 2002. For the purpose of fulfilling this obligation, it was primarily necessary to transpose the content of the Framework Decision into Polish legislation (framework decisions issued within the EU’s Third Pillar, just as directives issued within the scope of the First Pillar, are not directly applicable).

Divergent opinions arose within judicial circles regarding Poland’s ability to execute an EAW against its own citizens, given the prohibition on “extraditing” Polish citizens expressed in Article 55(1) of the 1997 Constitution. Alongside views expressing the opinion that an appropriate amendment to the Constitution was required, other commentators suggested that the “surrendering” of a citizen on the basis of an EAW was a concept distinct from the notion of “extradition” within international law, which was mirrored (in those commentators’ opinions) in Article 55(1) of the Constitution. The Marshal of the Sejm and the Prosecutor General addressed the latter views in proceedings before the Constitutional Tribunal.

The Polish legislator decided to transpose the Framework Decision of 13 June 2002 by way of amendment to the Code of Criminal Procedure, without any accompanying alteration of the Constitution. The aforementioned amendment was made on the basis of a 2004 Act amending several criminal statutes. Two new chapters were introduced into the Code of Criminal Procedure (the said Code): chapter 65a, regulating situations when a Polish court issues an EAW, and chapter 65b, regulating situations when an EAW issued by a court of another EU Member State concerns a person present in Poland. At the same time, the legislator created a terminological distinction between extradition and the surrendering of a person on the basis of an EAW: in the amended Article 602 of the said Code, included in chapter 65 (entitled “Surrender and transport of prosecuted or convicted persons, or the delivery of

objects upon the request of foreign states”), “extradition” is defined in a manner so as to exclude the surrendering of a person on the basis of the EAW, pursuant to the procedure regulated in Chapter 65b.

No provision in the Code expressly states that the surrendering of a person from the Polish territory, on the basis of an EAW, may also apply to a Polish citizen. Such a conclusion stems, however, from certain regulations contained in Chapter 65b, as interpreted in conjunction with the Framework Decision of 13 June 2002. Namely, Article 607p of the said Code, specifying the compulsory prerequisites for refusing to execute an EAW, fails to envisage that the possession of Polish citizenship by the person to whom the warrant relates could constitute a basis for refusal to execute such a warrant (in comparison, Article 604 of the said Code, concerning extradition, states that extradition is not permissible where the person to whom the extradition relates is a Polish citizen or enjoys the right of asylum in Poland). Articles 607s and 607t impose certain restrictions for executing an EAW in respect of Polish citizens and persons enjoying the right of asylum in Poland, who are treated in the same way as Polish citizens.

These two last-mentioned Articles of the Code of Criminal Procedure draw a distinction as regards the application of an EAW in respect of Polish citizens on the basis of whether an EAW was issued for the purpose of executing a previously imposed custodial sentence (or detention order), or rather for the purpose of prosecuting a given person for a criminal offence. Article 607s (1) concerns the first situation and states that an EAW may not be executed against a Polish citizen in the absence of their consent to the surrender. In the absence of such consent, the carrying out of the penalty takes place in Poland (Article 607s (3)-(5). Article 607t(1), challenged in the present case, concerns the second situation: “Where a European arrest warrant has been issued for the purposes of prosecuting a person holding Polish citizenship or enjoying the right of asylum in the Republic of Poland, the surrender of such a person may only take place upon the condition that such a person will be returned to the territory of the Republic of Poland following the valid completion of proceedings in the State where the warrant was issued”.

In the present case, proceedings before the Constitutional Tribunal were initiated by the Circuit Court in Gdańsk, which considered the public prosecutor’s application concerning the issuance of a procedural decision on surrendering a Polish citizen – Ms M. D. – on the basis of an EAW, for the purpose of conducting a criminal prosecution against her in the Kingdom of the Netherlands.

The delay of the loss of the binding force of the unconstitutional provision, determined in part II of the ruling, is determined from the date on which the judgment was published in the Journal of Laws (this took place on 4 May 2005). It follows from the reasoning for the judgment that the legislator may avoid the effects of failing to adjust Polish law to the requirements of the Framework Decision by way of an appropriate amendment to the Constitution and, subsequently, by the re-introduction of the statutory norm found unconstitutional in the judgment summarised herein (cf. points 10 and 14-16 below).

The Tribunal's ruling

I Article 607t(1) of the Code of Criminal Procedure, insofar as it permits the surrendering of a Polish citizen to another Member State of the European Union on the basis of the European arrest warrant, is inconsistent with Article 55(1) of the Constitution.

II The Tribunal ruled that the loss of the binding force of the challenged provision shall be delayed for 18 months following the day on which this judgment was published in the Journal of Laws.

Principal reasons for the ruling

1. Constitutional notions have an autonomous nature in relation to binding acts of lower rank. The meaning of terms contained in ordinary statutes may not determine the interpretation of constitutional provisions; otherwise, the guarantees contained in these provisions would lose any sense. On the contrary, it is constitutional norms that dictate the manner and direction of interpretation as regards statutory provisions. The starting point for the interpretation of constitutional notions is the understanding of terms used in the text of the Constitution, shaped historically and defined within the legal doctrine.
2. Traditionally, the terms “extradition” and “surrendering” were treated as synonymous in the Polish legal discourse. This was true as regards the Code of Criminal Procedure of 1969 and 1997 (until its amendment of 18 March 2004). Accordingly, it should be assumed that, within the currently binding Constitution of the Republic of Poland of 1997, the constitution-maker identified “extradition” with “surrendering” as legal institutions consisting in the transfer of a prosecuted person upon the request of a foreign State, for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them. In using the term “extradition” in the 1997 Constitution and in vesting a constitutional rank to the prohibition on extraditing Polish citizens, the constitutional legislator could not have taken into account provisions concerning the European arrest warrant, even when envisaging Poland’s future membership of the European Union. It was only the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/5 84/JHA) that created the obligation for EU Member States to surrender their own citizens prosecuted on the basis of the EAW.
3. Significant discrepancies between “surrendering” on the basis of the EAW and “extradition” on the basis of the Code of Criminal Procedure, as amended in 2004, do not preclude the possibility that the former does not constitute extradition within the autonomous constitutional sense, as provided in Article 55(1) of the Constitution (cf. point 1 above). The Constitution fails to regulate those aspects which would determine the differences between both of these institutions on the basis of the Code. This indicates that it would only be possible to consider

- the surrendering of a person prosecuted on the basis of an EAW as an institution distinct from extradition, as referred to in Article 55(1) of the Constitution, where the essence of each of these institutions was different. Since the essence (core) of extradition lies in the transfer of prosecuted, or sentenced, persons for the purpose of conducting a criminal prosecution against them or executing a penalty previously imposed upon them, the surrendering of persons prosecuted on the basis of an EAW for the purpose of conducting a criminal prosecution against them or executing an imposed custodial sentence or another measure consisting in the deprivation of liberty, on the territory of another Member State, must be viewed as a form of extradition within the meaning of Article 55(1) of the Constitution.
4. The prohibition on extradition contained in the aforementioned constitutional provision expresses a right for Polish citizens to be held criminally accountable before a Polish court. Surrendering a citizen to another EU Member State on the basis of an EAW would entirely preclude enjoyment of this right and, *ipso facto*, would amount to an infringement of the essence of this right, which is inadmissible in the light of Article 31(3) of the Constitution. It should, therefore, be recognised that the prohibition on extraditing Polish citizens, as formulated in Article 55(1) of the Constitution, is absolute in nature and the personal right of citizens stemming therefrom may not be subject to any limitations.
 5. When Poland became a Member State of the European Union, Polish citizens also became citizens of the European Union. This circumstance constitutes an argument justifying the overturning, by means of an appropriate amendment to Article 55(1) of the Constitution, of the prohibition on extraditing Polish citizens to EU Member States. However, it does not constitute a sufficient prerequisite for concluding that such overturning has already occurred, by virtue of a dynamic interpretation of this provision. It is crucial that the Constitution links a certain set of individual rights and obligations (independent of the rights and obligations vested in “everyone” falling within the jurisdiction of the Republic of Poland) with the possession of Polish citizenship. In consequence, the possession of Polish citizenship must constitute a significant criterion when assessing an individual’s legal status – concerning both the obligations of the State vis-à-vis the citizen (particularly, when they are formulated in Article 55(1) of the Constitution) and the obligations of the citizen vis-à-vis the State, coupled with the former (cf. Articles 82 and 85 of the Constitution). Furthermore, it should be noticed that the surrender procedure on the basis of an EAW is not so much a consequence of introducing the institution of “citizenship of the Union” but rather an answer to the right of EU citizens to move freely and reside within the territory of another Member State, which preceded the introduction of the aforementioned institution.
 6. The Code does not contain any norm stating *expressis verbis* that the transfer of a person prosecuted on the basis of an EAW from the territory of the Republic of Poland shall also apply in respect of Polish citizens. Such a norm should,

- however, be derived from Article 607t(1), read in conjunction with Article 607p, of the said Code, which does not include the prosecuted person's possession of Polish citizenship as one of the enumerated prerequisites for obligatory refusal to execute an EAW.
7. Whilst the obligation to implement EU secondary legislation, including framework decisions adopted within the Union's Third Pillar (cf. Article 32 of the Treaty on European Union, as amended by the Amsterdam Treaty), has its basis in Article 9 of the Constitution of the Republic of Poland, the fact that a domestic statute was enacted for the purpose of implementing EU secondary legislation does not *per se* guarantee the substantive conformity of this statute with the norms of the Constitution.
 8. The obligation to interpret domestic law in a manner that is favourable to EU law (so as to comply with EU law) has its limits. In particular, it stems from the jurisprudence of the Court of Justice of the European Communities that EU secondary legislation may not independently (in the absence of appropriate amendments in domestic legislation) worsen an individual's situation, especially as regards the sphere of criminal liability. It is beyond doubt that the surrender of a person prosecuted on the basis of an EAW, in order to conduct a criminal prosecution against them in respect of an act which, according to Polish law, does not constitute a criminal offence, must worsen the situation of the suspect.
 9. The basic function of the Constitutional Tribunal within the Polish constitutional system is to review the conformity of normative acts with the Constitution. The Tribunal is not relieved of this obligation where the allegation of non-conformity with the Constitution concerns the scope of a statute implementing European Union law.
 10. Given the content of Article 9 of the Constitution, and the obligations stemming from Poland's membership of the European Union, an amendment to the currently applicable law is inevitable, enabling a full and, also, constitutionally compatible implementation of the Framework Decision of 13 June 2002. In order to enable the fulfilment of this task, an appropriate amendment to Article 55(1) of the Constitution may not be excluded so that this provision will envisage an exception to the prohibition on extraditing Polish citizens, so as to permit their surrender to other Member States of the European Union on the basis of an EAW.
 11. The possibility, envisaged in Article 190(3) of the Constitution, for a judgment of the Constitutional Tribunal to delay the loss of the binding force of a provision found nonconforming to an act of higher rank, is not limited to cases of the abstract review of norms but may also be applied within the procedure for review of norms initiated by a question of law referred by a court or by a constitutional complaint.
 12. Article 190 of the Constitution endows the Tribunal with significant discretion in exercising the competence to delay the entry into force of its judgments – both as regards the grounds for such a period of delay and the specified duration of such a delay (within the limits indicated by the discussed provision). However, this

discretion does not signify arbitrariness. The aforementioned delay is equivalent to temporarily leaving in force the provision found inconsistent with an act positioned higher in the hierarchical system of the sources of law and, *ipso facto*, must always be applied as an exception, permitted by the constitution-maker, from the principle of the hierarchical conformity of the legal system and the principle of the supremacy of the Constitution. Each decision concerning the application of such a delay should be based on weighing, on the one hand, values infringed in consequence of a prolonged application of unconstitutional provisions and, on the other hand, values enhanced by this delay.

13. The regulation contained in Article 31(3) of the Constitution, concerning the limitation of an individual's constitutional rights and freedoms, does not refer directly to the application of the delay envisaged in Article 190(3) of the Constitution. Accordingly, it is also permissible for the Tribunal to take advantage of the possibility to delay the entry into force of its judgments for reasons other than the values enumerated in Article 31(3) of the Constitution (security and public order, protection of the natural environment, health or public morals, or the freedoms and rights of other persons), even where it is inevitable that this leads to the temporary maintenance in force of provisions limiting constitutional rights and freedoms.
14. Whilst a judgment of the Constitutional Tribunal delaying the loss of binding force of an unconstitutional provision does not immediately eliminate this provision from the legal system, it does create an obligation for the legislator to undertake actions aiming at rapid elimination of the defects of the legal regulation indicated by the Tribunal, insofar as possible before the lapse of the time period stipulated in the Tribunal's judgment. The loss of binding force of the provision following the lapse of this period may be conceived as a specific sanction for failure to fulfil the indicated obligation.
15. Taking into account the complexity and more stringent requirements (also regarding the relevant time periods) governing the procedure for amending the law, as well as the fact that Poland's obligation to implement the Framework Decision of 13 June 2002 only exists from the date of Poland's accession to the EU, i.e. from 1 May 2004, the Tribunal decided (in part II of the ruling) that the loss of the binding force of the unconstitutional provision shall be delayed for 18 months, i.e. for the maximum period of delay, as envisaged in Article 190(3) of the Constitution.
16. If, as a consequence of the present judgment, an amendment to the Constitution is introduced, it will be necessary, in order to ensure the compatibility of domestic law with EU law, to re-introduce legal provisions concerning the EAW which were found unconstitutional on the grounds of the hitherto constitutional provision.
17. The institution of the EAW has crucial significance for the functioning of the administration of justice and, primarily – as a form of cooperation between Member States assisting in the fight against crime – for improving security. Accordingly, the Polish legislator should give the highest priority to ensuring its

- functioning. The absence of appropriate legislative actions undertaken within the time period specified in part II of the judgment summarised herein will not only amount to an infringement of the constitutional obligation for Poland to observe binding international law but could also lead to serious consequences on the basis of European Union law.
18. The Constitution does not envisage any exceptions to the principle of the universally binding force of the Tribunal's judgments, as expressed in Article 190(1) of the Constitution. In particular, the Tribunal's judgments are binding upon all courts.
 19. The delay of the loss of the binding force of Article 607t(1) of the said Code has the effect that, during the period of 18 months following the publication of the present judgment, this provision should be applied by organs administering justice, provided that the legislator does not earlier quash or amend this provision. Whilst this provision remains in force, Polish courts may not refuse to apply it for the reason that it fails to conform to Article 55(1) of the Constitution.
 20. In the light of the fact that the Constitutional Tribunal is bound by the limits of the referred question of law (Article 66 of the Constitutional Tribunal Act), whose scope is, in turn, determined by the substance of the case before the court referring the question (Article 193 of the Constitution), the issue raised in various writings as to whether provisions permitting the surrender, on the basis of an EAW, of a person suspected of committing an offence for political reasons, without the use of violence, conforms to Article 55(2) of the Constitution, may not be adjudicated on in the present case.

Key legal provisions

CONSTITUTION

Art. 9. The Republic of Poland shall respect international law binding upon it.

Art. 31. [...] 3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 55.1. The extradition of a Polish citizen shall be forbidden.

2. The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden.

3. The courts shall adjudicate on the admissibility of extradition.

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. [...]

3. A judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act. Such time period may not exceed

18 months in relation to a statute or 12 months in relation to any other normative act. Where a judgment has financial consequences not provided for in the Budget, the Constitutional Tribunal shall specify date for the end of the binding force of the normative act concerned, after seeking the opinion of the Council of Ministers.

Art. 193. 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 statute, if the answer to such question of law will determine an issue currently before such court.

CONSTITUTIONAL TRIBUNAL ACT

Art. 66. The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint.

TREATY ON EUROPEAN UNION

Art. 34. [...] 2. The Council shall take measures and promote cooperation, using the appropriate form and procedures as set out in this title, contributing to the pursuit of the objectives of the Union. To that end, acting unanimously on the initiative of any Member State or of the Commission, the Council may: [...]

b) adopt framework decisions for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result to be achieved but shall leave to the national authorities the choice of form and methods. They shall not entail direct effect; [...]

**JUDGMENT of 11 May 2005 – Ref. No. K 18/04
(summary)**

[Constitutionality of the Accession Treaty]

General information

Type of proceedings: abstract review

Initiator: groups of Sejm Deputies

Composition of the Tribunal: full bench

Dissenting opinions: 0

Legal provisions under review: the Treaty concerning the accession of the Republic of Poland to the European Union, read in conjunction with certain provisions of the Treaty establishing the European Community and the Treaty on European Union

Higher-level norms for review: numerous provisions of the Constitution cited by the applicants

Key issues: accession procedure, the influence of EU law on the Polish legal system, the primacy of EU law

Introduction

The Treaty concerning the accession of 10 States, including Poland, to the European Union (hereinafter: the Accession Treaty) was signed in Athens on 16 April 2003. There are 25 States that are parties to this Treaty: 15 existing EU Member States and 10 acceding States.

On 7 and 8 June 2003 a referendum was held in Poland, wherein the Nation was asked, within the procedure provided for by Article 90(3) of the Constitution of the Republic of Poland, to grant consent to the ratification of this Treaty. A majority of voters (77.45%) voted for ratification. On the basis of the referendum results, the Polish President ratified the Accession Treaty which, together with the accompanying documents, was published in the Journal of Laws of the Republic of Poland, Issue No. 90, dated 30 April 2004. On 1 May 2004, Poland became a member of the European Union.

The Accession Treaty is accompanied by the “Act concerning the conditions of accession of the Republic of Poland and the adjustments to the Treaties on which the European Union is founded”, which constitutes an integral part of the Treaty. The “Final Act” is of a similar character.

Pursuant to the Accession Treaty, Poland undertook to implement EU law in its entirety, including the so-called founding treaties – the Treaty establishing the European Community (EC Treaty) and the Treaty on European Union (EU Treaty). The concept of the European Union encompasses three “Pillars”: I – the European Communities, i.e. the European Community (formerly known as the European

Economic Community) and the European Atomic Energy Community; II – the Common Foreign and Security Policy; III – the Police and Judicial Cooperation in Criminal Matters. To date, only those Communities within the framework of the First Pillar have the character of international organisations; the Second and Third Pillars constitute a kind of forum for cooperation between Member States. Accordingly, the notion of “EU law” encompasses, on the one hand, Community law, i.e. the law of the First Pillar and, on the other hand, provisions connected with the functioning of the two remaining Pillars. Community law consists of the entire *acquis communautaire*, including provisions of the Treaties (the so-called primary Community law – originating directly from Member States), provisions issued by the organs of the Communities (called secondary Community law), as well as the jurisprudence of the Court of Justice of the European Communities (ECJ, located in Luxembourg) and the Court of First Instance.

The Constitutional Tribunal’s judgment in the present case does not represent the Tribunal’s first statement concerning the relationship between Polish law and EU law. It refers, however, to certain problems concerning this relationship and, in particular, the relationship between the Polish Constitution and the contents of the Accession Treaty and founding treaties, in the broadest and, to date, the most fundamental manner. The issue concerning the constitutionality of the procedure for accession was dealt with in the Tribunal’s judgment of 27 May 2003, K 11/03. Amongst the Tribunal’s various judgments concerning the relationship between domestic law and EU law, the following judgments deserve special attention: K 33/03 (bio-components in gasoline and diesel), K 15/04 (participation of foreigners in European Parliamentary elections), K 24/04 (inequality in the competences of the Sejm and Senate committees in respect of EU legislative proposals) and P1/05 (the application of the European arrest warrant to Polish citizens). The aforementioned judgments are summarised individually.

The initiators of the proceedings before the Constitutional Tribunal in the present case – three groups of Deputies from the Sejm (the lower house of the Polish Parliament), opposing Poland’s membership in the EU on the conditions stemming from the Accession Treaty – alleged that this accession failed to conform to the Constitution of the Republic of Poland, *inter alia*, to the constitutional principles of the sovereignty of the Polish People and the supremacy of the Constitution within the Polish legal system. When challenging these conditions of accession, in their entirety, the applicants focused their critique on the following provisions of the Treaties:

- Article 1(1) of the Accession Treaty, according to which 10 new EU Member States, including Poland, become “Parties to the Treaties on which the Union is founded as amended or supplemented”.
- Article 1(3) of the Accession Treaty: “The provisions concerning the rights and obligations of the Member States and the powers and jurisdiction of the institutions of the Union as set out in the Treaties referred to in paragraph 1 shall apply in respect of this Treaty”.

- Article 2 of the Act concerning the conditions of accession, according to which the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank prior to accession shall be binding upon the new Member States.
- Article 8 of the EC Treaty, establishing the European system of central banks (ESCB) and the European Central Bank (ECB) acting within the limits of the powers conferred upon them by this Treaty and by the Statutes of the ESCB and ECB.
- Article 12 of the EC Treaty: “Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited. The Council, acting in accordance with the procedure referred to in Article 251, may adopt rules designed to prohibit such discrimination”.
- Article 13(1) of the EC Treaty: “Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.” Section 2 of this Article contains complementary provisions concerning procedural matters.
- Article 19(1) of the EC Treaty: “Every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State. This right shall be exercised subject to detailed arrangements adopted by the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament; these arrangements may provide for derogations where warranted by problems specific to a Member State.”
- Article 33 of the EC Treaty, determining the objectives and methods of organisation of the Common Agricultural Policy within the Community framework.
- Article 105 of the EC Treaty, determining the objectives and tasks of the European System of Central Banks and authorising the Council of the EU to confer the European Central Bank specific tasks concerning policies relating to the prudential supervision of certain financial institutions.
- Article 190 of the EC Treaty, concerning European Parliamentary elections and the composition of the European Parliament (EP). According to section 1, the EP is composed of the representatives of the peoples of the States brought together in the Community, elected by direct universal suffrage. Section 2 of this Article, in the wording introduced by the Accession Treaty, determines the number of representatives elected in each Member State; Poland has 54 MEP’s, i.e. the same amount as Spain (larger States, in population terms, have more places: Germany has 99 MEP’s, whilst France and United Kingdom each have 78 MEP’s). According to section 3, the representatives shall be elected for a term of five years. Sections 4 and 5 have the following wording: “4. The European Parliament shall

draw up a proposal for elections by direct universal suffrage in accordance with a uniform procedure in all Member States or in accordance with principles common to all Member States. The Council shall, acting unanimously after obtaining the assent of the European Parliament, which shall act by a majority of its component members, lay down the appropriate provisions, which it shall recommend to Member States for adoption in accordance with their respective constitutional requirements. 5. The European Parliament, after seeking an opinion from the Commission and with the approval of the Council acting by a qualified majority, shall lay down the regulations and general conditions governing the performance of the duties of its Members. All rules or conditions relating to the taxation of Members or former Members shall require unanimity within the Council.”

- Article 191 of the EC Treaty: “Political parties at European level are important as a factor for integration within the Union. They contribute to forming a European awareness and to expressing the political will of the citizens of the Union.”
- Article 202 of the EC Treaty: “To ensure that the objectives set out in this Treaty are attained the Council shall, in accordance with the provisions of this Treaty: ensure coordination of the general economic policies of the Member States, have power to take decisions, confer on the Commission, in the acts which the Council adopts, powers for the implementation of the rules which the Council lays down. The Council may impose certain requirements in respect of the exercise of these powers. The Council may also reserve the right, in specific cases, to exercise directly implementing powers itself. The procedures referred to above must be consonant with principles and rules to be laid down in advance by the Council, acting unanimously on a proposal from the Commission and after obtaining the opinion of the European Parliament.”
- Article 203 of the EC Treaty: “The Council shall consist of a representative of each Member State at ministerial level, authorised to commit the government of that Member State. The office of President shall be held in turn by each Member State in the Council for a term of six months in the order decided by the Council acting unanimously.”
- Article 234 of the EC Treaty: “The Court of Justice shall have jurisdiction to give preliminary rulings concerning: a) the interpretation of this Treaty; b) the validity and interpretation of acts of the institutions of the Community and of the ECB; c) the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide. Where such a question is raised before any court or tribunal of a Member State, that court or tribunal may, if it considers that a decision on the question is necessary to enable it to give judgment, request the Court of Justice to give a ruling thereon. Where any such question is raised in a case pending before a court or tribunal of a Member State against whose decisions there is no judicial remedy under national law, that court or tribunal shall bring the matter before the Court of Justice.”
- Article 249 of the EC Treaty: “In order to carry out their task and in accordance with the provisions of this Treaty, the European Parliament acting jointly with

the Council, the Council and the Commission shall make regulations and issue directives, take decisions, make recommendations or deliver opinions. A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States. A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods. A decision shall be binding in its entirety upon those to whom it is addressed. Recommendations and opinions shall have no binding force.”

- Article 308 of the EC Treaty: “If action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community, and this Treaty has not provided the necessary powers, the Council shall, acting unanimously on a proposal from the Commission and after consulting the European Parliament, take the appropriate measures.”
- Article 6(2) of the EU Treaty: “The Union shall respect fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms signed in Rome on 4 November 1950 and as they result from the constitutional traditions common to the Member States, as general principles of Community law.”
- Article 17 of the Charter of Fundamental Rights, adopted on 7th December 2000 by the Council of the EU during the Nice Summit: “1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest. 2. Intellectual property shall be protected.”

When justifying the claim that the conditions of accession failed to conform to the Polish Constitution, the applicants referred to the Constitution’s Preamble – especially to its part concerning the sovereign and democratic determination of Homeland’s fate by the Nation, and the independence of Poland – as well as to numerous constitutional provisions, which are quoted below.

The structure of the ruling corresponds to the configuration of the challenged provisions and the higher-level norms for constitutional review indicated by the applicants. Whenever the Tribunal uses the formula “is not inconsistent with”, this expresses the Tribunal’s view that the constitutional provision cited by the applicant does not constitute an adequate basis upon which to review challenged legal provisions, given the absence of any significant conjunction between their contents.

The Tribunal’s ruling

1. The Accession Treaty signed in Athens on 16 April 2003 conforms to the Preamble and to Articles 8(1), 21(1), 38, 83, 87, 90(1), 91(3) of the Constitution and

- is not inconsistent with Articles 1,2,4,5,6,10,13,18,23,25(4), 31,62(1), 79(1), 95,101(1), 178(1), 188 point 1, 193, 227(1) and 235 of the Constitution.
2. The Act concerning the conditions of accession and the adjustments to the Treaties on which the European Union is founded, constituting an integral part of the Accession Treaty, conforms to the Preamble and Articles 8(1), 21(1), 38, 83, 87 and 91(3) of the Constitution and is not inconsistent with Articles 1, 2, 4, 5, 6, 10, 13, 18, 23, 25(4), 31, 62(1), 79(1), 95, 101(1), 178(1), 188 point 1, 193, 227(1) and 235 of the Constitution.
 3. The Final Act, constituting an integral part of the Accession Treaty, is not inconsistent with the Preamble and Articles 1, 2,4, 5, 6, 8(1), 10, 13, 18, 21(1), 23, 25(4), 31, 38, 62(1), 79(1), 83, 87, 91(3), 95, 101(1), 178(1), 188 point 1, 193, 227(1) and 235 of the Constitution.
 4. Article 1(1) and (3) of the Accession Treaty conforms to the Preamble and Articles 8(1) and 91(3) of the Constitution and is not inconsistent with Articles 188 and 235 of the Constitution.
 5. Article 2 of the Act mentioned in point 2 conforms to the Preamble and Articles 8(1) and 91(3) of the Constitution and is not inconsistent with Articles 188 and 235 of the Constitution.
 6. The Accession Treaty, read in conjunction with Articles 8 and 105 of the EC Treaty, is not inconsistent with Article 227(1) of the Constitution.
 7. The Accession Treaty, read in conjunction with Article 12 of the EC Treaty, is not inconsistent with Article 6 of the Constitution.
 8. The Accession Treaty, read in conjunction with Article 13 of the EC Treaty, is not inconsistent with Articles 6 and 18 of the Constitution.
 9. The Accession Treaty, read in conjunction with Article 19(1) of the EC Treaty, is not inconsistent with Articles 1 and 62(1) of the Constitution.
 10. The Accession Treaty, read in conjunction with Article 33 of the EC Treaty, is not inconsistent with Article 23 of the Constitution.
 11. The Accession Treaty, read in conjunction with Article 190 of the EC Treaty, is not inconsistent with Articles 2 and 101(1) of the Constitution.
 12. The Accession Treaty, read in conjunction with Article 191 of the EC Treaty, is not inconsistent with Article 13 of the Constitution.
 13. The Accession Treaty, read in conjunction with Articles 202 and 203 of the EC Treaty, is not inconsistent with Articles 4,5 and 10 of the Constitution.
 14. The Accession Treaty, read in conjunction with Article 234 of the EC Treaty, insofar as it imposes an obligation to request a preliminary ruling from the Court of Justice by a national court against whose decisions there is no judicial remedy under national law, is not inconsistent with Articles 8(1), 174, 178(1), 188, read in conjunction with Articles 190(1), 193 and 195(1), of the Constitution.
 15. The Accession Treaty, read in conjunction with Article 249 of the EC Treaty, is not inconsistent with Articles 31(3), 83 and 87(1) of the Constitution.
 16. The Accession Treaty, read in conjunction with Article 308 of the EC Treaty, is not inconsistent with Articles 79(1) and 95(1) of the Constitution.

17. The Accession Treaty, read in conjunction with Article 6(2) of the EU Treaty, is not inconsistent with Articles 21(1) and 38 of the Constitution.

On the basis of Article 39(1) point 1 of the Constitutional Tribunal Act, the Tribunal discontinued proceedings in relation to the review of the conformity of:

- a) the Accession Treaty, and the Acts indicated in points 2 and 3, with the Constitution in its entirety;
 - b) the Accession Treaty, and the Act indicated in point 2, with Article 55(1) of the Constitution;
 - c) Article 17 of the Charter of Fundamental Rights with Article 21(1) of the Constitution
- given that it would be inadmissible to issue a judgment with regard to these issues.

Principal reasons for the ruling

1. The accession of Poland to the European Union did not undermine the supremacy of the Constitution over the whole legal order within the field of sovereignty of the Republic of Poland. The norms of the Constitution, being the supreme act which is an expression of the Nation's will, would not lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any Community provision. In such a situation, the autonomous decision as regards the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator.
2. The process of European integration, connected with the delegation of competences in relation to certain matters to Community (Union) organs, has its basis in the Constitution. The mechanism for Poland's accession to the European Union finds its express grounds in constitutional regulations and the validity and efficacy of the accession are dependent upon fulfilment of the constitutional elements of the integration procedure, including the procedure for delegating competences.
3. The Constitutional Tribunal's competence to adjudicate upon matters concerning the conformity of international agreements with the Constitution (Article 188 point 1 of the Constitution) is not dependent upon the procedure for consenting to the ratification of an agreement; it encompasses agreements which were ratified following prior statutory consent, as well as those ratified via the procedure of a nationwide referendum (Article 90(3) of the Constitution).
4. When reviewing the constitutionality of the Accession Treaty as a ratified international agreement, including the Act concerning the conditions of accession (constituting an integral component of the Accession Treaty), it is also permissible to review the Treaties founding and modifying the Communities and the European Union, although only insofar as the latter are inextricably connected with application of the Accession Treaty.

5. Statutes authorising the ratification of an international agreement are adopted with observance of the appropriate procedural requirements governing the decision-making process within the Sejm and the Senate. These requirements, as regards the regulation contained in Article 90(1) and (2) of the Constitution, which refer to international agreements concerning the delegation of competences of Polish public authority organs to an international organisation or international organ, are significantly strengthened – in comparison with the ratification mentioned in Article 89 of the Constitution. In the discussed field, the Sejm and Senate function as organs representing the Nation-sovereign, in accordance with the principle expressed in Article 4(2) of the Constitution. The reference to a sovereign decision of the Nation is even more intensive and direct where consent for the ratification of an international agreement concerning the delegation of certain competences is not expressed by statute (Article 89(1), read in conjunction with Article 90(2), of the Constitution) but rather via the procedure of a nationwide referendum (Article 90(3)).
6. It is insufficiently justified to assert that the Communities and the European Union are “supranational organisations” – a category that the Polish Constitution, referring solely to an “international organisation”, fails to envisage. The Accession Treaty was concluded between the existing Member States of the Communities and the European Union and applicant States, including Poland. It has the features of an international agreement, within the meaning of Article 90(1) of the Constitution. The Member States remain sovereign entities – parties to the founding treaties of the Communities and the European Union. They also, independently and in accordance with their constitutions, ratify concluded treaties and have the right to denounce them under the procedure and on the conditions laid down in the Vienna Convention on the Law of Treaties 1969. The expression “supranational organisation” is neither mentioned in the Accession Treaty, nor in the Acts constituting an integral part thereof or any provisions of Community secondary legislation.
7. Article 90(1) of the Constitution authorises the delegation of competences of state organs only “in relation to certain matters”. This implies a prohibition on the delegation of all competences of an organ of state authority or competences determining its substantial scope of activity, or competences concerning the entirety of matters within a certain field.
8. Neither Article 90(1) nor Article 91(3) authorise delegation to an international organisation of the competence to issue legal acts or take decisions contrary to the Constitution, being the “supreme law of the Republic of Poland” (Article 8(1)). Concomitantly, these provisions do not authorise the delegation of competences to such an extent that it would signify the inability of the Republic of Poland to continue functioning as a sovereign and democratic state.
9. From an axiological perspective of the Polish Constitution, the constitutional review of delegating certain competences should take into account the fact that, in the Preamble to the Constitution, emphasising the significance of Poland

- having reacquired the possibility to determine her fate in a sovereign and democratic manner, the constitutional legislator declares, concomitantly, the need for “cooperation with all countries for the good of a Human Family”, observance of the obligation of “solidarity with others” and universal values, such as truth and justice. This duty refers not only to internal but also to external relations.
10. The regulation contained in Article 8(1) of the Constitution, which states that the Constitution is the “supreme law of the Republic of Poland”, is accompanied by the requirement to respect and to be favourably inclined towards appropriately drafted regulations of international law binding upon the Republic of Poland (Article 9). Accordingly, the Constitution assumes that, within the territory of the Republic of Poland – in addition to norms adopted by the national legislator – there operate regulations created outside the framework of national legislative organs.
 11. Given its supreme legal force (Article 8(1)), the Constitution enjoys precedence of binding force and precedence of application within the territory of the Republic of Poland. The precedence over statutes of the application of international agreements which were ratified on the basis of a statutory authorisation or consent granted (in accordance with Article 90(3)) via the procedure of a nationwide referendum, as guaranteed by Article 91(2) of the Constitution, in no way signifies an analogous precedence of these agreements over the Constitution.
 12. The concept and model of European law created a new situation, wherein, within each Member State, autonomous legal orders co-exist and are simultaneously operative. Their interaction may not be completely described by the traditional concepts of monism and dualism regarding the relationship between domestic law and international law. The existence of the relative autonomy of both, national and Community, legal orders in no way signifies an absence of interaction between them. Furthermore, it does not exclude the possibility of a collision between regulations of Community law and the Constitution.
 13. Such a collision would occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to the situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorised by the Constitution to represent the Nation, would need to decide on: amending the Constitution; or causing modifications within Community provisions; or, ultimately, on Poland’s withdrawal from the European Union.
 14. The principle of interpreting domestic law in a manner that is “favourable to European law”, as formulated within the Constitutional Tribunal’s jurisprudence,

- has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions realised by the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the introduction of Community provisions.
15. The Communities and the European Union function, in accordance with the Treaties establishing these organisations, on the basis of, and within the limits of, the powers conferred upon them by the Member States. Consequently, the Communities and their institutions may only operate within the scope envisaged by the provisions of the Treaties. The Member States maintain the right to assess whether or not, in issuing particular legal provisions, the Community (Union) legislative organs acted within the delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of the precedence of Community law fails to apply with respect to such provisions.
 16. The Court of Justice of the European Communities (ECJ) is the primary, but not the sole, depositary of powers as regards application of the Treaties within the legal system of the Communities and Union. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of sincere cooperation between the Community-Union institutions and the Member States. This assumption generates a duty for the ECJ to be favourably inclined towards national legal systems and a duty for the Member States to show the highest standard of respect for Community norms.
 17. The principle that judges of the courts and Constitutional Tribunal are subject to the norms of the Constitution (Article 178(1) and 195(1)) also encompasses the duty to apply Community law binding upon Poland. Such a duty arises as a result of the ratification, in compliance with the Constitution and on the basis thereof, of international agreements concluded with the Member States of the Communities and the European Union, which constitute a part of international law binding upon Poland (Article 9 of the Constitution). The ECJ's competence to declare a binding interpretation of Community law, particularly via the procedure for delivering preliminary rulings (Article 234 of the EC Treaty), constitutes an element of the aforementioned agreements. The referral to the appropriate Community organ, by a Polish court or tribunal, of a question regarding the validity or content of Community law to be applied in accordance with the obligations stemming from ratified Treaties, does not conflict with Article 174 of the Constitution, pursuant to which the "courts and tribunals shall pronounce judgments in the name of the Republic of Poland".

18. Article 188 of the Constitution determines the Constitutional Tribunal's competences (scope of jurisdiction). The application of Article 234 of the EC Treaty neither constitutes a threat to these competences, nor narrows them. If the Constitutional Tribunal decided to request a preliminary ruling concerning the validity or content of Community law, the Tribunal would undertake this within the framework for exercising its adjudicative competences, as stipulated in Article 188 of the Constitution, and only where, in accordance with the Constitution, the Tribunal ought to apply Community law.
19. The direct review of the conformity with the Constitution of particular decisions of the ECJ, as well as the "permanent jurisprudential line" derived from these decisions, does not fall within the Constitutional Tribunal's scope of jurisdiction (Article 188 of the Constitution).
20. The principle of a democratic state ruled by law (as expressed in Article 2 of the Constitution) refers to the functioning of states and not necessarily to international organisations. This concerns, in particular, the concept of separation and balance of powers: the legislature, executive and judiciary (Article 10 of the Constitution), constituting an element of the aforementioned principle. Accordingly, the Constitutional Tribunal may not treat these principles as adequate bases of review for institutional solutions within the Communities and European Union, including the composition and legislative competences of the Council.
21. The formal requirements for adopting Polish law, as specified in the Polish Constitution, are not directly applicable to the procedures and principles governing adoption of Community law.
22. The scope of activity of the Polish legislative power is limited to the territory of the Republic of Poland. Accordingly, Article 308 of the EC Treaty may not be reviewed from the perspective of its conformity with Article 95(1) of the Constitution, which stipulates that legislative power in Poland shall be exercised by the Sejm and Senate.
23. Article 31(3) of the Constitution, specifying the conditions permitting the introduction of limitations on the enjoyment of constitutional rights and freedoms within the domestic legal system (including the requirement that such limitations be laid down by statute and be proportionate), is addressed to the Polish legislator. It is, therefore, unjustified to transfer the requirements stemming from this constitutional provision directly to the field of issuing norms of Community secondary legislation (Article 249 of the EC Treaty). This does not, however, preclude the possibility of reviewing legal provisions, including Community Regulations, insofar as they are in force within the territory of Poland, from the perspective of observing the requirements laid down in Article 31(3) of the Constitution.
24. The requirement to observe the law of the Republic of Poland, as expressed in Article 83 of the Constitution, also encompasses provisions of ratified international agreements and Community Regulations (cf. Articles 87(1) and 91 of the Constitution).

25. The Polish constitutional legislator may, in a sovereign manner, regulate the process of elections to the organs of state authority and elected organs of local self-government within the territory of Poland. Regulation of elections to the organs of the Communities and European Union, however, remains beyond the remit of the Polish Constitution, since it constitutes the subject-matter of international agreements establishing the Communities and European Union (in particular, Article 190 of the EC Treaty). This does not preclude the Polish legislator's possibility to regulate – by way of an ordinary statute – the mere course of elections to the European Parliament held on the territory of Poland. Such legal provisions must take account of the Treaty principle, arising in consequence of the existence of citizenship of the European Union, that the right to vote and to stand as a candidate at European Parliament elections is enjoyed by all European citizens within the territories of all Member States and not only by citizens of the State on whose territory the voting takes place. Any such statutory regulation should also take into consideration the constitutional principle of constitutional principle of favourable predisposition towards the process of European integration and the cooperation between States.
26. The right to vote and to stand as a candidate at local elections vested in EU citizens who, although not holding Polish citizenship, are resident in Poland (Article 19(1) of the EC Treaty) does not constitute a threat to the Republic of Poland as a common good of all Polish citizens (Article 1 of the Constitution) nor to its national independence. The local self-governing community participates in exercising public authority of a local nature, and decisions or initiatives regarding the state as a whole may not be adopted within local self-government (cf. Article 16 of the Constitution).
27. Furthermore, granting foreign EU citizens the right to vote and to stand as a candidate at local elections does not contradict Article 62(1) of the Constitution, which guarantees Polish citizens the right to elect, *inter alia*, their representatives to organs of local self-government. The aforementioned constitutional right is not of an exclusive character, in the sense that, should the Constitution grant it directly to Polish citizens, it might not also be vested in the citizens of other States.
28. The prohibition on discrimination based on nationality, race, sex and other personal characteristics is a canon of both international and national fundamental legal rules. The Republic of Poland is obliged to observe this prohibition given its membership of the United Nations and the Council of Europe, including, in particular, ratification of the (European) Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights. Furthermore, this prohibition constitutes a legal consequence of the constitutional principle of equality before the law (Article 32(1)) and has been directly introduced in Article 32(2) of the Constitution. As regards the criterion of sex, the principle of equal treatment (and the prohibition on discrimination inevitably inherent therein) has been directly expressed in Article 33 of the Constitution. For these reasons, the prohibitions on discrimination

- contained in Articles 12 and 13 of the EC Treaty do not introduce a normative novelty in comparison with Articles 32 and 33 of the Constitution.
29. Marriage, being the union of a man and woman, has acquired a distinct constitutional status within the domestic law of the Republic of Poland, on the basis of Article 18 of the Constitution. Any modification of this status would be possible only by the way of an amendment to the Constitution (according to Article 235 thereof); in no circumstances would it be possible by way of a ratified international agreement.
 30. The prohibition on discrimination based on sexual orientation, as formulated in Article 13 of the EC Treaty, refers to natural persons (and also possibly to their organisations); it does not refer to the institution of marriage as such.
 31. The scope of application of Article 191 of the EC Treaty (the role of political parties in the EU) and Article 13 of the Constitution (prohibition on the existence of parties possessing features stipulated in this provision) remain, in principle, separate. The former of the aforementioned provisions may not be directly applied within the Member States. Given this, it is not possible for a collision to occur between these two provisions.
 32. The objectives of the Common Agricultural Policy, as stipulated in Article 33 of the EC Treaty – and particularly the increase of agricultural productivity by promotion of technical progress and ensuring the rational development of agricultural production and optimum utilisation of the factors of production, especially labour – do not contradict the principle of the Polish agricultural system being based upon the model of the family farm, as expressed in Article 23 of the Constitution. It remains within the legislator's domain to shape the principles governing the agricultural system and Article 33 of the EC Treaty contains no direct order or prohibition in this regard. On the contrary, amongst the factors that should be taken into account when planning the Common Agricultural Policy, Article 33(2) of the EC Treaty indicates the particular nature of agricultural activity, resulting from the social structure of agriculture in the particular Member States.
 33. Article 105 of the EC Treaty is not self-executory in nature, and it is, therefore, not possible to directly speak of a collision between this provision and Article 227(1) of the Constitution, which establishes the National Bank of Poland as the central bank of the state, vests therein the exclusive right to issue money, endows it with the competence to formulate and implement monetary policy, and imposes upon it responsibility for the value of the Polish currency. The absence of any such a collision does not preclude the expediency and need to consider, prior to the anticipated introduction of the common currency within the territory of Poland, the relationship between legal provisions governing, on the one hand, the European System of Central Banks, the European Central Bank and common monetary policy (Articles 8 and 105 of the EC Treaty) and, on the other hand, the Polish Constitution. This may require the adoption of a decision within the procedure applicable for amendment to the Constitution.

34. The apprehension – constituting the basis of allegations of an infringement of Article 21(1) of the Constitution – that EU law guarantees of property rights, as derived from Article 6(2) of the EU Treaty, read in conjunction with Article 17 of the EU Charter of Fundamental Rights, could be utilised to attempt to undermine the property rights of Polish citizens in the Western and Northern regions of the Republic of Poland (territories that, on the basis of decisions of the three Great Powers, accrued to Poland after the Second World War), is unjustified. The European Community does not directly interfere in the Member States’ systems of property rights, as is unambiguously confirmed in Article 295 of the EC Treaty. Community law may not limit a Member State’s discretion in shaping the property rights within its territory, provided that there exists no infringement of the principle of non-discrimination and no disproportionate influence on the enjoyment or disposition of existing rights of ownership. Community norms may not regulate ownership relations created following conclusion of the Second World War, firstly given the existence of the *lex retro non agit* principle and, secondly, given the absence of a unanimous delegation of such matters by Member States to the scope of competences of the Communities and the European Union.
35. The aforementioned assessment is not weakened by the fact that Article 116 of the Basic Law (*Grundgesetz*) of the Federal Republic of Germany regulates the German citizenship of persons originating from territories currently constituting Poland’s Western and Northern regions and that some of these persons formulate expectations regarding real estates located within these territories. The principle of respecting common “constitutional traditions”, as formulated in Article 6(2) of the EU Treaty, by no means implies an obligation to respect such expectations. Regardless of the fact that it is an arbitrary assumption to derive such expectations from Article 116 of the German *Grundgesetz*, it would be unfounded to reduce the notion of common “constitutional traditions” to the constitutional system of a single EU Member State. Given its literary formulation, at the very least, this notion must take account of principles common to many of the Member States’ constitutional systems.
36. Regardless of the review on the merits summarised in points 34 and 35 above, the Constitutional Tribunal is not empowered to adjudicate upon the constitutionality of Article 17 of the Charter of Fundamental Rights. In the form in which this Charter was proclaimed in Nice, it currently maintains features more closely resembling a declaration than a legal act; the provisions of this Charter do not have legally binding force.
37. The Framework Decision on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA), adopted by the Council of the European Union on 13th June 2002, may not be reviewed from the perspective of its conformity with the categorically formulated provision of Article 55(1) of the Polish Constitution, given the generality of this Framework Decision and the solely directional nature of its disposition. Conversely, the Constitutional

Tribunal reviewed the constitutionality of Article 607t(1) of the Polish Criminal Procedure Code, which implements the aforementioned Framework Decision, in its judgment of 27 April 2005, P 1/05.

Key legal provisions

CONSTITUTION

[Preamble] Having regard for the existence and future of our Homeland, which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, we, the Polish Nation – all citizens of the Republic, both those who believe in God as the source of truth, justice, good and beauty, as well as those not sharing such faith but respecting those universal values as arising from other sources, equal in rights and obligations towards the common good – Poland, beholden to our ancestors for their labours, their struggle for independence achieved at great sacrifice, for our culture rooted in the Christian heritage of the Nation and in universal human values, [...] aware of the need for cooperation with all countries for the good of the Human Family, [...] hereby establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of aiding in the strengthening the powers of citizens and their communities. [...]

Art. 1. The Republic of Poland shall be the common good of all its citizens.

Art. 2. The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

Art. 4. 1. Supreme power in the Republic of Poland shall be vested in the Nation.
2. The Nation shall exercise such power directly or through their representatives.

Art. 5. The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.

Art. 6. 1. The Republic of Poland shall provide conditions for the people's equal access to cultural goods which are the source of the Nation's identity, continuity and development.

2. The Republic of Poland shall provide assistance to Poles living abroad to maintain their links with the national cultural heritage.

Art. 8. 1. The Constitution shall be the supreme law of the Republic of Poland.
2. The provisions of the Constitution shall apply directly, unless the Constitution provides otherwise.

Art. 9. The Republic of Poland shall respect international law binding upon it.

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. 13. Political parties and other organizations whose programmes are based upon totalitarian methods and the modes of activity of nazism, fascism and communism, as well as those whose programmes or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, shall be forbidden.

Art. 16. 1. The inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law.

2. Local self-government shall participate in the exercise of public power. The substantial part of public duties which local self-government is empowered to discharge by statute shall be done in its own name and under its own responsibility.

Art. 18. Marriage, being a union of a man and a woman, as well as the family, motherhood and parenthood, shall be placed under the protection and care of the Republic of Poland.

Art. 21. 1. The Republic of Poland shall protect ownership and the right of succession.

2. Expropriation may be allowed solely for public purposes and for just compensation.

Art. 23. The basis of the agricultural system of the State shall be the family farm. This principle shall not infringe the provisions of Articles 21 and 22.

Art. 25. [...] 4. The relations between the Republic of Poland and the Roman Catholic Church shall be determined by international treaty concluded with the Holy See, and by statute.

Art. 31. 1. Freedom of the person shall receive legal protection.

2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 32. 1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.

Art. 33. 1. Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.

2. Men and women shall have equal rights, in particular, regarding education, employment and promotion, and shall have the right to equal compensation for work

of similar value, to social security, to hold offices, and to receive public honours and decorations.

Art. 38. The Republic of Poland shall ensure the legal protection of the life of every human being.

Art. 55.1. The extradition of a Polish citizen shall be forbidden.

Art. 62.1. If, no later than on the day of vote, he has attained 18 years of age, a Polish citizen shall have the right to participate in a referendum and the right to vote for the President of the Republic of Poland as well as representatives to the Sejm and Senate and organs of local self-government.

Art. 79.1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

Art. 83. Everyone shall observe the law of the Republic of Poland.

Art. 87.1. The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

2. Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.

Art. 89. 1. Ratification of an international agreement by the Republic of Poland, as well as denunciation thereof, shall require prior consent granted by statute – if such agreement concerns:

- 1) peace, alliances, political or military treaties;
- 2) freedoms, rights or obligations of citizens, as specified in the Constitution;
- 3) the Republic of Poland's membership in an international organization;
- 4) considerable financial responsibilities imposed on the State;
- 5) matters regulated by statute or those in respect of which the Constitution

requires the form of a statute.

2. The President of the Council of Ministers (the Prime Minister) shall inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute.

3. The principles of and procedures for the conclusion and renunciation of international agreements shall be specified by statute.

Art. 90. 1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

2. A statute, granting consent for ratification of an international agreement referred to in para. 1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate

by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Art. 91.1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

Art. 95.1. Legislative power in the Republic of Poland shall be exercised by the Sejm and the Senate.

2. The Sejm shall exercise control over the activities of the Council of Ministers within the scope specified by the provisions of the Constitution and statutes.

Art. 101. 1. The Supreme Court shall adjudicate upon the validity of the elections to the Sejm and the Senate.

Art. 125. 1. A nationwide referendum may be held in respect of matters of particular importance to the State.

2. The right to order a nationwide referendum shall be vested in the Sejm, to be taken by an absolute majority of votes in the presence of at least half of the statutory number of Deputies, or in the President of the Republic with the consent of the Senate given by an absolute majority vote taken in the presence of at least half of the statutory number of Senators.

3. A result of a nationwide referendum shall be binding, if more than half of the number of those having the right to vote have participated in it.

4. The validity of a nationwide referendum and the referendum referred to in Article 235, para. 6, shall be determined by the Supreme Court.

5. The principles of and procedures for the holding of a referendum shall be specified by statute.

Art. 174. The courts and tribunals shall pronounce judgments in the name of the Republic of Poland.

Art. 178. 1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

Art. 188. The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1) the conformity of statutes and international agreements to the Constitution;

- 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
- 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
- 4) the conformity to the Constitution of the purposes or activities of political parties;
- 5) complaints concerning constitutional infringements, as specified in Article 79(1).

Art. 190. 1. Judgments of the Constitutional Tribunal shall be of universally binding application and shall be final.

Art. 193. 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 statute, if the answer to such question of law will determine an issue currently before such court.

Art. 195.1. Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution.

Art. 227.1. The central bank of the State shall be the National Bank of Poland. It shall have the exclusive right to issue money as well as to formulate and implement monetary policy. The National Bank of Poland shall be responsible for the value of Polish currency.

Art. 235. 1. A bill to amend the Constitution may be submitted by the following: at least one-fifth of the statutory number of Deputies; the Senate; or the President of the Republic.

2. Amendments to the Constitution shall be made by means of a statute adopted by the Sejm and, thereafter, adopted in the same wording by the Senate within a period of 60 days.

3. The first reading of a bill to amend the Constitution may take place no sooner than 30 days after the submission of the bill to the Sejm.

4. A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies, and by the Senate by an absolute majority of votes in the presence of at least half of the statutory number of Senators.

5. The adoption by the Sejm of a bill amending the provisions of Chapters I, II or XII of the Constitution shall take place no sooner than 60 days after the first reading of the bill.

6. If a bill to amend the Constitution relates to the provisions Chapters I, II or XII, the subjects specified in para. 1 above may require, within 45 days of the adoption of the bill by the Senate, the holding of a confirmatory referendum. Such subjects shall make application in the matter to the Marshal of the Sejm, who shall order the holding of a referendum within 60 days of the day of receipt of the application. The amendment to the Constitution shall be deemed accepted if the majority of those voting express support for such amendment.

7. After conclusion of the procedures specified in para 4 and 6 above, the Marshal of the Sejm shall submit the adopted statute to the President of the Republic for signature. The President of the Republic shall sign the statute within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*).

CONSTITUTIONAL TRIBUNAL ACT

Art. 39. 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:

- 1) if the pronouncement of a judicial decision is superfluous or inadmissible;
- 2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
- 3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

1. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.

JUDGMENT of 20 February 2006 – Ref. No. K 9/05

[Local Self-Government Elections – the Requirement of Permanent Residence]

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Wiesław Johann – Presiding Judge
 Marian Grzybowski – Judge Rapporteur
 Adam Jamróz
 Mirosław Wyrzykowski
 Bohdan Zdziennicki,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 20 February 2006, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the Polish Ombudsman, in which he requested the Tribunal to examine the conformity of:

Article 6(1) in conjunction with Article 5(1), Article 6a(1) as well as Article 7(1) of the Act of 16 July 1998 on Elections to Communal Councils, Poviats Councils and Voivodeship Assemblies (Journal of Laws – Dz. U. of 2003 No. 159, item 1547 as amended), insofar as they do not provide for the right to vote (an active electoral right) and the right to stand for election in elections to communal councils as well as the elections of mayors of villages, towns and cities (a passive electoral right) with regard to Polish citizens and EU citizens who are not Polish citizens, entered in the permanent electoral register in a given commune within a period shorter than 12 months before the day of elections, to Article 31(3), Article 32(1), Article 52(1), Article 62(1) and (2) as well as Article 169(2), first sentence, in conjunction with Article 16(1) of the Constitution,

adjudicates as follows:

- 1. Article 6(1) in conjunction with Article 5(1) and Article 7(1) of the Act of 16 July 1998 on Elections to Communal Councils, Poviats Councils and Voivodeship Assemblies (Journal of Laws – Dz. U. of 2003 No. 159, item 1547, of 2004 No. 25, item 219, No. 102, item 1055 and No. 167, item 1760 as well as of 2006 No. 17, item 128), insofar as it does not provide for an active electoral right and a passive electoral right in elections to communal councils as well as the elections of mayors of villages, towns and cities with regard to Polish citizens entered in the permanent electoral register in a given commune**

- within a period shorter than 12 months before the day of elections, is inconsistent with Article 31(3), Article 32(1), Article 62 and Article 169(2), first sentence, in conjunction with Article 16(1) of the Constitution of the Republic of Poland as well as is not inconsistent with Article 52(1) of the Constitution.**
- 2. Article 6a(1) in conjunction with Article 7(1) of the Act referred to in point 1, insofar as it does not provide for an active electoral right in elections to communal councils with regard to EU citizens who are not Polish citizens, entered in the permanent electoral register in a given commune within a period shorter than 12 months before the day of elections, is inconsistent with Article 169(2), first sentence, in conjunction with Article 16(1) of the Constitution as well as is not inconsistent with Article 52(1) of the Constitution.**

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

The subject of the constitutional review.

1. Pursuant to Article 16(1) of the Constitution, “the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law”. In its Article 169(1), the Constitution stipulates that the units of local self-government “shall perform their duties through constitutive and executive organs”. The members of the constitutive organs mentioned in the Constitution are elected. In its Article 169(2), second sentence, the Constitution provides that principles and procedures for submitting candidates and for the conduct of elections, as well as requirements for the validity of elections, shall be specified by statute. In accordance with Article 169(3) of the Constitution, a statute shall also specify principles and procedures for the election and dismissal of the executive organs of units of local self-government.

2. The statutory regulation which – in accordance with the requirement set forth in Article 169(2), second sentence, of the Constitution – regulates principles and procedures for submitting candidates and for the conduct of elections, as well as sets out requirements for the validity of elections is the Act of 16 July 1998 on Elections to Communal Councils, Poviats Councils and Voivodeship Assemblies (Journal of Laws – Dz. U. No. 95, item 602 as amended). The elections of executive authorities for local self-government at the basic level (communes), i.e. the elections of mayors of villages, towns and cities, are regulated by the Act of 20 June 2002 on the Direct

Elections of Mayors of Villages, Towns and Cities (Journal of Laws – Dz. U. No. 113, item 984 as amended), which was amended in December 2005.

3. The application of the Polish Ombudsman (hereinafter: the Ombudsman) comprises a request for the examination of the constitutionality of: Article 6(1) in conjunction with Article 5(1) and Article 7(1) as well as Article 6a(1) in conjunction with Article 5(1) and Article 7(1) of the Act of 16 July 1998 on Elections to Communal Councils, Poviats Councils and Voivodeship Assemblies (Journal of Laws – Dz. U. of 2003 No. 159, item 1547, as amended; hereinafter: the Act of 16 July 1998), insofar as the said regulations do not provide for the right to vote (an active electoral right) and the right to stand for election, in elections to communal councils and the elections of mayors of villages, towns and cities (a passive electoral right), with regard to Polish citizens and EU citizens who are not Polish citizens, entered in the permanent electoral register in a given commune within a period shorter than 12 months before the day of elections.

In his application, the Ombudsman argues that the indicated provisions of the challenged Act are inconsistent with Article 31(3) (which regulates the premisses of admissible restrictions on the exercise of constitutional rights and freedoms), Article 32(1) (which guarantees that everyone shall be equal before the law and shall have the right to equal treatment by public authorities), Article 52(1) (which provides that the freedom of movement as well as the freedom to choose the place of residence and sojourn within the territory of the Republic of Poland shall be ensured to everyone), as well as with Article 62(1) (which provides that if, no later than on the day of vote, Polish citizens have attained 18 years of age, they shall have (...) the right to vote for representatives to *inter alia* organs of local self-government) and Article 169(2) of the Constitution (which stipulates that elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot, in conjunction with Article 16(1) of the Constitution).

The allegations raised in the application and justification for the allegations.

4. In the view of the Constitutional Tribunal, the allegations put forward in the application may be summed up as the non-conformity to the Constitution of the regulations of the Act of 16 July 1998 on Elections to Communal Councils, Poviats Councils and Voivodeship Assemblies in the following two aspects:

- a) the introduction of an additional statutory requirement – not provided for in Article 169(2) of the Constitution – that Polish citizens who wish to vote in elections to constitutive organs, and consequently also to exercise the right to stand for election, should be entered in the permanent electoral register in a given commune no later than 12 months before the day of elections;
- b) the application of the said formal requirement also to EU citizens (citizens of the other EU Member States) who are not Polish citizens.

Challenged as a starting point in the application, Article 6(1) of the said Act of 16 July 1998, stipulates as follows: “The right to vote in elections to communal councils shall be granted to Polish citizens referred to in Article 5(1), entered in the permanent electoral register in a given commune, as mentioned in the Act of 12 April 2001 on Elections to the Sejm and the Senate (Journal of Laws – Dz. U. No. 46, item 499, as amended), no later than 12 months before the day of elections”.

At the same time, Article 5(1) of the Act of 16 July 1998 specifies a group of persons who have been assigned the right to vote (an active electoral right), which has, in principle, been granted to every Polish citizen in a much broader scope: a) “who no later than on the day of vote attains 18 years of age” as well as b) “who permanently resides within the jurisdiction of a given council”; at the same time, providing for restrictions specified in Article 6(1). The said restrictions amount to the requirement to enter such a voter in the permanent electoral register in a given commune “no later than 12 months before the day of elections”, which has been challenged in the Ombudsman’s application.

However, the supplemented scope of the allegation i.e. Article 6a(1) provides that the right to vote in elections to communal councils shall also be granted to EU citizens who are not Polish citizens, and who: 1) no later than on the day of vote, have attained 18 years of age; 2) permanently reside within the borders of a given commune; as well as 3) subject to para. 2, have been entered in the permanent electoral register in the commune no later than 12 months before the day of elections. Thus, also with reference to EU citizens who are not Polish citizens, the said Act (Article 6a(1) *in fine*) has established a requirement of entering voters in the said register no later than 12 months before the day of elections.

The assessment of the constitutionality of the challenged provisions of the Act.

5. Drawing a comparison between the content of Article 6(1) of the Act of 16 July 1998 and the content of Article 62(1) of the Constitution leads to the conclusion that the requirement, introduced in the cited statutory regulation, which consists in entering voters in the electoral register no later than 12 months before the day of elections (the day of vote) creates a discrepancy between the statutory regulation and the Constitution, which narrows down the scope *ratione personae*. Indeed, it excludes, from the group of voters, persons who – at least 12 months before the day of elections – have not been entered in the official electoral register in a given commune. These may be: a) persons who have not been entered at all in the electoral register in a given commune; as well as b) persons entered in the said register but at a date falling later than 12 months before the day of local self-government elections.

By contrast, Article 62(1) of the Constitution grants the right to participate in elections as well as the right to elect representatives to the organs of local self-government to all citizens if “no later than on the day of vote”, they have attained 18 years of age. The provision does not authorise the legislator to introduce any instances of exclusion from the scope *ratione personae* than those provided for in Article 62(2).

Thus, the said instances of exclusion may only concern persons who have been deemed legally incapacitated by a legally effective court ruling or have been deprived of their public or electoral rights in the same way.

By introducing the requirement of entering voters in the electoral registers of communes within the set time-limit, the (ordinary) legislator has led to a situation where a restriction has been imposed on citizens' exercise of their constitutional right to vote (and on the basis of Article 7(1) of the challenged Act of 16 July 1998 – also the right to stand for election), i.e. the legislator has created the situation provided for in Article 31(3) of the Constitution.

6. The said restriction, and actually the statutory deprivation of the constitutional right to vote (and in conjunction with Article 7(1) of the Act of 16 July 1998 – also the right to stand for election) has been introduced in violation of several elements of constitutional regulation included in Article 31(3). Although it has been introduced by statute (i.e. in compliance with the statutory form of a restriction), it has not – firstly – been justified by the legislator by indicating the circumstances of protecting any of the values mentioned in Article 31(2) of the Constitution, respect for (or protection of) which may constitute a premiss for restricting the exercise of constitutional rights and freedoms of the individual. Secondly, the introduced exclusion has not been preceded by showing that the said introduction is potentially necessary in a democratic state for the implementation or protection of any of the constitutional values that justify the admissibility of restrictions provided for in Article 31(3). Thirdly, the formal requirement to enter voters in relevant electoral registers no later than 12 months before the day of vote (elections) does not so much lead to a partial restriction as to the actual deprivation of the constitutional right to vote (and derivative rights) in the case of persons not entered in the register. Such a state of affairs is clearly contrary to the regulation of Article 31(3), second sentence, of the Constitution, in accordance with which “the said restrictions may not infringe the essence of rights and freedoms”.

In this situation, the Constitutional Tribunal states that Article 6(1) in conjunction with Article 5(1) and Article 7(1) of the Act of 16 July 1998, insofar as it results in the deprivation of the right to vote, and also the right to stand for election, in the context of persons who have not been entered in an electoral register in a given commune no later than 12 months before the day of elections (vote), is contrary to Article 62(1) and (2) as well as Article 31(3) of the Constitution.

7. The indicated provisions within the challenged scope also raise doubts as to their conformity to Article 169(2) of the Constitution.

Pursuant to Article 16(1) of the Constitution, the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law. Article 169(2) of the Constitution provides that “elections to constitutive organs shall be universal, direct, equal and shall be conducted by secret ballot”, and also that “the

principles and procedures for submitting candidates and for the conduct of elections, as well as the requirements for the validity of elections, shall be specified by statute”.

The exegesis of the said provision of the Constitution leads to the following conclusions. Firstly, elections to the constitutive organs of local self-government need to comply with the principle of universal elections. The establishment of that principle entails that the introduction of additional requirements without constitutional authorisation results in the non-conformity of those requirements with the Constitution. Indeed, the ordinary legislator may not decide about depriving anyone of the right to vote (and derivative rights) if it has been granted in the Constitution (see K. Skotnicki, *Zasada powszechności w prawie wyborczym. Zagadnienia teorii i praktyki*, Łódź 2000, p. 24). Secondly, the constitution-maker has authorised the ordinary legislator in Article 169(2), second sentence, to specify by statute: a) the principles and procedures for the conduct of elections, and b) the requirements for the validity of elections. However, he has not provided for constitutional authorisation in Article 169(2) of the Constitution (or in any other provisions of the Constitution) with regard to specifying, by statute, a group of persons who are entitled to the right to vote (and consequently – the right to stand for election) in elections to the organs of local self-government. Even if one were to make a highly disputable (and dubious) assumption that the action of determining “principles for the conduct of elections” exceeds the scope of procedural and functional matters of an electoral procedure, and comprises some issues of participating in elections in the role of ‘the voter’ or ‘the one who is elected’ (i.e. the right to vote and/or the right to stand for election), then it is indisputable – in the opinion of the Constitutional Tribunal – that the process of specifying rules for ‘participation in an electoral procedure’ in an ordinary statute should take account of principles explicitly formulated in the Constitution. Since Article 62(1) and Article 169(2), first sentence, explicitly express the universal character of the right to vote, and consequently – the right to stand for election (Article 7(1) of the Act of 16 July 1998) – in elections to the constitutive organs of local self-government, a statutory regulation may not rule out that principle or restrict the essence thereof.

Consequently, in the view of the Constitutional Tribunal, it should be deemed that the requirement of entering voters in the permanent register in a given commune no later than 12 months before the day of elections, introduced in Article 6(1) of the Act of 16 July 1998, exceeds the scope of constitutional premisses for exclusion from the group of the subjects of the right to vote (the attainment of the age of 18 no later than on the day of vote, deprivation of public and electoral rights, as well as legal incapacitation by a legally effective ruling). For this reason, the said provision is also inconsistent with Article 169(2) of the Constitution. Moreover, the relevant statutory regulation does not fall within the scope of the constitutional authorisation formulated in Article 169(2), second sentence, of the Constitution.

8. The Ombudsman has also argued that Article 6(1) of the challenged Act (in conjunction with Article 5(1) and Article 7(1) of the said Act) infringes the principle

of equality before the law and the right to equal treatment by public authorities – Article 32(1) of the Constitution.

What constitutes the axis of the non-conformity of the said regulation to Article 32(1) of the Constitution, within the scope of active and passive electoral rights, is the unequal treatment of persons over 18 who have been entered in the permanent electoral register no later than 12 months before the day of elections and those who have not fulfilled that requirements. The distinction is drawn in a situation where the two groups that are being compared, to the same extent, display a feature which determines their membership in a particular self-governing community by the fact of their permanent residence in the area of a given unit of local self-government.

Pursuant to Article 16(1) of the Constitution, the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law. As it is aptly stressed by the Ombudsman, a self-governing community comprises all persons residing within the administrative borders of a given unit of local self-government, including: Polish citizens and persons who do not have Polish citizenship. The said membership (in a self-governing community) is not – in the light of Article 16(1) of the Constitution – determined by the entry in the permanent electoral register in a given commune made no later than 12 months before the day of elections.

Since the circumstance of entering voters in the permanent electoral register in a given commune within a certain time-limit before the day of elections, which is a formality, does not constitute a prerequisite for membership in a self-governing community, and thus it should not be regarded as a premiss concerning electoral rights that arise from that membership, then the introduction of differentiation into electoral rights, depending on whether persons have or have not fulfilled the requirement of being entered in the relevant register within the set time-limit, is not legally justified. This would be contrary to the principle of equality before the law as well as the right to equal treatment by public authorities, due to the fact that both groups indicated here meet the basic requirement for membership in a self-governing community – i.e. the requirement of permanent residence within the borders of a given unit of local self-government. Indeed, in the light of Article 16(1) of the Constitution, this characteristic should be regarded as essential for assigning electoral rights to the organs of local self-government (both constitutive and executive organs) in the context of Polish citizens as well as EU citizens that permanently reside in the Republic of Poland, but who are not Polish citizens. In the view of the Constitutional Tribunal, in this context, the said differentiation arising from Article 6(1) in conjunction with Article 5(1) as well as Article 7(1) of the Act of 16 July 1998 should be deemed inconsistent with the constitutional principle of equality before the law and the constitutional requirement of equal treatment by public authorities, as expressed in Article 32(1) of the Constitution. The said infringement of Article 32(1) is caused by far-reaching differentiation that has been based on an irrelevant formal criteria: the entry into the permanent electoral register no later than 12 months before the day of elections (NB which is done *ex officio*, and where mistakes may not be ruled out); due to the scale of differentiation, persons who have not been entered in the electoral register within the

indicated time-limit are deprived of their active electoral rights as well as – pursuant to Article 7(1) of the challenged Act – their passive electoral rights, despite the fact that they fulfil the basic constitutional requirement, i.e. the prerequisite for membership in a self-governing community is permanent residence within the borders of a given unit of local self-government. The admissibility of exclusion of Polish citizens from the group of persons who may stand for election in elections to the executive organs of local self-government undermines the necessity and diminishes the need to examine the issue of the right to stand for election in the case of EU citizens who have no Polish citizenship (just as the issue of the constitutionality of Article 7(1) of the challenged Act with regard to EU citizens who are not Polish citizens).

9. Also, the Ombudsman’s application comprises Article 6a(1) in conjunction with Article 5(1) and Article 7(1) of the Act of 16 July 1998. The challenged provision enlarges the group of persons who are entitled to vote in elections to communal councils to also include EU citizens (i.e. the citizens of the other EU Member States) who hold no Polish citizenship, who reside within the borders of a given commune and, who have attained 18 years of age no later than 12 months before the day of vote.

The allegation of unconstitutionality (by analogy with Article 6(1) of the said Act) pertains to an additional requirement introduced in Article 6a(1), i.e. the requirement that the person referred to in Article 6a(1) of the Act of 16 July 1998 should be entered in the permanent electoral register in a given commune no later than 12 months before the day of elections. Additionally, it should be noted that Article 7(1) of the said Act correlates granting the right to stand for election (a passive electoral right) in the context of a given group of persons with the fact whether that group is entitled to vote. Therefore, the rule set out in Article 7(1) also refers to the persons specified in Article 6a(1) of the said Act.

10. When analysing the allegation about the non-conformity of Article 6a(1) (to Article 31(3), Article 32(1), Article 62(1) and (2) as well as Article 169(2) of the Constitution), raised by the Ombudsman, the Constitutional Tribunal considered, first of all, the status of persons mentioned in Article 6a(1) of the Act of 16 July 1998 in the light of constitutional and statutory regulations on elections to the organs of local self-government, taking account of treaty obligations that bind the Republic of Poland as an EU Member State.

Article 62(1) of the Constitution does not literally provide for granting the right to elect “the representatives of the organs of local self-government” to persons who are not the citizens of the Republic of Poland, but who permanently reside within the administrative borders of a given commune in Poland and who are citizens of other EU Member States and – as a consequence thereof (Article 17(1) of the Treaty establishing the European Community; OJ C 325 of 24.12.2002; hereinafter: the EC Treaty) – EU citizens. Granting the right to elect the representatives of the organs of local self-government to this group of persons (who no later than on the day of elections have attained 18 years of age) constitutes the consequence of obligations that bind the

Republic of Poland, arising from the Treaty of Accession (signed on 16 April 2003; Journal of Laws – Dz. U. 2004 No. 90, item 864) as well as the Treaty on European Union (within the version assigned thereto by the Treaty of Maastricht), in particular from Article 19(1) of the EC Treaty. Pursuant to Article 19(1) of the EC Treaty, every citizen of the Union residing in a Member State of which he is not a national shall have the right to vote and to stand as a candidate at municipal elections in the Member State in which he resides, under the same conditions as nationals of that State.

The term ‘municipal elections’ has been defined in Article 2(1)(b) of the Council Directive 94/80/EC of 19 December 1994 laying down detailed arrangements for the exercise of the right to vote and to stand as a candidate in municipal elections by citizens of the Union residing in a Member State of which they are not nationals (OJ L 368 of 31.12.1994, pp. 38–47 as amended). Pursuant to the Directive, the said elections comprise “universal and direct elections to the representative organs of public authority” as well as – if this is stipulated by national law – “heads” and members of executive organs of public authority (cf. also A. Wyzomska, “Jedność w Unii Europejskiej”, [in:] *Prawo Unii Europejskiej*, J. Barcza (ed.), Warszawa 2003, pp. 361–362).

The situation regulated in Article 6a(1) of the Act of 16 July 1998 corresponds to the content of Article 19(1) of the EC Treaty (and Article 2(1)(b) of the Directive 94/80/EC). In particular, what is of significance here is the requirement of equal treatment of EU citizens who are not Polish citizens (“as if they were nationals”) when juxtaposed with Polish citizens.

In the context of the allegations about unconstitutionality, the requirement of equal treatment should be referred, in particular, to the requirement of entering a given person in a permanent electoral register in a commune no later than 12 months before the day of elections, which has been added to the Act of 16 July 1998. The supraconstitutional requirement that has been formulated in this way with regard to Polish citizens has been regarded as unconstitutional within the scope of its non-conformity to Article 169(2) of the Constitution. The principle of equal treatment of EU citizens and Polish citizens (in the context of Article 19(1) of the EC Treaty) implies that similar evaluation should be referred to Article 6a(1) of the Act of 16 July 1998. However, in a situation where (active and passive) electoral rights concerning elections to the organs of local self-government do not constitute the constitutional rights of EU citizens who are not Polish citizens, but who reside in Poland and are members of local communities, Article 31(3) of the Constitution is not applicable; indeed, it concerns the restrictions of rights and freedoms regulated in the Constitution. Also, the said circumstance rules out, in the context of Polish citizens and persons who are not Polish citizens, the possibility of the direct application of the principle of absolute equal treatment (derived from Article 32 of the Constitution), due to the lack of characteristics that are fully relevant to both groups of residents (members) of local communities.

It should be pointed out that the Directive 94/80/EC permits EU Member States to correlate the granting of electoral rights to EU citizens who are not citizens of a

given EU Member State with the requirement of residence in the territory of a given Member State for a specified period, where relevant local elections are held. Nevertheless, Article 6a(1) does not refer to the requirement of sojourn, but to a strictly formal criterion of entering a given person (persons) in a permanent electoral register no later than 12 months before the day of vote. In that situation, the provision of Article 6a(1) of the said Act remains contrary to Article 19(1) of the EC Treaty, which constitutes – on the basis of the Treaty of Accession to the European Union as well as the statutes concerning the conditions of the said accession – an integral element of the Treaties that bind the Republic of Poland, ratified upon consent expressed by nation-wide referendum, i.e. with the participation of the sovereign – the nation.

11. Finally, the Constitutional Tribunal needs to analyse the content of the challenged provisions from the point of view of Article 52 of the Constitution. The Ombudsman's application includes a sentence which implies that the applicant – by indicating Article 52(1) of the Constitution as a higher-level norm for the review – alleges the following two principles have been infringed: the principle of free movement within the territory of the Republic of Poland as well as the freedom to choose the place of residence and sojourn.

The assessment of the validity of allegation depends on whether it is determined that the challenged regulations cause a direct legal effect in realms that are protected by the regulation of Article 52(1) of the Constitution, i.e. within the realm of the freedom of movement within the territory of the Republic of Poland or in the realm of the freedom to choose the place of residence and sojourn. In the view of the Constitutional Tribunal, the negative (restrictive) consequences of the challenged regulations of the Act under review directly appear in the realm of the possibility of exercising active and passive electoral rights in local self-government elections. They mean the lack of possibility to exercise electoral rights – the right to vote and the right to stand for election in elections to the organs of local self-government – by persons who have not been entered in a given electoral register no later than 12 months before the day of elections. Although one may not rule out the indirect effect of the challenged regulations on the decisions of persons interested in voting or standing for election in local self-government elections as regards their choice of residence or sojourn; still, this is an indirect effect which concerns the realm of motives that is difficult to render in specific terms. It is also worth pointing out that the challenged provisions rely on the criterion of entering voters in an electoral register in a given commune no later than 12 months before the day of elections, which is not tantamount to the actual choice of the place of residence or sojourn.

In this situation, the Constitutional Tribunal has established that Article 52(1) of the Constitution has not been infringed by the challenged provisions.

For all these reasons, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.

DECISION of 19 December 2006 – Ref. No. P 37/05

[Excise Duty – the Division of the Scope of Jurisdiction Between
the Constitutional Tribunal and the CJEU]

The Constitutional Tribunal, in a bench composed of:

Jerzy Stępień – Presiding Judge

Jerzy Ciemniowski

Zbigniew Cieślak

Marian Grzybowski

Wojciech Hermeliński

Adam Jamróz

Marek Kotlinowski – Judge Rapporteur

Ewa Łętowska

Marek Mazurkiewicz

Janusz Niemcewicz

Mirosław Wyrzykowski

Bohdan Zdziennicki,

having considered, sitting in camera on 19 December 2006, a question of law referred by the Voivodeship Administrative Court in Olsztyn:

as to whether Article 80 of the Act of 23 January 2004 on Excise Duty (Journal of Laws – Dz. U. No. 29, item 257 as amended; hereinafter: the Excise Duty Act), which stipulates that passenger cars not registered in Poland in accordance with the road traffic provisions shall be subject to excise duty, is consistent with Article 90, first sentence, of the Treaty establishing the European Community – which provides that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products – and, thus, is also consistent with Article 91 of the Constitution, pursuant to which an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes,

decides as follows:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070 as well as of 2005 No. 169, item 1417), to discontinue the proceedings on the grounds that issuing a ruling is inadmissible.

STATEMENT OF REASONS

I

1. In accordance with the procedure set out in Article 193 of the Constitution and Article 3 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643 as amended; hereinafter: the Constitutional Tribunal Act), by its decision of 16 November 2005, the Voivodeship Administrative Court in Olsztyn referred the following question of law to the Tribunal: “Is Article 80 of the Act of 23 January 2004 on Excise Duty (Journal of Laws – Dz. U. No. 29, item 257 as amended; hereinafter: the Excise Duty Act), which stipulates that passenger cars not registered in Poland in accordance with the road traffic provisions shall be subject to excise duty, consistent with Article 90, first sentence, of the Treaty establishing the European Community (hereinafter: the EC Treaty) – which provides that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products – and, thus, is it not contrary to Article 91 of the Constitution, which provides that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes?”. At the same time, the court referring the question decided to suspend proceedings in the case in the context of which the question of law had been formulated.

The question of law was posed on the basis of the following facts. In his application of 5 April 2005, Mr S. P. referred to the Head of the Customs Office in Olsztyn with a claim for the recovery of an overpaid excise duty, with relation to his acquisition of a passenger car in Germany. In the opinion of the said tax-payer, the obligation to pay an excise duty with relation to the intra-Community acquisition of a passenger car is inconsistent with Article 23(1) and (2), Article 25 and Article 90 of the EC Treaty. The Member States of the European Union may not impose, directly or indirectly, on the products of other EU Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. Thus, the EU Member States have not been deprived of the right to determine and diversify taxes, but such practice is permitted only when it does not lead to any forms of discrimination against imported products.

In the decision of 2 June 2005 (ref. no. 371000-PA1-9106-9/05/JL), the Head of the Customs Office in Olsztyn refused to determine the overpayment of the excise duty with relation to the intra-Community acquisition and refused to recover the paid excise duty. As a result of an appeal filed by the party, the Director of the Main Customs Office in Olsztyn issued a decision of 5 September 2005 (ref. no. 370000-PA-9116-37/05) which upheld the decision issued by the Head of the Customs Office. In the statement of reasons for the decision, he stated that the authority of first instance had applied relevant provisions of substantive law to the established facts, and that in the said case there had been no overpayment of the excise duty and that the

tax had not been wrongly charged. Regarding the allegations that the Polish law was inconsistent with Article 23, Article 25 and Article 90 of the EC Treaty, the Director of the Main Customs Office stated that Polish authorities had not received any notification in which the European Commission (hereinafter: the Commission) had challenged the correctness of an excise duty imposed on passenger cars. In his opinion, carrying out the assessment of the conformity of Polish provisions to the Community law does not fall within the scope of the competence of tax authorities. Also, in the said case, there was no contradiction between a norm of domestic law and a norm of EU law. With relation to Article 249, third paragraph, of the EC Treaty, the issue of excise duty was regulated by the enactment of the Act of 23 January 2004; it divides goods subject to excise duty into harmonised and non-harmonised ones. The latter of the two categories comprises, *inter alia*, passenger cars. The EU Member States retain the right to maintain or introduce taxes which are levied on products other than those subject to harmonisation, provided that those taxes do not give rise to border-crossing formalities in trade between the Member States. None of the other EU Member States imposes an excise duty on the acquisition or import of passenger cars, but the said States replace the excise duty with other charges, *inter alia*, a registration tax (up to 180% of the gross price of a vehicle), an annual traffic tax (from EUR 30 to EUR 463) or a registration charge. The provision of Article 90 of the EC Treaty does rule out shaping tax rates with regard to non-harmonised products subject to excise duty at a level that is the most beneficial due to a socio-economic interest of the state, as long as they are not higher than those imposed on similar domestic products. A condition for imposing an excise duty on a passenger car is the fact that the car is not registered in the territory of the Republic of Poland, in accordance with the Act of 20 June 1997 – Law on the Road Traffic (Journal of Laws – Dz. U. of 2005 No. 108, item 908), and not the status of the car as a non-domestic product.

In an appeal lodged with the Voivodeship Administrative Court, the aforementioned party raised the allegation that the national law was contrary to Article 90 of the EC Treaty and the provisions of the Constitution. The Voivodeship Administrative Court in Olsztyn, when formulating the question of law, stressed discrepancies in the context of an excise duty that had been revealed in the jurisprudence of administrative courts. The court also argued that courts had no jurisdiction to challenge statutes; jurisdiction to assess the legality of statutes was solely vested in the Constitutional Tribunal. Taking account of the wording of Article 91(1) and (3) of the Constitution in conjunction with Article 90 of the EC Treaty, the Voivodeship Administrative Court expresses doubts as to the constitutionality of Article 80 of the Excise Duty Act, which imposes an obligation on Polish citizens to pay an excise duty with relation to the intra-Community acquisition of a second-hand passenger car not registered in Poland. In the opinion of the court referring the question, the European Court of Justice has no jurisdiction to dispel those doubts; its jurisdiction comprises elucidating the content of the provisions of Community law or determining their validity, but it may not provide an interpretation of the domestic law of particular EU Member States, may not determine whether those provisions are valid or not

(more broadly – conformity or non-conformity of domestic law to community law), or may not carry out the assessment of the facts of a case that is pending before a court of a given EU Member State. Indeed, in the said case, the point is not – as stressed by the court – the interpretation of Community law, but the assessment of the conformity of domestic law to the provisions of the EC Treaty. Arising from the principle of the primacy of Community law, the obligation not to apply a provision of domestic law that is contrary thereto constitutes only one aspect of the issue. As a result, by applying validation norms, the court must determine which provision may constitute a basis of its determination. In the view of the court, a provision of Community law that is directly applicable could constitute such a basis only in the case of challenging an administrative decision concerning the imposition of an excise duty. However, in the case under examination, the decision concerns refusal to determine the overpayment of an excise duty and refusal to refund the tax calculated and voluntarily paid by the said taxpayer. In such a case, the issue of the recovery of the tax is regulated by domestic law, namely Article 75(2)(1)(a) of the Act of 29 August 1997 – the Polish Tax Code (Journal of Laws – Dz. U. of 2005 No. 8, item 60, as amended).

In the opinion of the court referring the question, Article 90 of the EC Treaty undoubtedly imposes an obligation of the same treatment of similar domestic and imported products, which is reinforced in the jurisprudence of the ECJ by the principle of a broad interpretation as well as the definition of similar goods. Thus, EU Member States may not impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products. What weighs in favour of the unconstitutionality of Article 80 and the subsequent provisions of the Excise Duty Act is that the fiscal charges on a second-hand car imported from another EU Member State are undoubtedly higher than the share of taxes included in the price of cars on the domestic market, and the obligation to pay an excise duty and the requirement to submit, at the time of import into Poland, a simplified declaration to the head of an appropriate customs office constitute formalities that hinder the crossing of borders between EU Member States. The said obligations undermine the principle of free movement of goods as well as are contrary to the Directive 92/12/EEC. The court extensively discussed the argumentation presented by the opponents of the view that Article 80 of the Excise Duty Act was inconsistent with Article 90 of the EC Treaty, relying *inter alia* on the statement that the condition for imposing an excise duty on a passenger car was not the mere fact of crossing a border or the fact that the car had the status of a non-domestic product, but the fact that it was not registered in Poland. In the opinion of the court, such a stance however contradicts the guidelines of the European Commission as regards the recognition of “the first registration” in other States of the Community. At first glance, the taxation of similar goods (second-hand cars acquired in the territory of Poland and another EU Member State) is thus identical; however, the obligation to pay an excise duty applies only to second-hand cars acquired in EU Member States before their first registration in the

territory of the Republic of Poland. The above conclusion appears to be confirmed by the ECJ's jurisprudence.

2. In his letter of 22 February 2006, the Prime Minister took a stance on the financial effects of a ruling to be issued by the Tribunal in the case under examination. He stated that the revenue of the State Treasury from the excise duty paid by taxpayers with relation to the acquisition of passenger cars during the period from May to December 2004 as well as from January to December 2005 amounted to PLN 1.5 billion, which constituted 4% of the revenue from the excise duty on all groups of products. A ruling of the Tribunal on the non-conformity of the challenged provision to the EC Treaty and to the Constitution may result in the obligations of the State Treasury to refund (recover) the excise duty paid by taxpayers.

3. In his additional letter of 3 March 2006, the Minister of Finance presented his stance on provisions concerning taxes on passenger cars. In his opinion, at the current stage of the development of Community law, EU Member States maintain freedom within the scope of the introduction of internal regulations that concern taxation on passenger cars. The lack of harmonised taxation rules results in varied taxation systems as regards their structural aspects as well as amounts. Although the European Commission has presented the Proposal for a Council Directive on passenger car related taxes (COM-261/05), but due to the lack of a uniform stance of EU Member States, the direction and further timetable of work are not known within that scope.

When describing the Polish system of excise duty on passenger cars, the Minister of Finance stressed that passenger cars not registered in Poland in accordance with the road traffic provisions were subject to excise duty. The excise duty is a one-time domestic tax imposed on every car produced and purchased in the territory of the Republic of Poland, obtained by intra-Community acquisition or imported. In the opinion of the Minister of Finance, such a legal construct is based on an objective criterion that guarantees the same treatment of cars, regardless of their country of origin; it does not discriminate against those that come from outside Poland and does not favour those that were produced in Poland, and consequently it meets the requirements of Article 90 of the EC Treaty. Also, the possibility of decreasing the rates of excise duty on the basis of the Regulation of the Minister of Finance of 22 April 2004 on the reduction of excise duty (Journal of Laws – Dz. U. No. 87, item 825 as amended) – which is related to such elements as the capacity of a given engine – regardless of the country of origin of a given car, is merely action aimed at protecting the natural environment. Indeed, what follows from Article 90 of the EC Treaty is that if EU Member States wish to avoid being accused of discriminatory practice, they should adopt legal solutions that are not based on the criterion of the origin of goods and, at the same time, rely on objective and neutral factors. One may speak of an infringement of the prohibition that arises from the indicated provision only when the tax system affects the decisions of consumers and deters

them from purchasing cars that come from other EU Member States, due to which the national production is in a privileged situation. In fact, in Poland – in the light of provided data – the market for second-hand passenger cars that come from other EU Member States is a dominant one. Additionally, the Minister of Finance stated that the elimination of Article 80(1) of the Excise Duty Act would introduce a legal gap which would result in the exemption of new cars that were produced and sold in Poland from the payment of the excise duty.

At the same time, the Minister of Finance stressed that there was no clear opinion of Community organs as regards the conformity of the Polish provisions to *acquis communautaire*. On 22 June 2005, in accordance with the procedure set out in Article 234 of the EC Treaty, the Voivodeship Administrative Court in Warsaw referred a question to the ECJ for it to issue a preliminary ruling on the conformity of the said provisions to Community law; however, a ruling in that case has not been issued yet. Moreover, the said matter is also the subject of the infringement procedure instituted by the European Commission on the basis of Article 226 of the EC Treaty. On 9 September 2005, the Permanent Representation of the Republic of Poland to the European Union received – in order to refer it further to the European Commission – a reply to formal allegations dated 13 July 2005, which concerned the breach of the provisions of the EC Treaty. Still, in the opinion of the Minister of Finance, information received from the European Commission suggests that the stance of the European Commission in that case has not yet been determined.

4. In his letter of 18 July 2006, the Marshal of the Sejm expressed the view that it was useless for the Constitutional Tribunal to adjudicate on the question of law referred by the Voivodeship Administrative Court in Olsztyn. To support his view, he cited two judgments issued by the Constitutional Tribunal – one dated 28 January 2002, ref. no. K 2/02 (OTK ZU Issue No. 1/A/2003, item 4) and the other dated 21 September 2004, ref. no. K 34/03 (OTK ZU No. 8/A/2004, item 84) – in which the Tribunal had clearly confirmed the obligation to adhere to Community law. Moreover, the ECJ had been examining a reference for a preliminary ruling on similar matters, made by the Voivodeship Administrative Court in Warsaw. The ECJ's ruling would be binding not only on the Voivodeship Administrative Court in Warsaw, but also on all national courts. Additionally, the Marshal of the Sejm pointed out that the view presented by tax authorities, namely that the excise duty was consistent with Community law due to the lack of reservations on the part of the European Commission in that context, had ceased to be up to date; on 4 July 2006 the European Commission clearly stated that Poland had infringed Community law within that scope and set a two-month time-limit for the Polish legislator to eliminate existing discrepancies.

5. In his letter of 22 November 2006, the Public Prosecutor General expressed the view that the proceedings instituted by way of the question of law referred by the Voivodeship Administrative Court in Olsztyn, which concerned the conformity

of Article 80 of the Excise Duty Act to Article 90 of the EC Treaty in conjunction with Article 91 of the Constitution, should be discontinued pursuant to Article 39(1)(1) of the Constitutional Tribunal Act on the grounds that issuing a ruling was useless.

In the opinion of the Public Prosecutor-General, the following issue should primarily be considered: is it indispensable for the case pending before the Voivodeship Administrative Court in Olsztyn that the Constitutional Tribunal should provide a reply to the question of law referred by that court, if the ECJ has been conducting proceedings instituted by a reference for a preliminary ruling made by the Voivodeship Administrative Court in Warsaw and the scope of which also comprises doubts raised in the question of law referred to the Constitutional Tribunal?

As quoted by the Public Prosecutor-General, the view presented in the doctrine in that respect, in the context of the jurisprudence of the ECJ, is that – despite the right of every national court to make a reference for an interpretation of Community law (even if there already exists the jurisprudence of the ECJ in an identical or similar case) – the interpretation of the provisions of EU law, provided in the context of the reference for a preliminary ruling made by a national court, is binding not only for the national court that made the said reference, but also for all courts and tribunals of EU Member States that apply a given provision, as long as the ECJ does not alter its interpretation. Also, in its jurisprudence, the ECJ has underlined that an interpretation of a provision of Community law concerns the correct understanding and application of the said provision from the moment of its entry into force. The courts may and should also apply such an interpretation to legal relations established before a given preliminary ruling on interpretation is issued. By contrast, the conflict-of-law rule expressed in Article 91(2) of the Constitution provides for the precedence of a ratified international agreement in the case of a conflict between a statutory norm and a norm set in the said agreement. The said rule also comprises the principle of the primacy of Community primary law and the principle of the direct application of Community law (Article 91(3) of the Constitution).

In the conclusion of his letter, the Public Prosecutor-General states that it is useless for the Constitutional Tribunal to issue a ruling in the present case, since in the case of a conflict between a statutory norm and a norm of Community primary law, the court referring the question of law – being bound by the interpretation of Article 90 of the EC Treaty provided by the ECJ in the context of the reference for a preliminary ruling made to the ECJ by the Voivodeship Administrative Court in Warsaw – should refuse to apply the statutory provision and should directly apply Community law. At the same time, the Public Prosecutor-General draws attention to the fact that the higher-level norm for the review indicated in the question of law is inadequate. Article 91(2) of the Constitution provides that a provision of a ratified international agreement takes precedence over a statutory provision which contradicts it, and bears no relation to the regulation set out in Article 80 of the Excise Duty Act, which concerns a tax on second-hand cars imported from another EU Member State, and not the principle of primacy.

II

To begin with, it should be stated that there are several vital arguments that weigh in favour of discontinuing the proceedings on the question of law referred by the Voivodeship Administrative Court in Olsztyn.

First of all, a substantive determination of the case by the Constitutional Tribunal would result in providing an interpretation of Community law without taking account of interpretative standards adopted with regard to all EU Member States. Moreover, a legal system where, with regard to the same legal situations, the jurisdiction of both the ECJ and the Constitutional Tribunal would be recognised would pose of a risk of the emergence of two parallel lines of jurisprudence in the context of adjudication on the content of the same legal provisions. Undoubtedly, what is of significance within this scope is the circumstance that the ECJ safeguards Community law and, when issuing its rulings, it does not need to take account of standards arising from the legal order of particular EU Member States, which also includes the place of a constitution in the system of the sources of domestic law in EU Member States. By contrast, the Constitutional Tribunal is to safeguard the Constitution, which – as its Article 8(1) states – shall be the supreme law of the Republic of Poland. In such context, there may potentially be conflicts between the rulings issued by the Constitutional Tribunal and those delivered by the Court of Justice. Taking the above into consideration, it should be stated that, also due to the content of Article 8(1) of the Constitution, the Constitutional Tribunal is obliged to perceive its position in such a way that – as regards fundamental matters concerning systemic issues – it is “the court which will have the last word” with regard to the Polish Constitution. The Court of Justice and the Constitutional Tribunal may not be juxtaposed as courts competing with each other. The point is not only to eliminate the overlapping of the jurisdiction of the two courts or concurrent rulings on the same legal issues, but also any dysfunctionality in relations between the EU legal order and the Polish one. What is essential is to take into consideration the indicated differences between the roles of the Court of Justice and the Constitutional Tribunal.

Secondly, the Voivodeship Administrative Court in Olsztyn, which has referred the question of law to the Constitutional Tribunal, has not noticed that the essential determination of the case pending before it requires – despite what the court claims – an interpretation of Community law. The court itself mentions existing disputes as to how an excise duty should be categorised in the light of Community law. The previous jurisprudence of voivodeship administrative courts in cases concerning the application of Article 80 of the Excise Duty Act is divergent and inconsistent.

For instance, in the judgment of 25 May 2005, ref. no. I SA/Lu 77/05, the Voivodeship Administrative Court in Lublin stated that Polish provisions on excise duty on second-hand cars imported from the EU – as a type of a prohibited customs duty, restricting the freedom of intra-Community trade – were inconsistent with Community law. Cars fall within the category of non-harmonised products, and thus – pursuant to Community law – EU Member States may freely regulate issues

related to the imposition of excise duty, provided that the said regulations will not infringe the fundamental freedoms of the internal market. Therefore, an importer (exporter) may refuse to pay a charge that has been introduced in breach of the Treaty. In the view of the Voivodeship Administrative Court in Lublin, an excise duty should be evaluated in the context of an infringement of the requirement that similar domestic and imported products should be treated in the same way (Article 90 of the EC Treaty). The Administrative Court refused to apply the national law in that respect and stated that decisions of the customs authorities had been issued in violation of substantive law.

However, the same Voivodeship Administrative Court – in its judgment of 11 February 2005, ref. no. III SA/Lu 690/04, issued by a different bench – dismissed an appeal against a decision on the amount of an excise duty that was due. The court stated that the said duty was one of the elements of the universal tax system that was binding in Poland. And therefore, the fact of imposing an excise duty as well as the amount of the duty did not infringe the EC Treaty.

The Voivodeship Administrative Court in Łódź, in its judgment of 23 June 2005 (ref. no. I SA/Łd 1059/04), dismissed an appeal against a decision, issued by the Director of the Main Customs Office in Łódź, on refusal to recognise the overpayment of an excise duty with relation to the intra-Community acquisition of a passenger car. In the statement of reasons for its decision, the Voivodeship Administrative Court stated that it had limited itself to examining the conformity of the appealed decision to the provisions of law. The case under examination did not concern determining the amount of an excise duty that was due on the basis of provisions that were inconsistent with the provisions of the EC Treaty, but the issue of the possible overpayment of the excise duty in the situation where a given taxpayer had paid the excise duty, thus fulfilling an obligation arising from provisions that were contrary to Community law. A contradiction between the provisions of domestic law and the directly applicable provisions of Community law results only in the possibility of refusing to apply the provisions by national courts or, in the case of doubts as to the interpretation of EU law, in making a reference to the ECJ for a preliminary ruling. However, it should be pointed out that the said power is vested only in the organs of the judiciary. Such a power is not vested in tax authorities, which are not authorised to challenge the binding force of provisions on existing tax liabilities that are due, and thus they could not determine that the calculation of a tax by a given taxpayer in accordance with those provisions was incorrect.

By contrast, the Voivodeship Administrative Court in Warsaw, when adjudicating on refusal to recover an excise duty paid with relation to the intra-Community acquisition of a passenger car, raised doubts as to the conformity of: Article 80 of the Excise Duty Act to Article 25 and Article 90, first sentence, of the EC Treaty; § 7 of the Regulation of the Minister of Finance of 22 April 2004 on the reduction of excise duty to Article 90, second sentence, of the EC Treaty; as well as Article 81 of the Excise Duty Act to Article 28 of the EC Treaty. As a result, pursuant to Article 234 of the EC Treaty, by the decision of 22 June 2005 (ref. no. III SA/Wa 679/05), the Voivodeship Administrative Court made a reference to the ECJ for a preliminary

ruling (*Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie*, case C-313/05) with regard to the possibility of applying the provisions of national law concerning an excise duty on second-hand cars, having regard to the provisions of the Treaty, and in particular Article 90 of the EC Treaty.

The above-indicated discrepancies occur not only in the jurisprudence of courts, but also between the official organs of the Republic of Poland and the European Community. It suffices to mention here, on the one hand, the appeal of the Committee on Petitions of the European Parliament issued with regard to the abolition of the tax, or proceedings instituted by the European Commission against Poland under Article 226 of the EC Treaty, and, on the other hand, the opinion of the Minister of Finance, who in his letter to the Constitutional Tribunal argued for the conformity of an excise duty to Community law.

In such a state of affairs, to introduce some order in matters that are the subject of the question of law referred to the Constitutional Tribunal by the Voivodeship Administrative Court in Olsztyn, it is first of all necessary to clarify the scope of the meaning of Article 90 of the EC Treaty by the ECJ by way of a reference for a preliminary ruling. What is of relevance here is the reference for a preliminary ruling made by the Voivodeship Administrative Court in Warsaw, which *inter alia* concerned issues raised in the question of law referred to the Tribunal by the Voivodeship Administrative Court in Olsztyn. The date for delivering a judgment by the ECJ in the case C-313/05, *Maciej Brzeziński v Dyrektor Izby Celnej w Warszawie*, is tentatively set for 18 January 2007. Hence, at this stage, the resolution of the case pending before the court referring the question of law is not contingent on a reply (judgment) delivered by the Constitutional Tribunal.

Thirdly, the main problem in the present case is the application of law, and not the binding force thereof. In the process of applying the law, judges are subject only to the Constitution and statutes (Article 178(1) of the Constitution). The principle is related to the conflict-of-law norm expressed in Article 91(2), which provides for an obligation to refrain from applying a statute in the case of conflict of laws between the statute and an international agreement ratified by statute. The principle of precedence also concerns Community law (Article 91(3) of the Constitution). For that reason, if a national court has no doubts as to the interpretation of a norm of Community law, it should refuse to apply a provision of a statute that is contrary to Community law and it should directly apply the provision of Community law; alternatively – if it is impossible to directly apply the norm of Community law – the court should seek possibilities to interpret national law in a way that would be consistent with Community law. In the case of doubts as to interpretation in the context of Community law, the court should make a reference to the ECJ for a preliminary ruling in that respect.

The mere fact that a specific provision of a national statute will not be applied does not weigh in favour of the necessity to repeal the statute, although in a majority of cases this may imply a clear need for the legislator to amend such a provision. However, this does not have to be a strict rule. In every case, this depends on the nature of

such a provision, its scope and the character of the conflict of laws (with Community law). Expecting the Constitutional Tribunal to eliminate such statutory provisions would entail expecting the Tribunal to ensure that Community law is implemented effectively. This is an issue falling within the scope of applying the law. The Tribunal has no jurisdiction to resolve individual matters concerning the application of law, including Community law. Also, in the context of the divergent jurisprudence of voivodeship administrative courts, the Tribunal has not been established to shape their consistent line of jurisprudence within the scope of Community law.

Finally, attention should be drawn to the content of Article 193 of the Constitution, which is vital in the context of the legal institution of a question of law. Pursuant to that provision, 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. The assumption that in the event of a conflict between a norm of national law and a norm of Community law, the latter will take precedence over the former, leads to the conclusion that, in the case under analysis, the correlation required by Article 193 of the Constitution will not occur. Such a conflict of laws is to be resolved single-handedly by the court applying the law, and in the case of any doubts regarding the interpretation of Community law – with the help of the ECJ, obtained by way of the preliminary reference procedure.

The lack of relevance of the question of law to the case pending before the court, where it is alleged that a norm of Polish law is inconsistent with a norm of EU primary law, justifies the discontinuation of proceedings before the Constitutional Tribunal on the basis of Article 39(1)(1) of the Constitutional Tribunal Act on the grounds that issuing a ruling is inadmissible.

This succinct presentation of basic arguments in favour of the determination indicated in the operative part of the decision, however, requires some elaboration on several issues that arise in the context of the present case.

III

1. The subject and higher-level norms for the review. Main procedural problems.

What constitutes the subject of the review which has been requested by the court referring the question is Article 80 of the Act of 23 January 2004 on Excise Duty (Journal of Laws – Dz. U. No. 29, item 257 as amended; hereinafter: the Excise Duty Act); the higher-level norms for the review are: Article 90, first sentence, of the Treaty establishing the European Community (Annex No. 2 to the Journal of Laws of 2004 No. 90, item 864; hereinafter: the EC Treaty) as well as Article 91 of the Constitution.

From the point of view of the adopted form of determination, what is of significance is a relation between the indicated higher-level norms as well as the context in which they are indicated. Both the way of formulating the *petitum* of the question of law as well as detailed argumentation contained in the statement of reasons show that it is Article 90 of the EC Treaty that is of main significance. However, the indication

of Article 91 of the Constitution (in fact, the point is its paragraph 2), is to fulfil – as it seems – a double role. First of all, the said provision is to constitute a kind of “link” between the national law and community law. Secondly, it is meant as the basis of accepting the superior character of the norm of an international agreement in relation to a statutory norm, and thus – in the case of determining the non-conformity of the essence of the above-said norm – the Tribunal’s adjudication that the statutory norm has ceased to have effect.

In the present case, the point is not the “typical” case of a constitutional review, which consists in examining a relation between two norms of national law that take up various positions in the hierarchical structure of the legal system. The aim of the referral made by the court referring the question is clearly the review of the conformity of the norms of national law to the primary EU law. The court referring the question states in the statement of reasons that “in the case under discussion, the point is not an interpretation of Community law, but the assessment of the conformity of the national law to the provisions of the EC Treaty”. What precedes the substantive aspects is the procedural problem of the purposiveness or admissibility of the examination of relations between norms indicated by the Constitutional Tribunal. The said problem must be rendered in a broader context of relations between Polish law and Community law as well as the mutual positioning of the powers of national and Community organs of legal protection.

2. Article 80 of the Excise Duty Act from a systemic point of view.

The excise duty is regulated by the said Excise Duty Act as well as the Regulation of the Minister of Finance of 22 April 2004 on the reduction of excise duty (Journal of Laws No. 87, item 825 as amended).

In the light of challenged Article 80(1) of the Excise Duty Act, passenger cars not registered in Poland in accordance with the road traffic provisions shall be subject to excise duty (the Act of 20 June 1997 – Law on the Road Traffic; Journal of Laws – Dz. U. of 2005 No. 108, item 908). Article 80(2) of the Excise Duty Act stipulates that the following shall be liable for excise duty: persons effecting any sale of passenger cars before their initial registration in Poland; importers and persons effecting acquisitions in the Community. Excise duty on vehicles arises: in the case of sale, as from the issue of the invoice and, at the latest, within seven days from the day the goods are delivered; in the case of import, as from the day on which the customs debt arises for the purposes of customs law; in the case of acquisition in the Community, from the time of acquisition of the right to use the passenger car as the owner and, at the latest, from its registration in Poland in accordance with the road traffic provisions. With reference to the last one of those instances, the tax base is an amount which an acquirer is obliged to pay (Article 82(3) of the Excise Duty Act). In addition, persons effecting the intra-Community acquisition are required to submit, at the time of import into Poland, a simplified declaration to the head of an appropriate customs office within five days of the date of the acquisition in the Community, and to pay the excise duty no later than the date of the registration of the vehicle in Poland.

By the Regulation of the Minister of Finance of 10 November 2006 (Journal of Laws – Dz. U. No. 210, item 1551), which amended the above-mentioned Regulation of 22 April 2004, the rate of the excise duty on used cars imported to Poland from EU Member States was reduced. The previous rate, calculated on the basis of a special formula, could amount to 65% of the tax basis specified in Article 10 of the Excise Duty Act. From the moment of the entry into force of the amending Regulation of 10 November 2006, i.e. from 1 December 2006, the amount of the excise duty has been the same as the amount of tax on new vehicles, i.e. depending on the capacity of the engine: an excise duty on cars where the cylinder capacity of the engine does not exceed 2000 cm³ is 3.1%, and where the said capacity exceeds 2000 cm³ – 13.6%. With reference to the state of affairs prior to the entry into force of the said amendments, § 2 of the said Regulation shall apply; the provision stipulates that in the situation where an obligation to pay an excise duty arose before 1 December 2006 (such a situation occurred in the case pending before the court referring the question), the previous excise duty rates are applicable.

3. The issue of relations between Polish law and Community law. The provision of Article 91 of the Constitution versus the place of Community law in the national legal order as well as the ways of resolving conflicts between the norms of Polish law and Community law.

The issue of relations between Polish law and Community law – formulated in a strictly substantive-law way – was the subject of the Tribunal’s considerations in the case K 18/04, which concerned the question of conformity to the Constitution of the Treaty of Accession, resolved by the judgment of 11 May 2005 (OTK ZU No. 5/A/2005, item 49). The cited judgment remains the most extensive and thoroughly argued analysis of the matter presented by the Tribunal.

Indicated by the court referring the question, the provision of Article 91 of the Constitution specifies the position of international agreements and law introduced by international organisations (including also Community law) in the national legal order as well as an approach to legal acts enacted outside the system of the organs of the Polish State. What is of significance from the point of view of the higher-level norms for the review indicated in the present case is paragraph 2 of Article 91 of the Constitution. Ratified international agreements which – within the meaning of paragraph 1 – have become part of the national legal order, are not transformed into national normative acts (domestic law), but continue in their character to be – due to their origin – the acts of international law (see A. Wasilkowski, “Prawo krajowe – prawo wspólnotowe – prawo międzynarodowe. Zagadnienia wstępne” [in:] *Prawo międzynarodowe i wspólnotowe*, p. 11; K. Działocha, comment on Article 91 [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. I, Warszawa 1989, p. 2).

The fulfilment of the premisses of the “entry” into the national legal order of an international agreement leads to the situation where its norms are directly applicable (Article 91(1) of the Constitution) and take precedence over statutes – if the statutes are incompatible with the agreement. In the light of Article 91 of the

Constitution, the issue of the said relations between the norms of the national legal order, which arise from various law-making centres, should (above all) be considered in the context of the precedence of applying an international norm over a domestic statutory norm that is contrary to the international norm, and that precedence is guaranteed by statutory procedures for the review of the observance of law in the process of its application, with judicial review in the first place. Article 91(2) of the Constitution comprises – together with the determination of the position of an international agreement in the hierarchical structure of the national legal order – the basic mechanism for eliminating a conflict between the norms of domestic law. The above thesis may be exemplified by reference to the formulation of the presented question of law. Indeed, the argued non-conformity of Article 80 of the Excise Duty Act to Article 90 of the EC Treaty does not “this way” determine the non-conformity of the said provision to Article 91(2) of the Constitution. On the contrary, the legal situation diagnosed by the court referring the question implements the hypothesis of Article 91(2) of the Constitution, by authorising the court adjudicating in a given case not to apply a statutory norm.

By determining the hierarchical precedence of international agreements over statutes, the constitution-maker created a possibility of reviewing the legality of statutory provisions from the point of view of their conformity to ratified international agreements the ratification of which required consent granted by statute (Article 188(2) of the Constitution). However, such a review may be carried out only where there are no other ways of eliminating the emergent conflict of laws (e.g. if a norm of an international agreement does not have the character of a directly applicable norm) or this is vital from the point of view of the certainty of law (e.g. if the scope of the application of an international norm completely overlaps with the scope of the application of a statutory norm, which would cause the latter norm to be normatively “void”).

In principle, there should be preference for eliminating conflicts between national norms and international ones at the level of the application of law. Apart from those clearly doctrinal considerations, the mechanism for eliminating conflicts of norms at the level of the application of law is more operational and flexible than the review of legality conducted by the Constitutional Tribunal. From the point of view of structural aspects, the mechanism is justified by the fact that a norm of international law will usually be binding within a narrower scope than a national statutory norm – be it the scope *ratione temporis*, the scope *ratione materiae* or the scope *ratione personae*. In accordance with the principle of precedence, the application of international law does not abolish, override or invalidate a norm of national law, but it limits the scope of the application thereof. The change of wording or the loss of validity in the case of an international norm will change the scope of the application of a national statutory norm without any need for action on the part of the national legislator.

In the opinion of the Constitutional Tribunal, the above conclusions remain up to date also in the case under examination. The resolution of the conflict, alleged by the court referring the question, between the content of Article 80 of the Excise Duty

Act and Article 90 of the EC Treaty should take place at the level of the application of law. On this basis alone, the admissibility of substantive adjudication by the Constitutional Tribunal seems useless, to say the least.

4. The autonomous character of the Community judicial system and the principles of legal cooperation with national courts.

4.1. The role of the European Court of Justice and its position, when juxtaposed with the structure of the national judicial system.

The European Court of Justice is one of the main institutions of the Community. In the context of the case under examination, among many other powers of the Court of Justice, attention should be drawn primarily to the legal institution of a reference made to the Court of Justice for a preliminary ruling.

Adjudication by the ECJ on a reference made thereto for a preliminary ruling is incidental in character, and it suspends main proceedings pending before a court of a given EU Member State, which has exclusive jurisdiction to determine the case pending before it. In this context, the jurisdiction of the ECJ is solely to issue a ruling on the interpretation of a provision of Community law or on the validity of the said provision (cf. *Orzecznictwo Europejskiego Trybunału Sprawiedliwości*, R. Skubisza (ed.), Warszawa 2003, p. 15). The aim of the preliminary reference procedure is to ensure that the national courts of all EU Member States apply Community law in a uniform way.

The Court of Justice has jurisdiction to give preliminary rulings (Article 234 of the EC Treaty) concerning: the interpretation of the EC Treaty; the validity and interpretation of acts of the institutions of the Community and the European Central Bank; as well as the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Article 234 of the EC Treaty regulates the preliminary reference procedure. This is the main mechanism of legal cooperation between national courts and the Court of Justice. The said mechanism, based on a subtle division into the interpretation of law and the application thereof, grants the Community court the possibility of providing interpretation, and assigns national courts with the application of law.

The Court of Justice contributes to the resolution of a dispute, but it does not adjudicate on a specific case. The said Court has stressed many times that the point is “judicial cooperation” which requires the national court and the Court of Justice, both keeping within their respective jurisdiction, to make direct and complementary contributions to the working out of a decision (see the ECJ’s judgment in the case *Schwarze v Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 16/65).

However, one should bear in mind that a preliminary ruling is binding for the national court making a reference for such a ruling, and it is the court’s obligation to take account of the ruling when determining a given case on its merits, in accordance with the principle of sincere cooperation expressed in Article 10 of the EC Treaty. What is more, overlooking the ECJ’s preliminary ruling by the court that has made a reference for such a ruling constitutes an infringement of Community law, and falls

within the scope of an infringement procedure which the European Commission is authorised institute against an EU Member State, under Article 226 of the EC Treaty. After the breakthrough ruling of 30 September 2003 issued by the ECJ in the case *Gerhard Köbler v Republik Österreich* (case C-224/01), in the event where a national court issues its ruling in manifest breach of the case-law of the Court in the matter, the EU Member State is rendered liable for damages (cf. T. T. Koncewicz, “Wyroki Trybunału w Luksemburgu: czy to już precedens, czy jeszcze nie”, *Rzeczpospolita* of 21 November 2006).

Hence, the division of the scope of jurisdiction between the national courts of EU Member States and the ECJ as regards the interpretation and application of Community law is as follows: interpretation falls within the jurisdiction of the ECJ, and the application of law – construed as the application of a norm of Community law to the facts of a given case that have been determined by a court – is the task of a national court of an EU Member State, which is bound in a given case by the ECJ’s interpretation (cf. *Orzecznictwo...*, *op.cit.*, pp. 15-16). Although currently the ECJ has been emphasising clearly that it may interfere in the assessment of the stage at which a reference for a preliminary ruling is made, if it notices that there is really no connection between the referral and proceedings that are pending, or that it may even criticise the referral as groundless, this does not however eliminate the division line drawn between the two scopes of jurisdiction, but it is to ensure “a more effective judicial dialogue” (cf. T. T. Koncewicz, “Pytania wstępne, czyli wspólnotowy dialog sądowy”, *Rzeczpospolita* of 1 December 2006).

4.2. National courts versus the application of the norms of Community law in the context of Article 9 and Article 91(2) of the Constitution as well as Article 10 of the EC Treaty.

The crucial issue in the circumstances of this case refers to the realm of the application of law. Obviously, national courts are obliged to directly apply the norms of national law. However, a national court judge is also obliged to determine whether the facts of a given case are subject to the norms of a Community regulation, which is directly applicable in the territory of every EU Member State (see the ECJ’s judgment of 19 May 1990 in the case *The Queen v the Secretary of State for Transport/ ex parte Factortame Ltd.* and others, 213/98). Pursuant to Article 9 of the Constitution, the Republic of Poland adheres to international law that binds it, which *mutatis mutandis* also refers to the autonomous – although genetically related to international law – system of Community law. By contrast, in accordance with Article 10, first and second sentences, of the EC Treaty, Member States undertake all proper general or detailed measures to ensure the fulfilment of the obligations arising from the Treaty or the activity of Community institutions. They make it easier for the Community to fulfil its duties. The way of fulfilling that general obligation to comply with international and Community law is specified with regard to the organs of the judiciary by the conflict-of-law norm expressed in Article 91(2) of the Constitution (see point 3 of this statement of reasons). Therefore, despite the view of the court referring the

question, national courts also have the right and obligation to refuse to apply a national norm, if it is in conflict with the norms of Community law. A given national court does not in such a case adjudicate about derogating the norm of national law, but it only refuses to apply it, insofar as it is obliged to assign precedence to the norm of Community law. The said legal act does not become invalid; it is binding and is applied within the scope that does not fall within the scope *ratione materiae* and the scope *ratione temporis* of the Community regulation. However, in the case of doubts regarding a relation between a norm of national law and a norm of Community law, it is necessary to refer a question to the ECJ for a preliminary ruling, as the ECJ is the proper authority to provide an interpretation of the Treaty as well as the norms of secondary legislation, and – in a functional sense – it is included in this way into the judicial system of a given EU Member State.

It should be stated on that basis that there is no necessity to refer to the Constitutional Tribunal with questions of law that concern the conformity of national law to Community law – even in a situation where a given court refuses to apply a national statute. Thus, the issue of sorting out the conflict of laws with national statutes, in principle, remains outside the scope of interest of the Constitutional Tribunal. The question whether a statute is in conflict with Community law will indeed be determined by the Supreme Court, administrative courts and common courts, and the interpretation of the norms of Community law will be determined by the ECJ, which will issue a preliminary ruling (see L. Garlicki, “Członkostwo Polski w Unii Europejskiej a sądy” [in:] *Konstytucja dla rozszerzającej się Europy*, E. Popławskiej (ed.), Warszawa 2000, p. 215; see also the judgment of the Federal Constitution Court of Germany of 31 May 1990, 2 BvL 12, 13/88, 2 BvR 1436/87 as well as the judgment of the Italian Constitutional Court of 5 June 1984 in the case of *Granital SpA v Amministrazione delle Finanze dello Stato*, 170/1984). The above statement does not mean that the verb ‘may’ used in Article 193 of the Constitution expresses the optionality of referring questions of law to the Constitutional Tribunal in general. The verb ‘may’ denotes a power of a given court to institute proceedings before the Constitutional Tribunal, and the Tribunal clearly states that, in each case where the court challenges the conformity of a statute to the Constitution, there is no possibility to potentially declare the unconstitutionality of the statute in another way than on the basis of a judgment issued by the Constitutional Tribunal (cf. the judgments of: 4 October 2000, ref. no. P. 8/00, OTK ZU No. 6/2000, item 189; 31 January 2001, ref. no. P. 4/99, OTK ZU No. 1/A/2001, item 5). However, in a special situation of a conflict between a statute and Community law, the court’s power to refer a question of law to the Tribunal is in a sense limited due to the conflict-of-law rule set out in Article 91(2) of the Constitution as well as principles governing the application of Community law, and in particular the principle of the direct application of Community law in the case of its conflict with the statute.

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

JUDGMENT of 18 February 2009 – Ref. No. Kp 3/08

[Reference for a Preliminary Ruling under the Former Third Pillar of the European Union]

In the Name of the Republic of Poland**The Constitutional Tribunal, in a bench composed of:**

Bohdan Zdziennicki – Presiding Judge

Stanisław Biernat – Judge Rapporteur

Zbigniew Cieślak

Maria Gintowt-Jankowicz

Mirosław Granat

Wojciech Hermeliński

Adam Jamróz

Marek Kotlinowski

Teresa Liszcz

Ewa Łętowska

Marek Mazurkiewicz

Janusz Niemcewicz

Andrzej Rzepliński

Mirosław Wyrzykowski,

Grażyna Szałygo – Recording Clerk,

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

Article 1 of the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union – to the extent it authorises the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities, as regards the competence of every Polish court to request the Court of Justice to give a preliminary ruling on the questions as referred to in Article 35(3)(b) of the Treaty on European Union – to Article 45(1) of the Constitution, adjudicates as follows:

Article 1 of the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2)

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

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. The subject and scope of the allegations.

1.1. Formulated by the President in accordance with Article 122(3) of the Constitution, the allegation of non-conformity to the Constitution concerns Article 1 of the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union. The challenged provision of the Act reads as follows:

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

By contrast, the provisions of Article 35(1)-(5) of the EU Treaty have the following wording:

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

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

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

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

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

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

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

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

Pursuant to Article 42 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional

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

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

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

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

It should be noted that Article 234 of the EC Treaty was the object of adjudication by the Constitutional Tribunal in the judgment of 11 May 2005 in the case K 18/04

(OTK ZU No. 5/A/2005, item 49, points 10.1-11.4), in which the Tribunal adjudicated that the indicated provision was consistent with Article 8(1), Article 174, Article 178(1), Article 188 in conjunction with Article 190(1), Article 193 and Article 195(1) of the Constitution. The Constitutional Tribunal stated that the obligation to refer a question for a preliminary ruling constituted a legal consequence of the international (Community) commitments which had been assumed sovereignly by the Polish State as a Member State of the European Union. By ratifying the Treaty of Accession and the Act concerning the conditions of accession, the Republic of Poland accepted the separation of functions within the framework of the system of the EU bodies. An element of that separation is the jurisdiction of the Court of Justice of the European Communities to interpret Community law and ensure the uniformity of that interpretation. Such an obligation is a legal consequence of ratification of international agreements, in conformity with the Constitution (and pursuant to it), which were concluded with other Member States of the European Union. What remains an element of those agreements is Article 234 of the EC Treaty and the fact that the Court of Justice have jurisdiction as regards giving preliminary rulings on questions and providing valid interpretation of acts of Community law.

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

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

2.3. The scope of the preliminary ruling procedure with regard to police and judicial cooperation in criminal matters has been specified in Article 35(1) of the EU Treaty, cited above, and as regards a negative perspective – in Article 35(5) of the EU Treaty. It follows from the wording of the indicated provisions that the scope of competence of national courts to refer questions for a preliminary ruling under the Third Pillar is considerably limited. The courts may raise questions concerning merely the strictly specified sources of the secondary (derivative) EU law, namely: the validity and interpretation of framework decisions and decisions, the interpretation of conventions established under Title VI of the EU Treaty and the validity and interpretation of the measures implementing those conventions. Pursuant to Article 35(5) of the EU Treaty, the jurisdiction of the CJEC under the Third Pillar of the European Union may not encompass reviewing the validity or proportionality of operations carried out by the police or other law enforcement services of a Member State or the exercise of the responsibilities incumbent upon Member States with regard to the maintenance of law and order and the safeguarding of internal security. At the same time, as in the case of the procedure governed by Article 234 of the EC Treaty, it is inadmissible to refer questions concerning the interpretation or validity of national law as well as the conformity of the national law to the EU law.

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

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

The Act of 10 July 2008 made use of the mechanism provided for in Article 23(2) and Article 25(2) of the Act of 14 April 2000 on International Agreements (Journal of Laws – Dz. U. of 2000 No. 39, item 443, as amended). The indicated provisions provide for a special procedure for a change in the scope of an international agreement

by unilateral actions whose initiator is the Polish party to the agreement. Article 23(2) of the Act on International Agreements refers to the situations where a change in the scope of an international agreement does not consist in concluding a new agreement. The decision about a change in the scope of a ratified international agreement is made by the President of the Republic of Poland, upon a motion of the Council of Ministers. Article 25(2) of the Act on International Agreements provides for a further proviso, namely that a change in the scope of an international agreement, as referred to in Article 89(1) and Article 90(1) of the Constitution, requires a prior consent granted by statute (cf. more on the subject in: A. Wyrozumska, *Umowy międzynarodowe. Teoria i praktyka*, Warszawa 2006, p. 468 and the subsequent pages).

2.5. The Constitutional Tribunal points out that the issue of the qualification of the declaration referred to in Article 35(2) of the EU Treaty has been the subject of discussions for the last few years. At times a different position was taken to that presented in the challenged Act, namely that the declaration on acceptance of the jurisdiction of the CJEC should be submitted by the Council of Ministers, pursuant to Article 35(2) of the EU Treaty, without any need for passing a statute, as this is not the case of a change in the scope and application of an international agreement within the meaning of Article 25 of the Act on International Agreements.

The advocates of that view argued that consent for a possible submission of the declaration has already been expressed in the Treaty of Accession signed in Athens on 16 April 2003 (Journal of Laws – Dz. U. of 2004 No. 90, item 864, as amended; hereinafter: the Treaty of Accession), pursuant to which Poland has become a party to the Treaty on European Union (cf. the opinion of the Legal Advisory Committee to the Minister of Foreign Affairs, noted by T. Ostropolski, “Prace nad uznaniem przez Polskę jurysdykcji Trybunału Sprawiedliwości WE do orzekania w trybie prejudycjalnym w III filarze UE”, [in:] *Postępowanie prejudycjalne ...*, p. 67, and also W. Czaplński, “Glosa do wyroku Trybunału Konstytucyjnego z 27 kwietnia 2005 r. w sprawie P 1/05”, *Państwo i Prawo* 2005, Vol. 9, p. 111)

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

2.6. The Constitutional Tribunal does not share the view presented at the hearing by the applicant’s representative that the result of the said declaration is the transfer of competence of courts or – as it was also put – the narrowing down of the scope of the competence of Polish courts for the sake of institutions of an international organisation, i.e. the Court of Justice. Such qualification would result in a requirement to adopt the challenged Act pursuant to the procedure set forth in Article 90 of the Constitution. The competence to submit to the preliminary ruling procedure within the Third Pillar law of the European Union was accepted, by the Republic of Poland, together with the entire Treaty on European Union, via the Treaty of Accession.

The declaration submitted pursuant to Article 35(2) of the EU Treaty means only activation of that competence, and not its emergence. The EU law on police and judicial cooperation in criminal matters is binding in Poland and is applied by Polish authorities directly or indirectly, as a result of its implementation into Polish law. In the situation where Polish courts are not authorised to refer questions to the Court of Justice for a preliminary ruling, pursuant to Article 35 of the EU Treaty, they need to rely on themselves with regard to the interpretation and assessment of validity of the sources of EU law, set out in Article 35(1) of the EU Treaty. It is worth quoting here the opinion of the President of the Polish Supreme Court, who in a resolution of 20 July 2006, Ref. No. I KZP 21/06, (OSN KW 2006, No. 9, item 77), providing an interpretation of the Framework Decision 2002/584/JHA on the European arrest warrant, explained that: “Unfortunately, Polish courts are deprived of a legal possibility of referring questions to the CJEC for a preliminary ruling pursuant to Article 35 of the EU Treaty, since Poland has not yet submitted the declaration on acceptance of the jurisdiction the CJEC, as regards the measures adopted under the Third Pillar, pursuant to Article 35(2) of the Treaty. (...) taking into consideration this normative determinant, the Supreme Court must, in the said case, take an independent position”. Paradoxically, Polish courts rely on the rulings of the Court of Justice, made in response to questions referred for a preliminary ruling by other Member States, but they themselves may not initiate the issuance of such rulings. Creating a possibility of referring questions to the CJEC for a preliminary ruling broadens, rather than narrows down, the scope of the competence of Polish courts. In the judgment K 18/04, the Constitutional Tribunal established that referring to a competent Community authority with a question about the validity of an act of Community law – which, in accordance with the ratified Treaty obligations, should be applied – does not preclude the application of Article 174 of the Constitution of the Republic of Poland (...). There is, in particular, no functional obstacle to adjudicating “in the name of the Republic of Poland”. Also, referring questions pursuant to Article 35 of the EU Treaty is merely the competence of the courts, and not their obligation. The declaration submitted pursuant to Article 35(2) of the EU Treaty does not have a character of an international agreement, which additionally excludes the possibility of referring to Article 90 of the Constitution.

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

has been adopted, as referred to in Article 35(3)(b) of the EU Treaty. It concerns authorising every court of the Republic of Poland to be able to refer a question for a preliminary ruling if that court considers that a decision on the question is necessary to enable it to give judgment.

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

2.9. What is worth emphasising is another characteristic of the wording in Article 35 of the EU Treaty. Pursuant to the third paragraph of Article 234 of the EC Treaty, national courts against whose decisions there is no judicial remedy under national law are obliged to refer questions of law to the Court of Justice, if a ruling on the question by the CJEC is necessary to enable a given national court to give judgment; by contrast, it follows from Article 35(3) of the EU Treaty that national courts are authorised, but not obliged in that respect. The Treaty of Amsterdam was supplemented with Declaration No. 10, pursuant to which the Member States were given a possibility of introducing such an obligation into national law. On that basis, in the submitted declarations, Austria, Belgium, the Czech Republic, Spain, the Netherlands, France, Luxembourg, Germany and Italy reserved the right to make provision in their national law that when a question concerning the validity or interpretation of an act referred to in Article 35(1) is raised in a case pending before a national court against whose decisions there is no judicial remedy under national law, that court is obliged to bring the matter before the Court of Justice.

3. A higher-level norm for the constitutional review.

3.1. Pursuant to Article 45(1) of the Constitution, “everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”. As it has been indicated on numerous occasions by the Constitutional Tribunal, the meaning of the right to a fair trial encompasses the following: (1) the right of access to a court, i.e. the right to initiate a procedure before a court – an authority of certain characteristics (impartial and independent); (2) the right to a court procedure which conforms to the requirements of a fair and public hearing; (3) the right to a court ruling, i.e. the right to be granted a binding ruling in a given case by a court; (4) the right to have cases examined by the

authorities with an adequate organisational structure and position (cf. the judgment of 10 July 2000, Ref. No. SK 12/99, OTK ZU No. 5/2000, item 143, the judgment of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108). It follows from the above that the individual's right to a fair trial is exercised by the entirety of the principles which lead to a hearing that is fair and proper with regard to the subject matter as well as carried out within a reasonable time (see the judgment of 16 March 1999, Ref. No. SK 19/98, OTK ZU No. 3/1999, item 36).

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

The Constitutional Tribunal indicates that the said imperative, arising from Article 45(1) of the Constitution, belongs to procedural guarantees which are of special significance to the individual. However, this concept is difficult to define when contained in a norm of such great generality as the constitutional norm. The assessment whether a delay is justified or not may be carried out only in a given case, taking into account the character of the case (criminal, civil or administrative), the procedural provisions which are appropriate for its examination, the degree of difficulty (complexity) and the circumstances surrounding the case, *inter alia*, the behaviour of the parties to the proceedings (cf. Z. Czeszejko-Sochacki, "Prawo do sądu w świetle Konstytucji RP", *Państwo i Prawo* 1997, Vol. 11-12, p. 103). The requirement for court proceedings to be carried out "without undue delay", it corresponds to the principle of swift proceedings which has been conceived on the basis of particular procedural statutes. It is noted in the literature on the subject that the said requirement should be construed as an imperative, meant for the legislator, that the procedure for examining cases by courts should be structured in such a way that proceedings will be carried out efficiently and, if possible, swiftly. The imperative of swift proceedings may not justify the overlooking of the procedural guarantees contained not only in Article 45(1), but also in other provisions of the Constitution (cf. P. Hofmański, "Prawo do sądu w ujęciu Konstytucji i ustaw oraz standardów prawa międzynarodowego", [in:] *Wolności i prawa jednostki oraz ich gwarancje w praktyce*, Warszawa 2006, p. 276). Therefore, the Constitutional Tribunal emphasises that Article 45(1) is infringed in the case of delay in proceedings where there are no sufficient grounds for such delay, or those grounds may not be approved from the point of view of effective judicial protection.

3.3. When interpreting the said excerpt from Article 45(1) of the Constitution, one may refer to the first sentence of Article 6(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention), which ensures that "everyone is entitled to a fair and public hearing within a reasonable time", as well as to the extensive jurisprudence of the European Court of Human Rights (hereinafter:

the ECHR or the Strasbourg Court), which has emerged on the basis that provision. The Constitutional Tribunal has indicated a number of times that Article 45(1) of the Constitution, to the extent it concerns the right to a court procedure which conforms to the requirements of a fair and public hearing, takes into account the content of the first sentence of Article 6(1) of the Convention (see the judgment of 2 April 2001, Ref. No. SK 10/00, OTK ZU No. 3/2001, item 52, the judgment of 7 September 2004, Ref. No. P 4/04, OTK ZU No. 8/A/2004, item 81, the judgment of 19 February of 2008, Ref. No. P 49/06, OTK ZU No. 1/A/2008, item 5).

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

On a number of occasions the ECHR has assessed the course of proceedings in particular criminal cases, in the context of meeting the requirement of carrying them out “within a reasonable time”, within the understanding of Article 6(1) of the Convention. At the same time, it should be noted that identical wording is included in Article 2(1)(4) of the Act of 6 June 1997 – the Code of Criminal Procedure, Journal of Laws – Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure). The assessment carried out by the ECHR with regard to the length of criminal proceedings is very rigorous when the accused is deprived of liberty during the period when the case is pending (e.g. the judgment of 25 November 1992 in the case of *Abdoella v the Netherlands*, No. 12728/87); the judgment of 25 March 1996 in the case of *Mitap and Müftüoğlu v Turkey*, No. 15530/89). To a certain extent, the fact that proceedings take a long time may be justified by the behaviour of accused persons; namely, if they exercised their procedural entitlements, and lodged, for example, more and more applications to submit evidence, requests for the exclusion of judges or applications for referring the case to a different court (see the judgment of 16 July 1971 in the case of *Ringelsen v Austria*, No. 2614/65; the judgment of 28 June 1978 r. in the case of *König v Germany*, No. 6232/73; the judgment of 25 February 1993 r. in the case of *Dobbertin v France*, No. 13089/87; the judgment of 4 May 1999 r. in the case of *Ledonne v Italy*, No. 35742/97). According to the ECHR, when assessing whether particular proceedings were carried out within a reasonable time, the entire proceedings should be taken into account, including the investigation stage, together with the appellate and cassation procedures, if in the end they lead to indictment in a

criminal case. Considering these criteria, it should be recognised that the said imperative is infringed by the proceedings where there is no justification for the inactivity of the authorities involved in court proceedings (cf. P. Hofmański, commentary on Article 2 of the Code of Criminal Procedure, point 9, [in:] P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007).

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

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

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

- (1) the perpetrator of a criminal offence shall be detected and called to penal responsibility, and that no innocent person shall be so called,
- (2) by a correct application of measures provided for by criminal law, and by the disclosure of the circumstances which favoured the commission of the offence, the tasks of criminal procedure shall be fulfilled not only in combating the offences, but also in preventing them as well as in consolidating the rule of law and the principles of community life,
- (3) legally protected interests of the injured party shall be secured, and
- (4) determination of the case shall be achieved within a reasonable time.

The rules enumerated in the above provision, specifying the aims of criminal proceedings, constitute a certain *ratio legis* of the Code as a whole. Article 2(1) (1) and (2) of the Code of Criminal Procedure introduces the principle of an adequate criminal law response. In accordance with that principle, the procedural rules

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

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

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

In the President's application, it is aptly indicated that there are various procedures available under Polish law that allow the court adjudicating in a case, whose intention is to explain legal issues that raise interpretative doubts, to refer a question of law to a court (or an enlarged panel of that court) occupying the highest position in the judicial hierarchy. Therefore, Article 390(1) of the Code of Civil Procedure (Journal of Law – Dz. U of 1964 No. 43, item 296, as amended) provides for the possibility of referring questions of law which raise serious doubts, and have arisen in the course of examination of appellate measures, to the Supreme Court. Likewise, Article 441(1) of the Code of Criminal Procedure stipulates that the Appellate Court may refer a question to the Supreme Court for resolution if, in the course of the examination of appellate measures, a question of law is disclosed requiring a "substantial interpretation

of the law”. An analogical procedure of referring questions of law by the Supreme Court to an enlarged panel of seven judges of that court where there are “serious doubts as to the interpretation of the law” during the examination of a cassation appeal or any other appellate measure provided for in Article 59 of the Act on the Supreme Court (Journal of Law – Dz. U. of 2002 No. 240, item 2052, as amended). Also, within the meaning of Article 187(1) of the Act – Law on proceedings before administrative courts (Journal of Laws – Dz. U. of 2002 No. 153, item 1270, as amended), the Supreme Administrative Court may refer a question to a panel of seven judges for resolution if, in the course of examination of a cassation appeal in civil proceedings, a question of law emerges which “raises serious doubts”.

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

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

In the context of the present case, it should be emphasised that the reference of questions to the Supreme Court, the Supreme Administrative Court or the Constitutional Tribunal by the adjudicating courts inevitably results in extending the duration of proceedings that are pending before those courts. However, the procedures for the reference of questions of law have never been challenged, in the practice of the Constitutional Tribunal, from the point of view of their conformity to Article 45(1) of the Constitution. However, the Constitutional Tribunal has adjudicated about the conformity to the Constitution of other untypical procedural solutions, which entailed occurrence of a certain sequence or interdependencies between the proceedings conducted by courts and other authorities (cf. the judgment

of 14 June 2006, Ref. No. K 53/05, OTK ZU No. 6/A/2006, item 66, the judgment of 9 February 2008, Ref. No. P 49/06, OTK ZU No. 1/A/2008, item 5).

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

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

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

5.1. The applicant fears that the excessive length of proceedings, arising from the fact that all Polish courts are to be authorised to refer questions for a preliminary

ruling pursuant to Article 35 of the EU Treaty, may have a negative impact on the parties and other participants of criminal proceedings.

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

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

5.3. Pursuant to Article 34(2)(b) of the EU Treaty, framework decisions shall be adopted for the purpose of approximation of the laws and regulations of the Member States. Framework decisions shall be binding upon the Member States as to the result

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

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

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

in the case C-555/03, *Warbecq v Ryanair Ltd.*, [2004] ECR I-6041, points 11-16). The above ruling was given in the proceedings commenced pursuant to Article 68 of the EC Treaty which provides for referring questions to the CJEC for a preliminary ruling only by courts against whose decisions there is no judicial remedy under national law.

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

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

5.5 It is aptly stated in the President's application that the provisions of Polish law do not set out the rules and procedures for referring questions to the Court of Justice. However, this does not entail, despite the view presented in the application, that there is no possibility of hearing a case in criminal proceedings without undue delay. A Polish court referring a question for a preliminary ruling will be able to apply,

by analogy, various procedural solutions applicable when a question is referred to the Supreme Court, pursuant to Article 441 of the Code of Criminal Procedure, or the Constitutional Tribunal, pursuant to Article 193 of the Constitution. Article 23 of the Statute of the Court of Justice (published in Annex 2 to the Journal of Laws – Dz. U. of 2004 No. 90, item 864, as amended; hereinafter: the Statute of the CJEC) specifies the obligation of a national court, in the case where a question is referred for a preliminary ruling, to suspend its proceedings until the CJEC gives its ruling. It should be assumed that the term “suspend” (French *suspend*, German *aussetzen*) has been used here broadly, and refers to different forms of temporary adjournment of court proceedings. Hence, the procedural consequences of reference for a preliminary ruling are not determined here, as this is determined by the national law of the Member States.

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

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

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

In accordance with the jurisprudence of the Constitutional Tribunal, “if an established and consistent application of law has in a definite way determined an interpretation of a given legal provision, and at the same time the established interpretation

is not challenged by the representatives of the doctrine then the subject of the constitutional review is a legal norm decoded from the provision, in compliance with the established application” (the decision of 4 December 2000, Ref. No. SK 10/99, OTK ZU No. 8/2000, item 300; the judgment of 3 October 2000, Ref. No. K. 33/99, OTK ZU No. 6/2000, item 188). In the case of a preventive review of a statute, the above situation however may not take place, as the challenged provision is not yet binding, and thus one may not speak of its application. Therefore, the Constitutional Tribunal regards the applicant’s allegations, indicated below, as predictions about the development of a common application, which will in the future determine the content of the norm contained in the challenged provision.

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

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

6.3. The applicant expressed reservations that, due to the incorrect formulation of requests for a preliminary ruling within the scope of the procedure provided for in Article 35 of the EU Treaty, the Court of Justice would refuse to give rulings on the referred questions. This way the goal of the preliminary ruling procedure will not

be achieved, despite the delay in proceedings. These reservations are based on the observation provided by the applicant that questions of law referred pursuant to Polish law are sometimes turned down, due to the non-fulfilment of formal requirements.

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

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

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

request was made by the Supreme Court, eleven requests were made by administrative courts and four were made by common courts). The above data also suggests that so far common courts have been less willing to refer questions for a preliminary ruling.

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

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

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

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

The Constitutional Tribunal indicates that the urgent procedure may regard all the cases under Title VI of the EU Treaty. Indeed, pursuant to Article 104b(1) of the Rules of Procedure of the CJEC, a request for the urgent procedure may concern a reference for a preliminary ruling “which raises one or more questions in the areas

covered by Title VI of the Union Treaty or Title IV of Part Three of the EC Treaty”. Both the Statute and the Rules of Procedure of the CJEC do not provide for any exclusion within the scope of the preliminary ruling procedure. Initiating the urgent proceedings will depend on the national court referring a question for a preliminary ruling, for it is best suited to assess whether in a given case there is a need for swift action. Moreover, if the national court does not submit an appropriate request for the urgent procedure, the Court of Justice will be able to decide *ex officio* whether to hear the case, by applying that procedure.

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

It should be noted that, in its statement addressed to the Court of Justice with regard to the urgent preliminary ruling procedure (OJ L 24, 29.1.2008, p. 44), the Council of the European Union calls upon the Court to ensure that the deadlines in this regard are not, in principle, less than 10 working days² and that the urgent preliminary ruling procedure should be concluded within three months. Therefore, the expectations that judgments made under that procedure will be issued within that period are highly justified.

The information note supplement of 2008 (OJ C 64, 8.3.2008, p. 1), issued by the CJEC following the implementation of the urgent preliminary ruling procedure, presents exemplary situations determining the application of the urgent procedure. In particular, these are the cases of a person detained or deprived of his/her liberty where

² [Editorial remark. The Polish text of the statement of the Council of the EU, unlike the versions of the statement published in other EU official languages, contains the following wording: “deadlines in this regard are, in principle, no more than 10 working days”.]

the answer to the question raised is decisive as to the assessment of that person's legal situation or, in proceedings concerning parental authority or custody of children, where the identity of the court having jurisdiction under Community law depends on the answer to the question referred for a preliminary ruling. The CJEC stressed that it was not possible to provide an exhaustive list of such situations, particularly because of the varied and evolving nature of Community rules governing the area of freedom, security and justice.

In the President's application and in the address of the applicant's representative, the terms "urgent procedure" and "accelerated procedure" procedure are used interchangeably. In the context of the analysis of the ways of shortening the duration of proceedings before the Court of Justice, the Constitutional Tribunal draws attention to the need to distinguish between these two terms. The urgent procedure belongs to the framework of general preliminary ruling procedure, and is governed by Article 23a of the Statute of the CJEC and by Article 104a of the Rules of Procedure of the CJEC. It may be applied by the Court of Justice, upon the request of a national court where the circumstances of a given case indicate that giving a preliminary ruling on the submitted question is a matter of exceptional urgency. Shortening the duration of proceedings involves setting a date for the hearing forthwith, shortening the deadlines for submitting the pleadings as well as restricting the matters raised in the statements of case to the essential points of law raised by the question referred.

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

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

For the above reasons, the Constitutional Tribunal has adjudicated that Article 1 of the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union – granting consent for the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European

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

DECISION of 20 May 2009 – Ref. No. Kpt 2/08
[Dispute over the Representation of the Republic of Poland
in the European Council]

The Constitutional Tribunal, in a bench composed of:

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

Grażyna Szałygo – Recording Clerk,

having considered, at the hearings on 27 March and 20 May 2009, in the presence of the applicant, the President of the Republic of Poland and the Public Prosecutor-General, an application of 17 October 2008 by the Prime Minister (who presides over the Council of Ministers) to settle a dispute over powers between the President of the Republic of Poland and the Prime Minister which concerns determining the central constitutional organ of the state that is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the state,

decides as follows:

1. **The President of the Republic of Poland, the Council of Ministers and the Prime Minister (who presides over the Council of Ministers), while exercising their constitutional duties and powers, observe the principle of cooperation between the public powers, expressed in the Preamble and Article 133(3) of the Constitution of the Republic of Poland.**
2. **The President of the Republic of Poland, as the supreme representative of the Republic, may – under Article 126(1) of the Constitution – decide to**

- participate in a particular session of the European Council, if he finds it useful for the exercise of the duties of the President of the Republic of Poland, specified in Article 126(2) of the Constitution.
3. **The Council of Ministers, under Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution, determines the stance of the Republic of Poland to be presented at a given session of the European Council. The Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed stance.**
 4. **The participation of the President of the Republic of Poland in a given session of the European Council requires cooperation of the President with the Prime Minister and the competent minister, according to the principles set out in Article 133(3) of the Constitution. The goal of the cooperation is to ensure uniformity of actions taken on behalf of the Republic of Poland in relations with the European Union and its institutions.**
 5. **The cooperation of the President of the Republic of Poland with the Prime Minister and the competent minister enables the President to refer – in matters related to the exercise of his duties specified in Article 126(2) of the Constitution – to the stance of the Republic of Poland determined by the Council of Ministers. The cooperation also makes it possible to specify the extent and manner of the intended participation of the President in a session of the European Council.**

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. The subject and scope of the dispute over powers as formulated in the application by the Prime Minister.

1.1. Pursuant to Article 189 of the Constitution, the Prime Minister referred an application to the Constitutional Tribunal for it to: “settle a dispute over powers between the President of the Republic of Poland and the Prime Minister as regards determining the central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the State”. This way, the applicant indicated, as the subject of the dispute, the power to represent the Republic of Poland at the sessions of the European Council (as an EU body) and the related power to present the stance of the Polish state at that forum.

1.2. In the view of the Constitutional Tribunal, the subject of the dispute over powers therefore comprises – according to the application by the Prime Minister – two functionally related powers:

- a) “to determine” a central constitutional organ of the Republic of Poland that is authorised to represent the state at the sessions of the European Council;
- b) “to present” the stance of the Republic of Poland at the sessions of the European Council.

The dispute concerns, in particular, the situation where the President of the Republic of Poland decides to take part in a session of the European Council, whereas the Council of Ministers has not provided for (or planned) that.

1.3. In his application to settle the dispute over powers, the Prime Minister expressed the view that the subject of the dispute – apart from the powers to decide about the participation in a session of the European Council – was the power to “present the stance of the Republic of Poland at a session of the European Council”. In another place in the application, the dispute over powers was described as a dispute concerning the power “to determine the composition of the delegation of the Republic of Poland for a session of the European Council”.

The characteristics of the dispute over powers indicated here, the settling of which the Prime Minister requests, in a sense complicate the examination of the application. The concepts used to render the characteristics (“presenting the stance of the Republic of Poland at a session of the European Council”, “determining, in a binding way, the composition of the delegation of the Republic of Poland for a session of the European Council”) regard – which should be stressed – to a greater extent, particular actions undertaken in relation to the sessions of that body or during such a session, than the constitutionally specified powers of the Council of Ministers or the Prime Minister (who presides over that Council). To some extent, this is not only a dispute over the legally specified powers of constitutional organs of the state, but also a dispute over the rules and scope of specific actions related to the manner of representing the Republic of Poland at a particular session of the European Council.

1.4. The Constitutional Tribunal states that the competence of a constitutional organ of the state is the power granted by the constitution-maker or the legislator to act with legally specified consequences within the specified scope *ratione materiae*; undertaking such action may be a legal obligation or entitlement of a given organ of the state.

In this context, the Constitutional Tribunal stresses that the powers understood in this way should not be regarded as tantamount to the systemic roles of state organs (the roles fulfilled within the constitutional system), to the duties (i.e. legally specified objectives and consequences of the functioning of particular state organs), or to the scope *ratione materiae* (the areas of actions specified in respect of their objects).

Settling disputes over powers between central constitutional organs of the state, the Constitutional Tribunal adjudicates on the content and limits of powers of the

state organs being the parties to a given dispute. The subject of adjudication may be both the scope *ratione materiae* of the disputed powers (the content of actions of the state organs being parties to the dispute over powers), as well as the scope *ratione personae* (indication of authorities that have the power to take certain actions specified by law).

Examining a dispute over powers, the Constitutional Tribunal determines the existence of powers or lack thereof in the case of a central organ of the state and the shape of the disputed power. The question about power is usually raised in the context of a specific individual situation, where two (or more) of the central organs of the state consider themselves competent to take the same legal measure or where neither (none) of the said organs of the state consider themselves competent to take a given measure.

The wording of Article 189 of the Constitution does not give grounds to assume that the jurisdiction of the Constitutional Tribunal is restricted to settling the disputes over powers provided for in the Constitution. The duties of the central constitutional organs of the state are carried out by exercising powers which arise both from the Constitution and statutes, and moreover – from other universally binding acts (ratified international agreements, and even – regulations). The general term “a dispute over powers”, as used in Article 189 of the Constitution indicates that the Tribunal settles disputes over powers, regardless of the rank of the provision which provides for the powers. As regards central constitutional organs of the state, determining the content and scope of particular powers is done by juxtaposing detailed rules governing competence with certain roles and duties, specified in the Constitution, of specific state organs which are parties to a given dispute over powers.

Settling a dispute over powers by the Constitutional Tribunal amounts to taking a legally binding position in a situation where there is a discrepancy in stances between two or more organs as to the scope (limits) of powers of one of them. The discrepancy may arise from the assertion that both organs of the state have power to issue a given act or take a given legal measure (a positive power dispute) or the assertion that neither of them is competent in the said regard. Also, the dispute must be real, and not merely a potential interpretative doubt. The organ of the state that initiates the dispute over powers should prove the real character of the dispute over powers and make the legal interest in the adjudication probable.

Undoubtedly, the Prime Minister, as an authority submitting an application to settle the dispute over powers, as well as the President of the Republic of Poland, as an authority being a party to the dispute (and in any case: interpreting differently the power to represent the Republic of Poland at the sessions of the European Council than the applicant), remain central constitutional organs of the state within the meaning of Article 189 of the Constitution. Therefore, the dispute – referred to the Constitutional Tribunal to be settled – fulfils the requirements set out in Article 189 of the Constitution, with regard to the scope *ratione personae*.

The content of the application of the Prime Minister (and the argumentation presented by his representatives at the hearing before the Constitutional Tribunal), the

content of the reply of the President to the application of the Prime Minister, as well as the content of the pleading of the plenipotentiary of the President submitted on the first day of the hearing and the statements of the representatives of the President indicate that there were different stances as regards the power to represent the Republic of Poland in the course of particular sessions of the European Council and the power to present the stance of the Republic of Poland at those sessions. The discrepancies occurred in practice, in relation to particular sessions of the European Council (in particular: the session on 15-16 October 2008). As a result, the case pertaining to the application by the Prime Minister of 17 October 2008 displayed real elements of a dispute over powers within the meaning of Article 189 of the Constitution.

1.5. Taking into consideration the subject of the dispute over powers, it should be emphasised that the Constitution of the Republic of Poland was enacted prior to the accession of Poland to the European Union. By contrast to the constitutions of the EU Member States (e.g. France or Finland), the Polish legislator has not made relevant amendments or additions in the constitutional regulations concerning the scope of activity and powers of state organs in order to make them more specific in relation to the membership in the European Union. Many issues concerning the powers and roles related to the membership in the EU have not been explicitly and directly regulated in the Constitution of 2 April 1997. The authors of the Constitution decided that problems that might potentially arise might be resolved by observing the principle of favourable predisposition and respect towards regulations of EU Treaties and international law obligations which bind the Republic of Poland (which primarily arises from Article 9 of the Constitution). In the opinion of the Constitutional Tribunal, a distinction between particular powers of central constitutional organs of the state should be drawn – in the first place – in accordance with the interpretation of the fundamental assumptions of the system of the government defined in the Constitution of the Republic of Poland, making reference in particular to the genesis (including the evolution of the powers of the organs of the executive branch) and the primary principles of the Constitution.

1.6. One of those assumptions is the functioning of two central constitutional organs (authorities): the President and the Council of Ministers, but with regard to each of them there is a different basis as for appointing them to fulfil constitutional roles. These organs are characterised by their scope of relevant activities and powers; at the same time, it has been indicated which situations require mutual and loyal cooperation.

The existence of two organs of the executive branch, where each of them fulfils roles which differ as regards their scope and kind, entailing actions taken on behalf of the Republic of Poland also in foreign relations, determines the diverse participation of these organs of the state, to the extent and in the manner set forth by the Constitution and statutes (pursuant to Article 126(3) and Article 146(1), (2) and (4) of

the Constitution), in the shaping of the relations between the Republic of Poland as an EU Member State and other institutions of the European Union.

1.7. The policy of the Republic of Poland towards the European Union, being also related to Poland's membership in the EU, is not explicitly regulated in the Constitution, which is understandable due to the time of the enactment of the Constitution.

There is no doubt that the provision which applies to the relations between the European Union and its other Member States is Article 146(4)(9) of the Constitution. The wording of this provision is so broad that it refers to all the states and international organisations, including those to which Poland belongs to as well as others (regardless of the character and degree of integration of a given organisation).

Poland's relations with the European Union defy the constitutional boundaries of "foreign policy" or "internal affairs". The EU law constitutes, at the same time, part of the national legal order. It is applied by the organs of the Polish state. In this regard, the consequences of the EU membership may be regarded as falling within the scope of the internal affairs.

By contrast, Poland's relations with other Member States, as well as contacts with the EU (Community) institutions and bodies, display the characteristics of foreign policy. At the same time, it should be taken into account that some EU institutions and bodies are composed of representatives of the Member States (the European Council, the Council of the European Union, the Committee of Permanent Representatives – COREPER, numerous committees functioning in accordance with the so-called comitology procedure, units of Community and EU agencies). Thus, the representatives of the Republic of Poland participate in the adoption of decisions which, hence, do not have a fully external character with regard to the Republic of Poland.

Therefore, Poland's relations with the European Union do not have a homogeneous character. However, undoubtedly, as a whole, they fall within the scope of "the internal affairs and foreign policy of the Republic of Poland" (Article 146(1) of the Constitution) and "the affairs of the State" (Article 146(2) of the Constitution).

2. The European Council – roles and duties, participation in its sessions.

The European Council is an institution of the European Union. Pursuant to Article 4 of the Treaty on European Union (hereinafter: the EU Treaty), the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They may be assisted by ministers of foreign affairs of the Member States and a member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council. The European Council

shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

Therefore, the European Council deals with the most important strategic issues of the European Union. The subjects of the sessions of the European Council are the issues concerning the future of the EU, and also the most serious current problems, occurring within as well as outside the EU, which directly or indirectly concern the European Union.

This may be issues falling under all three pillars of the EU: the European Community and its policies, common foreign and security policy as well as police and judicial co-operation in criminal matters. Apart from the general authorisation, arising from Article 4 of the EU Treaty, the European Council bases its activities on specific authorisations granted by the Treaties.

The European Council adopts political decisions. They may have a different character and degree of generality and imperativeness. Then, some of the decisions are implemented in the form of legal acts by the institutions which are competent with regard to creating EU law, i.e. the Council of the European Union and the European Commission. Frequently, before taking legislative initiative, the European Commission refers to the European Council for political acceptance of the planned actions. The European Council also constitutes the ultimate forum for resolving conflicts between particular Member States which have not been resolved at lower levels of mutual interaction, and especially in the Council of the European Union (i.e. an EU institution which is composed of the Member States' ministers who are competent in that respect).

The European Council adopts its decisions and arrives at its arrangements by way of consensus, without carrying out a formal voting. The outcomes of the sessions of the European Council are included in the conclusions of the end of the EU presidency assigned for a given six-month period. They are published directly after a given session of the European Council.

In accordance with the rules for organising the proceedings of the European Council, adopted at the session in Seville on 21-22 June 2002 (the so-called Seville conclusions). The European Council has its sessions, in principle, four times a year (twice during a six-month period of the presidency of a given Member State or States). In exceptional circumstances, the European Council may hold an extraordinary session.

The proposals for the agenda of the European Council are prepared by the Committee of Permanent Representatives (COREPER) and the committees which are competent with regard to the issues falling under the second and third pillar of the European Union, as well as by the General Secretariat of the Council of the European Union.

The sessions of the European Council are prepared by the General Affairs and External Relations Council, which gathers the ministers of foreign affairs of the Members States. This Council coordinates all the preparatory work and devises agendas for its session. During such a session, which is held at least four weeks prior

to a session of the European Council, the General Affairs and External Relations Council, acting in accordance with the proposal of the current presidency, prepares a detailed agenda of a session including: the list of matters to be approved or signed, in which case a debate is unnecessary; a list of matters to be discussed, which is to specify general political guidelines; a list of matters to be discussed which allow for adopting a decision in accordance with the procedure set out in paragraph 9 of the Seville conclusions; a list of matters to be discussed which are not to be the subject of conclusions.

On the day preceding a session of the European Council, the General Affairs and External Relations Council gathers at the last preparatory session and adopts the final agenda, which may not be then extended without consent of all the delegations from the Member States.

During a session of the European Council when the conclusions are adopted, each Member State is entitled to two seats. The phrase “Heads of State or Government”, from Article 4 of the EU Treaty, who are members of the European Council (participate in its sessions), refers to the national constitutions and legislation of particular Member States.

3. Separation of powers between central constitutional organs of the executive branch.

The experience of the functioning of the two central organs (authorities) of the executive branch— the President and the Council of Ministers – in the years 1989-1997 was one of the bases for the constitutional solutions during the period of work on the Constitution of 2 April 1997. Despite the efforts of the authors of the Constitution, no clear-cut separation of powers was made, as *inter alia* the dispute under examination may suggest, between the two segments of the executive branch in order to eliminate a possibility of a dispute (conflict). The dispute (conflict) exists although the regulations binding in the years 1989-1997, which constituted the most serious source of tension and conflicts, were eliminated from the constitutional order.

The Constitution specifies the legal principles and basis of the duties, roles, powers, rules of cooperation and mutually dependent actions taken by the two organs of the state. Applying the Constitution, one should also take into consideration the rules which have not been regulated therein *expressis verbis*, which constitute the essence of the mechanism of state government. The unwritten principles and rules may have the character of constitutional customs, a well-established practice of operation, or they may be a derivative of canons of legal, and in particular constitutional, culture which have developed in democratic states.

The need for taking into account both the rules which are expressed in the Constitution and those which arise from other binding sources is related to the fact that the scope of the powers of two (or more) organs of the state may overlap, but the means to exercise them remain different. In particular, the duties assigned to two (or more) organs of the state may be referred to the same term (such as security); nevertheless

their real content is contingent upon the duties of a given state organ which arise from the system of government, its powers as well as the scope and kind of responsibility.

In the situation where an issue being the subject of the dispute over powers – i.e. indicating the central constitutional organ of the state which has the power to represent the Republic of Poland at a session of the European Council in order to present the stance of the state there – has not been constitutionally regulated in an explicit and unambiguous way, what is indispensable is a reliable interpretation of relevant constitutional provisions.

4. The duties and powers of the Council of Ministers as regards the internal affairs and foreign policy of the Republic of Poland.

4.1. Article 146(1) of the Constitution stipulates that the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. The Constitutional Tribunal states that the “European” matter, being the subject of the sessions of the European Council, is primarily the matter which belongs to the traditionally understood “internal affairs” (policies concerning the economy, agriculture, transport, the natural environment, etc). The larger the extent to which the subject matter of the sessions of the European Council regards the internal affairs (or rather the particular areas of internal affairs) which are conducted by the Council of Ministers and for which that Council of Ministers bears political responsibility, the less justified is the participation of another state organ in the sessions of the European Council.

In the situation where the source of the dispute over powers is, above all, the way of understanding the matter of the foreign affairs and external relations, as well as the powers of the central constitutional organs of the executive branch in this regard, the analysis is focused on that matter.

4.2. The regulations of Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution indicate the scope of the competence and duties of the Council of Ministers in the field of external relations of the Republic of Poland. Article 146(1) reserves conducting “foreign policy” for the scope of competence of the Council of Ministers. The sphere of that policy as well as the affairs “not reserved to other State organs” (including the President of the Republic of Poland or local self-government) are vested in the Council of Ministers (Article 146(2) in conjunction with Article 146(1)). The scope of competence of the Council of Ministers, specified in Article 146(1) and (2), determines the duties and powers of that Council.

Many arguments indicate that conducting foreign policy is the domain of the Council of Ministers. Firstly, the Council of Ministers fulfils the constitutional duty of exercising “general control in the field of relations with other States and international organizations” (Article 146(4)(9)), which, secondly, entails ensuring the external security of the state (Article 146(4)(8)). Thirdly, the Council of Ministers conducts “the internal affairs and foreign policy of the Republic of Poland” (Article 146(1)).

Fourthly, the Council of Ministers has a sole power to sign international agreements and, fifthly, with regard to the Council of Ministers, there is a presumption of powers concerning “the affairs of the State” (Article 146(2)). Since there is the principle that conducting foreign policy is the domain of the executive branch, and within the framework of the executive branch, it is vested in the Council of Ministers, then the consequences of such a regulation leave no doubt: all other organs of the executive branch may conduct only the duties and exercise only the powers that arise from the Constitution or statutes, and also they need to recognise political responsibility of the government for conducting foreign policy.

The Constitutional Tribunal states that the wording of Article 146(1) of the Constitution contains the presumption of exclusive competence of the Council of Ministers as regards the substantive aspects of “conducting foreign policy”. This does not necessarily mean the sole power of the Council of Ministers in the realm of representing the Republic of Poland in relations with other states and international organisations. Indeed, what should be taken into consideration is Article 133(1), which describes the President of the Republic of Poland as “representative of the State in foreign affairs”. Pursuant to Article 146(2) of the Constitution, the Council of Ministers deals with all the matters pertaining to representing the state, except for those cases which are clearly reserved – in Article 133(3) – for the President of the Republic of Poland, and the conducting of which requires cooperation with the Prime Minister and the Minister of Foreign Affairs.

The Constitutional Tribunal assumes that the scope of “conducting foreign policy” also encompasses participation in sessions, decision-making committees and meetings with the representatives of other states and international (supranational) organisations.

An addition to the regulations of Article 146(1) and (2) of the Constitution is paragraph 4 point (9) of that Article. It specifies that the role of the Council of Ministers is to “exercise general control in the field of relations with other States and international organizations”. Also here, the provision specifying the role of the Council of Ministers as exercising “general control” is not a provision governing competence in the full sense of the phrase. Indeed, it does not specify, due to the emphasis on the word “general” (with regard to the term “control”), particular control competences. What is more, it is preceded (in Article 146(4) *ab initio*) by a proviso that the Council of Ministers exercises its “general control” “in accordance with the principles specified by the Constitution and statutes”. Thus, the constitution-maker himself assumed and announced that the principles and scope of exercising the relevant “general control” would be specified.

4.3. The conducting of internal affairs and foreign policy is vested in the Council of Ministers. Pursuant to Article 148(4), the Prime Minister shall “ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation” (which determines the position and role of the Prime Minister).

The Prime Minister has not been entrusted, by the Constitution, with explicitly stated and constitutionally reserved duties and powers with regard to relations with other states and international organisations. Consequently, his actions are derivative of the constitutional role to “represent the Council of Ministers” (Article 148(1)) and the constitutional duty to “ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation” (Article 148(4) of the Constitution). The constitutional requirement of cooperation between the President of the Republic of Poland and the Prime Minister (and the competent minister) as regards foreign policy refers to the Prime Minister as the authority exercising the duties (powers) set out in Article 148(1) and (4) in the area of foreign policy, falling within the scope of activity (competence) and powers of the Council of Ministers. The Prime Minister, cooperating with the President in respect of foreign policy (Article 133(3) of the Constitution), exercises his powers arising from Article 148(1) and (4), and hence he acts within the scope of competence assigned to the Council of Ministers *in corpore*, over which he presides, and not explicitly within the scope of activity and powers of the Prime Minister alone. What remains a form of carrying out the duty specified in Article 148(4) of the Constitution is determining, by the Prime Minister, the manner of representation of the Council of Ministers at a given session of the European Council.

4.4. Conducting foreign policy and exercising “general control” in that respect (Article 146(1) and Article 146(4)(9)), and also remaining an authority which is competent in matters “not reserved to other state organs” (Article 146(2) of the Constitution), encompasses determining the content of the stance of the Republic of Poland within the scope of all its foreign relations, including the entire scope and all the forms of relations with the European Union. For that reason, determining the stance of the Republic of Poland each time it is to be presented at a session of the European Council falls, pursuant to Article 146(2) of the Constitution, within the exclusive competence of the Council of Ministers. The Council of Ministers, the Prime Minister (who presides over the Council of Ministers) and subordinate organs of government administration are also responsible – in accordance with Article 146(2) – for preparing the said stance, negotiating indispensable arrangements with the governments of other Members States and with the EU institutions. The Council of Minister – acting through its representatives i.e. the Prime Minister and the designated minister (who is a member of the Council of Ministers) – is competent to decide about the content, place, form and scope of presentation of the said stance (*inter alia*) at a session of the European Council. Also, it may independently authorise the Prime Minister (the designated minister) to make any necessary modifications to the said stance within the framework of foreign policy (and in particular European policy), determined by itself due to current needs ensuing from the course of debates in the European Council.

4.5. Developing and taking (“presenting”) the stance of the Republic of Poland at the sessions of the EU political institution – the European Council, therefore, constitutes a vital element of conducting foreign and European policy by the Council of Ministers (as affairs not reserved to other state organs, within the meaning of Article 146(2) of the Constitution). These fall within the scope of activity of the Council of Ministers, pursuant to Article 146(2). The Council of Ministers is competent to decide about the members of the delegation for a particular session of the European Council (within the “limits” set in Article 4 of the EU Treaty and the resolutions of the European Council, including currently the so-called Seville conclusions). Also, it may specify the content and manner of presenting the stance of the Polish state as well as its possible modifications both at a given session of the Council and (particularly) during the discussions preceding the session.

4.6. A general power to represent the Council of Ministers is vested – pursuant to Article 148(1) – in the Prime Minister. He also specifies the manner of implementation of the policies adopted by the Council of Ministers, the work of which he manages (Article 148(4)). The participation of the Prime Minister in the sessions of the European Council directly results from his systemic position and duties within the Council of Ministers and more broadly – within the system of state organs. As part of specifying the manner of implementing the policies of the Council of Ministers, the Prime Minister may also determine the manner of representing the Council of Ministers during the preparations for a given session as well as at the session of the European Council.

5. The constitutional position and duties of the President of the Republic of Poland versus the question of participation in the sessions of the European Council.

5.1. Article 10(2) of the Constitution establishes the principle of dualism of the executive power, and thus the President of the Republic of Poland and the Council of Ministers act as separate central authorities of the executive branch which are distinct as regards their structures, powers and duties. The President of the Republic of Poland acts independently of the Council of Ministers and “on his own responsibility”, as regards fulfilling the role and duties assigned to him by law. This pertains to the role of the President specified in Article 126(1) of the Constitution, and in particular as regards his actions which have no legal effects and do not involve issuing official acts.

Ensuring observance of the Constitution (Article 126(2)), the President of the Republic of Poland himself interprets and applies its provisions when exercising his duties specified in the Constitution and statutes.

However, the principle of the President’s independence with regard to conducting his duties has been constitutionally limited, when it comes to issuing official acts. The constitution-maker has drawn a distinction in this regard between the situations specified in Article 144(3) of the Constitution, in which the President independently exercises his powers, and all the other situations where the official acts of the President

require the countersignature of the Prime Minister (which entails assuming, by the Prime Minister, political responsibility to the Sejm for the issuance and content of those acts). Indeed, within the entire scope of his activity, the President is not subject to supervision by the Sejm and is not responsible to the Sejm. The real political evaluation of actions of the President takes place when a President in power stands for re-election for the second term of office, and is manifested in the act of re-election. The President is politically responsible to the Nation.

5.2. The President of the Republic of Poland does not have the powers to independently conduct foreign policy of the state which arise from the provisions of the Constitution. Indeed, pursuant to Article 146(1) of the Constitution, conducting that policy falls within the scope of constitutional competence of the Council of Ministers. Also, the competence of the Council of Ministers encompasses, in accordance with Article 146(2) of the Constitution, the affairs of the state which are not reserved to other state organs. The category of affairs specified in Article 146(2) may include the relations between the Republic of Poland and the European Union which do not constitute classic foreign policy, and which are also not regarded as the area of internal policy understood in a traditional way.

5.3. Assigning the duty (role) of the supreme representative of the Republic of Poland” to the President of the Republic of Poland is not tantamount to entrusting this authority with the duty to “conduct foreign policy”. Pursuant to Article 146(4)(9) of the Constitution, “to the extent and in accordance with the principles specified by the Constitution and statutes”, it is the Council of Ministers that shall “exercise general control in the field of relations with other States and international organizations”.

5.4. The status of the President as regards external affairs (foreign policy) – taking into account the state of constitutional regulation at the time of drafting the Constitution of 1997 – manifests the intention of the constitution-maker. The President has not been granted the powers that were vested in him under the rule of the “Small Constitution” of 1992, namely the power to exercise “general control” in the field of foreign affairs, and in the area of external and internal national security (Article 32(1) and Article 34 of the “Small Constitution”); neither has he been granted the power to have a final say on the choice of candidate for the post of the minister responsible for foreign affairs (as well as the ministers who are responsible for internal affairs and national defence). The lack of the said powers (in conjunction with the provisions of Article 146 of the Constitution) indicates a clear intention of the constitution-maker to include conducting foreign policy in the scope of competence and powers of the Council of Ministers and the Prime Minister (who presides over it), which is specified in the Constitution. The limitation of the powers of the President was also a reaction to the strong position of the President in the “Small Constitution”, as well as to the criticism of the functioning of central organs of the executive branch. It was seen in the previously binding constitutional regulation as one of the sources of dysfunction

of the state as regards foreign policy. The solutions adopted in the Constitution of 1997 were to prevent such dysfunction, or at least to counteract it.

5.5. The Constitution does not set out the powers to conduct foreign policy and exercise general control over that policy by the President of the Republic of Poland. The duties of the President, specified in Article 126(2) (which serve as certain guarantees of the values indicated there), as well as the powers set out in Article 133(1) of the Constitution, are characterised by a great deal of (direct and indirect) reference to external policy (both foreign and European), which is conducted by the Council of Ministers.

The Constitution distinguishes the systemic position of the President as “the supreme representative of the Republic of Poland” from his systemic role of “representative of the State in foreign affairs”.

The constitutional regulation describing the President of the Republic of Poland as “representative of the State in foreign affairs” does not differ from a classic definition of the role of the head of state. The constitutional construct reveals the assumption that the President remains included in the realm of foreign policy, but within the scope which is determined by the Constitution and statutes. Exercising his duties and powers, he is obliged, pursuant to the Preamble and Article 133(3) of the Constitution, to cooperate with the Prime Minister and the competent minister.

The Constitutional Tribunal takes into account the circumstance that two terms were used in Polish when regulating the role of the President of the Republic of Poland: *przedstawiciel* (Eng. ‘a delegate’) and *reprezentant* (Eng. ‘a representative’) of the Republic of Poland. In colloquial Polish, these terms are often regarded as synonyms. However, according to the established rules of interpretation, the use of different terms justifies the need for differentiation between their meanings. Indeed, it should be presumed that, when using different terms with regard to the actions of the President in the field of external relations of the state, the constitution-maker had the reasonable assumption in mind that terms which are lexically diverse should be assigned meanings which are not identical. The participation in a session of the European Council – on behalf of a given Member State – is not, in fact, limited to sheer representation, nor is it limited to actual actions; it involves participating in the process of adopting political decisions (by way of consensus) by this EU institution.

5.6. Pursuant to Article 126(1) of the Constitution, the President of the Republic of Poland is the supreme representative of the Republic of Poland, and moreover – the guarantor of the continuity of state authority.

In the view of the Constitutional Tribunal, Article 126(1) of the Constitution has assigned a universal character to the role of the President as “the supreme representative of the Republic of Poland”, in the sense that this role is fulfilled by the President both in the context of external relations and internal affairs, as well as – regardless of the circumstances, place and time. There are no legal premisses, on the basis of which the forum of the EU political institution, i.e. the European

Council, should be excluded *a limine* from the scope of fulfilling that role. Since the Constitution designates only the President as “the supreme representative of the Republic of Poland, the President – within the scope of and in accordance with the principles specified in the Constitution and statutes – independently decides about the place and the form of fulfilling this role set forth in Article 126(1) of the Constitution. The systemic position of “the supreme representative” entails that the scope of the self-contained role of the President primarily regards “the embodiment of the majesty of the Republic of Poland”.

At the same time the Constitutional Tribunal emphasises that the systemic position of the President as “the supreme representative of the Republic of Poland” does not mean that the President is the supreme state authority of the Republic of Poland. Despite the suggestions put forward during the proceedings in this case, the Polish term “*najwyższe przedstawicielstwo*” (Eng. supreme delegation) does not also mean “*najwyższa reprezentacja*” (Eng. supreme representation). Finally, what is important, assigning the systemic role of the “supreme representative of the Republic of Poland” to the President does not directly entail entrusting the President with the duty to conduct foreign or “EU” policy. The Constitution does not state that the President has a general power to participate in the sessions of the European Council, and in particular – a power to present the stance of the Republic of Poland at the sessions of the said Council.

5.7. The systemic position of the President as “the supreme representative of the Republic of Poland” and “the guarantor of the continuity of State authority” has been constitutionally determined – in Article 126(2) – by indicating the constitutional duties of the President. The said provision stipulates that the President of the Republic of Poland shall: (a) ensure observance of the Constitution, (b) safeguard the sovereignty and security of the State as well as the inviolability of its territory. It should be assumed that Article 126(2) outlines the scope of the duties which the Constitution provides for the President, thus delineating the boundaries and character of his systemic roles specified in Article 126(1) of the Constitution.

The Constitutional Tribunal draws attention to three circumstances. Firstly, the wording of Article 126(2) of the Constitution indicates that the provision specifies duties, and not powers. Secondly, the duties set out in Article 126(2) are carried out by the President together and in cooperation with other organs of the state. With regard to none of the indicated duties, the President has the sole power to carry them out in the forms which have legal effects. Thirdly, as regards the duties (goals) set out in Article 126(2), the President may not carry them out freely. When carrying them out, he may only exercise the powers specified in the Constitution and statutes. The said powers may only be exercised by the President in the situations where this serves the purposes expressed in Article 126(2) of the Constitution.

5.8. Having assumed that the duties set out in Article 126(2) are carried out by the President, within the scope of his constitutional role (position) as “the supreme

representative of the Republic of Poland” and as “the guarantor of the continuity of State authority”, it should be analysed – for the benefit of the case – to what extent it is possible that there will be situations which will necessitate the participation of the President in a session of the European Council (due to his constitutional duties).

The duty of the President to safeguard the inviolability and integrity of the territory of the Polish state comprises the obligation to counteract any attempts at cession of even the smallest part of the territory of Poland, including also the territorial waters. This also entails preventing political disintegration of the territory of Poland, emergence of diversified public orders going beyond the scope of constitutionally permitted decentralisation of powers. This also regards counteracting any attempts at introducing territorial autonomy and any aspirations to federalise Poland. This duty complements safeguarding the sovereignty and security of the state.

Due to the criteria for membership in the European Union (Article 49 of the EU Treaty and the conclusions of the Copenhagen European Council in 1993), including the basic condition, i.e. prior resolution of border disputes between the Member States, and moreover – due to the content of Article 11 of the EU Treaty, the occurrence of threats to territorial integrity of the Member States is unlikely.

A constitutional duty of the President, specified in Article 126(2) *in fine*, is to safeguard the inviolability and integrity of the territory of the state. The issue of territorial integrity does not constitute the matter of the EU law or Community policies. Also, the provisions of the Treaties, provisions of the Accession Agreement, as well as the previous experience of the functioning of the European Union, do not indicate that the European Council has the power to adopt (or adopts) decisions in the matters concerning the inviolability and integrity of the territory of particular Member States, including the Republic of Poland. This circumstance is not without significance for the participation of the President of the Republic of Poland in the session of the European Council motivated by the exercise of the constitutional duties indicated in Article 126(2) of the Constitution.

When analysing the issues of sovereignty, it should be stressed that the Council may adopt decisions solely within the scope of competences of particular organs of the state (especially those of the executive branch, to a lesser extent those of the legislative branch, and to the least extent – of the judiciary), which have been conferred on the European Union for the joint exercise thereof by the European Council. The issue of sovereignty, also in the context of the President’s duties set out in Article 126(2) of the Constitution, has been covered by the Constitutional Tribunal in the judgment of 11 May 2005 in the case K 18/04 (OTK ZU No. 5/A/2005, item 49). In the said case, the constitutionality of the Treaty of Accession has been confirmed. The Constitutional Tribunal presented the view – which is still valid today – that the object of conferral that is subject to the assessment of conformity to the Constitution (as regards respecting the sovereignty and security of the state) comprises the competences of state organs “in relation to certain matters”. They have earlier been determined “on the basis of and within the scope of the Constitution”, and therefore in accordance with its axiology expressed in the wording of the Preamble

to the Constitution. Emphasising the significance of the recovered possibility of a sovereign and democratic determination of the state's own fate, the Preamble declares the need for "cooperation with all countries for the good of the Human Family", for the fulfilment of the obligation of "solidarity with others" and for respect for universal values. This obligation refers not only to internal affairs, but also to foreign relations. Similar values, belonging to the common legal inheritance of European countries, also determine the goals and direction of the activity of the Communities and the European Union.

Pursuant to Article 6(1) of the EU Treaty: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". These principles are shared by the Member States.

The Tribunal emphasises that the object of the decisions of the European Council are the matters referred by the Member States for the joint handling via the EU institutions. Both the manner and object with regard to the conferral of competences of organs of state authority, in relation to certain matters, maintain the attribute of being "consistent with the Constitution" as "the supreme law of the Republic of Poland". By contrast, the change in the scope as regards the conferral of the competences of state organs on the European Union requires amendments to the Treaties constituting the basis of the Union.

From the point of sovereignty and the protection of other constitutional values, what is significant is the limitation of conferral of competences "in relation to certain matters" (and thus without infringing the "core" competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland).

The Constitutional Tribunal states that the sessions of the European Council which are devoted to amending the Treaties constituting the basis of the Union may be related to the issue of sovereignty of the Republic of Poland, which would justify the participation of the Polish President therein.

Article 126(2) of the Constitution entrusts the President of the Republic of Poland with the duty to "safeguard" the security of the state. The basic scope of carrying out that duty is related with the exercise of the powers of the President as the Supreme Commander of the Armed Forces of the Republic of Poland. Moreover, the President has the superseding power in the situation of a serious threat to the state related to the introduction of the martial law, a state of emergency as well as an order of (general or partial) mobilisation. Therefore, the President has, at his disposal, vital measures to safeguard the sovereignty, security and territorial integrity of the Republic of Poland. From that perspective, the participation of the President in the sessions of the European Council should be perceived as serving (supplementing) the exercise of the duties specified in Article 126 of the Constitution, and carried out in relations with the European Union.

The European Council may deal with the issues pertaining to the security of the Member States, and thus – the security of the Polish state. There have been numerous doubts and facets of the dispute, as regards the scope of participation of the President of the Republic of Poland (who exercises the constitutional duty to

“safeguard the security” specified in Article 126(2) of the Constitution) in the sessions of the European Council. Thus, the Constitutional Tribunal stresses the usefulness of distinguishing the semantic scope of the term “security of the State” (Article 126(2) of the Constitution) and the meanings of the term “security” in the particular areas of the functioning of the state (e.g. energy security, environmental security and health safety), which are in particular connected with the duties, powers and responsibility of the Council of Ministers and its particular members managing the relevant units of government administration.

The Constitutional Tribunal is not settling the dispute concerning a specific session of the European Council. Nevertheless, it draws attention to the fact that the duties mentioned in Article 126(2) are the duties carried out by the President together and in cooperation with other organs of the state. With regard to none of the indicated duties, the President has the sole power to exercise the duties. For instance, as regards ensuring observance of the Constitution, the partner of the President is the Constitutional Tribunal, and as regards safeguarding the inviolability of the Polish territory – the Council of Ministers, and in particular the Minister of National Defence.

5.9. As mentioned before, the Constitution distinguishes the systemic position of the President as “the supreme representative of the Republic of Poland” from the systemic role of “representative of the State in foreign affairs”. Regardless of the suggestions of the representative of the President in this case, these terms are not identical. Thus, it is inadmissible to assume an interpretation based on assigning the same meanings to different terms.

The construct describing the President of the Republic of Poland “as representative of the State in foreign affairs” is a manifestation of an obvious attribute of each republican head of state and, in the system of government of the Republic of Poland, it has no other meaning than the meaning of this classic attribute. The constitutional construct manifests an assumption that the President is involved in conducting foreign policy, but within the scope determined by the Constitution and statutes; whereas, when exercising his duties and powers, he is obliged to cooperate with the Prime Minister and the competent minister.

5.10. The powers of the President as representative of the State in foreign affairs are set out in Article 133(1) of the Constitution. The President ratifies and renounces international agreements, and notifies the Sejm and the Senate thereof; he appoints and recalls the plenipotentiary representatives of the Republic of Poland to other states and to international organisations; as well as he receives the Letters of Credence and Recall of diplomatic representatives of other states and international organisations accredited to him. In all these cases, the exercise of the President’s powers is shared with appropriate organs of the state. For example – the enactment of a statute granting consent to ratification of an international agreement takes place only upon motion by the Council of Ministers; the President may not ratify an international agreement

without the prior enactment of a statute granting consent to such ratification; the official act of ratification of an international agreement by the President does not constitute a personal power (prerogative) and, to be effective, it requires the counter-signature of the Prime Minister, presiding over the Council of Ministers; appointing and recalling the plenipotentiary representatives of the Republic of Poland is done upon motion by the Minister of Foreign Affairs; receiving the Letters of Credence and Recall of diplomatic representatives of other states requires cooperation with the Minister of Foreign Affairs.

5.11. The participation of the President (also when not consulted with the Prime Minister) in a session of the European Council brings about certain constitutional and political consequences.

Firstly, the presence of the President of the Republic of Poland and the Prime Minister (who presides over the Council of Ministers) at a session of the European Council affects who presides over the state's delegation (due to diplomatic precedence).

Secondly, the European Council is not shaped as a forum where a given Member State is primarily represented by a person with the attribute of the supreme representative of the state, but who is not involved in the day-to-day work of the government. There are no legal grounds to adopt the assumption that the mere status of "the supreme representative of the Republic of Poland" unequivocally determines the participation of the President in a session of the European Council.

6. The normative content of the President's obligation to cooperate with the Prime Minister and the competent minister (Article 133(3) of the Constitution).

6.1. The Preamble to the Constitution obliges the authorities of the Republic of Poland to cooperate. This obliges them to: mutually respect the scope of duties and powers of constitutional organs of the state, and moreover – respect the dignity of the offices and of the persons who hold them, be loyal to each other, act in good faith, notify each other of initiatives, be ready to cooperate and compromise, and carry out such arrangements diligently.

The concurrence of the aims as the manifestation of the idea of cooperation is a consequence of the fundamental principle of the system of government, expressed in Article 1 of the Constitution: "the Republic of Poland shall be the common good of all its citizens". The constitutional organs of the state have been obliged to undertake such action which will facilitate the implementation of the principle contained in Article 1 of the Constitution.

6.2. The Constitutional Tribunal states that it follows from the Preamble to the Constitution and Article 133(3) that the President, the Prime Minister and the competent minister are permanently obliged to cooperate as regards carrying out the duties which do not fall exclusively within the scope of their competence. Cooperation constitutes a series of actions undertaken on the initiative either by the President

or the Prime Minister or both of the said authorities, within the scope defined by the Constitution and statutes. Exercising some of the duties (and powers) of the Council of Ministers requires certain constitutional or statutory cooperation with the President of the Republic of Poland. With regard to the duties of the President, the requirement of cooperation with the Prime Minister and competent ministers has much wider scope. Therefore, there is no complete symmetry between one scope of constitutional obligations to cooperate and another.

Constitutionally imposed, this cooperation remains – in the view of the Constitutional Tribunal – purposeful praxeologically due to the connection between “conducting foreign policy” and exercising “general control” in that respect by the Council of Ministers (represented by the Prime Minister) and the realm of fulfilling the constitutional role and duties by the President of the Republic of Poland (as “the supreme representative of the Republic of Poland” and the guarantor of “the sovereignty and security of the state”), as well as also due to unity (uniformity) of the conducted European policy and the need for effective functioning of the state.

6.3. The obligation of cooperation, as set forth in Article 133(3) of the Constitution, i.e. in respect of foreign policy is primarily, though not entirely, the duty of the President. This constitutional norm sets the obligation to seek compromises, in the case of the President – refraining from decisions and actions which have not been earlier discussed by the Prime Minister or the Minister of Foreign Affairs. The obligation of the organs of the state to cooperate implies a legal imperative that action in the area of foreign and European policy be uniform. At the same time this imperative contains constitutional prohibition against creating two parallel and independent centres for conducting foreign policy. Cooperation within the meaning of Article 133(3) means that the President may not, acting with the best intentions, conduct competent policy to the one agreed by the government. This would be against the Polish *raison d'état*, and hence the significance the Constitution assigns to the uniform stance of the executive branch in foreign relations. When dealing with international organisations or institutions, the President may not take a stance which would be contrary to the stance of the government, due to the significance of uniform foreign policy as an indicator of the *raison d'état*.

The obligation of cooperation also concerns the Prime Minister and the competent minister, and in particular it imposes, on those authorities, the obligation to be ready to cooperate with the President of the Republic of Poland.

6.4. The Constitution does not determine the rules and manner of cooperation. The constitution-maker has left this to be worked out in practice i.e. in the course of relations between the President and the Prime Minister, as well as on the basis of current needs. The cooperation encompasses determining the stance of the Republic of Poland in relation to a particular session of the European Council, regardless of the willingness of the Polish President to participate in the session, to the extent that stance falls within the scope of “foreign policy”.

As regards the sessions of the European Council, the said cooperation, in particular, entails informing the President of the Republic of Poland by the Prime Minister or the Minister of Foreign Affairs about the subject of the planned session. In the case of the officially notified interest of the Polish President in the matter (matters) concerning the subject of a session of the European Council (which falls within the scope of duties of the President, as set out in Article 126(2) of the Constitution), the Council of Ministers provides complete information on the stance of the government in that respect.

The participation of the President in a given session of the European Council should be the object of cooperation among the central constitutional organs of the state specified in Article 133(3) of the Constitution. This may be a result of arrangement, or even of a joint decision of the President of the Republic of Poland and the Council of Ministers represented by the Prime Minister.

6.5. The cooperation referred to in Article 133(3) of the Constitution takes place each time the President expresses his willingness to participate – due to the duties specified in Article 126(2) of the Constitution – at a session of the European Council. The rule is the representation of the Polish state at a session of the European Council by the Prime Minister. Indeed, conducting foreign policy falls within the remit of the Council of Ministers as such. The Prime Minister specifies the ways of carrying out the duties in that respect and represents the Council of Ministers as a state organ which conducts foreign policy and is competent as regards the affairs of the state not reserved to other organs of the Polish state. The Council of Ministers also conducts general control “in the field of relations with other States and international organisations”, within the scope of and in accordance with the principles specified in the Constitution and statutes.

6.6. Both the applicant – i.e. the Prime Minister – as well as the President of the Republic of Poland (with reference to the application) rightly interpret the constitutional obligation of cooperation as an imperative of the constitution-maker addressed to the President of the Republic of Poland, the Prime Minister and the minister competent in respect of foreign affairs. The cooperation implies mutual openness for joint work, and the readiness to undertake it. Since the constitution-maker has specified the scope of the said cooperation relatively broadly, namely “in respect of foreign policy”, then he implied in the imperative of cooperation all the forms of the activity by the President, the Council of Ministers and the Prime Minister, who presides over it, which are “targeted” outside of the Republic of Poland. This obligation requires an exchange of information, consultation as well as the possibility of submitting commentaries to the stance of the Council of Ministers, as a state organ conducting foreign and European policy and, moreover, where necessary, making binding arrangements. The constitutional obligation of cooperation between the President and the Council of Ministers also encompasses the full dimension of representation of the Republic of Poland in the European Union (and within its

borders), and also – as indicated before – cases of the President’s participation in particular sessions of the European Council, in the regard which is constitutionally determined.

6.7. The following minimal expectations arise from the constitutional obligation of cooperation (specified in Article 133(3) of the Constitution):

- a) mutual readiness to cooperate, both on the part of the President of the Republic as well as the Prime Minister and the Minister of Foreign Affairs,
- b) the obligation of the Prime Minister to inform the President about the subject matter of the sessions of the European Council and the stance determined by the Council of Ministers,
- c) the President’s obligation to make himself familiar with the stance determined by the Council of Ministers,
- d) the President’s obligation to notify about his intention to participate in a particular session of the European Council,
- e) mutual readiness to make transparent arrangements with regard to the participation of the President of the Republic of Poland in a session of the European Council,
- f) the obligation to observe the arrangements as regards the manner of participation and potential involvement of the President in the presentation of the stance of the Republic of Poland, determined by the Council of Ministers.

6.8. The arrangements made on the basis of Article 133(3) of the Constitution may comprise the issues of the extent and manner of participation of the President in a session of the European Council. The arrangements may include the President’s involvement in presenting the stance of the Republic of Poland, determined by the Council of Ministers (and agreed with other Members States), concerning the matters being the subject of a given session of the European Council, which are connected with fulfilling the constitutional duties of the President.

The President’s involvement in presenting the stance of the Republic of Poland may not result in diminishing the internal coherence of that stance, or in moving away from the content determined by the Council of Ministers. Neither may it go beyond the limits of arrangements made pursuant to Article 133(3) of the Constitution.

6.9. As regards the matters which have not been taken into account in the said arrangements between the President of the Republic of Poland and the Prime Minister together with the Minister of Foreign Affairs, as well as with regard to the matters which solely fall within the scope of competence of the Council of Ministers, as a state organ conducting foreign and European policy, that organ of the state has the sole power to determine, modify and present the stance of the Republic of Poland at the sessions of the European Council. Within the set scope of competence, it is the Prime Minister or the minister authorised by the Council of Ministers as a representative

(who is a member of the Council of Ministers) to present and modify the stance on behalf of the Council of Ministers.

6.10. The President of the Republic of Poland – even when he does not express his willingness to participate, on the basis of Article 126(1) and (2) of the Constitution, in a particular session of the European Council, and does not participate therein – may submit comments on the stance of the Republic of Poland, as part of cooperation with the Prime Minister and the competent minister (pursuant to Article 133(3) of the Constitution), prepared for a session of the European Council.

6.11. On the margin of a legal analysis, the Constitutional Tribunal notes that the functioning of the central organs of the executive branch in practice has shown situations that contradict the principle of cooperation.

For these reasons, the Constitutional Tribunal has decided as in the operative part of this decision.

Dissenting Opinion
of Judge Mirosław Granat
to the Decision of the Constitutional Tribunal
of 20 May 2009 in the case Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act, I submit my dissenting opinion to the following points of the operative part of the decision of the Constitutional Tribunal of 20 May 2009 (Kpt 2/08)

- point 3 []
- point 4 []
- point 5 []

1. The dispute over powers examined by the Tribunal does not concern “foreign policy” of the Republic of Poland (as referred to in Article 146(1) and Article 133(3) of the Constitution) or “foreign relations” (as it is often presented). If the subject of the dispute indicated in the application, i.e. “determining a central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the state” (p. 1) is juxtaposed with the field of “foreign relations”, then it should be stated that this is not the case of a dispute over powers within the meaning of Article 189 of the Constitution. The Constitution explicitly stipulates that “the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland” (Article 146(1) and that the Council of Ministers shall “exercise general control in the field of relations with other States and international organizations” (Article 146(4)(9)). By contrast, pursuant to Article 133(3), “the President of the Republic shall cooperate with the

Prime Minister and the appropriate minister in respect of foreign policy”. In the light of these provisions, “foreign policy” (“foreign affairs”) concern classic foreign relations, shaped by international agreements. There is no doubt that “foreign policy” is conducted by the Council of Ministers.

2. In my opinion, the dispute concerns “European matters” or, in other words, “conferred competences”. The description of the realm of such matters can be found in the Constitution of the Republic of Poland. These are matters arising from Article 90(1) of the Constitution. The scope of that realm is determined by the competences conferred by the Republic of Poland, i.e. “the competence of organs of State authority” conferred pursuant to an international agreement on “an international organisation or international institution” (“in relation to certain matters”). “Conferred competences” constitute relations between Poland and the organisations referred to in Article 90(1), as well as the matters falling within the scope of the competences of such an organisation. Such a constitutional basis, and not the provisions of Article 146(1) and Article 133(3) of the Constitution, cited in points 2 and 3 of the operative part of the decision, determines the context in which the dispute “takes place” as to representing Poland at the sessions of the European Council and presenting Poland’s stance.

In the judgment of 31 May 2004, concerning the Act on Elections to the European Parliament (Ref. No. K 15/04, OTK ZU No. 5/A/2004, item 47), the Tribunal stated that the European Union was not a state and “analogies to the system of state organisation are not justified” (as above, p. 662). The character of the EU is not sufficiently specified (it is not an international law entity; the lack of explicit premisses for distinguishing, in its case, between a “supranational” and “international” organisation) (cf. as above, p. 681). The previous view of the Tribunal, from the time of Poland’s accession to the European Union, indicates the peculiarity of the characteristics of that entity.

3. The significance of Article 90(1) of the Constitution of the Republic of Poland for determining the scope of dispute over powers is that the provision contains an answer to the question about the term “European matters” and their scope [which cases of the state’s policy may be specified as “European”]. “European matters” are matters in relation to which Poland conferred the competences of organs of the state, pursuant to Article 90(1) of the Constitution. In this case, it is not necessary to determine whether the matters on the agenda of the European Council are more “internal” or more “foreign”, from the point of view of conducting the policy of the state. What is vital for determining the scope of the dispute over powers is the formal criterion for European matters [“conferred matters”]. If the “conferred competences” were analysed as regards their substance, then there would be a need to return to “amalgamation” (merging) of internal and foreign affairs as a characteristic of the activity of Polish state organs in the EU bodies (cf. the statement of reasons for the judgment of the Constitutional Tribunal of 11 May 2005, Ref. No. K 18/04, OTK

ZU No. 5/A/2005, p. 674). In any case, in my opinion it is futile, and impossible in practice, to divide these matters into “internal” and “foreign”, and to decide which of them take precedence in “European matters”, as well as to make the power of the Council of Ministers or of the President of the Republic of Poland to determine and present Poland’s stance, at a session of the European Council, dependent on that fact. The rendering of “security of the State”, divided in the statement of reasons of the decision into “security of the State” (within the meaning of Article 126(2) of the Constitution) and “security of the State” “in the particular aspects of the functioning of the state”, as well as the consequences thereof, are an illustration of the said evaluation.

4. What follows from Article 90(1) of the Constitution is a qualitative difference between the said areas of external relations of Poland. It constitutes *lex specialis* with regard to the general principle of Poland’s accession to international organisations (expressed in Article 89(1)(3) of the Constitution). This manifests the legislator’s assumption that Poland’s accession to an organisation which has an integrative and supranational character, from the legal point of view, is a different act than the membership in a classic international organisation (cf. M. Masternak – Kubiak, “Konstytucyjno – prawne podstawy procedury przystąpienia Polski do Unii Europejskiej”, *Przegląd Sejmowy*, 2003, Issue No. 5 (58), p. 43). The reservation of the legislator – that the manner of expressing consent to the conferral of the competence of organs of State authority” by the Republic of Poland must meet more stringent requirements than an amendment to the Constitution of the Republic of Poland – convinces me that this is a special realm of relations (different from “foreign policy” and conducting thereof). Obviously, the role of Article 90 is more significant than merely “procedural”. It is emphasised, in the literature on the subject, that “it contains a great amount of separate systemic content which is of groundbreaking and historical significance” (cf. M. Kruk, “Tryb przystąpienia Polski do Unii Europejskiej i konsekwencje członkostwa dla funkcjonowania organu państwa”, [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, Warszawa 2006, p. 141). The above argumentation inclines me to remark that Poland’s accession to the European Union constituted a moment so significant as regards the constitutionalism of our country that the Tribunal had the opportunity to draw conclusions therefrom for defining the area of the dispute.

Therefore, I object to the reasoning adopted by the Tribunal which explains the role of the Council of Ministers and of the President of the Republic of Poland (and *vice versa*: of the President of the Republic of Poland and of the Council of Ministers), in the dispute over powers which occurs in the context of “conferred competences” from Article 90(1) (and not – I wish to stress that again – in the context of traditional international relations), by means of constitutional categories and terms concerning “foreign policy”. The error of reductionism consists here in interpreting the constitutionally singled out [in Article 90] issue of relations with a supranational organisation (and the consequences of conferral of competences for

the internal system of government) in the light of the regulations regarding classic international relations. However, the Constitution should not be interpreted in such a way that its regulations concerning one type of relations are applied to another type which emerged later, based on *argumentum a simili*. In the interpretation of the Constitution, such argumentation may not be the basis for adjudicating on the powers of constitutional organs of the state. Similarity of matter does not constitute justification for treating both areas of external policy of the state as equivalent.

The presentation of the dispute before the Constitutional Tribunal lacks the thought of the Tribunal expressed in the statement of reasons for the judgment of 12 January 2005, Ref. No. K 24/04 (the Cooperation Act). The Constitutional Tribunal stated that:

The development of the European Union in many cases necessitates a new approach to legal issues and institutions which have been shaped by the tradition for many years (and sometimes even centuries), enriched with jurisprudence and the doctrine, which have also ingrained in the consciousness of generations of lawyers. The necessity for redefining certain – as it would seem inviolable – institutions and terms arises from the fact that in the new legal situation, ensuing from European integration, there may sometimes be a conflict between the well-established understanding of some of constitutional provisions and the newly-emerged need for effective, and at the same time consistent with constitutional principles, impact at the forum of the European Union. (OTK ZU No. 1/A/2005, item 3).

In the context of the case at hand, “a new approach” should have been adopted as regards determining norms which concern shaping the stance of Poland in the European Union. Then I would understand the premiss for which the Constitutional Tribunal refrained from a restrictive interpretation of the dispute over powers as a form of review in a specific case (the requirement that a dispute be “real”), presented in the decision of 23 June 2008 (Kpt 1/08, OTK ZU No. 5/A/2008, item 97), for the sake of understanding such a dispute as a form of abstract interpretation of the Constitution, as it is the case in the present case.

5. I cannot agree with the method of reasoning applied by the Tribunal (reflected in the analysis presented in the statement of reasons, as well as in some of its conclusions) which consists in extrapolating, from the scope of activity of the European Council and the European provisions regulating the competence of the Council (Article 4 of the Treaty on European Union), the competence of national authorities, specified by the norms of constitutional rank. Even the “governmental” character of the European Council does not provide authorisation to interpret the Constitution of the Republic of Poland in the light of those provisions. Such argumentation redefines the relation of the Constitution to the EU law. In the process of interpretation of the Constitution, its provisions (having primary systemic significance for the integration process) may not be read as directives whose meaning is adjusted to a regulation (subject to its own dynamic) of a supranational organisation such as the European Union.

The consequence of thinking of the type “from the competences of the European Union to the Constitution of the Republic of Poland” is the act of singling out “state security in particular areas of the functioning of the state”, from “the security of the State” (as a category from Article 126(2) of the Constitution, which the President is to safeguard), (e.g. energy security, environmental security, health safety); these areas are primarily related to the duties, powers and responsibility of the Council of Ministers and its particular members (point 5.8 of the statement of reasons). The consequence of such an approach of the Tribunal is taking away essential content of “security of the State” as referred to in Article 126(2) of the Constitution (the content which corresponds to key challenges of the contemporary world).

6. The issue of control within the scope of “conferred competences”, from the point of view of national authorities, has not been introduced in the Constitution. As regards “conferred competences”, a supranational organisation directly exercises public power in Poland (one finds no proviso in the Constitution, which is known from Article 88-1 of the Constitution of the French Republic, on exercising “some of their powers in common” by the French Republic, the Communities and the Union). Therefore, is the Constitutional Tribunal competent to settle the dispute over powers in that respect? In my opinion, it definitely is. The provisions of the Constitution constitute a set of norms which are both general and sufficiently exhaustive that they delineate the separation of powers in the state in respect of the functions and the scope *ratione personae*. The Tribunal had the obligation to provide a consistent interpretation, taking into consideration the character of the European Union and the significance of Poland’s accession to the Union.

Since the competences of state organs were conferred on the organisation which, as it follows from the jurisprudence of the Constitutional Tribunal, is a unique legal entity, in accordance with a procedure meeting the requirements of *pouvoir constitué*, then the Council of Ministers and the President of the Republic of Poland should take part in determining the stance and presenting it as regards “conferred competences”. These authorities participate in the procedure for deciding about conferring competences on an international organisation or institution, and thus they are competent to take part in determining the stance of the Republic of Poland at a session of the European Council and in presenting that stance.

7. Where “the European function” of the state has not been introduced to the Constitution (apart from the meaning of Article 90(1)) and where the Constitutional Tribunal has decided not to determine whether and in what way the provisions on foreign policy may be referred to “conferred competences”, and also in the case of objections to regard Article 4 of the EU Treaty as a prism for viewing the Constitution of the Republic of Poland, a decision-making process within the scope of the “conferred competences” must take into account “cooperation between the public powers” (as stated in the Preamble to the Constitution) and the principle of separation and balance of powers (Article 10). Pursuant to Article 10, it is the separation and balance

of powers that constitute the basis of “the system of government of the Republic of Poland”. In my view, the balance of powers is one of the designata of “cooperation between the public powers”. The executive power, as referred to in Article 10 of the Constitution, encompasses the entire activity of the state which has legal effects, apart from legislative and judicial activity” (cf. P. Sarnecki, Commentary on Article 146, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Wyd. Sejmowe, Warszawa 2001, L. Garlicki (ed.), Vol. II., p. 5). It follows from that provision that “state authority is primarily represented by the executive branch” (P. Sarnecki, as above). Therefore, conferring “the European function” of the state on one organ of the executive branch would infringe on the said meta-principle of constitutional law. In the case where the Constitution does not mention “the European function”, what should be a hint in the interpretation of the constitutional provisions is the desire to maintain competence balance, in the light of the principle of separation and balance of powers.

Although the Tribunal places and settles the dispute in the context of “foreign policy” of Poland in the operative part of the decision, in the statement of reasons thereof it mentions Poland’s EU policy. This mention is superfluous (the Tribunal specifies neither the content nor the meaning of the category). Refraining from an analysis of the dispute in the light of “conferred competences”, the Tribunal however stresses that assigning the President of the Republic of Poland the role of the supreme representative of the Republic of Poland” (in Article 126(1) of the Constitution) does not lead to granting him “the duty to conduct foreign policy” or “EU policy”. Despite the fact that the issue of “EU policy” has been left out of the analysis of the Tribunal, the Tribunal takes the duties of the President for granted with regard to matters which (in the view of the Tribunal) do not fall within the scope of the dispute.

8. I am fully aware of the indispensability of constitution-making and/or legislative activities related to “the European function” of the Constitution. Nevertheless, it should be emphasised that, in the culture of some states, there is the notion of constitutional dialogue. Representing Poland in the European Council, with all its formal determinants, requires maintaining the simplest forms of cooperation (dialogue) between the Prime Minister, the Council of Ministers and the President of the Republic of Poland, which belong to the pre-constitution tradition and do not necessarily require a legal regulation.

9. The President is the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority (Article 126(1)). The nation has granted the President power for a 5-year term of office, in universal and direct elections (Article 127(1)). The constitution-maker specified certain duties of the head of state: ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory (Article 126(2)). I hold the view that pursuant to Article 126 (not only paragraph 1 thereof, as the Constitutional Tribunal argues, but in particular its paragraph 2), the President himself

may decide about his participation in a given session of the European Council, i.e. without being granted consent by any other organ of the state.

10. I may not accept point 3 of the operative part of the decision, due to a logical inconsistency contained therein. The conclusions of the reasoning do not have grounds in the assumed premisses. The said point comprises two sentences. The former stipulates that “the Council of Ministers, under Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution, determines the stance of the Republic of Poland to be presented at a given session of the European Council”. The latter, stipulating that “the Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed stance”, is key to settling the dispute by the Constitutional Tribunal, but does not indicate the legal basis it follows from.

11. Juxtaposing point 3 with point 5 of the operative part of the decision, does not allow to precisely determine the view of the Tribunal, as regards presenting the stance of the Republic of Poland by the Polish President at the sessions of the European Council. The Prime Minister (pursuant to point 3) is undoubtedly competent to represent the Republic of Poland at the sessions of the European Council and to present the agreed stance there. However, it is possible (point 5, second sentence) that the “extent and manner” of intended participation of the President in a particular session of the European Council may be specified on the basis of cooperation between the two authorities (the thesis in point 5 is not possibly an exception, in the reasoning of the Tribunal, from the rule expressed in point 3 of the operative part of the decision). However, it follows from the statement of reasons that the presentation of the state’s stance by the President still may not result in “departing from the content agreed by the Council of Ministers”. Since the President may at best merely be *porte parole* with regard to the stance of the Council of Ministers, then determining the “extent and manner” of his participation in a given session of the European Council, within the framework of cooperation between the two authorities”, is illusory. Assigning such substance to the principle of cooperation between the public powers in the statement of reasons of the decision deprives the head of state of its attributes set out in Article 126(1) and (2) of the Constitution.

12. As I have pointed out above, the Tribunal did not mention the reason for departing from the restrictive interpretation of the premisses indicating the existence of the dispute over powers, which were specified in the decision in the case Kpt 1/08 (both decisions were issued one shortly after another). For the Constitutional Tribunal to examine the dispute, it is vital to establish whether the dispute is “real” (and not “theoretical”) (as in the case Kpt 1/08), i.e. that the subject of adjudication may only be the question about a power (about its existence or lack thereof, and about its legal shape) as well as about “concurrence (conflict) of powers”. In particular, as the Tribunal noted in the statement of reasons in the case Kpt 1/08, “the actions of

the President taken within the scope of his powers” (cf. OTK ZU No. 5/A/2008, item 97, p. 971) are not subject to evaluation. It follows from the stance held in this case by the President of the Republic of Poland that he does not aspire to be responsible for determining the composition of the delegation or to shape the stance of the Council of Ministers. The Tribunal has not assigned any significance to this circumstance which is relevant for the evaluation whether the dispute is real. It merely stated the existence of a “discrepancy in opinions” as regards the powers to represent Poland and present Poland’s stance at particular sessions of the European Council. It assessed that such differences “occurred in practice”. By contrast, in the case Kpt 1/08 (ended by discontinuation of the proceedings), the Tribunal actually analysed “voiced intentions” of the participants in the presumed dispute (p. as above).

Due to the aforementioned inconsistency, the present decision does not contribute to establishing a distinction between the “real” dispute (as referred to in the case Kpt 1/08) and a potential (“foreseen”) one which constitutes an attempt at arriving at a binding interpretation of constitutional provisions *in abstracto*.

Dissenting Opinion
of Judge Teresa Liszcz
to the Decision of the Constitutional Tribunal
of 20 May 2009 in the case Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to points 2, 3 and 5 of the operative part of the decision and the statement of reasons thereof.

1. The basic issue that the Constitutional Tribunal had to examine in this case was whether we deal here with a dispute over powers within the meaning of Article 189 of the Constitution. Pursuant to Article 53 of the Constitutional Tribunal Act, a dispute over powers occurs where “two or more central constitutionally recognised State organs have considered themselves competent to decide in the same case or have made a ruling in it (a positive power dispute) or where the said organs have not considered themselves competent to decide in a particular case (a negative power dispute)”. The application by the Prime Minister does not unambiguously indicate what case both organs of the state decided in or in what case both organs considered themselves competent. The application, in many ways, specifies the presumed subject of the dispute – in particular – as determining the composition of the delegation of the Republic of Poland for a session of the European Council, or as representing the Republic of Poland at those sessions. However, the Constitution does not regulate the powers indicated here. Enacted before Poland’s accession to the European Union, it does not contain any regulations concerning the powers of the organs of the Polish

state, as regards the relations of the Republic of Poland with the European Union. When analysing that issue, one needs to take into account the character of the relations between the European Union and the Member States. That character ensues from the fact that these relations – not being the subject of internal policy – do not belong to the realm of foreign policy either, but actually constitute the subject of the third policy of the state – apart from foreign and internal policies, in principle concerning the competences conferred by the Republic of Poland on the European Union, pursuant to Article 90 of the Constitution. When addressing the problem examined by the Tribunal in a strict way, it may be stated – as the President of the Republic of Poland did – that since the scope of powers of the state organs has not been specified in that respect, then this may not be the case of a dispute over powers. It is worth pointing out here that the President of the Republic of Poland has never challenged the right of the Prime Minister to represent Poland at the forum of the European Council. However, one may not overlook the fact that there is a real dispute between the Prime Minister and the President of the Republic of Poland, which is mainly political and personal in character, but which nevertheless displays essential characteristics of a dispute over powers concerning the representation of the Republic of Poland at the forum of the European Union. For the sake of the state, this dispute should be resolved.

2. Pursuant to Article 4 of the Treaty on European Union (hereinafter: the EU Treaty), “the Heads of State or Government” are involved in the work of the European Council. The use of the inclusive disjunction “or” means, in accordance with the rules of logic, that – from the point of view of the European Union – a Member State may be represented at the sessions of the European Council both by the “head of state” alone, as well as by “head of government” alone, or by both of them together. That regulation of the Treaty has been elaborated on and made more specific in the “Rules for organising the proceedings of the European Council”, adopted in Seville in 2002. Pursuant to the Rules, the delegation of each Member State is assigned two seats. However, the Treaty on European Union does not determine (and may not determine) who – the head of the state, the head of government, or the head of the state and the head of government – is to represent a given Member State in the European Council. The regulations concerning that issue are included in the national law (above all, in the constitution) of each Member State.

In order to resolve the dispute, the subject of which is the power to represent the Republic of Poland as an EU Member State, at the sessions of the European Council and the power to present the stance of the state at those sessions. The Tribunal had to interpret the provisions of the Constitution concerning the duties, roles and powers of the President of the Republic of Poland and of the Council of Ministers, represented by the Prime Minister, within the scope which is the closest to the relations with the European Union, i.e. the relations with international organisations referred to in Article 146(4)(9) of the Constitution, included in a broadly defined foreign policy.

3. The regulations of vital significance for determining the powers of the Council of Ministers – and thus the Prime Minister – are the provisions of Article 146(2) of the Constitution, which sets out the scope *ratione materiae* of the Council of Ministers with regard to the matters concerning the policy of the state which are not reserved to other organs of the state, and paragraph 4(9) of that Article which obliges the Council of Ministers to exercise general control in the field of relations with other states and international organisations. In my opinion, it follows from these provisions that the Prime Minister – as the head of government – is, in principle, obliged to participate in the sessions of the European Council and present the stance of the Republic of Poland there.

4. At the same time, the President of the Republic of Poland – as the supreme representative of the Republic of Poland, pursuant to Article 126(1) – has the right (though not the obligation) to participate in every session of the European Council, relying on his own judgment as to whether there is a need for his attendance at a given session, without anyone's consent. Assigning the duty of conducting foreign policy and exercising general control with regard to relations with other states and international organisations does not limit fulfilling the systemic role of the supreme representative of the Republic of Poland by the President. Due to his constitutional position, strong legitimacy which he gains by the manner of election to his office, as well as the entirety of constitutional powers, the President of the Republic of Poland may not be deprived of the power to perform his role as the supreme representative at the forum of the European Council. It should be pointed out that the Constitution describes only the President as the – supreme – representative of the Republic of Poland. The President is such a representative both with regard to foreign relations as well as internal ones, at any time and in any place, throughout the whole term of his office.

I do not agree with the stance of the Constitutional Tribunal if – as it seems to follow from the statement of reasons (especially points 5.7., 5.8., 6.4., 6.5.) – it limits the possibility of participation of the President in the sessions of the European Council only to these sessions, *inter alia*, which concern the issues related with the fulfilment of the duties set out in Article 126(2) of the Constitution by the President. In my view, point 2 of the operative part of the decision does not introduce such a restriction, since – pursuant to that point – it is the President himself who determines whether his participation in a session is justified or not; however, the final part thereof, referring to Article 126(2) of the Constitution, contains a hint of limitation and hence it may lead to divergent interpretations of that point. In the provision of Article 126(1) of the Constitution, which grants the President the status of the supreme representative of the Republic of Poland (and the guarantor of the continuity of state authority), there is no restriction.

As to the duties specified in Article 126(1) of the Constitution, the President acts independently of the Council of Ministers; this primarily regards the actions which

have no legal effects and which do not involve issuing official acts which undoubtedly include participation in the sessions of a political body of the European Union.

I agree with the view of Professor Paweł Sarnecki, who – in the commentary on Article 126(1) of the Constitution – points out that the very status of the President as the supreme representative of the Republic of Poland implies his right to be present wherever there are events which are of significance for the Republic of Poland – i.e. at least to exercise the so-called sheer representation (cf. P. Sarnecki, *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warszawa 1999, Vol. I, Article 126).

The participation of the President is particularly justified at those sessions of the European Council whose agendas, at least indirectly, concern the duties of the President, specified in Article 126(2) of the Constitution: ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory. It is necessary to stress here that the indicated duties should be construed in a broad sense, since matters which are seemingly distant from the constitutionally specified duties of the President, such as the issue of the EU enlargement, combating terrorism or relations with third countries, may be of relevance in the context of protection of these fundamental values of Polish statehood which the head of state is to safeguard. At the same time, I strongly disagree with the attempt to limit the interpretation of the term “security of the state”, in the light of Article 126 of the Constitution, by excluding the elements such as energy security, environmental security or health safety from the range of its meaning (point 5.8. of the statement of reasons), which contemporarily are of fundamental significance for “security in general” of the modern state. To be able to fulfil the duties specified in Article 126(2), the President should, *inter alia*, be aware of the political plans of the EU which are determined at the sessions of the European Council, and he has the right to gather firsthand information with regard to those matters.

The status of the President, as the supreme representative of the Republic of Poland, excludes the possibility of making his participation in the sessions of the European Council contingent on the consent of another authority, in particular – the Prime Minister, or the possibility of treating the President as “a person accompanying the government delegation”. By his presence at the forum, the President fulfils his own duties arising from Article 126 of the Constitution. Also, it should be added that the European Council is the only body of the European Union, at the sessions of which the President may attend, as the other bodies and institutions have an intergovernmental character and a clearly specified composition.

5. Obviously, like the Tribunal, I rule out the possibility of presenting divergent stances by the President of the Republic of Poland and the head of the Polish government at the forum of the European Council, as well as at any other foreign forum. The common good, which the Republic of Poland constitutes, does not allow such a possibility. Therefore, I hold the view that the Tribunal rightly emphasises the obligation of the President and the Council of Ministers (represented by the Prime Minister) to cooperate, as the two components of the executive branch, in particular

in relation to matters falling within the scope of activity of the European Council. This obligation, concerning the two authorities to the same extent, primarily arises from the Preamble to the Constitution and – additionally with regard to European matters, as those belonging to the realm of foreign policy – from Article 133(3). I do not agree with the one-sided rendering of that obligation in the operative part of the decision of the Tribunal, in accordance with which the Council of Ministers alone determines the stance in all the matters related to the subject-matter of the sessions of the European Council (point 3), whereas the President may merely “refer” (if I correctly interpret the wording “cooperation (...) enables (...) to refer”) – only when it comes to fulfilment of his duties set out in Article 126(2) of the Constitution – to the final stance agreed by the Council of Ministers. I believe that to carry out cooperation, it is necessary for the President to be routinely notified by the Council of Ministers, whose representative takes part in the preparations for the sessions of the European Council, about the dates and the subject-matter of all the sessions, so that the President could decide about his participation in a given session or could present, to the Council of Ministers, his stance on every matter included in the agenda of the session where he finds it fit. And, as regards the matters related to the duties of the President specified in Article 126(2), the President, the Council of Ministers and the Prime Minister should make all efforts to develop a common stance. Indeed, these are matters which are of fundamental significance for the state, in which none of the said authorities had any exclusive duties and powers, but their duties and powers partly overlap.

6. I also challenge points 3 and 5 of the operative part of the decision, to the extent they do not allow (and at least do not allow *expressis verbis*) the possibility of representation and presentation of the stance of the Republic of Poland at a (particular) session of the European Council solely by the President (obviously in the situation where this has been agreed with the Prime Minister). The content of point 5, second sentence, of the operative part of the decision, read in the light of the strong wording of point 3 thereof, may at best suggest the possibility of the President’s participation in that delegation and presentation of his stance in addition to the stance of the head of the government. Also, the statement of reasons (point 6.7.(e)) contains a mention of the arrangements as to “the President’s possible involvement in presenting the stance developed by the Council of Ministers”. If this is an apt interpretation of the meaning of points 3 and 5 of the operative part of the decision, they constitute, in this regard, the negation of the position of the President as the supreme representative of the Republic of Poland.

For the above reasons, I feel obliged to submit this dissenting opinion.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the Decision of the Constitutional Tribunal
of 20 May 2009, Ref. No. Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereafter: the Constitutional Tribunal Act), as well as § 46 of the Rules of Procedure of the Constitutional Tribunal (*Monitor Polski* – M. P. of 2006 No. 72, item 720), I submit my dissenting opinion to the statement of reasons for the decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, to the extent the Constitutional Tribunal specified the subject and elements of the dispute over powers (Part V point 1).

1. To begin with, what should be stressed is the significance of the adjudication in this case Kpt 2/08. It is the first time that the Constitutional Tribunal has adjudicated a dispute over powers, based on Article 189 of the Constitution, which arose between the President of the Republic of Poland and the Council of Ministers. The adjudication is significant also due to the fact that the legal regulation which is binding in that respect is “characterised by a large degree of vagueness” (cf. L. Garlicki, Commentary on Article 189 of the Constitution [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. V, L. Garlicki (ed.), Warszawa 2007, p. 2). For this reason, the Tribunal was obliged to determine the legal content and meaning of the term “disputes over powers”, as referred to in Article 189 of the Constitution. In other words, it was faced with the necessity to identify the meanings of the basic categories specifying the activity of “central constitutional organs of the State”.

2. Although the legislator used the term “dispute over powers”, he did not include its definition in the Constitution itself. Certain clarification occurs only at the statutory level, in Article 53(1) of the Constitutional Tribunal Act. Pursuant to that provision, “the Tribunal shall arbitrate disputes concerning powers where two or more central constitutionally recognised State organs have considered themselves competent to decide in the same case or have made a ruling in it (a positive power dispute) or where the said organs have not considered themselves competent to decide in a particular case (a negative power dispute)”. Consequently, the statutory definition of disputes over powers is based on the category of competence in a given regard.

From the point of view of the case Kpt 2/08 under examination by the Constitutional Tribunal, it is vital to separate normative matter from the matter which falls outside the sphere of normativeness, as the disputes between central constitutional organs of the state, which arise outside the sphere of normativeness (e.g. political disputes), obviously are insignificant from the point of view of the regulation of Article 189 of the Constitution. In the context of that Article, only the actions normatively specified are significant. Therefore, the dispute over powers is only such

a dispute that takes place in the context of actions which are bound by legal norms determining the duties of the organs of the state.

3. Leaving the doctrinal perspective aside, the entirety of duties of the “central constitutional organs of the state” (but also other organs of the state and of public administration) may be narrowed down to the norms specifying the subject, object, content, manner and result of activity. The subject and object of activity (the sum, content and type of matters assigned to a given organ) are determined by the legal norms regulating the competence (cf. Z. Cieślak, *Zbiory zachowań w administracji państwowej. Zagadnienia podstawowe*, Warszawa 1992, p. 56). By contrast, the content of the duties is determined by substantive law norms (see *ibidem*, p. 67) and norms regulating the performance of duties (see *ibidem*, p. 63); whereas the manner of activity is determined by procedural norms regulating the legal forms of activity (cf. *ibidem*, p. 70). By contrast, the result of that activity is determined by substantive law norms, procedural norms and norms regulating the performance of duties. Rules governing competence in a narrow sense play the role of a factor which limits the scope of the application of a given legal form of activity of an organ (see *ibidem*, p. 75)

In the light of Article 189 of the Constitution, it should be stated that mere term “powers” is not legally defined, and what is more, it is rarely used by the legislator in the binding legal order. Construing that meaning is done intuitively. This intuitive meaning of powers also confirmed in the statements of the participants in the proceedings during the hearing of the case Kpt 2/08, encompasses the activity of the subject which is determined normatively and has a direct legal effect (from this perspective it is irrelevant whether the activity is obligatory or optional). By contrast, the term “duty” complements the system of activity of a central constitutional organ of the state, which is not legally indifferent, in such a way that this is a legally delegated activity of the subject which is to implement or protect values; this activity indirectly has legal effects. At the same time, the requirement of correctness of the activity carried out in accordance with the norms regulating the performance of duties is its legality.

4. In the light of the above, it should be concluded that the meaning of the term “disputes over powers” (Article 189 of the Constitution) encompasses positive and negative power disputes with regard to the activity of the subjects determined by the norms regulating competence, substantive law norms, procedural norms and norms regulating the performance of duties. Therefore, it goes beyond the narrow understanding of the term “disputes over powers”, understood as the discrepancies in opinions of two or more organs of the state as to the powers of one of them (cf. L. Garlicki, *op.cit.*, p. 4). By contrast, the term “duty” used in the statement of reasons for the decision in the case Kpt 2/08 does not have a normative meaning. This is a category from outside the realm of normative categories, an actual category denoting the state of affairs caused legally by a given activity of the subject (cf.

Z. Ziemiński, “O pojmowaniu celu, zadania, roli i funkcji prawa”, *Państwo i Prawo*, Issue No. 12/1987, pp. 20 and 22).

I hope that these remarks contribute to disambiguate the meanings of the terms and categories used in the statement of reasons for the decision Kpt 2/08.

For the reasons mentioned above, I feel obliged to submit the dissenting opinion to the statement of reasons for the decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08.

JUDGMENT of 16 July 2009 – Ref. No. Kp 4/08

[Impact of an Opinion of the European Central Bank on the Legislative Process
in Poland]

In the Name of the Republic of Poland**The Constitutional Tribunal, in a bench composed of:**

Bohdan Zdziennicki – Presiding Judge

Zbigniew Cieślak

Maria Gintowt-Jankowicz

Mirosław Granat

Marian Grzybowski

Adam Jamróz

Marek Kotlinowski

Teresa Liszcz

Ewa Łętowska

Marek Mazurkiewicz – 2nd Judge Rapporteur

Janusz Niemcewicz – 1st Judge Rapporteur

Andrzej Rzepliński

Mirosław Wyrzykowski,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 16 July 2009, in the presence of the applicant, the Sejm and the Public Prosecutor-General, an application by the President of the Republic of Poland, submitted pursuant to Article 122(3) of the Constitution of the Republic of Poland, to determine the conformity of:

Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts to Article 2, Article 7, Article 21(1), Article 9 in conjunction with Article 91(1) and (2), as well as to Article 227(1) of the Constitution,

adjudicates as follows:

1. **Article 19 in conjunction with Article 1(37)(a) of the Act of 4 September 2008 amending the Act on trading in financial instruments and certain other acts:**
 - a) **is inconsistent with Article 227(1) in conjunction with Article 2 and Article 21(1) of the Constitution of the Republic of Poland,**
 - b) **is not inconsistent with Article 7, Article 9 and Article 91(1) and (2) of the Constitution.**
2. **Article 19, in conjunction with Article 1(37)(a) of the Act referred to in point 1, is not inextricably linked to the whole Act.**

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

[...]

2.2. The doubts as to the conformity of the procedure applied for enacting the Act to the law are linked by the President with the following facts:

2.2.1. In a letter of 7 November 2007, the Prime Minister submitted to the Sejm the government's bill amending the Act on trading in financial instruments and certain other acts (Sejm Paper No. 64, 6th term). The explanatory note to the bill included, *inter alia*, the information that "the bill was referred to the European Central Bank for an opinion to be issued thereon. The said opinion was presented in the document entitled 'Opinion of the European Central Bank of 16 November 2006 at the request of the Polish Minister for Finance on a draft law amending the Law on trading in financial instruments' (CON/2006/53)". However, the Sejm Paper did not include the content of that opinion. The first reading of the bill included in the Sejm Paper No. 64 was held on 9 January 2008, and further legislative work was carried out by the Sejm's Public Finance Committee.

During the work on the bill, the Council of Ministers drafted the government's own amendment to the bill of 8 November 2007. The drafted amendment encompassed, *inter alia*, assigning the following wording to Article 46(3) of the amended Act:

"The following may be the shareholders of the National Depository: companies running the stock exchange, companies running the OTC market, investment companies, banks, the State Treasury, international financial institutions where the Republic of Poland is a member, as well as legal entities or other organisational units whose activity involves registering securities, clearing and settling transactions made when trading in securities, or organising a regulated market, which have their registered offices in the territory of an OECD member country or partner country, and which are subject to supervision by the competent supervisory body of that country".

Moreover, the amending bill included Article 18a, with the following wording:

"1. Within the time-limit of 12 months since the day of the entry into force of this Act, the National Bank of Poland shall be obliged to dispose of all the shares it holds in the National Depository for Securities, the recipients of which shall be an entity or entities indicated in Article 46(3) of the Act referred to Article 1, with the wording amended by this Act.

2. After the lapse of the time-limit specified in paragraph 1, the National Bank of Poland may not exercise its rights attached to the shares of the National Depository for Securities".

2.2.2. The Minister of Finance requested the European Central Bank to issue an opinion on the aforementioned amendment. As a result, the ECB Executive Board presented the Opinion of the European Central Bank of 21 May 2008 at the request of the Polish Minister for Finance on a draft law amending the law on trading in financial instruments and other legislation (CON/2008/20), concerning the new elements introduced into the bill.

After receiving the ECB opinion, on 26 May 2008 the Council of Ministers submitted to the Sejm the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts (Sejm Paper No. 64-A, 6th term). It contained, *inter alia*, the above-mentioned provisions regarding the National Depository for Securities, but the explanatory note thereto did not contain any information on the content of the opinion issued by the ECB with regard to that bill; nor was the opinion presented to the Parliament.

On 25 June 2008, the President of the National Bank of Poland submitted a letter to the Marshal of the Sejm (DSP-WSRPW-BW-073-2-1963/08), in which he expressed his protest against the plan to exclude the National Bank of Poland from holding shares in the National Depository for Securities. The President of the NBP informed about the content of the ECB opinion in that case, and requested that the stance of the NBP be presented to all the Deputies. On 26 June, the letter of the President of the NBP was referred for publication by the Marshal of the Sejm, and disseminated as a supplement to the Sejm Paper No. 64-A.

In this context, there is a doubt as to whether the legislative proceedings were carried out in accordance with the procedure required by regulations for enacting the challenged provisions.

2.2.3. It follows from the analysis of the legislative proceedings concerning the bill that the issues regulated in the challenged provisions constituted the subject of controversy in the course of parliamentary work. The amendment drafted and submitted by the Council of Ministers was considered during the first reading in the Sejm at the 19th session on 9 July 2008. It follows from the arguments in the discussion that the content of the ECB opinion, published in Polish and English on the Internet, was known by some of the interested Deputies. During the debate, Deputy Wiesław Janczyk also posed the question: "Are the representatives of the government and the Ministry of Finance familiar with the ECB opinion that the requirement to sell shares held in the National Depository for Securities (KDPW) by the National Bank of Poland infringes on the independence of the national bank?" (verbatim record from the 19th session of the Sejm of the Republic of Poland on 9 July 2008 [the first day of the Sejm's session], p. 86).

The Sejm referred the government's own amendment to the Sejm's Public Finance Committee. The Permanent Subcommittee on Financial Institutions of the Sejm's Public Finance Committee resolved that the National Bank of Poland should not be excluded from holding shares in the KDPW, thus rejecting that part of the amendment. At the sessions on 21 July 2008, the Sejm's Public Finance Committee

adopted the report by the Subcommittee, which does not encompass the government's amendments aimed at eliminating the NBP from the list of shareholders of the KDPW. As a result, the changes proposed by the Council of Ministers, with regard to the shares of the KDPW, were not included in the bill prepared by the Sejm's Public Finance Committee, presented in the Sejm for the second reading.

During the second reading, the chairperson of the Committee, Deputy Zbigniew Chlebowski, proposed an amendment that – after the lapse of the time-limit specified by statute for the disposal of shares by the NBP – the NBP could not exercise its right to vote attached to the shares held in the KDPW. The said amendment was adopted by the Sejm during the third reading on 26 July 2008, and was preserved at further stages of the legislative proceedings concerning the bill in the Senate.

The ECB opinion was still the subject of the Deputies' concern during the third reading. Deputy Jerzy Polaczek asked the representative of the government whether the ECB had issued a negative opinion on the NBP's obligation to dispose of shares held in the KDPW (verbatim record from the 20th session of the Sejm of the Republic of Poland on 25 July 2008 [the fourth day of the debate], p. 571). The ECB opinion was also the subject of the Senators' concern during the consideration of the bill passed by the Sejm at the session on 6 August 2008: the content of the opinion was presented at the session by the First Deputy of the President of the NBP (the Senate of the Republic of Poland, the 17th session of the 7th term, verbatim record, p. 8), and Senator Jan Dobrzyński expressed his views on the opinion (the Senate of the Republic of Poland, the 17th session of the 7th term, verbatim record, p. 14).

3. The opinion of the Central European Bank and its significance for the case under examination.

3.1. The consultative powers of the Central European Bank are governed by the Treaty establishing the European Community (Journal of Law – Dz. U. of 2004, No. 90, item 864/2; hereinafter: the Treaty or the Treaty establishing the European Community) and the Council Decision of 29 June 1998 on the consultation of the European Central Bank by national authorities regarding draft legislative provisions, 98/415/WE (OJ L 189 of 3.07.1998, pp. 446-447; hereinafter: the Decision or the Council Decision). Pursuant to Article 105(4) of the Treaty, the ECB shall be consulted by national authorities regarding any draft legislative provision in its fields of competence, but within the limits and under the conditions set out by the Council in accordance with the procedure laid down in Article 107(6) of the Treaty. More detailed rules concerning providing consultation have been regulated in the aforementioned Council Decision of 29 June 1998. Pursuant to Article 2 of the Decision, the authorities of the Member States shall consult the ECB on any draft legislative provision within its field of competence pursuant to the Treaty and in particular on:

- currency matters,
- means of payment,
- national central banks,

- the collection, compilation and distribution of monetary, financial, banking, payment systems and balance of payments statistics,
- payment and settlement systems,
- rules applicable to financial institutions insofar as they materially influence the stability of financial institutions and markets.

Article 4 of the Decision specifies the obligations of the Member States as regards consulting the ECB. Pursuant to that Article, “each Member State shall take the measures necessary to ensure effective compliance with this Decision. To that end, it shall ensure that the ECB is consulted at an appropriate stage enabling the authority initiating the draft legislative provision to take into consideration the ECB’s opinion before taking its decision on the substance and that the opinion received from the ECB is brought to the knowledge of the adopting authority if the latter is an authority other than that which has prepared the legislative provisions concerned”. The provisions of the EU Law generally impose, on national authorities, the obligation to submit a motion to the ECB, requesting the ECB for its opinion. The indication of competent national authorities requires reference to the national law.

In the context of Polish law, it should be assumed that the aforementioned obligation rests with the authority enacting a given legal act. In the case of a bill, the said obligation rests with the author of the bill, with the proviso that – in the case of a bill being introduced by a group of Deputies or a Sejm committee, or a group of citizens – the obligation to issue a motion requesting an opinion falls on the Marshal of the Sejm. There is no doubt that the Council of Ministers has the obligation to submit a motion to the ECB to request an opinion on a draft normative act which concerns matters falling within the scope of the competence of the bank.

It clearly follows from the provision presented above that, upon the receipt of the opinion, the authority which requested it has a legal obligation to undertake action which would ensure that the content of the opinion is presented to the Sejm and the Senate. If it was the Council of Ministers that requested the opinion, the obligation rests with the Council of Ministers.

3.2. The Treaty establishing the European Community and the Council Decision do not in detail regulate the subject of the opinion or the content included therein. The opinion of the ECB may concern both the issue of conformity of the proposed legal act to the EU law, as well as the purposefulness of the solutions put forward by national authorities. Providing opinions on certain draft legal acts by the ECB is aimed, *inter alia*, at drawing the state’s attention to a possible infringement of the EU law or to the negative impact of a proposed legal act on the implementation of objectives of the European Community. They are to ensure the observance of the EU law and the determination and conduct of national policies by the governments of the Member States, taking into consideration the requirements of European integration.

The views presented in the opinion are not binding for the organs of the Member States. The fact that an opinion of the ECB is not implemented does not bring about any legal consequences.

3.3. The analysis of the above-mentioned provisions leads to the conclusion that the content of the government's own amendment fell within the scope of the consultative powers of the ECB. Polish authorities had a legal obligation to request the ECB for its opinion in relation to the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts, and to present that opinion to the authority adopting the legal act. In the case under examination, competent national authorities fulfilled the obligation to request the ECB for an opinion. However, the Council of Ministers did not fulfil the obligation to present the opinion to the Sejm and the Senate at the moment of submitting the government's own amendment. The information about the opinion and its content reached the Sejm Deputies, but this happened via unofficial channels and already at the stage of parliamentary work on the text of the government's own amendment. Therefore, what requires consideration is the question whether the indicated infringement may be regarded as a breach of the procedure, the observance of which is required by the provisions of law for enacting a statute; and if so, whether the significance of that infringement justifies the declaration of unconstitutionality by the Tribunal in the case of the challenged provisions of the Act.

3.4. In the context of the case under examination, doubts may primarily arise as to whether the obligation of the Council of Ministers – to provide the Sejm and the Senate with the ECB opinion on the bill – constitutes an element of the procedure for enacting statutes. The power to enact statutes is vested in the Sejm and the Senate, and the obligation under discussion rests on the authority which is only competent to initiate the legislative proceedings. In the view of the Constitutional Tribunal, the said obligation constitutes one of the elements of legislative procedure, as it is related with the access of the Parliament and its members to the information which is necessary for diligent fulfilment of their legislative function.

3.5. Assessing the seriousness of the particular infringement of law by the Council of Ministers, the Tribunal draws attention to the following issues.

Firstly, since January 2005, all the ECB opinions have been published on the websites of that institution, right after sending the opinions to the authorities requesting them, unless there are particular reasons which justify withholding the publication. Thus, the opinion was available on the Internet to all concerned, and the Deputies and the Senators could easily familiarise themselves with its content. In the aforementioned letter of 25 June 2008, which was disseminated as an appendix to the Sejm Paper No 64-A, the President of the National Bank of Poland also drew attention to the content of that opinion. It followed from the speeches of the Deputies and Senators that the interested Members of Parliament were familiar with the content of the ECB opinion. The fact that the said opinion was not presented to the Sejm did not really limit the possibility of accessing the document by the Members of the Polish Parliament. Therefore, the said infringement of law had no effect on the

possibility of conducting a democratic debate in the Parliament; neither did it result in limiting the rights of the parliamentary opposition.

Secondly, the main purpose of the provisions imposing the obligation on the author of a given bill to present the results of consultation and the received opinions is to enable the Sejm to thoroughly analyse the bill. The Sejm has numerous legal instruments at its disposal to ensure the protection of its powers and the receipt of documents which otherwise would not be presented to the Parliament. The Marshal of the Sejm may return a bill or a draft resolution to the author thereof, if the explanatory note accompanying the bill does not meet the requirements specified in Article 34(2) and (3) of the Resolution of the Sejm of the Republic of Poland of 30 July 1992 – the Rules of Procedure of the Sejm of the Republic of Poland (M. P. of 2009 No. 5, item 47). The Sejm may request that an opinion of a particular authority be presented, provided that the binding law introduces the obligation to request such consultation. The fact that the Council of Ministers infringed the obligation to present the content of the opinion, together with the explanatory note to the bill, did not make it impossible for the Sejm to request the opinion to be sent by the Council of Ministers. Ensuring the protection of the rights of the Parliament, in its relations with the government is first and foremost the task of the Parliament. As regards the examined legislative procedure, the Parliament did not deem it indispensable to exercise the above-mentioned powers, and the Sejm – in its stance on the case under examination, in the letter of 3 December 2008 by the Marshal of the Sejm, which was presented to the Tribunal – did not find any infringement as to the obligations by the Council of Ministers towards the Parliament.

3.6. In the light of the above-mentioned facts, the Tribunal states that the Council of Ministers infringed its obligations, by not providing the Sejm with the opinion presented by the ECB on the government's own amendment to the bill amending the Act on trading in financial instruments and certain other acts. In a democratic state ruled by law, such infringements of law should not occur. However, this infringement did not make it impossible for the Deputies and Senators to familiarise themselves with the content of the ECB opinion and take it into consideration at the stage of voting over the bill.

In the view of the Constitutional Tribunal, the negligence by the Council of Ministers, which occurred in the context of this case, does not constitute such a serious infringement of the legislative procedure which would justify the declaration of unconstitutionality of the provisions under examination, since the Deputies actually had an opportunity to familiarise themselves with the ECB opinion (cf. the judgment of the Constitutional Tribunal in the case K 39/07, with reference to the constitutionally admissible validation of the lack of a formal written opinion, in the situation where an opinion-giving representative expressed his/her opinion orally at a session of the Sejm).

At the same time, the Constitutional Tribunal draws attention to the necessity to change the existing practice and the necessity to observe the binding law. The high

incidence of such infringements of norms which regulate the legislative procedure may, in the future, weigh in favour of adopting a different assessment of constitutional consequences of similar negligence, if they recur.

[...]

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

DECISION of 17 December 2009 – Ref. No. U 6/08
[Fisheries – National Legal Acts that Implement EU Law]

The Constitutional Tribunal, in a bench composed of:

Teresa Liszcz – Presiding Judge

Adam Jamróz

Marek Kotlinowski – Judge Rapporteur,

having considered, sitting in camera on 17 December 2009, an application submitted by a group of Sejm Deputies for the Tribunal to determine the conformity of:

§ 1(2) of the Regulation of 12 February 2008 issued by the Minister of Agriculture and Rural Development to amend the Regulation on conditions and procedures for granting financial assistance under the Sector Operational Programme – “Fisheries and Fish Processing 2004-2006” (Journal of Laws – Dz. U. No. 23, item 140), in the part concerning § 132aa(4) of the Regulation of 14 September 2004 issued by the Minister of Agriculture and Rural Development on conditions and procedures for granting financial assistance under the Sector Operational Programme – “Fisheries and Fish Processing 2004-2006” (Journal of – Laws Dz. U. No. 213, item 2163, as amended), to Article 2, Article 21(1), Article 31(3) and Article 32 of the Constitution,

decides as follows:

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

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. Challenged by a group of Sejm Deputies (hereinafter: the applicants), § 1(2) of the Regulation of 12 February 2008 issued by the Minister of Agriculture and Rural Development to amend the Regulation on conditions and procedures for granting financial assistance under the Sector Operational Programme – “Fisheries and Fish Processing 2004-2006” (Journal of Laws – Dz. U. No. 23, item 140; hereinafter: the amending Regulation) amended the Regulation of 14 September 2004 issued by the Minister of Agriculture and Rural Development on conditions and procedures for granting financial assistance under the Sector Operational Programme – “Fisheries

and Fish Processing 2004-2006” (Journal of – Laws Dz. U. No. 213, item 2163, as amended; hereinafter: the Regulation of 14 September 2004), insofar as it concerned the terms of granting financial assistance for the provisional suspension of fishing for cod in 2007. Pursuant to § 132aa of the Regulation of 14 September 2004, added by the challenged provision of the amending Regulation: “Financial assistance for the provisional suspension of fishing for cod in 2007 shall be granted to a vessel flying the flag of Poland which:

- 1) was assigned a catch quota for cod for 2007;
- 2) did not carry out any fishing activities in an additional period:
 - a) 26 calendar days in the subdivisions 22-24 or
 - b) 24 calendar days in the subdivisions 25-27
 - listed in Annex I to the Council Regulation (EC) No 2187/2005 of 21 December 2005 for the conservation of fishery resources through technical measures in the Baltic Sea, the Belts and the Sound, amending Regulation (EC) No. 1434/98 and repealing Regulation (EC) No 88/98 (OJ L 349, 31.12.2005, p. 1, as amended; hereinafter: the Council Regulation (EC) No. 2187/2005);
- 3) documented the lack of fishing activities by the vessel on the days referred to in point 2;
- 4) complied with the prohibition of fishing for cod set out in Article 2 of the Commission Regulation (EC) No 804/2007 of 9 July 2007 establishing a prohibition of fishing for cod in the Baltic Sea (Subdivisions 25-32, EC Waters) by vessels flying the flag of Poland (OJ L 180 of 10.7.2007, p. 3)”.

The applicants have raised their reservations not with regard to entire § 132aa of the Regulation of 14 September 2004, but merely in the context of its point 4, which introduces the requirement that financial assistance shall be granted due to the provisional suspension of fishing for cod in 2007, in the case of compliance with the prohibition of fishing for cod specified in the above-mentioned Commission Regulation (EC) No 804/2007. In the applicants’ opinion, the establishment of the said requirement as a prerequisite for obtaining financial compensation due to the provisional suspension of fishing for cod in 2007 infringes the principle of protection of citizens’ trust in the state and its laws, derived from Article 2 of the Constitution, the principle of protection of justly acquired rights, specified in Article 21(1) of the Constitution, the principle of equality, expressed in Article 32 of the Constitution, and the principle of proportionality (Article 31(3) of the Constitution).

2. The assessment of the allegations raised by the applicants must be preceded by several general remarks concerning the subject of this case.

2.1. The Regulation of 14 September 2004, amended by § 1(2) of the amending Regulation, is one of several national legal acts that implement the Common Fisheries Policy within the framework of the European Union. The main aim of

the Common Fisheries Policy is, pursuant to Article 2 of the Council Regulation (EC) No 2371/2002 of 20 December 2002 on the conservation and sustainable exploitation of fisheries resources under the Common Fisheries Policy (OJ L 358, 31.12.2002, p. 59; hereinafter: the Council Regulation (EC) No 2371/2002), to protect and conserve living aquatic resources, “providing a fair standard of living for those who depend on fishing activities” and taking into account the interests of consumers.

The European Commission evaluates and controls the application of the rules of the Common Fisheries Policy by the Member States. Pursuant to Article 26(2) of the Council Regulation (EC) No 2371/2002, if there is any threat to the implementation of the Common Fisheries Policy, the Commission shall inform in writing the Member State concerned of its findings and set a deadline of no less than 15 working days for the said Member State to demonstrate the compliance of its actions with the principles of the Common Fisheries Policy and to give its comments. In the event of a Member State’s quota, allocation or available share being deemed to be exhausted, the Commission may, on the basis of the information available, immediately stop fishing activities.

2.2. When acceding to the EU, Poland accepted *acquis communautaire* concerning fisheries and became the addressee of the entirety of Community provisions that constituted the Common Fisheries Policy. The objectives of that policy are implemented by Poland under the Sector Operational Programme – “Fisheries and Fish Processing 2004-2006”, on the basis of: the Regulation of 11 August 2004 issued by the Minister of Agriculture and Rural Development with regard to the Sector Operational Programme – “Fisheries and Fish Processing 2004-2006” (Journal of Laws – Dz. U. No. 197, item 2027, as amended); as well as the above-mentioned Regulation of 14 September 2004, which, *inter alia*, specifies requirements for obtaining financial compensation for the provisional suspension of fishing for cod in 2007.

2.3. The applicants have challenged one of the requirements set out in the amending Regulation, the fulfilment of which was correlated by the legislator with providing fishermen with financial assistance due to the provisional suspension of fishing for cod in 2007. The said requirement implies compliance with the prohibition of fishing for cod, set out in the Commission Regulation (EC) No 804/2007, on the part of a fishing vessel agent whose vessel is flying the flag of Poland.

The said prohibition was introduced by the Commission on the basis of information obtained by its inspectors who determined that catches of cod by Polish vessels in 2007 were three times the amounts declared by Poland. Therefore, the Commission deemed that the fishing opportunities for the said stock allocated to Poland for 2007 – by the Council Regulation (EC) No 1941/2006 of 11 December 2006 fixing the fishing opportunities and associated conditions for certain fish stocks and groups of fish stocks applicable in the Baltic Sea for 2007 (OJ L 367, 22.12.2006, p. 1) – had been exhausted. In the absence of appropriate action taken by Polish authorities – i.e.

the introduction of a provisional prohibition of fishing for cod, which Poland had been obliged to do by Community provisions – the Commission at its own initiative determined that, from the date of entry into force of the Commission Regulation (EC) No 804/2007 (i.e. from 11 July 2007) until 31 December 2007, vessels flying the flag of Poland would be prohibited from fishing, retaining on board, transshipping or landing cod stocks. The said Commission Regulation has become binding in its entirety and directly applicable in the Polish legal order, on the date of its entry into force, which follows from the character of the said legal act.

3. Moving on to analyse the arguments presented in the application, the Constitutional Tribunal points out that – pursuant to Article 188(1)-(3) of the Constitution, the wording of which was repeated in Article 2(1)(1)-(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act) – the scope of a review conducted by the Tribunal comprises statutes, international agreements, and legal provisions issued by the central organs of the state. The scope of the jurisdiction of the Tribunal delineated in this way excludes, *inter alia*, the following from the scope of the Tribunal’s review: law enacted by an international institution referred to in Article 91(3) of the Constitution, i.e. EU secondary legislation. The lack of indication of EU secondary legislation as the subject of a constitutional review in the catalogue presented in Article 188(1)-(3) of the Constitution makes it impossible for the Tribunal to adjudicate on the conformity of the said legislation to the Constitution. The lack of the Tribunal’s jurisdiction in that respect entails that allegations concerning the conformity of the acts of EU secondary legislation to the Constitution may not be examined by the Tribunal.

3.1. In the present case, what constitutes the subject of the review indicated in the *petitum* of the application is § 1(2) of the amending Regulation which sets out the requirements for obtaining financial compensation due to the provisional suspension of fishing for cod. In the applicants’ view, the said provision infringes the principle of protection of citizens’ trust in the state and its laws, expressed in Article 2 of the Constitution. The substantiation of that allegation is based on the argumentation that fishermen who had not exhausted the catch limits allocated to them for cod for 2007, before the entry into force of the Commission Regulation (EC) No 804/2007, which introduced the prohibition of fishing for cod, were deprived of the possibility to exhaust the said limits, despite the fact that the special fishing permits had not been withdrawn.

3.2. Making reference to this part of the application, the Tribunal states that § 1(2) of the amending Regulation formulates neither a prohibition of fishing for cod nor a right to make use of the catch limits specified in the special fishing permits. The prohibition of fishing for cod was introduced pursuant to the Commission Regulation (EC) No 804/2007, which on the date of its entry into force became part of the

Polish legal order. Thus, the Constitutional Tribunal deems that the argumentation presented by the applicants in support of their allegation that § 1(2) of the amending Regulation is unconstitutional does not correspond to the content of the said provision. In the view of the Tribunal, the applicants' allegations that the fishermen were prevented from exhausting their catch quotas due to the entry into force of the EU prohibition of fishing for cod, in fact, refer to the Commission Regulation (EC) No 804/2007. The said Commission Regulation has not been challenged in the *petitum* of the application and does not constitute the subject of the review in the present case. For this reason, it is necessary to discontinue the proceedings as regards the examination of the constitutionality of the challenged provision to Article 2 of the Constitution.

3.3. The above-presented argumentation exhausts grounds for discontinuing the review proceedings as regards examining the conformity of § 1(2) of the amending Regulation to Article 2 of the Constitution. However, in addition, the Tribunal has addressed to the applicants' allegations that fishing permits, which have the character of administrative decisions, were not revoked after the entry into force of the EU prohibition of fishing for cod. By continuing fishing activities despite the prohibition, the fishermen acted – in the applicants' opinion – in the full confidence that the administrative decisions were valid. Allegations formulated this way are not subject to review by the Tribunal, as indeed they refer to the application of law and not the enactment of law. The review and assessment of the application of law fall outside the scope of the jurisdiction of the Tribunal.

4. Another allegation raised by the applicants with regard to § 1(2) of the amending Regulation concerns the infringement of Article 32 of the Constitution by the said provision. In the applicants' opinion, the infringement of the principle of equality consists in correlating the possibility of applying for financial assistance due to the provisional suspension of fishing for cod in 2007 with adherence to the prohibition established in the Commission Regulation (EC) No 804/2007; this results in the unequal treatment of only those persons, “out of the whole group [of persons] (...) that breach provisions concerning fisheries”, who failed to comply with the prohibition set out in the Commission Regulation (EC) No 804/2007. Indeed, only those persons have been deprived of the right to compensation for refraining from fishing for cod during a totally different period than the one referred to in the Commission Regulation (EC) No 804/2007. Thus, in accordance with the applicants' argumentation, fishermen who infringed other provisions on fisheries than the provisions of the Commission Regulation (EC) No 804/2007 could apply for financial assistance mentioned in § 132aa of the Regulation of 14 September 2004.

Such justification for the allegation that Article 32 of the Constitution has been infringed may not be considered by the Constitutional Tribunal, as the applicants have not proved in a proper way how § 1(2) of the amending Regulation infringes the principle of equality before the law.

4.1. The principle of equality means that all addressees of a given regulation who, to the same extent, display a certain (relevant) essential characteristic should be treated equally, i.e. in accordance with the same criteria, without any discriminatory or favourable differentiation (see the judgment of the Constitutional Tribunal of 5 November 1997, ref. no. K 22/97, OTK ZU No. 3-4/1997, item 41). When formulating an allegation about an infringement of the principle of equality, a given applicant is primarily obliged to indicate a relevant common characteristic of the addressees of a given norm that s/he has challenged and prove that the said norm introduces differentiation with regard to the said subjects which infringes Article 32 of the Constitution.

4.2. In the present case, the applicants have not met the above requirement. Indeed, they indicated no essential common characteristic that weighed in favour of regarding comparable groups of persons as similar, and which would allow to determine that those similar persons were treated differently by the law, without any justification in the Constitution. In particular, despite the applicants' assertions, it may not be assumed that persons display a common characteristic due to the fact that they, in various ways, breach certain unspecified provisions on fisheries. The Constitutional Tribunal has deemed that the applicants failed to justify their allegation concerning the infringement of Article 32(1) of the Constitution. This way they have not met the requirement referred to in Article 32(1)(4) of the Constitutional Tribunal Act. The said non-fulfilment of the requirement leads to the discontinuation of proceedings within the scope of examining the conformity of § 1(2) of the amending Regulation to Article 32 of the Constitution, due to the inadmissibility of issuing a judgment. Indeed, the Constitutional Tribunal may not, on its own, formulate arguments for the unconstitutionality or constitutionality of a normative act that has been subjected to review, as this would constitute an infringement of the principle that the Tribunal shall, while adjudicating, be bound by the scope of a given application (cf. the decision of the Constitutional Tribunal of 20 July 2004, ref. no. Ts 116/03, OTK ZU No. 3/B/2004, item 182).

5. Also, the applicants have raised the allegation that the principle of protection of justly acquired rights, which arises – in their opinion – from Article 21(1) of the Constitution, has been infringed.

Pursuant to Article 21(1) of the Constitution: “The Republic of Poland shall protect ownership and the right of succession”. However, the applicants' allegation does not regard the loss of ownership, but the loss of “a legitimate expectation of obtaining the possibility to effectively exercise (...) the right to catch a certain amount of a given species of fish”. Thus, the allegation refers to *lucrum cessans*, i.e. anticipated benefits, which could hypothetically be achieved. In accordance with the jurisprudence of the Constitutional Tribunal, Article 21(1) of the Constitution does not provide for the protection of property rights other than ownership (see the judgment of the Constitutional Tribunal of 12 January 1999, ref. no. P 2/98, OTK ZU No. 1/1999,

item 2). Therefore, it does not refer to the protection of the legitimate expectation of the said benefit. Article 21(1) of the Constitution may not be a higher-level norm for the constitutional review of the allegation that the principle of protection of justly acquired rights has been infringed by § 1(2) of the amending Regulation. The review proceedings within that scope are thus subject to discontinuation on the grounds that issuing a judgment is inadmissible.

6. Due to the fact that the applicants have not indicated a right that is subject to protection on the basis of Article 21(1) of the Constitution, the higher-level norm for the review arising from Article 31(3) of the Constitution is not applicable here. In accordance with the jurisprudence of the Constitutional Tribunal, Article 31(3) of the Constitution may not constitute a completely autonomous higher-level norm for review and must always be indicated in conjunction with other provisions of the Constitution that regulate certain rights or freedoms (see the judgment of the Constitutional Tribunal of 29 April 2003, ref. no. SK 24/02, OTK ZU No. 4/A/2003, item 33, as well as the decision of the Constitutional Tribunal of 12 December 2000, ref. no. Ts 105/00, OTK ZU No. 1/B/2002, item 59).

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

JUDGMENT of 5 October 2010 – Ref. No. SK 26/08
[European Arrest Warrant (II)]

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Maria Gintowt-Jankowicz – Presiding Judge

Wojciech Hermeliński – Judge Rapporteur

Adam Jamróz

Marek Kotlinowski

Andrzej Rzepliński,

Grażyna Szałygo – Recording Clerk,

having considered, at the hearing on 5 October 2010, in the presence of the complainant, the Sejm and the Public Prosecutor-General, a constitutional complaint submitted by Mr J. T., in which he requested the Tribunal to examine the conformity of:

Article 607k, Article 607l, Article 607m as well as Article 607p of the Act of 6 June 1997 – the Polish Code of Criminal Procedure (Journal of Laws – Dz. U. No. 89, item 555, as amended; hereinafter: the Code of Criminal Procedure) to Article 45(1), Article 42(2) and Article 55(4) of the Constitution, as well as to Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, done at Rome on 4 November 1950 (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended), and Article 14(1) of the International Covenant on Civil and Political Rights, opened for signature in New York on 19 December 1966 (Journal of Laws – Dz. U. of 1977 No. 38, item 167),

adjudicates as follows:

Article 607p(1)(5) of the Act of 6 June 1997 – the Code of Criminal Procedure (Journal of Laws – Dz. U. No. 89, item 555, as amended), **insofar as it contains a ground for refusal to execute a European arrest warrant issued against a Polish citizen for the purpose of conducting a criminal prosecution, in the case where:**

- a) **it is obvious for the court adjudicating on the execution of the European arrest warrant that a person who is the subject of the said warrant has not committed an act on the basis of which the European arrest warrant has been issued,**
- b) **the description of the act on the basis of which the European arrest warrant has been issued makes it impossible to carry out the legal classification of the act,**

is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution of the Republic of Poland.

Moreover, the Tribunal decides:

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

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

[...]

2. Substantive issues.

2.1. The characteristics of the challenged provisions.

The provisions challenged by the complainant are contained in Chapter 65b of the Code of Criminal Procedure. The provisions contained in that chapter were added to the Code of Criminal Procedure by the Act of 18 March 2004 amending the Penal Code, the Code of Criminal Procedure and the Code of Misdemeanours (Journal of Laws – Dz. U. No. 69, item 626). The Act entered into force on 1 May 2004, i.e. on the day of Poland's accession to the EU.

The special character of the constitutional issue presented to the Constitutional Tribunal for examination is related to the fact that the provisions indicated as the subject of the allegation were added to the Code of Criminal Procedure due to the obligation to implement the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA, OJ L 190, 18.7.2002, p. 1; hereinafter: the Framework Decision). The legal framework of the European arrest warrant is specified in the Treaty of Amsterdam of 1997, which introduced a new source of EU law – a framework decision which binds all EU Member States and obliges them to implement its regulations into their national legal systems [...].

The Constitutional Tribunal has already presented its view on the issue of the constitutionality of a provision of the Code of Criminal Procedure implementing the Framework Decision. In the judgment of 27 April 2005, ref. no. P 1/05 (OTK ZU No. 4/A/2005, item 42), the Tribunal reviewed the constitutionality of Article 607t(1)

of the Code of Criminal Procedure, insofar as it allows for the surrender of a Polish citizen to another EU Member State on the basis of the European arrest warrant.

Carrying out the substantive analysis of the provision challenged in the proceedings which ended with the above-mentioned judgment, the Constitutional Tribunal determined that it had jurisdiction to conduct a constitutional review of provisions implementing framework decisions.

In the Polish literature on the subject, some of the representatives of the doctrine have argued that, although the subject of the review conducted by the Tribunal was a provision of the Code of Criminal Procedure, the resulting assessment had an indirect impact on the assessment of the provisions of the Framework Decision. Some authors have stated that the Tribunal has no jurisdiction to conduct the review of provisions which result from the implementation of a framework decision [...].

The Constitutional Tribunal does not share those views. The aforementioned judgment affects the assessment of the Framework Decision within the scope of the ruling. However, what constitutes the subject of the adjudication is constitutional doubts referring to the provisions of national law.

It should be emphasised that the organs of the state established to carry out the constitutional review of law in other EU Member States have been in favour of the admissibility of the constitutional review of national provisions that implement framework decisions, also in the context of the Council Framework Decision on the European arrest warrant. The following should be mentioned here: the opinion of the French State Council of 26 September 2002 (Ref. No. 368/282), the judgment of the Supreme Court of Cyprus of 7 November 2005 (Ref. No. 294/2005), the judgment of the Federal Constitutional Court of Germany of 18 July 2005 (Ref. No. 2 BvR 2236/04) as well as the judgment of the Constitutional Court of the Czech Republic of 3 May 2006 (Ref. No. Pl. US 66/04) [...]. In recent years, with regard to the constitutionality of provisions implementing the European arrest warrant, views on the substance of the issue have again been presented by the Federal Constitutional Court of Germany (its judgments: of 3 September 2009, ref. no. 2 BvR 1826/09, and of 9 October 2009, ref. no. 2 BvR2115/09) and by the Constitutional Court of Spain (its judgment of 28 September 2009, ref. no. STC 199/2009).

In the light of the above, the Constitutional Tribunal states that it has jurisdiction to review the constitutionality of the provisions challenged in the constitutional complaint under examination.

2.2. The essence of the European arrest warrant.

In accordance with Article 1(1) of the Framework Decision, the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

In its judgment of 27 April 2005, ref. no. P 1/05, the Constitutional Tribunal already indicated that the concept underlying the Council Framework Decision on the European arrest warrant was set in the specific realities of the current stage of

development of social, political and legal relations within the EU. The concept of the European arrest warrant remains related to the principle of free movement of persons within the EU, adopted in the Convention implementing the Schengen Agreement and concerning the gradual abolition of checks at the common borders, signed at Schengen on 19 June 1990, (OJ L 239, 22.9.2000, p. 19: special edition – Polish version – OJ, ch. 19, t. 2, p. 9). A negative consequence of free movement of persons and of the absence of checks at the common internal borders is the difficulty in prosecuting and trying the perpetrators of offences. This has made it necessary to develop new and more effective ways of combating crime.

The Tampere European Council of 1999 indicated a priority task to develop a common area of cooperation among the judicial authorities of the EU Member States [...], intending to create a situation where judicial cooperation in criminal matters would be based on the principle of mutual recognition of judicial decisions [...].

Framework decisions bind only with regard to a set goal, leaving the choice of the form and measures to be applied at the discretion of particular Member States of the European Union.

The European arrest warrant is based on the principle of mutual recognition of judicial decisions issued by foreign judicial authorities. This is clearly indicated in point 6 of the Preamble to the Framework Decision. The principle of mutual recognition implies the acceptance of differences among particular legal systems and mutual trust in the administration of justice by foreign judicial authorities.

The principle of mutual recognition, enshrined in Article 28 of the Treaty establishing the European Community (hereinafter: the EC Treaty), is intrinsically linked with private law [...]. The principle has been implemented in criminal law, with the indication of the “basis” shared by all EU Member States, which is constituted by the standards for the protection of human rights, set by the Convention for the Protection of Human Rights and Fundamental Freedoms, which binds all the States; this is to eliminate striking discrepancies in the level of the protection of those rights in particular Member States [...].

The European arrest warrant is extradition within the meaning of Article 55 of the Constitution (cf. the judgment of the Constitutional Tribunal of 27 April 2005, ref. no. P 1/05). Therefore, guarantees that apply to the European arrest warrant are those which the Constitution links with extradition.

2.3. The content of the provisions indicated as higher-level norms for the review in the present case.

Article 45(1) of the Constitution, which expresses the principle of a fair trial, reads as follows: “Everyone shall have the right to a fair and public hearing of his case, without undue delay, before a competent, impartial and independent court”.

In its interpretation of the principle of a fair trial, the Constitutional Tribunal has indicated on a number of occasions that the content of the said principle comprises, in particular, the following: the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state with particular characteristics

(impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court. In the more recent jurisprudence, what has been considered as an element of the right to a fair trial is also the right to have cases examined by the organs of the state with an adequate organisational structure and position (cf. e.g. the judgments of the Constitutional Tribunal of: 16 March 1999, ref. no. SK 19/98, OTK ZU No. 3/1999, item 36; 2 April 2001, ref. no. SK 10/00, OTK ZU No. 3/2001, item 52; 12 March 2002, ref. no. P 9/01, OTK ZU No. 2/A/2002, item 14; 20 September 2006, ref. no. SK 63/05, OTK ZU No. 8/A/2006, item 108; 24 October 2007, ref. no. SK 7/06, OTK ZU No. 9/A/2007, item 108).

In the substantiation of the constitutional complaint under examination, the complainant argues that the challenged provisions infringe his constitutional right to a fair trial, as regards the obligation to devise a proper court procedure which complies with the requirements of a fair and public hearing.

The right to defence, as specified in Article 42(2) of the Constitution, guarantees that anyone against whom criminal proceedings have been brought shall have the right to defence at all stages of such proceedings. Such a person may, in particular, choose counsel or avail himself/herself – in accordance with principles specified by statute – of counsel appointed by the court. The complainant makes reference to the first sentence of that provision, indicating that, due to the shortcomings of the challenged provisions, there is no possibility of undertaking effective defence before the court adjudicating on surrender on the basis of the European arrest warrant.

Article 55(4) of the Constitution, indicated as a higher-level norm for the review in the present case, was added by the Act of 8 September 2006 amending the Constitution of the Republic of Poland (Journal of Laws – Dz. U. No. 200, item 1471; hereinafter: the Act of 8 September 2006). It reads as follows: “The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens”.

The provision under analysis refers to two different situations. In the part where the provision forbids the extradition of a person suspected of the commission of a crime for political reasons but without the use of force, it is not related to the situation of the complainant.

What is significant here is the part of the said provision from which it follows that extradition is forbidden if it were to violate “rights and freedoms of persons and citizens” (Article 55(4) *in fine*). As it has been indicated above, the higher-level norm for the review arising from Article 55(4) of the Constitution will be considered in conjunction with the other provisions cited as a higher-level norm in the present case, i.e. in conjunction with Article 45(1) and Article 42(2) of the Constitution.

2.4. The assessment of the conformity of the challenged provision to the indicated higher-level norms for the review.

As it has been mentioned above, with regard to the challenged provision, the complainant has formulated two kinds of allegations.

Firstly, as indicated by the complainant, the Code of Criminal Procedure does not specify formal requirements which should be met by the European arrest warrant, on the basis of which the person who is the subject of the European arrest warrant is to be surrendered from the territory of the Republic of Poland. It does not specify requirements concerning the proper way of translating the European arrest warrant. The allegations raised in that context by the complainant, with regard to the translations of the European arrest warrant which were used by the court in his case, are not subject to substantive review. Indeed, the Constitutional Tribunal, as a court of law, and not a court of facts, has no jurisdiction to assess the correctness of the application of law (cf. e.g. the judgment of the Constitutional Tribunal of 8 December 2009, ref. no. SK 34/08, OTK ZU No. 11/A/2009, item 165).

Secondly, the complainant alleged that adjudicating on the surrender of a Polish citizen without the court's examination whether it was probable that alleged acts had been committed by the suspect was inconsistent with the Constitution. The European arrest warrant contains only information about evidence gathered in a given case and mentions a ruling which has been delivered, and on the basis of which the said warrant has been issued. The Code of Criminal Procedure does not include a requirement to enclose a decision on which the European arrest warrant is based and, moreover, it does not specify a requirement to present evidence indicating that it is probable that an offence has been committed by the person who is the subject of the said warrant.

Consequently, it is possible to surrender the person who is the subject of the European arrest warrant, despite the fact that the commission of alleged acts has not been made probable.

Pursuant to Article 1(1) of the Framework Decision, the European arrest warrant is a judicial decision issued by a Member State with a view to the arrest and surrender by another Member State of a requested person, for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order.

The above provision of the Framework Decision has been implemented into the Polish legal system by Article 607k of the Code of Criminal Procedure, which indicates the purpose of surrender on the basis of the European arrest warrant. Article 607k(1) concerns the surrender of the person who is the subject of the said warrant from the territory of the Republic of Poland. Such surrender is carried out for the purposes of conducting a criminal prosecution or executing a custodial sentence or detention order in the territory of another EU Member State.

It should be emphasised that the allegations raised by the complainant solely refer to a situation where surrender on the basis of the European arrest warrant serves the purpose of conducting a criminal prosecution. This clearly follows from the substantiation of the complaint. Due to the abstract and specific character of a constitutional complaint as a measure to commence review proceedings before the Constitutional Tribunal, the effective commencement of review proceedings concerning the constitutionality of the challenged provision, also with regard to a situation

where surrender on the basis of the European arrest warrant occurs for the purpose of executing a penalty, would not actually be possible. Indeed, the constitutional doubts raised by the complainant are linked to the actual circumstances in which surrender occurred for the purpose of conducting a criminal prosecution.

Moreover, attention should be drawn to the fact that the allegations raised in the constitutional complaint under examination are related to a situation where surrender concerns a Polish citizen. This circumstance is not without significance, when considering the fact that Article 55 of the Constitution renders a guarantee protecting against extradition differently in the context of Polish citizens than with regard to persons who do not have Polish citizenship.

Article 55(1) of the Constitution, as a rule, guarantees protection against extradition to Polish citizens. It provides for exceptions which are stipulated in the two subsequent paragraphs of that Article.

Pursuant to paragraph two: “Extradition of a Polish citizen may be granted upon a request made by a foreign state or an international judicial body if such a possibility stems from an international treaty ratified by Poland or a statute implementing a legal instrument enacted by an international organisation of which the Republic of Poland is a member, provided that the act covered by a request for extradition: 1) was committed outside the territory of the Republic of Poland, and 2) constituted an offence under the law in force in the Republic of Poland or would have constituted an offence under the law in force in the Republic of Poland if it had been committed within the territory of the Republic of Poland, both at the time of its commitment and at the time of the making of the request”.

Allowing for an exception from the hitherto absolute protection of Polish citizens against extradition, the new wording of Article 55(2) of the Constitution has restricted it in two ways.

It follows from Article 55(3) of the Constitution that the said restrictions do not apply to extradition granted upon a request made by an international judicial body established under an international treaty ratified by Poland, in connection with a crime of genocide, crime against humanity, war crime or a crime of aggression, covered by the jurisdiction of that body. The said provision refers to the surrender of a Polish citizen to International Criminal Courts and is not related to the European arrest warrant. Indeed, the Framework Decision solely concerns relations among the EU Member States.

Further obstacles to extradition are set out in Article 55(4) of the Constitution. It reads as follows: “The extradition of a person suspected of the commission of a crime for political reasons but without the use of force shall be forbidden, so as an extradition which would violate rights and freedoms of persons and citizens”. This prohibition is not restricted by the premiss of citizenship.

Challenged Article 607p(1) of the Code of Criminal Procedure is therefore subject to constitutional assessment in the present case only insofar as it specifies grounds for mandatory refusal to execute the European arrest warrant issued for the purpose of conducting a criminal prosecution against a Polish citizen.

Taking a stance on the allegations formulated in this way, it should be stated as follows.

In the jurisprudence of the Supreme Court and in the literature on the subject, it is unanimously assumed that the phrase “a criminal prosecution”, which is used in Article 607k(1) of the Code of Criminal Procedure, should be interpreted in the light of the provisions in force in the Member State issuing the European arrest warrant. The provisions of the executing Member State are not relevant here (cf. the resolution of the Supreme Court of 20 July 2006, ref. no. I KZP 21/06, OSNKW No. 9/2006, item 77, [...]).

In its decision of 8 December 2008, ref. no. V KK 332/08 (*Biuletyn Prawa Karnego* No. 1/2009, item 84), the Supreme Court presents the view that the Polish court which executes the European arrest warrant does not examine the admissibility of the issue thereof in the light of Article 607c(1) included in Chapter 65a of the Code of Criminal Procedure, which regulates a procedure for requesting another EU Member State to surrender the person who is the subject of the European arrest warrant, but carries out the said examination on the basis of Chapter 65b of the Code of Criminal Procedure, which contains the provision under discussion. According to the indicated decision of the Supreme Court, the assessment of the admissibility of surrendering the person who is the subject of the European arrest warrant should only be conducted in the light of Article 607p and Article 607r of the Code of Criminal Procedure, and only with reference to the premisses enumerated in those provisions, the Polish court may refuse to execute the said warrant. By contrast, the examination of the European arrest warrant in the light of premisses concerning the issue of the warrant is possible only within a very narrow scope, and only as regards meeting formal requirements by the warrant. In accordance with the stance of the Supreme Court, the court of the executing Member State may consider whether the European arrest warrant has been issued by a competent judicial authority and whether it contains elements which are essential for declaring it compliant with formal requirements. A review may not, however, lead to substantive adjudication on the lack of grounds for the execution of the warrant.

A similar stance has been taken by the Court of Appeal in Kraków (the decision of 15 July 2004, ref. no. II AKz 257/04, *Krakowskie Zeszyty Sądowe* No. 9/2004, item 41). In accordance with that decision, the European arrest warrant is subject to review (Article 607k of the Code of Criminal Procedure), but there may be no refusal to execute it, as long as it meets formal requirements (Article 607c of the Code of Criminal Procedure), and there are no negative premisses arising from Article 607p and Article 607r of the Code of Criminal Procedure. The difference here amounts to the application of Article 607c of the Code of Criminal Procedure in proceedings to execute the European arrest warrant issued by another Member State.

The above-cited view of the Supreme Court should be considered in conjunction with its previous stance, expressed in the resolution of 20 July 2006, ref. no. I KZP 21/06. In the indicated resolution, in the context of Article 607k(1) and, to put it more precisely, in the context of the purpose of surrender on the basis

of the European arrest warrant, specified therein, the Supreme Court states that the executing judicial authority may refuse to surrender the person who is the subject of the European arrest warrant, if it determines that the warrant has been issued contrary to the premisses of admissibility of the issue thereof. Also, according to that resolution, what determines whether the person who is the subject of the European arrest warrant is surrendered for the purpose of conducting a criminal prosecution is not the provisions of the executing State, but the provisions of the issuing Member State, interpreted in the light of the content of the Framework Decision on the European arrest warrant.

The opinions of the representatives of the doctrine on this issue are divergent. A view in favour of the admissibility of examining that issue, in the Polish literature on the subject, has been expressed by T. Grzegorzczuk (cf. T. Grzegorzczuk, *Kodeks postępowania karnego oraz ustawa o świadku koronnym. Komentarz*, Warszawa 2008, p. 1290). Such a view is also shared by M. Hudzik, who indicates that the European arrest warrant, similarly to extradition, does not allow for surrendering requested persons for the purpose of conducting a prosecution other than criminal prosecution. Consequently, a request for surrender for the purpose of conducting a different prosecution must be regarded as a circumstance determining refusal to execute the warrant (cf. M. Hudzik, “Dobre narzędzie, niedobra sprawa”, *Rzeczpospolita* Issue No. 132/2006, p. 7; see also: “Europejski nakaz aresztowania a nieletni sprawcy czynów zabronionych”, *Europejski Przegląd Sądowy* No. 8/2006, p. 22). A similar view is also shared by P. Hofmański, E. Sadzik and K. Zgryzek, who state that the court adjudicating on the execution of the European arrest warrant is obliged to examine whether the issuing judiciary authority has fulfilled the premisses of the issue of the said warrant (cf. P. Hofmański, E. Sadzik, K. Zgryzek, *Kodeks postępowania karnego*, Vol. III. Commentary on Articles 468-682, P. Hofmański (ed.), Warszawa 2007, p. 632).

Such a possibility is rejected by A. Górski and A. Sakowicz, in the light of the principle of mutual trust, which – in the view of those authors – excludes the admissibility of examination whether the European arrest warrant has been issued in accordance with the law of the issuing Member State (cf. A. Górski, A. Sakowicz, [in:] K. T. Boratyńska, A. Górski, A. Sakowicz, A. Ważny, *Kodeks postępowania karnego. Komentarz*, Warszawa 2007, p. 1289). The possibility of examining the purpose for the issue of the European arrest warrant is also rejected by K. Malinowska-Krutul, in “Ekstradycja a przekazanie w ramach europejskiego nakazu aresztowania” (*Prokuratura i Prawo* Issue No. 6/2007, p. 100), who states that there could be no other reasons for refusal to execute the European arrest warrant than the circumstances indicated in Article 607p and Article 607r of the Code of Criminal Procedure, e.g. recognising by a Polish court that there have been no circumstances arising from Article 607k, i.e. in other words – there is no appropriate “purpose” for the European arrest warrant, i.e. to conduct a criminal prosecution.

The Constitutional Tribunal has no jurisdiction to review the constitutionality of the application of law. At the same time, in accordance with the interpretation of the

principle of protection of citizens' trust in the state and its laws in the jurisprudence of the Constitutional Tribunal, what must be subject to constitutional protection is not only citizens' trust in the law, but – above all – trust in the interpretation of law assumed in the practice of applying the law by the organs of the state, in particular where the practice is consistent and well-established at a given point in time, and the provisions – on the basis of which this practice has been established – do not allow to accept it as manifestly unfounded. It follows from the principle of protection of citizens' trust in the state and its laws that the addressees of legal norms may assume that the content of the binding law is exactly the same as it has been specified by courts, especially when specified by the Supreme Court (cf. the judgment of the Constitutional Tribunal of 9 October 2001, ref. no. SK 8/00, OTK ZU No. 7/2001, item 211).

Referring the above statement to the allegations formulated by the complainant in the context of Article 607p(1) of the Code of Criminal Procedure, it should be noted that, in the light of Article 55(1) of the Constitution, which – as a rule – provides for a prohibition against extradition of Polish citizens, as well as in the light of Article 55(2) of the Constitution, which introduces an exception to the prohibition against surrendering Polish citizens, provided that other restrictions indicated in that provision are adhered to, the verification of the purpose of issuing the European arrest warrant is necessary. As it has been indicated above, such verification is admissible in the jurisprudence of courts.

In the context of the above jurisprudence, there is a different situation as regards the admissibility of the examination of the European arrest warrant in the light of the premisses for its issue. In accordance with the stance presented in the jurisprudence, it is possible only within a very narrow scope, and only as regards meeting formal requirements by the warrant. The Constitutional Tribunal states that the court of the executing Member State may consider whether the European arrest warrant has been issued by a competent judicial authority and whether it contains elements which are essential for declaring it compliant with formal requirements. The said review may not, however, include substantive adjudication on the existence or lack of grounds for executing the warrant.

What should be distinguished from the review of the purpose for issuing the European arrest warrant, and formal premisses which it should fulfil, is the verification of grounds for prosecuting the person who is the subject of the European arrest warrant. In particular, this concerns the possibility of examining an evidential basis.

As it has been indicated above, the potential source of the legislator's positive obligation should be looked for in provisions stipulating the grounds for refusal to execute the European arrest warrant. What is relevant for the allegation of a legislative omission is Article 607p(1) of the Code of Criminal Procedure, which specifies grounds for refusal to execute the European arrest warrant.

With regard to the possibility of verifying grounds for the prosecution of the person who is the subject of the European arrest warrant, the Court of Appeal in Kraków

has expressed its stance in its decision of 17 November 2004, ref. no. AKz 403/04 (*Krakowskie Zeszyty Sądowe* No. 11/2004, item 19). With reference to Article 10 of the Framework Decision on the European arrest warrant, the court indicated that the mechanism of the European arrest warrant was based on a high level of confidence between Member States which execute the warrant in accordance with the principle of mutual recognition of judicial decisions. In addition, it also drew attention to the fact that still before the amendment introducing the European arrest warrant, in the context of regulations concerning extradition, in the jurisprudence there was a view that the purpose of extradition proceedings was merely the adjudication on the legal admissibility of surrender. It was regarded sufficient to make the allegation about the commission of the offence probable, by means of filing an extradition request by an authority of a given state (cf. also the decision of 25 August 1999 of the Court of Appeal in Katowice, ref. no. II AKz 251/99 [...]).

Considering that issue from the constitutional perspective, attention should be drawn to the wording of Article 55(1) and Article 55(4) of the Constitution. As it has already been indicated, Article 55(1) of the Constitution, in principle, guarantees prohibition against the extradition of Polish citizens, and the indicated guarantee refers not only to surrender on the basis of “classic” extradition, executed in accordance with the provisions contained in Chapter 65 of the Code of Criminal Procedure, but also to surrender carried out on the basis of the European arrest warrant, regulated in Chapter 65a and Chapter 65b of the Code of Criminal Procedure (cf. the judgment of the Constitutional Tribunal of 27 April 2005, ref. no. P 1/05).

The prohibition against extradition arising from Article 55(4) of the Constitution, in the situation where the execution of extradition violates “rights and freedoms of persons and citizens”, constitutes – apart from premisses indicated in Article 55(2) of the Constitution – an additional restriction on the admissibility of extradition.

The use of the expression “violate rights and freedoms of persons and citizens” may raise doubts as to whether the provision under analysis refers to the rights and freedoms specified in the Constitution alone, or whether also to the freedoms and rights guaranteed by the provisions of international law, including the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. It is indicated in the literature on the subject that the interpretation of that expression should be broad and ought to comprise the rights which are guaranteed by the provisions of the acts of international law that bind Poland, as well as the rights and freedoms protected by the Constitution [...].

Article 607p of the Code of Criminal Procedure, partially constitutes the implementation of Article 3 of the Framework Decision on the European arrest warrant.

In accordance with the indicated provision of the Framework Decision on the European arrest warrant, grounds for mandatory refusal to execute the European arrest warrant, as well as the grounds for optional refusal to execute the warrant which are specified in Article 607r of the Code of Criminal Procedure, are not exhaustive in character [...]. In particular, point 13 of the Preamble to the indicated Framework Decision rules out the admissibility of surrender, if there was a serious

risk related thereto that in the Member State to which the accused person is to be surrendered, “he or she would be subjected to the death penalty, torture or other inhuman or degrading treatment or punishment”. Due to the fact that the members of the Council of Europe are bound by the European Convention on Human Rights, such a danger is considered to be unlikely [...].

In accordance with Article 607p(1)(5), a ground for mandatory refusal to execute the European arrest warrant is respect for the protection of the rights and freedoms of persons and citizens. The execution of the European arrest warrant shall be refused if it infringed on the indicated rights and freedoms.

The analysed grounds for refusal to execute the European arrest warrant have been added to the Code of Criminal Procedure by the Act of 27 October 2006 amending the Code of Criminal Procedure (Journal of Laws – Dz. U. No. 226, item 1647). The indicated amendment is related to the amendment to Article 55 of the Constitution, introduced by the Act of 8 September 2006.

It should be noted that Article 55(4) of the Constitution *in fine* and also Article 607p(1)(5) of the Code of Criminal Procedure introduce a new obstacle which is absent in the Framework Decision, as regards refusal to execute the European arrest warrant. This concerns both Polish citizens as well as any other persons who have no Polish citizenship, regardless of the type of offence committed.

The Framework Decision on the European arrest warrant contains no regulations which would concern proceedings to receive evidence before the court adjudicating on surrender.

As it has been indicated above, according to the decision of 8 December 2008 of the Supreme Court, ref. no. V KK 332/08, the assessment of the admissibility of surrendering the person who is the subject of the European arrest warrant should only be conducted in the light of Article 607p and Article 607r of the Code of Criminal Procedure; only by relying on the premisses mentioned in those provisions, a Polish court may refuse to execute the warrant. In the above-mentioned decision, the Supreme Court at the same time ruled out the admissibility of substantive adjudication on the lack of grounds for the execution of the European arrest warrant, when such adjudication was to follow verification of the fulfilment of formal requirements by the warrant.

In the case of “classic” extradition, i.e. surrender carried out on the basis of provisions contained in Chapter 65 of the Code of Criminal Procedure, the scope of proceedings to receive evidence before the court adjudicating on the legal admissibility of extradition is also limited. In principle, evidence may be examined here solely in the context of the legal admissibility of surrender.

In the context of “classic” extradition, in the literature on the subject, it is stated that during proceedings concerning the legal admissibility of extradition, it is inadmissible to determine the liability of a person who is the subject of an extradition request for the commission of an offence [...].

Explanations provided by the person who is the subject of an extradition request constitute a means of evidence in proceedings before the court adjudicating on the

legal admissibility of extradition. By contrast, in the case of a well-founded motion of a said person, who is to be surrendered for the purpose of conducting a criminal prosecution against him/her, the court should undertake the examination of evidence that is available in the territory of the state. The evidence may be examined not only upon the motion of the said person, but also upon the motion of the prosecutor or by the court *ex officio* (Article 167 of the Code of Criminal Procedure shall apply here). It is indicated that the basis for dismissal of a motion concerning evidence may, in this context, be Article 170(1) of the Code of Criminal Procedure [...].

It is assumed in jurisprudence that Article 604 of the Code of Criminal Procedure, which refers to “classic” extradition, may separately constitute the basis for dismissing a motion concerning evidence in a situation where, by means of the motion, a party makes a request for the examination of evidence which is not available in the territory of the state (cf. the decision of 18 January 2006 issued by the Court of Appeal in Lublin, ref. no. II AKz 2/06, *Prokuratura i Prawo* (supplement) No. 6/2006, item 29).

As it has been indicated by the Court of Appeal in Lublin (the decision of 5 May 2005, ref. no. II AKz 114/05 (OSA No. 9/2007, item 44), there is a need for examining indispensable evidence, in the course of proceedings regulated by Chapter 65 of the Code of Criminal Procedure, when this is required by the substantive-law premisses of substantive adjudication, which are referred to in Article 604(1) of the Code of Criminal Procedure, i.e. the premisses of admissibility of surrendering the requested person. They require the court to *ex officio* consider relevant evidence (available within the State), as part of the obligation provided for in Article 167 of the Code of Criminal Procedure.

The Constitutional Tribunal states that the view presented in the above ruling is additionally justified by the current wording of Article 55 of the Constitution. What is meant here is the guarantee contained in Article 55(4) *in fine*, in accordance with which extradition shall be forbidden if it violates the rights and freedoms of persons and citizens.

It has been aptly stated by the Public Prosecutor-General that the provisions implementing the Framework Decision into the Polish legal system do not provide for the examination of grounds for issuing the European arrest warrant by the courts of particular EU Member States. When considering issues which, to a large extent, concern that circumstance, one should take into account the wording of point 12 of the Preamble to the Framework Decision, which indicates that: “This Framework Decision respects fundamental rights and observes the principles recognised by Article 6 of the Treaty on European Union and reflected in the Charter of Fundamental Rights of the European Union(7), in particular Chapter VI thereof. Nothing in this Framework Decision may be interpreted as prohibiting refusal to surrender a person for whom a European arrest warrant has been issued when there are reasons to believe, on the basis of objective elements, that the said arrest warrant has been issued for the purpose of prosecuting or punishing a person on the grounds of his or her sex, race, religion, ethnic origin, nationality, language, political opinions or sexual orientation, or that that person’s position may be prejudiced for any of these

reasons. This Framework Decision does not prevent a Member State from applying its constitutional rules relating to due process, freedom of association, freedom of the press and freedom of expression in other media”.

The Constitutional Tribunal, just as other organs of public authority which apply the law in the EU Member States, is obliged to assume an interpretation of national provisions which will be consistent with the EU law, i.e. such an interpretation which will allow to achieve the aim indicated in a framework decision (cf. the judgment of the Court of 16 June 2005, in the case *Maria Pupino*, ref. no. C-105/03). However, interpretation consistent with the EU law has its limits. Delineating the boundaries of the obligation, the Court of Justice noted that the obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national criminal law is limited by general principles of law, particularly those of legal certainty and non-retroactivity. In particular, those principles prevent that obligation from leading to the criminal liability of persons who contravene the provisions of a framework decision from being determined or aggravated on the basis of such a decision alone, independently of an implementing law. The obligation on the national court to refer to the content of a framework decision when interpreting the relevant rules of its national law ceases when the latter cannot receive an application which would lead to a result compatible with that envisaged by that framework decision. In other words, the principle of conforming interpretation cannot serve as the basis for an interpretation of national law *contra legem*.

In the light of the above, the Constitutional Tribunal states that the assessment of the constitutionality of the challenged provision, in the context of the higher-level norms for review indicated in the present case, requires taking into account the wording of point 12 of the Preamble to the Framework Decision.

The Constitutional Tribunal shares the view of the Public Prosecutor-General that the principle of mutual trust should prevail when interpreting the provisions on the European arrest warrant. However, this statement does not solve the problem of possible unconstitutionality of provisions constituting the implementation of regulations based on the principle of mutual recognition.

It is worth making reference here to the views presented by the European Court of Human Rights, as regards guarantees enshrined in the European Convention on Human Rights in relation to extradition. In the statement of reasons for its judgment of 19 February 2008, ref. no. P 48/06 (OTK ZU No. 1/A/2008, item 4), the Constitutional Tribunal stated that lowering the constitutional standard, due to the necessity to take into account the provisions of the Convention when interpreting constitutional guarantees, would be tantamount to the non-conformity of a statutory regulation to the Constitution.

In the judgments delivered in the case of *Bozano v France* (of 2 December 1987, Application No. 9990/82) and the case of *Mohamoud Askar v the United Kingdom* (of 16 October 1995, Application No. 26373/95), the European Court of Human Rights stated that the right which might be infringed during extradition proceedings was the right to a fair trial, guaranteed in Article 6 of the Convention. The case

concerned the infringement of the said right in the country to which the person was extradited. Such a stance was taken by the Supreme Court in its decision of 29 July 1997, ref. no. II KKN 313/97, OSNKW No. 9-10/1997, item 85).

However, in the case under examination, there is a different situation. Article 55(4) of the Constitution in conjunction with Article 45(1) and Article 42(2) of the Constitution are to constitute the context for the assessment of constitutionality of provisions which concern court proceedings in the executing Member State, and not proceedings in the issuing Member State.

It is obvious that the guarantee arising from Article 6 of the European Convention on Human Rights binds proceedings carried out in the Member State which adjudicates on the execution of an extradition request/the European arrest warrant.

What should be stressed here once again is the fact that also point 12 of the Preamble to the Framework Decision declares the inviolability of the constitutional principles of the EU Member States, as regards respect for the right to a fair trial.

Undoubtedly, assuming the role of the accused in a general sense (a passive party to criminal proceedings) implies discomfort of the necessity to submit to the stringent rules of proceedings.

The Constitutional Tribunal has on a number of occasions stated in its jurisprudence that guaranteeing the right to defence is necessary in any repressive incidental proceedings, even if it does not cause acute interference with constitutional rights and freedoms (cf. e.g. the judgment of the Constitutional Tribunal of 28 November 2007, ref. no. K 39/07, OTK ZU No. 10/A/2007, item 129).

From the point of view of the guarantee of a fair trial (Article 45(1) of the Constitution), it is necessary to ensure the exercise of the right to defence. This is required, due to Article 2 of the Constitution, by any reliable procedure. A person against whom proceedings related to negative consequences are instituted must be provided with possibilities to defend himself/herself in a way which is adequate to the aim of the proceedings (Article 42(2) of the Constitution).

The execution of the European arrest warrant entails surrendering the person who is the subject of the said warrant from the territory of the Republic of Poland to another EU Member State. In the case of adjudicating on surrender based on the European arrest warrant, the degree of interference with the rights and freedoms of the person who is the subject of the said warrant is considerable. Moreover, proceedings aimed at the execution of the European arrest warrant may also have another negative aspect; namely, they may entail applying a preventive measure in the form of provisional arrest (Article 607k(3) of the Code of Criminal Procedure).

In the view of the Public Prosecutor-General, the aim of proceedings concerning surrender is to surrender or refuse to surrender the requested person, and not to adjudicate on the guilt of the person and the penalty for the act mentioned in the European arrest warrant. Therefore, the right to a hearing does not have to be guaranteed within the scope of verifying evidence confirming the commission of acts mentioned in the European arrest warrant.

The scope of jurisprudence of the court adjudicating on the execution of the European arrest warrant is primarily delineated by the Constitution, and above all by relevant guarantees set out in Article 55(4) in conjunction with Article 45(1) and Article 42(2) of the Constitution. Since, pursuant to Article 30 of the Constitution, the inherent and inalienable dignity of the person shall constitute a source of freedoms and rights of persons and citizens, and the indicated provision of the Constitution specifies a subjective right [...], then – on the basis of Article 607p(1)(5) of the Code of Criminal Procedure – it should be possible to refuse to execute the European arrest warrant, in the case where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on which the warrant is based. Such a conviction may arise from findings made due to the initiative of the person who is the subject of the European arrest warrant, his/her defence counsel, the prosecutor as a party to the proceedings, as well as from findings made due to the initiative of the court adjudicating on the execution of the warrant, or from findings arising from the facts which are known to the court.

The ground for the mandatory execution of the European arrest warrant, specified in Article 607p(1)(5) of the Code of Criminal Procedure, also comprises a situation where the description of the act is imprecise to the extent which makes it impossible to adjudicate on the admissibility of surrender, i.e. to the extent which makes it impossible to determine whether there are grounds for mandatory or optional refusal to execute the European arrest warrant (Article 607p and Article 607r of the Code of Criminal Procedure).

The Constitutional Tribunal states that the European arrest warrant must clearly indicate in relation to which act it has been issued. Otherwise, the court adjudicating on the execution of the warrant could not believe that it is obvious that the person who is the subject of the European arrest warrant has committed the act on which the said warrant is based. An imprecise description of the act would make it impossible to apply within the scope specified above the premiss of mandatory refusal to execute the European arrest warrant set out in Article 607p(1)(5) of the Code of Criminal Procedure. Indeed, as it has been indicated, this regulation provides for refusal to execute the European arrest warrant when it is obvious for the court adjudicating on the execution of the said warrant that the prosecuted person has not committed the act on which the arrest warrant is based. Therefore, without a sufficiently precise description of a given act, the premiss of refusal to execute the said warrant understood this way would be illusory.

As it has been indicated above, proceedings aimed at the execution of the European arrest warrant may also have another negative aspect; namely they may entail applying a preventive measure in the form of provisional arrest, which follows from Article 607k(3) of the Code of Criminal Procedure. The said provision, in the version in force at the time of adjudication in the complainant's case, read as follows: "A European warrant may be accompanied by a request for provisional arrest or another preventive measure". In the context of that regulation, there is no unanimity in the jurisprudence of courts as to the admissibility of verifying the evidential basis of

the request for surrender on the basis of the European arrest warrant. The Court of Appeal in Katowice was against such a possibility (the decision of 25 October 2006, ref. no. II AKz 685/06 (*Krakowskie Zeszyty Sądowe* No. 1/2007, item 101). A different stance was presented by the Court of Appeal in Katowice in its decision of 23 August 2006, ref. no. II AKz 518/06, *Krakowskie Zeszyty Sądowe* No. 1/2007, item 99). The view ruling out the admissibility of examination of evidential basis would, at the same time, rule out the admissibility of examination of a general premiss, the fulfilment of which, in accordance with Article 249(1) of the Code of Criminal Procedure, determines the admissibility of provisional arrest (cf. the decision of the Court of Appeal in Katowice dated 25 October 2006, ref. no. II AKz 685/06). Article 607k(3), in the version which is currently in force, stipulates that: “upon the motion of the prosecutor, the circuit court may order provisional arrest, setting the period thereof for the time indispensable for the surrender of the requested person”. The said regulation refers to a situation where surrender is carried out for the purpose of conducting a criminal prosecution. In the case where surrender is carried out for the purpose of executing a penalty, the sufficient basis for provisional arrest is a legally valid sentence decision or other ruling constituting the basis for the deprivation of liberty of the requested person (Article 607k(3) of the Code of Criminal Procedure *in fine*).

Taking the above into consideration, the Constitutional Tribunal states that, from the point of view of the Constitution, it would be impossible to accept a situation where the court adjudicating on provisional arrest for the person who is the subject of a request for surrender for the purpose of conducting a prosecution – after having determined that the application of that preventive measure is ruled out, as it does not fulfil the general premiss of provisional arrest by the fact that the person to be surrendered has not committed the alleged act – would still be obliged to surrender that person.

The Constitutional Tribunal states that taking into account the above-mentioned circumstances – i.e. 1) a situation where it is obvious for the court adjudicating on the execution of the European arrest warrant that the person who is the subject of the said warrant has not committed the act on the basis of which the European arrest warrant has been issued, and 2) in the case where the description of the act on the basis of which the European arrest warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant – is possible within the scope of the ground for non-execution specified in Article 607p(1)(5) of the Code of Criminal Procedure, rendered in the Constitution in its Article 55(4). It is of secondary importance how the above obstacle to surrender will be considered in a specific case, and in particular whether refusal to surrender will be preceded by requesting the issuing Member State, in accordance with Article 607z of the Code of Criminal Procedure, to complete the missing information and, at the same time, indicate new circumstances revealed in the case, in the hope that relying on that circumstance will result in the withdrawal of the European arrest warrant by the issuing Member State.

The Constitutional Tribunal emphasises that the above statement should not be regarded as tantamount to allowing the court adjudicating on the execution of the European arrest warrant to carry out detailed proceedings to receive evidence with regard to the guilt of the person who is the subject of the said warrant.

It is right to state that in the case of surrender to another EU Member State on the basis of the European arrest warrant the level of confidence in the validity of the request for surrender should be higher than in the case of surrender on the basis of a “classic” extradition request to another State which is not necessarily bound by at least the minimum level of guarantees set by the European Convention on Human Rights. On the other hand, in the light of the higher-level norms for the constitutional review in the present case, it would be impossible to accept the unconditional surrender of the person who is the subject of the European arrest warrant in the above-mentioned situations.

Bearing in mind that Article 607p(1)(5) of the Code of Criminal Procedure, which repeats – at the statutory level – the content of Article 55(4) of the Constitution, has capacious content, and in the case where it is obvious for the court adjudicating on the execution of the warrant that the person who is the subject of the warrant has not committed the act on the basis of which the European arrest warrant has been issued, as well as when the description of the act on the basis of which the said warrant has been issued is imprecise to the extent it is impossible to adjudicate on the execution of the said warrant, it should be assumed that – within the above-mentioned scope – the said provision is consistent with Article 45(1) and Article 42(2) in conjunction with Article 55(4) of the Constitution.

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

JUDGMENT of 24 November 2010 – Ref. No. K 32/09
[Constitutionality of the Lisbon Treaty]

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Marek Mazurkiewicz – Presiding Judge

Stanisław Biernat

Zbigniew Cieślak

Maria Gintowt-Jankowicz

Mirosław Granat

Marian Grzybowski

Wojciech Hermeliński

Adam Jamróz

Marek Kotlinowski

Teresa Liszcz

Ewa Łętowska

Andrzej Rzepliński

Sławomira Wronkowska-Jaśkiewicz

Mirosław Wyrzykowski

Bohdan Zdziennicki – Judge Rapporteur,

Grażyna Szałygo and Krzysztof Zalecki – Recording Clerks,

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

- 1) an application by a group of Sejm Deputies to determine the conformity of:
 - a) Article 1 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Journal of Laws – Dz. U. of 2009 No. 203, item 1569), to the extent it specifies the content of:
 - Article 9 C(3); Article 15b(2), first subparagraph; Article 28(3), third subparagraph; Article 28 D(2), second sentence; as well as Article 28 E(2), second sentence; Article 28 E(3), second subparagraph, second sentence; and Article 28 E(4), second subparagraph, first sentence, of the Treaty on European Union, to the extent they allow the Council of the European Union to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,

- Article 15b(3); Article 28 A(2), first subparagraph, second and third sentences; and Article 28 A(3), first subparagraph, first sentence; as well as Article 48(6), second subparagraph, and Article 48(7) of the Treaty on European Union,
 - b) Article 2 of the Treaty of Lisbon, to the extent it specifies the content of:
 - Article 188 C(4), first subparagraph; Article 188 K(1), first sentence; Article 188 N(8) as well as Article 251(8), (10) and (13) of the Treaty on the Functioning of the European Union, to the extent they allow the Council to enact – by a qualified majority, independently or jointly with the European Parliament, against the stance of the Republic of Poland – legal acts which will be binding in the territory of the Republic of Poland or which will bind the Republic of Poland in foreign relations,
 - Article 22, second subparagraph; Article 65(3), second and third subparagraphs, Article 69 A(2), second subparagraph, point (b); Article 69 B(1), third subparagraph; Article 69 E(4); Article 137(2), fourth subparagraph; Article 175(2), second subparagraph; Article 188 N(8), second subparagraph, second sentence; Article 190(1), second subparagraph; Article 229a; Article 245, second subparagraph; Article 266, third subparagraph, second sentence; Article 269, third subparagraph; Article 270a(2), second subparagraph; Article 280 H(1) and (2); as well as Article 308(1) of the Treaty on the Functioning of the European Union,

to Article 90(1)-(3) in conjunction with Article 2, Article 4 and Article 8(1) of the Constitution of the Republic of Poland as well as in conjunction with the principle of the Polish Nation's sovereign and democratic determination of the fate of its Homeland, as expressed in the Preamble to the Constitution,
 - c) the Declaration No. 17 concerning primacy, annexed to the Final Act of the Conference of the Representatives of the Governments of the Member States, which adopted the Treaty of Lisbon, to Article 8 in conjunction with Article 91(2) and (3) as well as Article 195(1) of the Constitution,
- as the alternative to the above:
- d) Article 1 of the Act of 1 April 2008 on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Journal of Laws – Dz. U. No 62, item 388)
- to the extent the legislator's consent to bind the Republic of Poland with the indicated provisions of the Treaties is not accompanied by the statutory regulation stipulating the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland in every case of possible adoption, by the European Council or the Council of the European Union, of a legal act on the basis of any of the said provisions – to Article 2, Article 4, Article 8(1), Article 10 and Article 95(1) of the Constitution,
- 2) an application by a group of Senators to determine the conformity of Article 1(56) of the Treaty of Lisbon, to the extent it amends Article 48 of the Treaty

on European Union in conjunction with Article 2(12), (13) and (289) of the Treaty of Lisbon, as regards Article 2 A(2), Article 2 B(2), and Article 2 F, which have been inserted in the Treaty on the Functioning of the European Union, and the new wording of Article 308 of the Treaty on the Functioning of the European Union, to Article 8 and Article 90(1) of the Constitution,

adjudicates as follows:

1. **Article 1(56) of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007** (Journal of Laws – Dz. U. of 2009 No. 203, item 1569), **specifying the wording of Article 48 of the Treaty on European Union, in conjunction with Article 2 of the Treaty of Lisbon specifying the wording of Article 2(2), Article 3(2) and Article 7 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution of the Republic of Poland.**
2. **Article 2 of the Treaty of Lisbon, specifying the wording of Article 352 of the Treaty on the Functioning of the European Union, is consistent with Article 8(1) and Article 90(1) of the Constitution.**

Moreover, the Tribunal decides:

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

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. The subject and scope of the constitutional review.

1.1. The subject of the review versus the scope of the jurisdiction of the Constitutional Tribunal. The application by the group of Senators, submitted on 18 December 2009, as the subject of the review, indicates the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007 (Journal of Laws – Dz. U. of 2009 No. 203, item 1569; hereinafter: the Treaty of Lisbon). The numbers and

content of the cited provisions of the Treaties have been provided by the Tribunal on the basis of the consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union, published in the OJ C 83 of 30.3.2010, p. 1 (Polish edition), taking account of the Procès-verbal of rectification to the Treaty of Lisbon, published in the OJ C 290 of 30.11.2009, p. 1 (Polish edition).

1.1.1. Granted to the Constitutional Tribunal in Article 188(1) of the Constitution, the jurisdiction to adjudicate regarding “the conformity of statutes and international agreements to the Constitution” does not differentiate among the indicated competences of the Tribunal, depending on the manner of granting consent to ratification. The Constitutional Tribunal is therefore competent to examine the constitutionality of international agreements whose ratification requires prior consent granted by statute. Neither Article 188(1) of the Constitution nor any other provision excludes that type of agreements from the scope of jurisdiction of the Constitutional Tribunal. This also pertains to the regulations which are subject to constitutional review in this case.

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

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

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

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

1.2.1. Pursuant to Article 66 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), the Tribunal, while adjudicating, is bound by the limits of the application, question of law or complaint. When interpreting that provision, it has been assumed in constitutional jurisprudence that “for the view [expressed by the applicants] to be regarded as the basis for stating the unconstitutionality of the challenged provision, it should contain substantiation specifying the relations among the challenged provisions and constitutional norms in the way indicating a high degree of probability that the allegation of unconstitutionality is justified. Acting on application by the participants in the proceedings, and not *ex officio*, the Constitutional Tribunal is bound by the limits of the application (... and the result of such a concept of constitutional review of the law is the obligation to prove the grounds for alleging the unconstitutionality of the challenged provisions, imposed on the participants in the proceedings (parties). Such a concept of constitutional judiciary is a derivative of (...) the presumption of constitutionality of the law and the principle of stability of the legal order” (the judgment of 27 May 2003, ref. no. K 11/03, OTK ZU No. 5/A/2003, item 43).

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

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

According to the applicants, the fundamental cause of unconstitutionality of the Treaty of Lisbon is the lack of a treaty-related regulation as regards the procedure for granting consent to amendments to the primary EU law. In the view of the applicants, only the introduction of a treaty-related norm will give the possibility of

the application of the Treaty of Lisbon which is consistent with the Constitution. Due to the lack of such a treaty-related regulation, the Treaty of Lisbon does not meet the requirement of conformity to the Constitution. Such a regulation should provide for the obligation to veto, by the representative of the Polish government, the amendments to the primary EU law in the case of non-conformity to the Polish constitutional order. Expressed in Article 9 of the Constitution, the principle stating that the Republic of Poland respects international law which is binding for the Republic, may not be contrary to Article 8 of the Constitution, which stipulates the primacy of the Constitution in the Polish legal order.

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

The applicants, in fact, accuse the legislator of legislative omission. The omission is alleged to consist in the lack of appropriate regulation of the participation of the Sejm and the Senate in the process of determining the stance of the Republic of Poland at the forum of the European Council and the Council (of the European Union). The applicants state that: “Until there is no norm in the internal Polish law which has impact on the binding force in the procedures governing the EU competences and the scope of jurisdiction of the EU judiciary, we challenge the conformity of the Treaty of Lisbon to the content and scope of the binding force of the Polish Constitution”. In the opinion of the Constitutional Tribunal, the applicants formulated that allegation, without taking into account the special character of the Act on the Ratification of the Treaty of Lisbon, and in isolation from the previous constitutional jurisprudence concerning the subject of legislative omission and negligence, as well as without making reference to the binding legal order.

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

this way. Its constitutionally specified scope of jurisdiction encompasses only existing normative acts.

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

However, the Constitutional Tribunal states that, in the European legal culture, the principle of *falsa demonstratio non nocet* is well-established, pursuant to which the essence of the case is of fundamental significance, and not its description (cf. also the judgments: of 19 March 2001, ref. no. K 32/00, OTK ZU No. 3/2001, item 50). The allegation of unconstitutionality of law should be reconstructed on the basis of the whole content of an application, a question of law or a constitutional complaint. Indeed, the *petitum* only systematises the reservations and given higher-level norms for review. The essence of an allegation comprises the content of *petitum* as well as that of the substantiation of the application (cf. the judgment of the Constitutional Tribunal of 2 September 2008, ref. no. K 35/06, OTK ZU No. 7/A/2008, item 120).

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

In this situation, the issuance of a judgment concerning the scope of the application would be inadmissible and, therefore, the proceedings within that scope are subject to discontinuation (Article 39(1)(1) of the Constitution Tribunal Act).

1.2.3. In the opinion of the applicants, it is indispensable to introduce a treaty-related regulation concerning mutual acknowledgement of judicial and extra-judicial decisions in civil cases, as well as to introduce a relevant restrictive clause in that respect. However, the applicants have not explained the connection between that

allegation and the scope of allegation and the higher-level norms for constitutional review. For that reason, the proceedings with regard to that part of the application are subject to discontinuation (Article 39(1)(1) of the Constitution Tribunal Act).

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

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

The judgment of the Constitutional Tribunal concerning the Treaty of Accession contains the view that there is a close relation between the principle of primacy of the Constitution with the sovereignty of the Republic of Poland (cf. K. Działocha, commentary on Article 8 of the Constitution of the Republic of Poland, [in:] *Konstytucja RP. Komentarz*, L. Garlicki (ed.), Vol. 5, p. 34, Warszawa 2007). In the opinion of the Constitutional Tribunal, the norms of the Constitution constitute “the manifestation of the sovereign will of the nation”, and therefore “they may not lose their binding force or undergo a change due to an irremovable contradiction between certain provisions (EU legal acts and the Constitution)” (as stated in the statement of reasons for the judgment dated 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/2005, item 49). The view of the relation between the primacy of the Constitution and the principle of sovereignty is concurrent with the stance of the doctrine, according to which the preservation of the primacy of the Constitution in the context of European integration must be considered tantamount to preservation of the sovereignty of the state (as in K. Wójtowicz, “Suwerenność w procesie integracji europejskiej”, [in:] *Spór o suwerenność*, W. Wołpiuk (ed.), Warszawa 2001, p. 174), and Poland's accession to the European Union changes the point of view as regards the principle of the supreme legal force of the Constitution (its primacy), but it does not challenge it (cf. K. Działocha, op.cit., p. 22).

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

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

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

The question of sovereignty constitutes the subject of numerous analyses in the doctrine of international and constitutional law. In the view of the Constitutional Tribunal, the concept of sovereignty as the supreme and unlimited power, both as regards the internal relations within the state and its foreign relations (cf. K. Działocha, commentary on Article 4 of the Constitution of the Republic of Poland, *op. cit.*), is subject to changes corresponding to developments that have been taking place in the world in the last few centuries. The changes stem from the democratisation of the decision-making process in the state, due to the replacement of the principle of sovereignty of the monarch with the principle of supremacy of the nation, bound by the human rights which arise from the inviolability of human dignity. They also stem from the increase of the role of international law, as a factor shaping international relations; they result from the development of the process institutionalisation of international community, as well as they are a consequence of globalisation and a consequence of European integration. As a result of the said changes, sovereignty is no longer perceived as an unlimited possibility of exerting influence on other states or as manifestation of power that is free from external influences – on the contrary, freedom of activity of a state is subject to international law restrictions. At the same time, however, from the perspective of the contemporary Polish doctrine of international law, sovereignty is an indispensable quality of the state which allows to distinguish it from other subjects of international law. The attributes of sovereignty include: having the exclusive power of jurisdiction as regards the territory of a given state and its citizens, conducting foreign policy, deciding about war and peace, freedom as to recognising other states and governments, maintaining diplomatic relations, deciding about military alliances and membership in international political organisations, conducting an independent financial, budget and fiscal policies (cf. W. Czapliński, A. Wyrozumska, *Prawo międzynarodowe publiczne*, Warszawa 2004, p. 135 and the subsequent pages). In the doctrine of international law, there is the view that the concept of absolute, unrestrained sovereignty is a thing of the past. A distinction is drawn between the limitation of sovereignty, arising from the will of the state, being in accordance with the international law, and the infringements of sovereignty which occur against the will of the state and which are inconsistent with international law. In the literature on the subject, it has been stressed that, due to incurring liabilities, the state does not necessarily limit its freedom of activity, but at times it extends its activity on the fields where it has not been present before, and the ability to incur international liabilities is what international law implies in the legal character of the state, and what constitutes the identity of the state in international law. Therefore, this is not a factor that limits sovereignty, as it originally serves as the proof of sovereignty (cf. R. Kwiecień, *Suverenność państwa. Rekonstrukcja i znaczenie idei w prawie międzynarodowym*, Kraków 2004, p. 128). Viewed from that perspective, it is debatable whether the procedure of majority vote limits sovereignty, since this neither

limits nor infringes on the sovereignty of the Member States, but it merely channels the conducting of the duties of the state (*ibidem*, p. 141).

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

In the view of the Constitutional Tribunal, incurring international liabilities and managing them do not lead to the loss or limitation of the state’s sovereignty, but it is its confirmation, and the membership in the European structures does not, in fact, constitute a limitation of the state’s sovereignty, but it is its manifestation. For the assessment of the state of Poland’s sovereignty after its accession to the European Union, it is vital to create the basis for the membership in the Constitution, as a legal act of the nation’s sovereign power. Moreover, the basis of the membership in the European Union is an international agreement, ratified – in accordance with the constitutional requirements – upon consent granted in a nationwide referendum. In Article 90, the Constitution provides for conferring the competences of state organs only relation to certain matters, which – in the light of the Polish constitutional jurisprudence – means a prohibition to: confer all the competences of a given organ of the state, confer competences in relation to all matters in a given field and confer the competences in relation to the essence of the matters determining the remit of a given state organ; a possible change of the manner and object of conferral requires observance of the requirements for amending the Constitution (as the Constitutional Tribunal stated in the statement of reasons for the judgment in the case K 18/04).

The Constitutional Tribunal shares the view expressed in the doctrine of constitutional law that accession to the European Union is perceived as some sort of limitation of sovereignty of a given state, but it does not mean its loss and is related with the compensatory effect in the form of a possibility of partaking in the decision-making

process in the European Union (as stated, in particular, in L. Garlicki, *Polskie prawo konstytucyjne*, Warszawa 2009, p. 57). The EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state's sovereignty, retain their significance.

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

The Constitutional Tribunal shares the view expressed in the doctrine that the competences, under the prohibition of conferral, manifest about a constitutional identity, and thus they reflect the values the Constitution is based on (cf. L. Garlicki, “Normy konstytucyjne relatywnie niezmiennalne”, [in:] *Charakter i struktura norm Konstytucji*, J. Trzciński (ed.), Warszawa 1997, p. 148). Therefore, constitutional identity is a concept which determines the scope of “excluding – from the competence to confer competences – the matters which constitute (...) ‘the heart of the matter’, i.e. are fundamental to the basis of the political system of a given state” (cf. K. Działocha, *op. cit.*, s. 14), the conferral of which would not be possible pursuant to Article 90 of the Constitution. Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and decisions concerning the rights of the individual which determine the identity of the state, including, in particular, the requirement of protection of human dignity and constitutional rights, the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle

of social justice, the principle of subsidiarity, as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences (cf. K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 284 and the subsequent pages).

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

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

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

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

The Constitutional Tribunal states that Poland’s membership in the European Union is linked with the complex political and economic transformations which have occurred in the last two decades. The accession to the European Union creates unique possibilities, in our history, of carrying out modernisation projects in the conditions of stability arising from the membership in the community of values and traditions, in which the Polish national identity is rooted.

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

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

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

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

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

In its jurisprudence, the Constitutional Tribunal has, on numerous occasions, made reference to the provisions of the Preamble, in particular when reviewing the conformity of specific provisions to the provisions of the Preamble, within the scope of the principles that arise from the Preamble: the sovereignty of the Polish Nation, cooperation between the public powers, social dialogue, subsidiarity as well

as diligence and efficiency in the work of public bodies (cf. the judgments of the Constitutional Tribunal of: 11 May 2005, ref. no. K 18/04; 18 July 2006, ref. no. U 5/04, OTK ZU No. 7/A/2006, item 80; 3 November 2006, ref. no. K 31/06, OTK ZU No. 10/A/2006, item 147; 12 March 2007, ref. no. K 54/05, OTK ZU No. 3/A/2007, item 25; 16 December 2009, ref. no. Kp 5/08, OTK ZU No. 11/A/2009, item 170; also cf.: “Preambuła Konstytucji Rzeczypospolitej Polskiej”, [in:] *Studia i Materiały Trybunału Konstytucyjnego*, Vol. 32).

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

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

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

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

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

The provisions of the Preamble to the Constitution are also, at the same time, a premiss of formulating the principle of favourable predisposition towards the process of European integration and the cooperation between States. From that perspective,

the interpretation of constitutional provisions concerning the membership in the EU should be carried out.

Adjudicating with regard to the application requires taking into account both the principle of protection of the state's sovereignty in the process of European integration and the principle of favourable predisposition towards the process of European integration and the cooperation between States (see the statement of reasons for the judgment dated 27 May 2003, ref. no. K 11/03). From the point of view of that principle, reconstructing a higher-level norm, in the light of which the assessment of constitutionality is carried out, one should not only refer to the text of the Constitution, but also – to the extent the said text refers to the terms, concepts and principles present in the EU law – refer to those meanings (see the statement of reasons for the judgment dated 28 January 2003, ref. no. K 2/02, OTK ZU No. 1/A/2003, item 4). However, on no account may an interpretation which favours the EU law lead to “the results which are contrary to the explicit wording of constitutional norms and are impossible to reconcile with the minimum of the guarantee functions fulfilled by the Constitution” (the statement of reasons for the judgment in the case K 18/04).

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

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

The basis of full axiological compatibility comprises identical axiological inspiration of the Union and the Republic of Poland, confirmed in the Preamble to the Treaty on European Union and the Preamble to the Constitution, identical focus on the observance of the principles of freedom and democracy, human rights and fundamental freedoms, as well as social rights, and also the efforts to enhance the democratic character of institutions and the effectiveness of their activities. Part of the EU law is constituted by fundamental rights, as general legal provisions, guaranteed

in the European Convention for the Protection of Human Rights and Fundamental Freedoms, and which are also reflected in the Constitution. Both Article 3 of the Treaty on European Union and Article 2 of the Constitution show equivalent pre-occupation with social justice. The Constitution explicitly states in Article 1 that the Republic of Poland is “the common good of all its citizens”.

As regards the allocation of competences between the Union and the Member States, the most significant, from the point of view of the Treaty of Lisbon, is the statement in Article 3(6) of the Treaty on European Union that the Union “shall pursue its objectives by appropriate means commensurate with the competences which are conferred upon it in the Treaties” and competences “not conferred upon the Union in the Treaties remain with the Member States” (Article 4(1) of the Treaty on European Union). Therefore, the principle of conferral, in its essence, constitutes the confirmation of the sovereignty of the Member States in relation to the Union, which may not act outside the competences conferred upon it and thus, in its activities, enhances the sovereignty of the Member States, since its aim is to promote the well-being of its peoples. Pursuant to Article 4(2) of the Treaty on European Union, the Union respects the equality of Member States before the Treaties as well as “their national identities, inherent in their fundamental structures, political and constitutional”; it respects “their essential State functions, including ensuring the territorial integrity of the State, maintaining law and order and safeguarding national security. In particular, national security remains the sole responsibility of each Member State”. However, the Member States “shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives” (Article 4(3), third subparagraph, the Treaty on European Union). Moreover, Article 2(5) of the Treaty on the Functioning of the European Union indicates that when the Union carries out actions to support, coordinate, or supplement the actions of the Member States, it does so “without thereby superseding their competence in these areas”. Also, it should be stressed that the Protocol on the exercise of shared competence stipulates that when the Union has taken action in a certain area, “the scope of this exercise of competence only covers those elements governed by the Union act in question and therefore does not cover the whole area”.

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

A vital characteristic of the culture of European integration is mutual loyalty between the Member States and the Union, which they cherish. European integration proves its value, providing balance between modernity, which is indispensable

in the contemporary world, and the preservation of national traditions based on supranational cultural community.

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

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

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

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

In Poland, the Treaty of Accession passed the test of constitutionality (see the judgment K 18/04). The constitutional review conducted on the basis of the present application concerns the Treaty of Lisbon, which *inter alia* changes the mechanism for enacting EU law, both EU primary law and EU secondary legislation. In that situation, a question arises whether the existing national guarantee mechanisms are sufficiently efficient and effective in order to provide desirable balance, both as to the principle of sovereignty itself, and as to the guarantee of Poland's (its authorities')

impact on the content of draft EU law under the new rules. This requires answering the following question: does the principle of sovereignty allow for conferral of legislative competences as regards its scope, object and manner, as it has been done in the Treaty of Lisbon.

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

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

The Constitutional Tribunal maintains the view presented in the previous jurisprudence and, in particular, in the statement of reasons for the judgment by the Constitutional Tribunal in the case K 18/04, that the legal consequence of Article 9 of the Constitution is the assumption that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national legislator, the regulations (provisions) originating outside the national (Polish) system of legislative bodies also apply. The constitution-maker has decided that the system of law which is binding in the territory of the Republic of Poland will have a multi-faceted character, and will encompass, apart from legal acts constituted by Polish legislative bodies, acts of international and Community law (cf. E. Łętowska, „Multicentryczność” systemu prawa i wykładnia jej przyjazna, [in:] *Rozprawy prawnicze* L. Ogiegło, W. Popiołek, M. Szpunar (eds.), Kraków 2005).

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

It is the legislator’s task to indicate – within constitutional limits – the principles, in accordance with which the Polish government will determine its stance on European matters, in cooperation with the Sejm and the Senate. The Constitutional Tribunal maintains the view expressed in the statement of reasons for the judgment of 12 January 2005, with regard to European matters, it is crucial that “the Polish

stance, whenever possible, should be a result of cooperation between the legislative powers”, which entails that “the prerogatives of the constitutional organs constituting the legislative power should be properly adjusted”.

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

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

Consequently, as the Constitutional Tribunal has stated, in particular, in the judgment in the case K 18/04, in the territory of Poland, subsystems of legal regulations, coming from different legislative centres, coexist. They should coexist in accordance with the principle of mutually friendly interpretation and cooperative coexistence. This circumstance sheds different light on the potential clash of norms and the primacy of one of the indicated subsystems. The assumption about the multi-faceted structure of the binding legal system in Poland has a general character. Due to the regulations contained in Article 9, Article 87(1) and Articles 90 to 91, the Constitution recognises the multi-faceted structure of the binding regulations in the territory of the Republic of Poland, and provides for a special procedure for its introduction. The said procedure resembles the procedure for amending the Constitution.

The views of the Constitutional Tribunal, presented in the judgment in the case K 18/04, have remained valid, regardless of the changes that have occurred in the primary EU law, due to the validity of the higher-level norms for constitutional review. Pursuant to the predictions of the representatives of the doctrine, the said judgment has considerable impact on subsequent jurisprudence of the Constitutional Tribunal” (as in S. Biernat, commentary on the judgment of the Constitutional Tribunal of 11.05.2005 [conformity of the Treaty of Accession to the Constitution of the Republic of Poland] K 18/04, *Kwartalnik Prawa Publicznego* No. 4/2005, p. 205), primarily due to “the explicit wording of Article 8 and its place in the Constitution”,

and also due to the fact that emphasis on the primacy of the Constitution may not endanger “the uniform binding force and application of the EU law, and harmonious performance of duties by Poland as a Member State” (S. Biernat, *ibidem*).

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

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

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

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

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

Also, it is not possible to understand the conferral of competences in such a way that would entail allowing a possibility of determining any competences that may be presumed to be conferred. In its jurisprudence, the Constitutional Tribunal has stressed a number of times that it is impossible in a democratic state ruled by law to create presumed competences. This also refers to the relations within the European Union, which not being a state, uses the law, and therefore must meet relevant standards in that respect. The conferral of competences may not result in gradual deprivation of the state of its sovereignty, due to allowing the possibility of conferring

the competences “in relation to certain matters”. As an exception to the principle of independence and sovereignty (cf. L. Garlicki, *op. cit.*, p. 55 and the subsequent pages), the conferral of competences may not be interpreted in a broad sense.

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

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

As it has been stated in the statement of reasons for the judgment in the case K 18/04, guaranteed in Article 91(2) of the Constitution, precedence of agreements on conferral of competences “in relation to certain matters” over the provisions of statutes if such statutes cannot be reconciled with such agreements, does not lead to recognising analogical precedence of those agreements over the provisions of the Constitution. Thus, the Constitution remains – due to its unique status – “the supreme law of the Republic of Poland” with regard to all international agreements which are binding for the Republic of Poland. This also concerns ratified international agreements about conferral of competences “in relation to certain matters”. Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as to the binding force and application in the territory of the Republic of Poland.

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

Needless to say, the system of the European Union has a dynamic character, which may lead to changes in the rules of its functioning. However, this does not mean that the conferral of competences provided for in the Constitution implies unconditional acceptance of the future systemic changes and, in particular, that may be understood as the premiss of adjustment of Article 90(1) of the Constitution to those changes, by

means of interpretation which assumes giving up the restriction consisting in allowing the conferral of competences only “in relation to certain matters”.

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

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

In the statement of reasons for the judgment in the case K 18/04, the Constitutional Tribunal has pointed out that, by approving the binding Constitution, the Nation itself decided that it agrees to the possibility of binding the Republic of Poland with the law enacted by an international organisation or international institution, i.e. with the law other than the treaty law. This is carried out within the limits provided for in ratified international agreements. Moreover, the Nation also granted

its consent, in the said referendum, to the fact that the said law would be directly binding in the territory of the Republic of Poland, taking precedence over statutes in the event of a clash of laws. The consent to bind the Republic of Poland with the law enacted in accordance with the rules specified in the primary law has been expressed in the Treaty of Accession, accepted by way of a nationwide referendum; and the constitutionality of the Treaty of Accession was the subject of assessment carried out by the Constitutional Tribunal in the case K 18/04.

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

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

The Constitutional Tribunal shares the view, expressed in the doctrine that accession to an international organisation entails conferring competences for the exercise of power necessary to carry out the activities of the organisation, by relevant national bodies, on the bodies of the organisation (cf. C. Mik, “Przekazanie kompetencji przez Rzeczpospolitą Polska na rzecz Unii Europejskiej i jego następstwa prawne” (commentary on Article 90(1) of the Constitution), [in:] *Konstytucja Rzeczypospolitej Polskiej z 1997 r. a członkostwo Polski w Unii Europejskiej*, C. Mik (ed.), Toruń 1999, p. 145). At the same time the stance of the Constitutional Tribunal, formulated in the statement of reasons of the judgment in the case K 18/04, remains relevant: “the Polish legislator should make a decision either about amending the Constitution or

amending the Community regulations, or – ultimately – about seceding from the European Union”.

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

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

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

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

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

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

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

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

The Constitutional Tribunal points out that, already after the applications had been submitted in this case, there was a significant change in the legal system. It involved the enactment of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union (Journal of Laws – Dz. U. No. 213, item 1395; hereinafter: the so-called Cooperation Act). The Act shall enter into force 3 months after its publication. The said Act repeals the Act of 11 March 2004,

with the identical title (Journal of Laws – Dz. U. No. 52, item 515, amended). The Cooperation Act is not the subject of review by the Constitutional Tribunal. However, the tribunal takes it into account as an element of the legal order which will be binding in a few weeks' time from the date of adjudication in this case. Its enactment and subsequent entrance into force entail that the allegations of the applicants, concerning the lack of a treaty-related regulation, will cease to be up-to-date. After its entrance into force, the Cooperation Act will enjoy the presumption of conformity to the Constitution. Obviously, this does not rule out the possibility of subjecting its provisions to constitutional review.

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

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

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

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

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

3.1. The matters related to the assessment of constitutionality of the Treaty of Lisbon have been covered in the judgments of the constitutional courts of the Czech Republic, Germany and Hungary, as well as in the decision of the Constitutional Council of the French Republic and the decision of the Constitutional Court

of Austria (cf. *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, K. Zaradkiewicz (ed.), Warszawa 2010).

A common characteristic of those adjudications is the emphasis on the openness of the constitutional order with regard to European integration, and the focus on the significance of constitutional and systemic identity – and thus sovereignty – of the Member States, the respect for which excludes the possibility of any presumed amendment to a national constitution and, in particular, as regards the rules of conferral of competences which arise from a given constitution. On the basis of those Treaty provisions which regard the Union as an international organisation, and not as a federal state, they stress the significance of the principle of conferral, and the principle of subsidiarity; they refer to granting the Parliaments of the Member States the final word, the absence of which hinders the EU activities; and moreover, they make the effectiveness of the Union conditional on internal constitutional procedures of its Member States. European constitutional courts confirm the significance of the principle of sovereignty reflected in the provisions of the state's constitution, due to which the assessment of the Treaty of Lisbon is carried out in the regard indicated by the applicants.

3.2. It is best reflected by the Decision of the Constitutional Council of the French Republic dated 20 December 2007, preceding the ratification of the Treaty, which made the possibility of ratification contingent – due to the formulation of the European clause in the Constitution of the French Republic – upon the previous amendment to the Constitution. At the same time, the Constitutional Council points to the numerous Treaty provisions repeating the solutions contained in the Constitution for Europe, rejected in a referendum; however, it does not indicate that the inclusion of those solutions in the Treaty of Lisbon is inadmissible. The Constitutional Council indicates in the motives for its decision that the solutions provided for in the Treaty may “not suffice to preclude any transfers of powers authorised by the Treaties from assuming a dimension or being implemented in a manner such as to adversely affect the fundamental conditions of the exercise of national sovereignty” (thesis 16). The “powers inherent in the exercising of national sovereignty” in particular include, according to the Constitutional Council, competences as regards the fight against terrorism and related activities, the fight against trafficking in human beings, as well as judicial cooperation on civil and criminal matters, which are connected with the establishment of the office of European Public Prosecutor (theses 18 and 19). In the view of the Constitutional Council, what is inconsistent with the French Constitution of that day is “any provision of the Treaty which, in a matter inherent to the exercising of national sovereignty already coming under the jurisdiction of the Union or the Community, modifies rules applicable to decision taking, either by substituting a qualified majority for a unanimous decision of the Council, thus depriving France of any power to oppose a decision, or by conferring decision-taking power on the European Parliament, which is not an emanation of national sovereignty, or by

depriving France of any power of acting on its own initiative” (thesis 20). Interpreting the constitutional European clause in the wording which was binding at the time of adjudicating, and in particular Article 88-1 (“The Republic shall participate in the European Communities and in the European Union constituted by States which have freely chosen by virtue of the treaties which established them to exercise some of their powers in common”), the Constitutional Council states that the clause confirms “the place of the Constitution at the summit of the domestic legal order”, and at the same time it enables “France to participate in the creation and development of a permanent European organisation vested with a separate legal personality and decision-taking powers by reason of the transfer of powers agreed to by the Member States”.

3.3. Also, in the judgment of the Federal Constitutional Court of Germany of 30 June 2009, the issue of “constitutional identity” constitutes an essential reason for recognising that the European Union, being “a union of sovereign states under the Treaties”, may not lead to the situation where there will be not enough room for the political debate in the Member States, which in reference to amendments of the Treaties constituting the Union does not have the binding force of a revised treaty, but pursuant to other legal regulations (the so-called bridging clause) which are not subject to ratification; this means that the federal government and legislative bodies bear special “responsibility for integration”, which is generally manifested in the form of expressing consent by relevant statute. Therefore, there is no possibility of assuming that the membership in the European Union, for its effectiveness, requires allowing for almost automatic acceptance of conferral of competences needed by the Union by way of simple exercise of the Treaty. In the light of the said judgment, constitutionally accepted accession to that type of organisation does not mean that it may grant itself the necessary competences falling within the remit of the Member States and gradually undermine the significance of their sovereignty. What is worth noting at this point is the fact that the Federal Constitutional Court redefined its own role as a guard of “constitutional identity”, in the light of the Treaty of Lisbon; courts with a constitutional function may not be deprived of the responsibility “for the boundaries of their constitutional empowerment for integration and for the safeguarding of the inviolable constitutional identity” (thesis 336). In the opinion of the Federal Constitutional Court, its competences arise from the sovereignty of Germany as a Member State of the Union. Due to the fact, the Court declares the inapplicability of an EU legal instrument in Germany, in the clear absence of a constitutive order to apply the law (thesis 339). The German law is the source of the principle of primacy of the EU law over the German law. The Federal Constitutional Court also stated in that judgment that failure to meet the requirements provided for in the German law concerning the participation of the houses of Parliament in the course of determining the stance of Germany in the European Council and the Council of the European Union, in the process of transferring “sovereign powers” would be an infringement on “constitutional identity” of the state, which indeed is not undermined by the constitutional consent to the membership in the EU. The

Federal Constitutional Court stated that the principle of primacy of the EU law solely referred to the primacy of its application in relation to the German law, and did not mean the obligation to repeal that law if it endangered the effectiveness of the EU law. The Court indicated that the constitutional court of a Member State might declare the non-conformity of an EU legal instrument to its own constitution, retaining the “right to the final word”, but at the same time agreeing to bear “consequences in international relations” (thesis 340). The Court indicated that the infringement on Germany’s constitutional identity was inadmissible, since the constitution-maker had not granted the right to decide about sovereignty to the representatives and bodies of the Nation. It is the Federal Constitutional Court that should ensure the respect for that restriction, being one of the unchanging provisions in the Basic Law of Germany as a state (theses 234 and 235). Since the Treaty of Lisbon makes reference to the national identity of the Member States, then, according to the Federal Constitutional Court, the essential areas of democratic formative action comprise: citizenship, the civil and the military monopoly on the use of force, revenue and expenditure including external financing, encroachments on fundamental rights (such as deprivation of liberty in the administration of criminal law), the disposition of language, the shaping of circumstances concerning the family and education, the ordering of the freedom of opinion, press and of association and the dealing with the profession of faith or ideology. The understanding of the elements of identity arises from the context of historical and cultural experiences (thesis 249).

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

3.4. The judgment of the Constitutional Court of the Czech Republic of 26 November 2008 refers to the previous German constitutional jurisprudence, by indicating in the reasoning that, after the entry into force of the Treaty of Lisbon, the Member States still remain “the masters of the treaties”. This view reflects the importance the Court assigns to the constitutional order of the Czech Republic, which remains the criterion for the assessment of admissibility of conferral of competences and determines the scope of such conferral. The Constitutional Court stressed that

it would be the obligation of the Czech legislator to adopt the legal provisions which would correspond with the requirements of the constitutional order, which the Treaty of Lisbon referred to. It also drew attention to the fact that the said Treaty did not change the concept of European integration, which meant that the Union remained an international organisation, and the Member States retained their constitutional identities, and thus the Czech Constitution remained the supreme law of the state. Emphasising the significance of the state's sovereignty, the Court pointed out that it played the role of the supreme body for protection of constitutionality of the Czech law, also in the context of possible exploitation of competence by the EU bodies and the EU law. The EU law which is inconsistent with the essence of constitutionality and of a democratic state ruled by law, both understood substantively, could not have a binding character in the Czech Republic. In the judgment of 3 November 2009, the Constitutional Court stated that the Treaty of Lisbon and its ratification were not inconsistent with the constitutional order of the Czech Republic.

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

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

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

3.8. The jurisprudence of European constitutional courts concerning the Treaty of Lisbon remains varied in respect of the scope of allegations, which stems from

different constitutional requirements of admissibility as regards challenging the Treaty in the Member States.

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

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

The jurisprudence of European constitutional courts included the view that the provisions of the Treaty of Lisbon were consistent with the national constitutions. At the same time, the focus was also placed on the significance of the constitutions and statutes of the Member States, as regards guaranteeing their sovereignty and national identity, which is clearly reflected in the judgment of the Federal Constitutional Court of Germany (of 30 June 2009). The Court stated that, in the situation where the Treaty of Lisbon was binding, the European Union remained an association of sovereign states, and not a federation. The Member States of the Union, as an international organisation, retain full sovereignty and are the “masters of the treaties”. The limits of permitted development of the Union are set by the circumstances where the Member States would begin to lose their constitutional identity (cf. *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, the Office of the Constitutional Tribunal, Warszawa 2010).

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

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

4.1. General remarks.

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

The applicants state that there is a need for enacting provisions in the Polish law, the lack of which – in his opinion – causes the unconstitutionality of the Treaty of

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

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

Enacting a statute which grants consent to the ratification of an international agreement is an element of the national ratification procedure. Stating the unconstitutionality of the statutory omission or negligence may not be effective, with regard to the consequences of binding the Republic of Poland with that agreement (until the time of its expiry, withdrawal from the agreement or its termination) due to the provisions of the Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969 (Journal of Laws – Dz. U. of 1990 No. 74, item 439), pursuant to which a party may not invoke the provisions of its internal law as justification for its failure to perform a treaty (Article 27).

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

The Treaty of Lisbon contains provisions aimed at strengthening the position of national Parliaments as a basis for strengthening the democratic legitimacy of the Union. This intention has been expressed in Article 12 of the Treaty on European Union, pursuant to which national Parliaments "contribute actively to the good functioning of the Union": (a) through being informed by the institutions of the Union and having draft legislative acts of the Union forwarded to them; (b) by seeing to it that the principle of subsidiarity is respected; (c) by taking part, within the framework of the area of freedom, security and justice, in the evaluation mechanisms for the implementation of the Union policies in that area and through being involved in the political monitoring of Europol and the evaluation of Eurojust's activities;

(d) by taking part in the revision procedures of the Treaties; (e) by being notified of applications for accession to the Union; (f) by taking part in the inter-parliamentary cooperation between national Parliaments and with the European Parliament. It is the Polish Parliament which decides to what extent and for the implementation of which European policies, as well as with what intensity, and what consequences, it will make use of the possibilities provided for in the Treaty of Lisbon.

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

Therefore, the Treaties provide for safeguards against the danger of Poland’s loss of control over the amendments to the primary EU law, which the applicants fear. The Treaties express the principle of making the effectiveness of an amendment contingent upon the stance of a Member State, which takes a different form depending on the type of the revision procedure. It is the task of each Member State to devise national procedures for evaluation of amendments. It should be stressed that Article 90(1) of the Constitution does not allow for conferring any competences of state organs if the requirements set out therein are not met, which means that the allegation of the applicants that the revision procedure of the Treaties is unconstitutional is groundless.

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

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

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

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

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

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

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

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

5. If, two years after the signature of a treaty amending the Treaties, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council”.

4.2.3. The ordinary revision procedure of the Treaties, challenged by the applicants, which requires concluding a revised treaty ratified by all the Member States, resembles the procedure for revising treaties which is specified in former Article 48 of the Treaty on European Union prior to the Treaty of Lisbon. The Treaty of Lisbon introduced three additional requirements which are aimed at strengthening the role of national Parliaments and the European Parliament, as well as are based on the experience with previous revision procedures of the Treaties. Firstly, the national Parliaments of the Member States must be notified about proposals for the amendments to the Treaties, submitted by the governments of the Member States, the European

Parliament or the European Commission. Secondly, provided that the European Council decides in favour of examining the proposed amendments to the Treaties, the President of the European Council convenes a Convention preceding a conference of representatives of the governments of the Member States which, by way of consensus, adopts recommendations to the conference. The European Council, upon the consent of the European Parliament, may however make a decision not to convene a Convention if this is not justified by the extent of the proposed amendments. In such a case, the European Council shall define the terms of reference for a conference of representatives of the governments of the Member States. Thirdly, a procedure for monitoring progress during the ratification of a revised treaty has been introduced – if, after the lapse of two years, four fifths of the Member States have ratified it and one or more Member States have encountered difficulties in proceeding with ratification, the matter shall be referred to the European Council.

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

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

4.2.5. The group of Senators indicates, as the subject of constitutional review, Article 48(6) and (7) of the Treaty on European Union, concerning the simplified

revision procedures of the Treaties which constitute the basis of the European Union. The provisions of the Treaty on European Union which have been challenged by the applicants read as follows:

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

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

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

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

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

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

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

4.2.6. In the opinion of the group of Senators, the lack of participation of competent constitutional state organs as a preliminary requirement for an amendment to the primary EU law is inconsistent with the principle of primacy of the Constitution. The applicants pointed out that, although Article 48(6) of the Treaty on European Union provides for the possibility that decisions of the institutions of the European Union do not enter into force until they are approved by the Member States in accordance with their respective constitutional requirements, but this refers solely to institutional

changes in the monetary area. As higher-level norms for the constitutional review, the group of Senators indicates Article 8(1) and Article 90(1) of the Constitution.

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

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

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

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

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

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

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

Union. The indicated requirement pertains to all decisions adopted pursuant to Article 48(6) of the Treaty on European Union, whereas institutional changes in the monetary area are additionally consulted with the European Central Bank.

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

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

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

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

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

for determining the stance of the Parliament on matters “conferred” pursuant to Article 48 of the Treaty on European Union, which contains measures safeguarding sovereign rights of the Republic of Poland.

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

Article 48(7), third subparagraph, of the Treaty on European Union stipulates that any initiative taken by the European Council on the basis of the first or the second subparagraph is notified to the national Parliaments. If a national Parliament makes known its opposition within six months of the date of such notification, the decision referred to in the first or the second subparagraph is not adopted. In the absence of opposition, the European Council may adopt the decision.

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

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

It is pointed out in the substantiation of the application by the group of Senators that Article 48 of the Treaty on European Union in conjunction with the indicated provisions of the Treaty on the Functioning of the European Union “does not take into account the primacy of consent of a given Member State with regard to the national public security clause”. This allegation is not justified in the context of the explicit wording of Article 4(2) of the Treaty on European Union, which stipulates

that “national security remains the sole responsibility of each Member State”. The applicants indicate that “only adoption” of the clause indicated by him “eliminates the clash between the post-Treaty institutions and procedures of the European Union and the constitutional legal order which is binding in Poland”. But, in fact, the indicated clause has already been adopted in the Treaty on European Union.

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

4.2.12. In the applicants’ view, Article 352 of the Treaty on the Functioning of the European Union may serve, almost within the entire scope of application of the primary law, as a basis of competence that allows for activity at European level, which raises reservations as to “the prohibition against conferring *carte blanche* authorisation or competence to determine competences” and allows for introducing significant amendments to the treaty base of the European Union, “without the necessity of constitutive participation of legislative organs, apart from the participation of the governments of the Member States”, which means “exceeding the constitutional requirements of conferring the sovereign rights of the Polish state on the European Union”.

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

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

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

adopted in accordance with Article 352 of the Treaty on the Functioning of the European Union.

Challenged by the applicants, Article 352(1) and (2) is, to a large extent, equivalent to Article 308 of the Treaty establishing the European Community (the EC Treaty), which used to be binding prior to the entrance into force of the Treaty of Lisbon. The indicated provision has already been reviewed by the Tribunal in the judgment in the case K 18/04 (point 18.6.). The Constitutional Tribunal, *inter alia*, stressed the fundamental significance of the requirement of unanimous action by the Council. This means that actions provided for in Article 308 of the EC Treaty may not be taken without obtaining the consent of any of the Member States, including the consent of the Republic of Poland. The Constitutional Tribunal indicates that in comparison with former Article 308 of the EC Treaty, Article 352 of the Treaty on the Functioning of the European Union, challenged by the applicants, may find a wider application, namely, “within the framework of the policies defined in the Treaties”. There are also procedural differences. Instead of the Council’s consultation with the European Parliament, the requirement of the Parliament’s consent is introduced. Moreover, Article 352 of the Treaty on the Functioning of the European Union contains additional paragraphs 2 to 4, which limit and complement the scope of application of the flexibility clause. Pursuant to Article 352(2) the Treaty on the Functioning of the European Union within the framework of the procedure for the review of the application of the principle of subsidiarity, specified in Article 5(3) of the Treaty on European Union, the Commission draws the attention of national Parliaments to the proposals which are based on Article 352 of the Treaty on the Functioning of the European Union. In this regard, the national Parliaments exercise their powers in accordance with the Protocol No. 2 on the application of the principles of subsidiarity and proportionality, and in particular Article 7 thereof. Moreover, the measures adopted on the basis of Article 352 of the Treaty on the Functioning of the European Union may not entail harmonisation of Member States’ laws or regulations in cases where the Treaties exclude such harmonisation (Article 352(3) of the Treaty on the Functioning of the European Union). Neither can the indicated provision serve as a basis for attaining objectives pertaining to the common foreign and security policy and any acts adopted pursuant to this Article shall respect the limits set out in Article 40, second subparagraph, of the Treaty on European Union, which concerns the scope of the implementation of the policies listed in Articles 3 to 6 of the Treaty on the Functioning of the European Union (Article 352(4) of the Treaty on the Functioning of the European Union). The Declaration No. 41, annexed to the Treaty of Lisbon, additionally specifies that the reference in Article 352(1) of the Treaty on the Functioning of the European Union to the objectives of the Union refers to the objectives as set out in Article 3(2), (3) and (5) of the Treaty on European Union, and therefore legislative acts may not be adopted in the area of the common foreign and security policy.

4.2.13. The Constitutional Tribunal indicates that Article 352 of the Treaty on the Functioning of the European Union is subsidiary to the other provisions of the Treaties which set out the competences of the Union. Its application as a legal basis of a measure (a legal act) is justified only when no other provision of the Treaty grants the EU institutions the competence which is necessary for the adoption of the said measure (cf. the judgment in the ECJ Case 45/86 *Commission v Council* [1987] ECR 1493). The indicated provision is aimed at supplementing the lack of competences to take action which have been granted to the EU institutions explicitly or implicitly in particular provisions of the Treaties, in the situation where this proves indispensable for the Union to fulfil its tasks and attain one of the objectives set out in the Treaties. Article 352 of the Treaty on the Functioning of the European Union, being part of the institutional order based on the principle of conferred (granted) competences, may not constitute the basis of extending the scope of EU competences outside the general framework which arises from the entirety of the Treaties, in particular specifying the tasks and the actions of the Union. The provision may not serve as a basis for enacting provisions, the result of which would be an amendment to the Treaties bypassing the procedure provided for that purpose. Such a stance has been confirmed in the Declaration No. 42, annexed to the Treaty of Lisbon. A similar view had already been expressed by the Constitutional Tribunal (cf. the Opinion 2/94 on Accession by the Community to the European Convention for the Protection of Human Rights and Fundamental Freedoms [1996] ECR I1759).

In the view of the Constitutional Tribunal, the allegations of the applicants concerning conferral of competences to create additional competences on the basis of Article 352(1) and (2) of the Treaty on the Functioning of the European Union are unjustified. Pursuant to Article 4(1) and Article 5(2) of the Treaty on European Union, the Union operates within the limits of the competences conferred upon (granted to) the Union by the Member States in the Treaties, whereas any competences which have not been conferred on the Union remain the responsibility of the Member States. Article 352 of the Treaty on the Functioning of European Union formulates the requirements for its application: an action of the Union is necessary (indispensable) to attain one of the objectives of the Union, falls within the scope of the policies set out in the Treaties (with the exclusion of the common foreign and security policy), and the Treaties have not provided for authorisation to act in the way required in that respect. The evaluation whether the indicated premisses have been satisfied is the task of the EU courts (cf. the aforementioned Opinion 2/94). Also, it is groundless to allege that the indicated procedure overlooks constitutional organs of the state. Pursuant to Article 352 of the Treaty on the Functioning of the European Union, the Council acts unanimously, i.e. upon consent of the representatives of all the Member States. Additional guarantees for the national Parliaments are provided for in the Protocol No. 2 on the application of the principles of subsidiarity and proportionality. Pursuant to Article 7(2), in the case where justified opinions on the non-conformity of a draft legislative act to the principle of subsidiarity constitute at

least one third of the votes granted to the national Parliaments, the draft of the legal act is subject to another analysis.

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

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

4.2.14. Article 90(1) of the Constitution, indicated as a higher-level norm for review, concerns concluding a Treaty of Accession or revised treaties and does not regulate the issues of replacing the requirement of unanimity with the requirement of a qualified majority as well as replacing a special legislative procedure with an ordinary legislative procedure, which may have impact on the competences of the organs of the state. Also, the Constitution does not regulate the manner of authorising a representative in the European Council to act within the scope of decisions provided for in Article 48(7) of the Treaty on European Union. The lack of constitutional regulation with regard to this issue is not, however, tantamount to the non-conformity to the Constitution of the Treaty mechanism of conferral or modification of the

competences, the enactment of which does not clash with the indicated higher-level norms for constitutional review. Only the comparison of the decision of the European Council with the scope of competences granted by the Treaty may constitute a premiss of evaluation of their conformity to the Constitution in its present form. Depending on that evaluation, it would be possible to introduce an appropriate amendment to the Constitution, the modification of the scope of conferral of the competences arising from that decision, a possible change of the decision or taking the decision about seceding from the European Union.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

After determining the meaning of Article 90 of the Constitution, it is essential to interpret the conferral of “competence of organs of State authority”. In the light of the

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

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

Firstly, a question arises as to the meaning of the wording "by virtue of international agreements". In the literature on the subject, there is a view that, under the provisions of the Constitution, conferral of competences may occur not only in an international agreement itself, but also by means of various legal acts enacted on the basis of the said agreement. This means that a legal act enacted on the basis of an international agreement ratified in accordance with Article 90 of the Constitution, and conferring the competences of organs of the state, needs to be neither ratified nor approved, in any other way, in accordance with the procedure specified in that provision, provided a given international agreement, with adequate precision, specifies particular competences which may be conferred by a legal act enacted on its basis. Therefore, an international agreement ratified in accordance with Article 90 of the Constitution may provide for the conferral of particular competences, specified in

advance, conferred by a legal act issued on the basis of the agreement, without any need to resort again to the procedure specified in the said provision.

Secondly, another question arises as to whether any changes to the agreement ratified in accordance with Article 90 of the Constitution require applying that procedure again. If, pursuant to that provision, the object of conferral is to be particular competence, then the scope of application of the provision must encompass not only the conferral of competences as such, but also any significant amendments to the regulations concerning the competence conferred earlier. Significant amendments should include, in particular, amendments to the manner of exercising those competences (e.g. amendments to the provisions regarding the majority required for the exercise of conferred competences). This means that an amendment to the provisions of an international agreement (ratified in accordance with Article 90 of the Constitution) which regard essential elements of the conferred competences requires concluding a new international agreement, subject to ratification in accordance with Article 90 of the Constitution. It is also admissible to amend the international agreement under analysis by virtue of another legal act which is subject to approval in accordance with the procedure specified in the said constitutional provision. By way of exception, in the light of the above arguments, an international agreement ratified pursuant to Article 90 of the Constitution may authorise the introduction of amendments, on the basis of that agreement, by means of legal acts that are not subject to approval in accordance with the procedure set out in Article 90 of the Constitution, provided that the content of the admissible amendments has been sufficiently specified in the said agreement.

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

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

By contrast in point 4.2.9., justifying the view that Article 48(6), third subparagraph, of the EU Treaty is consistent with the Constitution, the Tribunal states that “any conferral of competences in that respect is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision ‘shall not increase the competences conferred on the Union in the Treaties’. Therefore, there will be no conferral of ‘competence of organs of State authority in relation to certain matters’. Thus, the point is not the conferral of competences”. This suggests that Article 90 of the Constitution applies to the cases of conferral of competences,

whereas other amendments to the Treaties constituting the basis of the functioning of the European Union did not fall within the scope of application of the constitutional provision under consideration (which appears to contradict the view cited above).

There is also inconsistency in point 4.2.7., where the Constitutional Tribunal states that: “In the light of the Polish law, for the legal acts referred to in Article 48(6) of the Treaty on European Union, Article 12(2a) of the Act (...) on International Agreements (...), amended by the Cooperation Act, requires ratification. An international agreement is submitted to the President of the Republic of Poland for ratification after the consent referred to in Article 89(1) and Article 90 of the Constitution, or after notification of the Sejm of the Republic of Poland pursuant to Article 89(2) of the Constitution (Article 15(5) in conjunction with Article 15(3) of the Act on International Agreements)”. In this statement, the Tribunal permits different procedures for ratification of amendments to the Treaties constituting the basis of the functioning of the European Union, which seems to contradict the above-mentioned firm statement that amendments to those Treaties require the application of Article 90 of the Constitution.

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

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

3.2. Article 48(7) of the EU Treaty regulates one of the simplified revision procedures of the Treaties constituting the basis of the functioning of the European Union. I agree with the view presented in the judgment that the above provision is consistent with the Constitution. However, in the case under examination, it is vital to correctly qualify the content of that provision, from the point of view of Article 90 of the Constitution. In my view, the said Treaty provision does not constitute the basis for conferral of competences, but it authorises amendments to the essential elements of

the procedure for the exercise of competences already conferred. The said provision precisely determines the content of admissible amendments which may be introduced on the basis thereof. For the above reasons, legal acts issued on its basis constitute an example of conferral of competences by virtue of an international agreement, ratified pursuant to Article 90 of the Constitution. In my opinion, in the light of the views presented in the doctrine, in the context of the binding Constitution, those legal acts require neither prior consent pursuant to Article 90 of the Constitution nor approval in accordance with the procedure regulated in that constitutional provision.

At the same time, the Tribunal considers the issue of potential clash between an amendment to the Treaties adopted pursuant to Article 48(7) of the EU Treaty and the Constitution, and possible ways of eliminating such a clash (relevant amendments to the Constitution, modification of the scope of conferral of competences arising from that decision, alternatively working out a change of the said decision, or a decision to secede from the Union. Such an approach raises reservations, as Article 48(7) of the EU Treaty narrowly and unambiguously specifies the content of amendments which may be introduced on its basis. Such amendments, as long as they fall within the scope specified in Article 48(7) of the EU Treaty, should be regarded as consistent with the Constitution (there is no need, in the statement of reasons, to consider the question of potential clash between the content of those amendments and the content of constitutional norms).

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

It is worth noting that in the judgment of 30 June 2009, ref. no. 2 BvE 2/08, 2 BvE 5/08, 2 BvR 1010/08, 2 BvR 1022/08, 2 BvR 1259/08, 2 BvR 182/09, the Federal Constitutional Court of Germany expressed its reservations with regard to the flexibility clause, drawing attention to the fact that the Treaty of Lisbon considerably extended the scope of application of that clause (former Article 308 of the EC Treaty) to comprise almost entire realm of the primary EU law, with the exclusion of common foreign and security policy (thesis 327). In the view of the Federal Constitutional

Court of Germany, the flexibility clause considerably relaxes the principle of conferral (thesis 326) and makes it possible to substantially amend the treaty foundations of the European Union without the constitutive participation of legislative bodies of the Member States (thesis 328).

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

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

JUDGMENT of 16 November 2011 – Ref. No. SK 45/09

[Council Regulation (EC) No 44/2000 – the Constitutionality of EU Secondary Legislation]

In the Name of the Republic of Poland**The Constitutional Tribunal, in a bench composed of:**

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat – Judge Rapporteur
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 16 November 2011, in the presence of the complainant and the Public Prosecutor-General, a constitutional complaint submitted by Ms A. S., in which she requested the Tribunal to examine the conformity of:

Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments³ in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution of the Republic of Poland,

³ Whenever the term ‘judgment’ is used here in the context of the Council Regulation (EC) No 44/2000, it should be understood pursuant to Article 32 of the said Regulation, which stipulates the following: “For the purposes of this Regulation, ‘judgment’ means any judgment given by a court or tribunal of a Member State, whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

adjudicates as follows:

Article 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) is consistent with Article 45(1) and with Article 32(1) in conjunction with Article 45(1) of the Constitution of the Republic of Poland.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) and Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), to discontinue the proceedings as to the remainder.

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. The admissibility of the constitutional complaint.

1.1. What constitutes the subject of the review in the present case is a number of provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended; hereinafter: the Council Regulation (EC) No 44/2001), i.e. an act of the secondary legislation of the European Union (formerly: the European Community). Never before has the Constitutional Tribunal examined a case where it had to determine the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution. Hitherto, the Tribunal has only examined the conformity of the Treaties to the Constitution, which constitute the EU primary law (cf. the judgment of 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/ 2005 item 49, the judgment of 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108) as well as the statutes implementing the EU secondary legislation (cf. the judgment of 27 April 2005, ref. no. P 1/05, OTK ZU No. 4/A/2005 item 42, the judgment of 5 October 2010, ref. no. SK 26/08, OTK ZU No. 8/A/2010, item 73).

Bearing in mind the special character of the normative act which has been challenged in the present case as regards its constitutionality, a prerequisite for examining the constitutional complaint as to its substance is examination whether there are

no negative premisses which would cause the discontinuation of proceedings. The Constitutional Tribunal has the power to carry out such a review at any stage of proceedings.

Therefore, it should be considered whether legal acts enacted by the EU institutions may constitute the subject of the review, in the course of review proceedings commenced by way of constitutional complaint, as set out in Article 79(1) of the Constitution.

1.2. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be submitted to the Tribunal for it to determine “the conformity to the Constitution of a statute or another normative act”, upon which basis a court or organ of public administration has made a final decision on a complainant’s freedoms or rights or on his/her obligations specified in the Constitution. What is of fundamental importance in the present case is to determine whether an EU regulation is “another normative act” within the meaning of Article 79(1) of the Constitution, and hence whether it may constitute the subject of a constitutional complaint.

First of all, this entails determining a relation between Article 188(1)-(3) and Article 79(1) of the Constitution, and establishing whether the subject of constitutional complaints – to which Article 188(5) of the Constitution refers to – may be the legal acts mentioned in Article 188(1)-(3) of the Constitution, or whether this could also be other normative acts. Various views are presented on that issue in the literature on the subject. What is characteristic is that they were presented primarily in the context of the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution by the Constitutional Tribunal (cf. the presentation of various viewpoints of the representatives of the doctrine in that respect, T. Jaroszyński, *Rozporządzenie Unii Europejskiej jak składnik systemu prawa obowiązującego w Polsce*, Warszawa 2011, pp. 337-338, K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, pp. 323-328). Moreover, the said issue refers to the acts of local self-government law and collective labour agreements.

To put it succinctly, in the opinion of one group of authors, the scope of jurisdiction of the Tribunal has exhaustively been specified in Article 188(1)-(3) of the Constitution, which enumerates legal acts that are subject to review by the Tribunal, by mentioning the types of such acts or by indicating them by pointing out their characteristics: “legal provisions issued by central State organs” (where legal provisions mean provisions containing general and abstract norms). Therefore, legal acts which are not mentioned in the indicated provision may not be the subject of review by the Constitutional Tribunal. With reference to the acts of EU secondary legislation, it is noted in the literature on the subject that those legal acts neither have the status of international agreements nor may be classified as provisions issued by central state organs. Consequently, Article 188(1)-(3) of the Constitution determines that the EU secondary legislation does not fall within the scope of the Tribunal’s jurisdiction to conduct a judicial review.

By contrast, the authors belonging to the other group share the view that the provisions of Article 188(1)-(3) of the Constitution do not fully indicate the scope *ratione materiae* of the jurisdiction of the Constitutional Tribunal. In their opinion, Article 188(5) mentions a separate power of the Tribunal, namely the power to adjudicate on constitutional complaints, as referred to in Article 79(1) of the Constitution. The last indicated provision stipulates that “(...) everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act (...)”. In accordance with the unquestionable stance of science of law, a normative act is every legal act which contains norms that are general (addressed to a specified group of addressees) and that set conduct which is, in principle, repetitive (abstract legal act). Such a substantive concept of a normative act has been assumed in the previous jurisprudence of the Constitutional Tribunal. As early as in the ruling of 7 June 1989 (Ref. No. U. 15/88, OTK of 1989, item 10), relying on the views presented in the literature on the subject, the Tribunal stated that: “a normative act is a legal act that establishes legal norms which are general in character (and thus addressed to a certain group of addressees singled out due to a common characteristic shared by them) as well as abstract in character (i.e. they establish certain models of conduct)”. The analysis of the previous jurisprudence of the Tribunal indicates that the scope of normative acts, the challenging of which was regarded as admissible in the course of review proceedings commenced by way of constitutional complaint, is broader than what follows from Article 188(1)-(3) of the Constitution. However, such a view was presented only in exceptional cases. For instance, the Constitutional Tribunal allowed a constitutional complaint which challenged certain provisions of local self-government law to be examined on its merits, but the proceedings did not end with a judgment (see the decision of 6 October 2004, ref. no. SK 42/02, OTK ZU No. 9/A/2004, item 97). Likewise, in the decision of 6 February 2001, ref. no. Ts 139/00 (OTK ZU No. 2/2001, item 40), the Tribunal recognised the possibility of filing a constitutional complaint against the acts of local self-government law, as long as they were normative in character. In the view of the Tribunal, “the scope of provisions which are subject to review (the subject of a constitutional complaint) is set autonomously and exhaustively by Article 79(1) of the Constitution of the Republic of Poland”.

In the present case, the Constitutional Tribunal assumes that the scope *ratione materiae* of normative acts which may be subject to constitutional review, in the course of review proceedings commenced by way of constitutional complaint, has been set out in Article 79(1) of the Constitution, autonomously and independently from Article 188(1)-(3). Indeed, the examination of constitutional complaints constitutes a separate kind of proceedings. The arguments for such a conclusion are threefold.

Firstly, this is indicated by the systematics of the Constitution. Article 188, which regulates the scope of the jurisdiction of the Constitutional Tribunal, stipulates in its point 5 that the Constitutional Tribunal shall adjudicate on constitutional complaints, as specified in Article 79(1). The last-mentioned provision is also referred

to in Article 191(1)(6) of the Constitution, with regard to the subjects that may make application to the Constitutional Tribunal to institute review proceedings. This indicates that, when distinguishing between several types of proceedings before the Constitutional Tribunal, the constitution-maker has rendered proceedings involving the examination of constitutional complaints separately from the other types of proceedings before the Tribunal.

Secondly, Article 188(1)-(3) of the Constitution regulates the powers of the Tribunal within the scope of reviewing the hierarchical conformity of normative acts. It should also be added that the powers in that respect have been divided between the Constitutional Tribunal and administrative courts, which are authorised to adjudicate “on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration” (Article 184 of the Constitution). Thus, the powers to adjudicate on the hierarchical conformity of normative acts have been clearly separated from the powers to adjudicate on constitutional complaints.

Thirdly, the basic function of a constitutional complaint is the protection of constitutional rights and freedoms of the individual. Therefore, it would be unjustified to assume an interpretation of Article 188 of the Constitution which would narrow down the subject of review carried out in the course of review proceedings commenced by way of constitutional complaint, for such an interpretation would not facilitate the effective protection of rights and freedoms of the individual. By contrast, the view that every normative act may be the subject of the Tribunal’s review, as long as it constitutes basis upon which a court or organ of public administration has made a final decision on the individual’s rights or freedoms – is definitely justified in the light of constitutional values.

The Constitutional Tribunal indicates that the situation in the present case is different from the case U 6/08, which ended with the decision of 17 December 2009 (OTK No. 11/A/2009, item 178). In the statement of reasons for that decision, the Tribunal *obiter dicta* expressed the view that the constitutional review of norms of EU secondary legislation was inadmissible. However, the proceedings in that case were instituted by an application submitted by a group of Sejm Deputies, and they concerned an abstract review of norms. In such context, the scope of jurisdiction of the Tribunal is exhaustively specified in Article 188(1)-(3) of the Constitution.

1.3. The subject of a constitutional complaint may be a statute or another normative act. The jurisprudence of the Constitutional Tribunal has hitherto showed the adoption of the so-called substantive concept of a normative act (cf. point 1.2.). The term “normative act” has so far been referred, in the previous jurisprudence of the Tribunal, to the acts which result from the law-making activity of the organs of the Polish state. However, in its judgment of 18 December 2007, ref. no. SK 54/05 (OTK ZU No. 11/A/2007, item 158), the Tribunal adjudicated that a normative act within the meaning of Article 79(1) of the Constitution might also be an international agreement. In the said case, the complainant challenged the constitutionality

of Protocol 4 to the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, signed at Brussels on 16 December 1991.

In the opinion of the Constitutional Tribunal, a normative act within the meaning of Article 79(1) of the Constitution may not only be a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns the acts of EU law, enacted by the institutions of that organisation. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of the individual.

1.4. The legal acts of the EU institutions are varied. The catalogue of the legal acts and the characteristics thereof are specified in Article 288 of the Treaty on the Functioning of the European Union (hereinafter: the TFEU; ex Article 249 of the Treaty establishing the European Community). Due to the subject of the present case, the Constitutional Tribunal considers it indispensable to examine whether an EU regulation has the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

Pursuant to Article 288, second paragraph, of the TFEU: “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States”. Thus, the norms of a regulation are general and abstract in character. The addressees of the norms of a regulation are not only the Member States and the organs of those States, but also individuals (private parties).

The indicated thesis is confirmed by the jurisprudence of the Court of Justice of the European Union. What follows therefrom is that a regulation is “a measure which applies to objectively determined situations and produces legal effects with regard to categories of persons regarded generally and in the abstract” (the judgment of 5 May 1977, in the case 101/76, *Koninklijke Scholten Honig*, ECR 1977, p. 797). Also, the Court of Justice expressed the view that: “A measure does not cease to be a regulation because it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time as long as it established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose” (the judgment of 30 September 1982 in the case 242/81, *SA Roquette Frères*, ECR 1982, p. 3213). In accordance with the established jurisprudence of the Court of Justice, “general application” is a criterion distinguishing a regulation from individual and specific legal acts, in particular decisions indicating the addressee. The essential characteristics of such decisions involve limiting the group of addressees to which they are addressed. Some authors compare an EU regulation to a statute in a national legal order (see D. Lasok, *Zarys prawa Unii Europejskiej*, Toruń 1995, p. 176).

Therefore, the Constitutional Tribunal states that an EU regulation bears the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

1.5. Another prerequisite for a constitutional complaint to be admissible is the fact that its subject must be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. When applying that requirement to EU regulations, it should be stated that they are legal acts which are directly applicable in the legal order of the Member States, and do not require implementation into national law (cf. the judgment of the Court of Justice of 10 October 1973 in the case 34/73, *FLLI Variola SpA*, ECR 1973, p. 981). They may constitute the legal basis of administrative decisions and court rulings in the Member States, including Poland.

The norms of EU regulations may be a source of the rights and obligations of individuals (cf. the judgment of the Court of Justice of 17 September 2002 in the case C-253/00, *Antonio Muñoz y Cia SA*, ECR 2002, p. 7289). When participating in proceedings before national courts, individuals and legal entities may rely on the norms of EU regulations and derive their rights therefrom. The doctrine and jurisprudence of the Court of Justice mention in this regard that the norms of EU law, including regulations, have a direct effect. The Court of Justice stated that the attribute of "direct effect" is assigned to the provisions of regulations which are clear and precise, and do not leave any margin of discretion to the authorities of the Member States (cf. the judgment of the Court of Justice of 24 October 1973 in the case 9/73, *Schlüter*, ECR 1973, p. 1135).

Taking the above into consideration, the Constitutional Tribunal states that EU regulations may contain norms upon which basis a court or organ of public administration has made a final decision on the individual's freedoms or rights or on his/her obligations specified in the Constitution.

At the same time, it should be noted that it is not always easy to determine whether a court or organ of public administration has actually made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution on the basis of EU law. Frequently, courts or the organs of public administration adjudicate on the basis of the Polish law, which has been enacted in order to implement the EU law. This concerns directives, and also – in some cases – regulations. Also, there can be a situation where the legal basis of an individual act of applying the law is a legal norm constructed on the basis of EU and Polish provisions. Determining what legal act constitutes the legal basis of a decision of a court or organ of public administration is essential for determining the subject of review carried out in accordance with Article 79(1) of the Constitution. Dispelling doubts in this regard will depend on, *inter alia*, determining the content of the provisions of EU law and their effects.

It should be stated in the conclusion that EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint. The fact that they are the acts of EU law, also constituting part of the Polish legal order, results in a special character of the review conducted in such a case by the Constitutional Tribunal.

2. The secondary legislation of the European Union as the subject of constitutional review.

2.1. The stance presented in part III point 1.5 above, in accordance with which the norms of EU regulations may be the subject of constitutional complaints, is based on an analysis of the characteristics of the indicated category of the legal acts of EU secondary legislation, in the light of Article 79(1) of the Constitution. The said analysis needs to be supplemented and broadened in the context of the place and role of EU law in the Polish constitutional and legal order.

The Constitutional Tribunal has presented its views in that respect in numerous rulings, and in particular in the rulings concerning the Treaty of Accession (see the judgment in the case K 18/04) and the Treaty of Lisbon (see the judgment in the case K 32/09).

In the said judgments, the Constitutional Tribunal indicates that at present the legal order in Europe is – for the EU Member States – a multi-ingredient order: which encompasses the norms of the Treaties and those established by the EU institutions as well as norms enacted in the national order. Also, it is a dynamic system: the relation between the EU order and the national one keeps evolving along with the changes in the EU law. The Tribunal stated that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national law-maker, what also applies is regulations (provisions) created outside of the system of law-making organs of the Polish state.

2.2. EU regulations are normative acts whose position in the Polish constitutional system has been determined in Article 91(3) of the Constitution.

What at present constitutes the basis of the European Union as an international organisation is the following: the Treaty on European Union (hereinafter: the TEU) and the Treaty on the Functioning of the European Union. One of the constitutional principles of EU law is the principle of the primacy of EU law (formerly Community law) over the law of the Member States. The said principle has been formulated in the jurisprudence of the Court of Justice, but also it can be derived indirectly from various Treaty provisions, and in particular from those that specify the obligations of the Member States as regards the implementation of EU law (Article 4(3) of the TEU, Article 19(1) of the TEU, Article 291(1) of the TFEU and Articles 258-260 of the TFEU). What follows from Article 91(3) of the Constitution is the primacy of the norms of EU regulations in the event of their unconformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law. The said position of the Constitution is enshrined in Article 8(1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal.

In the judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal underlined that the Constitution remains – due to its special significance – “the supreme law of the Republic of Poland” in relation to all

international agreements binding the Republic of Poland. This also refers to ratified international agreements concerning the delegation of competence “in relation to certain matters”. The Constitution takes precedence as regards having effect and being applied in the territory of the Republic of Poland. The indicated stance has also been confirmed in the Tribunal’s judgment concerning the Treaty of Lisbon (Ref. No. K 32/09). That thesis, formulated in the context of the relation between the Constitution and the Treaties, should also be referred to the legal acts of the EU institutions.

Due to the indicated status of the Constitution as the supreme law of the Republic of Poland, it is admissible to examine whether the norms of EU regulations are consistent therewith.

2.3. The Constitutional Tribunal points out that it is necessary to draw a distinction between examining the conformity of the acts of EU secondary legislation to the Treaties, i.e. the EU primary law, on the one hand, and examining their conformity to the Constitution, on the other. The institution that ultimately determines the conformity of EU regulations to the Treaties is the Court of Justice of the European Union, and as regards the conformity to the Constitution – the Constitutional Tribunal.

The Member States have competence to bring actions to the Courts of the European Union, for them to review the legality of the acts of EU secondary legislation (Article 263 of the TFEU). Moreover, the courts of the Member States refer questions, in relation to proceedings that are pending, to the Court of Justice of the European Union for a preliminary ruling concerning the validity of acts of the institutions, bodies, offices or agencies of the Union (Article 267 of the TFEU). The Court of Justice has expressed the view that the national courts have no jurisdiction to declare that the acts of Community institutions are invalid. The Courts of the European Union have exclusive jurisdiction in that respect (cf. the judgment of the Court of 22 October 1987, in the case C-314/85, *Foto-Frost*, ECR 1987, p. 4199).

2.4. Particular Member States may have influence on the content of EU regulations and other acts of EU secondary legislation in the course of their enactment. What should be emphasised here is the role of the representatives of the Member States (ministers) in the Council, which is an EU institution involved in enacting EU legislative acts, together with the European Parliament (cf. Article 16(1) of the TEU and Article 289(1) and (2) of the TFEU). An essential role is also played by national Parliaments, which apart from being national law-makers, jointly participate in the process of enacting the EU law (Article 12 of the TEU and the Protocol on the role of national Parliaments in the European Union, annexed to the Treaty of Lisbon).

As the Constitutional Tribunal indicated in its decision of 19 December 2006, ref. no. P 37/05, the Court of Justice safeguards the EU law. By contrast, the Constitutional Tribunal is to safeguard the Constitution. In such context, there may potentially be conflicts between the rulings issued by the Constitutional Tribunal and those delivered by the Court of Justice.

Taking the above into consideration, it should be stated that, also due to the content of Article 8(1) of the Constitution, the Constitutional Tribunal is obliged to perceive its position in such a way that – as regards fundamental matters concerning systemic issues – it is “the court which will have the last word” with regard to the Polish Constitution. The Court of Justice and the Constitutional Tribunal may not be juxtaposed as courts competing with each other. The point is not only to eliminate the overlapping of the jurisdiction of the two courts or concurrent rulings on the same legal issues, but also any dysfunctionality in relations between the EU legal order and the Polish one. What is essential is to take into consideration the indicated differences between the roles of the Court of Justice and the Constitutional Tribunal (see OTK ZU No. 11/A/2006, item 177).

2.5. Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is the need to maintain due caution and restraint in that respect. The EU law binds all Member States (currently 27). One of the systemic principles of EU law is the principle of sincere cooperation. Pursuant to Article 4(3) of the TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union’s tasks and refrain from any measure which could jeopardise the attainment of the Union’s objectives. What would be difficult to reconcile with that principle is granting powers to particular Member States which would allow them to declare the norms of EU law to be no longer legally binding.

By contrast, within the meaning of Article 4(2) of the TEU, the Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional. National identity and constitutional identity, which is the essential component thereof, have already been discussed by constitutional courts, including the Constitutional Tribunal (cf. the aforementioned judgment in the case K 32/09). Also, the Court of Justice makes reference in its jurisprudence to the necessity to take into account the national identities of particular Member States (cf. the judgment of 22 December 2010, in the case C-208/09 *Sayn-Wittgenstein*, not yet reported as well as the judgment of 12 May 2011, in the case C-391/09 *Runevič-Vardyn*, not yet reported).

2.6. In that context, attention should be drawn to the various ways of avoiding the state of non-conformity of EU law to the Constitution.

As it has been indicated above, the Constitution has been explicitly guaranteed the status of the supreme law of the Republic of Poland. At the same time, that regulation is accompanied by the requirement of respect and favourable regard for the regulations of international law that are properly drafted and binding in the territory of Poland. In the judgment concerning the Treaty of Accession (Ref. No. K 18/04),

the Constitutional Tribunal emphasised that the subsystems of legal regulations which came from different law-making centres should co-exist on the basis of mutually acceptable interpretation and cooperative application. Any contradictions should be eliminated by applying interpretation that respects the relative autonomy of EU law and national law. Moreover, the said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. The said assumption gives rise to an obligation, on the part of the Court of Justice, to be favourably inclined towards national legal systems, whereas on the part of the Member States – the obligation to approach the EU norms with the utmost respect.

Additionally, the review of conformity of an EU regulation to the Constitution, conducted by the Constitutional Tribunal, should be regarded as independent, and also subsidiary, in relation to the jurisdiction of the Court of Justice.

When acceding to the European Union, the Republic of Poland delegated the competence of organs of public authority in relation to certain matters to the EU institutions (Article 90(1) of the Constitution). This also encompasses the delegation of competence to enact law. Consequently, the legal acts enacted by the EU institutions are binding in Poland. Pursuant to the principle of conferral (Article 5(1) of the TEU), which is fundamental to the law of the European Union, the competences of the Union, including law-making competences, shall be exercised only within the limits set by the Member States in the Treaties.

Moreover, the Republic of Poland accepted the division of powers with regard to the review of legal acts (cf. the judgment in the case K 18/04, cited above, and the judgment of 18 February 2009, ref. no. Kp 3/08, OTK ZU No. 2/A/2009 item 9). The result of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU law and to ensure that the interpretation is observed consistently in all Member States, as well as to have an exclusive power to determine the conformity of the acts of EU secondary legislation to the Treaties and the general principles of EU law. In such context, one should analyse the subsidiary character of the jurisdiction of the Constitutional Tribunal to examine the conformity of EU law to the Constitution. Before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 of the TFEU, as to the interpretation or validity of provisions that raise doubts. A similar view was presented by the Federal Constitutional Court of Germany in its order of 6 July 2010 in the case *Honeywell* (Ref. No. 2 BvR 2661/06).

As a result of the ruling of the Court of Justice, it may turn out that the content of the challenged EU norm is consistent with the Constitution. Another possibility is that the Court of Justice adjudicates on the non-conformity of the challenged provision to the EU primary law. In those instances, issuing a ruling by the Constitutional Tribunal would be useless. Although the Court of Justice and the Constitutional Tribunal differ as regards the scope of jurisdiction, still – due to the similarity of the values enshrined in the Constitution and the Treaties (cf. part III, point 2.10),

there is a considerable likelihood that the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal.

2.7. What needs to be considered is the effects of a judgment of the Constitutional Tribunal in the case of adjudication that the norms of EU secondary legislation are inconsistent with the Constitution. In the context of the acts of Polish law, the said non-conformity results in declaring the unconstitutional norms to be no longer legally binding (Article 190(1) and (3) of the Constitution). With regard to the acts of EU secondary legislation, such a result would be impossible, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. The consequence of the ruling of the Constitutional Tribunal would be to rule out the possibility that the acts of EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in suspending the application of the unconstitutional norms of EU law in the territory of the Republic of Poland.

What should be noted is that such a consequence of the Tribunal's ruling would be difficult to reconcile with the obligations of a Member State and the aforementioned principle of sincere cooperation (Article 4(3) of the TEU). The said situation could lead to proceedings against Poland conducted by the European Commission and an action brought against Poland before the Court of Justice of the European Union for the infringement of obligations under the Treaties (Articles 258-260 of the TFEU).

Undoubtedly, the ruling declaring the non-conformity of EU law to the Constitution should have the character of *ultima ratio*, and ought to appear only when all other ways of resolving a conflict between Polish norms and the norms of the EU legal order have failed. In its judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal indicated that, in such situations, there were three possible reactions in Poland to the occurrence of non-conformity between the Constitution and the EU law: a/ amending the Constitution, b/ taking up measures aimed at amending the EU provisions, or c/ taking a decision to withdraw from the European Union. Such a decision should be made by the Polish sovereign, i.e. the Polish Nation, or the organ of the state which, in accordance with the Constitution, may represent the Nation.

Leaving aside the last solution, which should be reserved for the exceptional cases of the most serious and irreconcilable conflicts between the bases of the constitutional order of the Republic of Poland and the EU law, after the Constitutional Tribunal issues the ruling declaring the non-conformity of particular norms of EU secondary legislation to the Constitution, measures should be undertaken forthwith in order to eliminate the conflict. The constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of the Tribunal's ruling be deferred in time, pursuant to Article 190(3) of the Constitution. A similar view was already presented by the Constitutional Tribunal in its judgment of 27 April 2005, in the case P 1/05, which concerned the European arrest

warrant (OTK ZU No. 4/A/2005, item 42). In the said judgment, the Constitutional Tribunal deferred the date on which a statute implementing certain provisions of EU law was to lose its binding force, mentioning the constitutional obligation of the Republic of Poland to respect international law binding upon it, and also due to the fact that Poland and other EU Member States are bound by shared systemic principles aimed at ensuring the proper administration of justice.

2.8. The jurisprudence of the constitutional courts of the EU Member States (constitutional councils, supreme courts) that concerns the place of EU law in the national legal orders is very extensive (cf. *Relacje między prawem konstytucyjnym a prawem unijnym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej*, K. Zaradkiewicz (ed.), Warszawa 2011). Generally, the rulings of the constitutional courts concerned two categories of issues. Firstly, they stemmed from the review of conformity of the Treaties constituting the basis of the Union, i.e. the EU primary law, to particular constitutions. The said review was usually carried out in relation to subsequent amendments made to the Treaties or, in the case of new countries acceding to the Union; in the latter case, also, the Treaties of Accession were the subject of the review. Secondly, the rulings of the constitutional courts concerned the constitutionality of statutes or other national legal acts which implemented the EU law or the content of which was otherwise related to the membership in the European Union. In fact, this category comprises the largest number of rulings.

It should be noted that only a direct review of conformity of the acts of EU secondary law to the national constitutions was carried out only in exceptional instances, as it is in the present case. This confirms the thesis that there is certain caution in that respect. In this context, reference should be made to the jurisprudence of the Federal Constitutional Court of Germany – the decision of 22 October 1986, in the case “*Solange II*” (Ref. No. 2 BvR 197/83) and the order of 7 June 2000, in the case *Bananenmarktordnung* (Ref. No. 2 BvR 1/97). In these cases, no rulings on the merits (judgments) were issued, cf. part III, point 8.2.

2.9. In the context of the present case, it should be considered, in greater detail, what kind of non-conformity of EU secondary legislation to the Constitution may be the subject of review in the course of review proceedings commenced by way of constitutional complaint. Due to the content of Article 79(1) of the Constitution, it should be assumed that the point is the allegation that the norms of EU secondary legislation infringe the constitutional rights and freedoms of the individual, and in particular those mentioned in the provisions of Chapter II of the Constitution.

The Constitutional Tribunal has previously expressed the view that the lower level of protection of the individual’s rights that arises from the EU law, in comparison with the level of protection guaranteed by the Constitution, would be unconstitutional. The constitutional norms from the realm of the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the introduction of EU regulation. Interpretation “consistent with the EU law” has its limits. It may

not lead to results which contradict the explicit wording of the constitutional norms and which are incompatible with the minimum of the guarantees provide by the Constitution (cf. the aforementioned judgment in the case K 18/04).

The scope of the powers of an international organisation a member of which is the Republic of Poland should be delineated in such a way so that the protection of human rights could be guaranteed to a comparable extent as in the Polish Constitution. The comparability concerns the catalogue of the rights, on the one hand, and the scope of admissible interference with the rights, on the other. The requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analysed separately (cf. likewise K. Wojtyczek, *op.cit.*, pp. 285-286).

2.10. What should be noted is that the protection of fundamental rights has been assigned great significance in the law of the European Union. The Constitutional Tribunal has already drawn attention to that fact, emphasising that the consequence of common axiology of the legal systems, shared by all the Member States, is the fact that the EU law does not emerge in an abstract European area and is free from the influence of the Member States and their communities. It is not created in an arbitrary way by the EU institutions, but it results from joint actions of the Member States (cf. the aforementioned judgment in the case K 18/04, as well as the confirmation of the said stance in the judgment in the case K 32/09). Moreover, both the Polish law and the EU law include the principle of proportionality. These circumstances diminish the risk that there will be different standards of protection of fundamental rights. The protection of fundamental rights in the EU law was initially based on the jurisprudence of the Court of Justice, and later on it had its basis in the Treaty norms (currently it arises from Article 6 of the TEU). In accordance with Article 6(1) of the TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. Pursuant to Article 6(2) of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws – Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). At present, the European Union is carrying out negotiations as regards acceding to the Convention. In accordance with Article 6(3) of the TEU, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. The extensive catalogue of rights, freedoms and principles included in the Charter of Fundamental Rights stems, to a large extent, from the European Convention for the Protection of Human Rights and Fundamental Freedoms; the parties to the Convention also include the Republic of Poland. Pursuant to Article 52(3) and (4) of the Charter of Fundamental Rights, in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision

shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. By contrast, on the basis of Article 53 of the Charter, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the Convention, and by the Member States' constitutions.

Therefore, the Charter of Fundamental Rights, the Convention as well as the constitutional traditions of the Member States set a high level of protection of fundamental rights (human rights) in the European Union.

The above circumstances prove a significant axiological concurrence between the Polish law and the EU law. However, this does not mean that the legal solutions in the two legal orders are identical. It would be hard to assume that the EU law will contain norms which will fully concur with the norms of the Polish law. This arises from differences related to the way of enactment of EU law, with the participation of all the Member States, as well as from the different character of the two comparable legal orders (on the one hand – the law of the state, on the other hand – the law of the international organisation).

3. The general characteristics of the Council Regulation (EC) No 44/2001

3.1. The provisions of the Council Regulation (EC) No 44/2001 that have been challenged by the complainant constitute an element of a broader legal regulation which concerns declaring the enforceability of judgments of foreign courts within the scope of judicial cooperation in civil matters among the EU Member States. The Council Regulation (EC) No 44/2001 regulates the procedure for recognition and enforcement which may be applied to judgments and other legal acts from the Member States, which have been issued in civil or commercial matters. The aim of the legal institution of declaring the enforceability of foreign judgments – which together with recognition constitutes a basic form of ensuring the effectiveness of judgments issued by the courts of the EU Member States – is to make it possible to enforce those judgments outside the borders of the Member State of origin by making them enforceable in the territory of another Member State.

3.2. The procedure for declaring the enforceability of judgments which has been set out in the Council Regulation (EC) No 44/2001 is based on “mutual trust in the administration of justice” in relations between the EU Member States (points 16–17 of the preamble to Council Regulation (EC) No 44/2001), which should determine and provide guidance for any actions of courts in cases related to the application of the Regulation. The national court of the Member State in which enforcement is sought should, in accordance with that principle, manifest its trust in a foreign court,

and in fact in a foreign legal order within the European Union and its administration of justice.

The principle of mutual trust in the administration of justice considerably expedites proceedings for the issue of a declaration of enforceability and thus facilitates the enforcement of judgments coming from the EU Member States. The aim of proceedings for the issue of a declaration of enforceability, regulated in the Council Regulation (EC) No 44/2001, is to grant legal protection to a party concerned, by allowing for enforcement to be carried out on the basis of a judgment issued in another Member State. The scope of jurisdiction of the court which issues a declaration of enforceability amounts to the examination of the premisses of enforcement in the Member State in which enforcement is sought. However, the subject of examination carried out by the court is not a relationship in substantive law, in the context of which a judgment has been issued. Also, proceedings for the issue of a declaration of enforceability may not be perceived as part of enforcement proceedings in the Member State in which enforcement is sought, as they do not directly lead to the compulsory satisfaction of a claim, but merely assign an attribute of enforceability to the judgment stating the existence of the claim, which constitutes merely one of the premisses of commencing enforcement proceedings in that Member State. Preserving the dependencies which exist between: examination carried out by a foreign court, proceedings for the issue of a declaration of enforceability and national enforcement proceedings – the solutions adopted in the Council Regulation (EC) No 44/2001 make the procedure for making a foreign judgment enforceable analogical to the procedure concerning a Polish ruling (cf. part III, point 6.5).

3.3. Regulations as regards the recognition and declaration of enforceability of judgments (granting *exequatur*), contained in the Council Regulation (EC) No 44/2001 are, to a large extent, modelled on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Brussels in 1968 (OJ C 27, 26.1.1998, p. 1; hereinafter: the Brussels Convention) as well as the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988, since 1 February 2000, Poland has also been the party to the Convention (OJ 2000 No. 10, item 132; hereinafter: the Lugano Convention).

The basic aim of the provisions of the Council Regulation (EC) No 44/2001 concerning the recognition and declaration of enforceability of judgments is to ensure “the free movement of judgments” within the EU Member States. The above aim is achieved at several levels. Firstly, the Regulation broadly renders the category of judgments and other legal acts which may be subject to recognition or declaration of enforceability. Secondly, it limits the terms (premisses) of recognition and declaration of enforceability, in comparison with the extensive regulations of particular Member States. Thirdly, it regulates the procedure for the so-called automatic recognition of judgments and other instruments from the EU Member States as well as the simplified and expeditious proceedings for the issue of a declaration of enforceability

(cf. K. Weitz, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Warszawa 2006, first edition, p. 570). The Court of Justice of the European Union has on a number of occasions indicated in its jurisprudence that the aim of proceedings provided for in the Council Regulation (EC) No 44/2001 is to simplify formalities related to mutual recognition and enforcement of judgments. As far as enforcement is concerned, the principal aim is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal (cf. the judgment of 16 February 2006 in the case C-3/05 *Verdoliva*, ECR 2006, p. 1579 and the jurisprudence cited therein).

4. Proceedings for the issue of a declaration of enforceability in the case of a judgment by a court of an EU Member State, in accordance with the Council Regulation (EC) No 44/2001.

Pursuant to Article 38(1) of the Council Regulation (EC) No 44/2001: “A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there”. The parties to the proceedings are the applicant (usually the creditor or his/her legal successor) and the party against whom a given judgment was issued in the Member State of origin, i.e. the debtor. First instance proceedings have been provided for as unilateral proceedings (*ex parte* proceedings), instituted by the applicant and taking place without the participation of the debtor.

The prohibition against making submissions by the debtor at the stage of the examination of the application, provided for in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is nothing new. In fact, it corresponds to the norm contained in Article 34, first sentence, of the Brussels Convention and Article 34, first sentence, of the Lugano Convention. The indicated solution is aimed at expediting proceedings at their initial stage so that the applicant interested in the rapid enforcement of a judgment or another instrument issued in an EU Member State could as soon as possible commence the enforcement of the judgment or the instrument in the Member State in which enforcement is sought. The principle of unilateral proceedings before the court of first instance is also aimed at preserving the so-called “surprise effect” in the case of the debtor. This consists in the fact that the debtor does not know that proceedings for the issue of a declaration of enforceability have been instituted against him/her, and therefore s/he has no possibility of removing property that may be subject to enforcement from the Member State in which enforcement is sought, or disposing of them in any other way.

By contrast, having been awarded the declaration of enforceability in first instance proceedings, the applicant may – pursuant to Article 47(2) of the Council Regulation (EC) No 44/2001 – proceed to any protective measures against the property of the debtor. The applicant may not, however, institute enforcement aimed at satisfying his/her claim until the lapse of the time specified for an appeal or until any such appeal against the judgment has been determined (Article 47(3) of the Council Regulation

(EC) No 44/2001). It follows from the above that proper enforcement is possible only after the debtor has been heard as part of examining the appeal or has had the opportunity to be heard.

In the light of the provisions of the Regulation, cases concerning the issue of a declaration of enforceability in first instance proceedings are examined by the court or competent authority. The competence of courts or competent authorities are specified in statements submitted by the EU Member States and are mentioned in the list constituting Annex II to the Council Regulation (EC) No 44/2001. Therefore, in the light of the Regulation, it is not only courts that may issue the declaration of enforceability of judgments in first instance proceedings, but these may also be other competent authorities, for instance quasi-judicial or administrative authorities, depending on the choice made by particular Member States. In the context of Poland, competence in that respect has been granted to circuit courts (*PI sąd okręgowy*). At the first stage of proceedings, the said court examines merely the formal aspects of an application for *exequatur*, and documents set out in Article 53 of the Council Regulation (EC) No 44/2001 attached to the application as well as determines, on such basis, whether the judgment is enforceable in accordance with the law of the Member State of origin. Article 45 of the Regulation stipulates that under no circumstances may the foreign judgment be reviewed as to its substance.

Within the scope which is not regulated by the Council Regulation (EC) No 44/2001, as regards proceedings for the issue of a declaration of enforceability in the case of a judgment by a court of an EU Member State, the provisions of national law are applicable, as long as they are not contrary to the provisions of the Regulation. In the light of the Polish law, the applicable provisions are the regulations of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws – Dz. U. No. 43, item 296, as amended; hereinafter: the Code of Civil Procedure) which concern international civil proceedings, and in particular provisions which govern proceedings to determine the enforceability of judgments pursuant to Articles 1150 to 1152 of the said Code (por. J. Maliszewska-Nienartowicz, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Vol. I, Warszawa 2010, p. 424). In that respect, it should be indicated that pursuant to Article 1151(1) of the Code of Civil Procedure, as amended by the amending Act of 5 December 2008 (Journal of Laws – Dz. U. No. 234, item 1571), the declaration of enforceability is done by issuing an enforcement clause for the judgment of a foreign court. The application for a declaration of enforceability is considered by the court in camera (Article 1151¹(2) of the Code of Civil Procedure).

Article 42(1) of the Council Regulation (EC) No 44/2001 requires that the decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought. Moreover, it is necessary that the declaration of enforceability, i.e. a ruling about granting *exequatur*, was formally served on the debtor (cf. the decision of the Supreme Court of the Republic of Poland, dated 6 January 2010, ref. no. I PZP 6/09, OSNP No. 13-14/2011,

item 183). An appeal is to be lodged by the debtor within one month of service thereof; the period provided for in that respect in the national law of the Member State in which enforcement is sought is excluded. However, if the debtor is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him/her in person or at his/her residence. In the case of the Polish law, parties lodge an appeal to a court of appeal (Pl. *sąd apelacyjny*) via a circuit court (Pl. *sąd okręgowy*) (pursuant to Annex III to the Council Regulation (EC) No 44/2001 as amended by the Commission Regulation (EC) No. 280/2009 of 6 April 2009, OJ L 93, 7.4.2009, p. 13). In the doctrine, it is indicated that an appeal lodged by the debtor may be based solely on the allegations that the requirements for the declaration of enforceability have been fulfilled. This concerns a situation where the judgment – the enforceability of which has been declared – is not a judgment within the meaning of Article 32 of the Council Regulation (EC) No 44/2001, the said judgment may not be enforced, or there are grounds to refuse a declaration of enforceability on the basis of Articles 34 or 35 of the Council Regulation (EC) No 44/2001 (cf. J. Ciszewski, T. Ereciński, *Kodeks postępowania cywilnego. Komentarz. Część czwarta. Przepisy z zakresu międzynarodowego postępowania cywilnego*, commentary on Article 1151, Warszawa 2009). Adopting a solution in accordance with which, during the proceedings for the issue of a declaration of enforceability in the case of a foreign judgment, the judgment may not be reviewed as to its substance does not allow to consider allegations concerning the content of the judgment. A decision of the court of appeal given on the appeal concerning the declaration of enforceability of a judgment by a foreign court (or refusal to issue the declaration of enforceability) may be contested by a cassation appeal (Pl. *skarga kasacyjna*) lodged by either of the parties with the Supreme Court of the Republic of Poland (Article 44 in conjunction with Annex IV to the Council Regulation (EC) No 44/2001).

5. The indication of the subject of the review and higher-level norms for the review.

5.1. In the constitutional complaint submitted to the Tribunal, the complainant challenged Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001, from the point of view of their conformity to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution. Due to the withdrawal of the complaint by the representative of the complainant at the hearing, with regard to Article 36, Article 40 and Article 42 of the Council Regulation (EC) No 44/2001 as well as the higher-level norms for the review included in Article 8, Article 32(2), Article 45(2) and Article 176(2) of the Constitution, the Tribunal decided to discontinue the proceedings in that respect, on the basis of Article 39(1) (2) 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).

As a result, after modifying her complaint, the complainant requested the Tribunal to determine the conformity of Article 41 of the Council Regulation (EC) No 44/2001

to Article 45(1) of the Constitution, to Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution as well as to Article 32(1) in conjunction with Article 45(1) of the Constitution.

Article 41 of the Council Regulation (EC) No 44/2001, challenged by the complainant, reads as follows: “The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application”.

5.2. Within the meaning of Article 79 of the Constitution, the subject of the constitutional complaint may only be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant’s freedoms or rights or on his/her obligations specified in the Constitution. The basis of adjudication encompasses the entirety of legal provisions (norms) applied by the organs of public authority in order to issue an act of applying the law. The basis understood in this way comprises not only the provisions of substantive law, but also procedural provisions as well as basic systemic provisions which provide for a given organ of public authority and vest relevant powers therein (cf. the judgment of the Constitutional Tribunal of 24 October 2007, ref. no. SK 7/06, OTK ZU No. 9/A/2007, item 108).

5.3. In the present case, the final decision is the decision of 9 March 2007 issued by the Court of Appeal in Warsaw, in which the court dismissed the complainant’s appeal against the decision on the application for a declaration of enforceability concerning the decision by the Court of Appeal in Brussels, which had been deemed enforceable in the territory of Poland. It should be noted that the allegations in the constitutional complaint are not addressed against the ruling of the Belgian court where compensation was ordered to be paid by the complainant. The complainant clearly links the infringement of her constitutional rights and freedoms with the aforementioned legally effective decision of the Polish court.

The analysis of the content of the constitutional complaint indicates that the complainant alleges that her subjective rights were infringed due to the fact that she was excluded from proceedings before the court of first instance, in the case where the proceedings regarded the enforceability of a foreign judgment. The complainant did not raise the said allegation in the appeal; however, the court of appeal made reference in the substantiation of its decision to the content of Article 41 of the Council Regulation (EC) No 44/2001, examining the issue of time-limit and manner of resorting to the redress procedure. Therefore, it may be assumed that the norm contained in the challenged provision fell within the scope of the basis of the ruling on the rights and obligations of the complainant, constituting an element of procedural regulation.

As regards Article 41, first sentence, of the Council Regulation (EC) No 44/2001, the Constitutional Tribunal states that neither in her constitutional complaint nor at

the hearing did the complainant formulate any allegations concerning contradictions with the indicated higher-level norms for the review. This justifies the discontinuation of the proceedings in that respect, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

Consequently, the Constitutional Tribunal concludes that the subject of the review conducted by the Constitutional Tribunal may only be the legal norm expressed in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, in accordance with which the party against whom enforcement is sought (the debtor) shall not at the first stage of the proceedings be entitled to make any submissions on the application.

5.4. The complainant has indicated the following higher-level norms for the review: Article 45(1) of the Constitution, Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution as well as Article 45(1) in conjunction with Article 32(1) of the Constitution.

A constitutional complaint is a special means of legal protection which is aimed at eliminating – from the legal system – regulations that are inconsistent with constitutional provisions concerning rights or freedoms. Article 79(1) of the Constitution clearly stipulates that a premiss authorising the submission of a constitutional complaint is not any infringement of the Constitution, but only the infringement of constitutional norms which regulate the rights or freedoms of the individual and citizen. Thus, a constitutional complaint must include the indication of a specific person whose rights or freedoms have been infringed, the indication which of the rights or freedoms enshrined in the Constitution have been infringed as well as the indication of a manner of the infringement. For the effectiveness of the instrument for protection of rights and freedoms, i.e. a constitutional complaint, it does not suffice to determine the non-conformity of a given normative act, or part thereof, to any higher-level norm for review, but to constitutional norms constituting the basis for the rights or freedoms of the individual.

5.5. In the opinion of the complainant, the challenged regulation is inconsistent with Article 45(1) of the Constitution in conjunction with Article 78 of the Constitution as well as with Article 176(1) of the Constitution.

What follows from Article 78 of the Constitution is the right to appeal against judgments and decisions made at first stage. A party that has doubts as to the validity of the conclusions reached in a ruling issued in first instance has the right to appeal against the ruling in order to verify (review) the validity of the ruling (cf. the judgments of: 16 November 1999, ref. no. SK 11/99, OTK ZU No. 7/1999, item 158; 18 May 2004, ref. no. SK 38/03, OTK ZU No. 5/A/2004, item 45).

Article 176(1) of the Constitution expresses the principle of two stages of court proceedings. It should be noted that Article 176(1) of the Constitution has a twofold character. On the one hand, it is a systemic provision, as it specifies the way of organising court proceedings, and thus the way of organising the system of courts. On

the other hand, Article 176(1) of the Constitution is a guarantee provision since – by supplementing the provisions of Article 78 – it specifies the content of the individual’s right to two stages of court proceedings (see the judgment of 13 July 2009, ref. no. SK 46/08, OTK ZU No. 7/A/2009, item 109; the decision of 8 June 2009, ref. no. SK 26/07, OTK ZU No. 6/A/2009, item 92; the decision of 21 July 2009, ref. no. SK 61/08, OTK ZU No. 7/A/2009, item 120). In accordance with the established jurisprudence of the Constitutional Tribunal, the constitutional principle of two stages of court proceedings implies, in particular, the following: a) access to a court of second instance, and thus providing parties with proper redress procedures which institute actual review of rulings issued by a court of first instance; b) assigning the examination of a given case in second instance proceedings to – in principle – a court of higher instance; c) devising a procedure before a court of second instance in an appropriate way, so that the court could thoroughly examine a given case and issue a ruling on its merits (see the judgment of 31 March 2009, ref. no. SK 19/08, OTK ZU No. 3/A/2009, item 29).

The complainant does not question the fact that she retained the right to appeal against the ruling issued in her case by the Circuit Court in Warsaw, i.e. the court of first instance in that respect. In the substantiation of her complaint, she explicitly indicated that: “Pursuant to the challenged provisions of the Regulation, a participant in proceedings undoubtedly has the right to appeal against rulings issued in first instance proceedings”. The complainant’s allegation amounts to challenging the standard procedure at the stage when a case is examined by a court of first instance. It should be noted that Article 176(1) of the Constitution, to a certain extent, guarantees proper court proceedings, but not before the court of first instance, but – as it has been indicated above – the court of second instance.

In the opinion of the Constitutional Tribunal, the complainant has not indicated in what way Article 41, second sentence, of the Council Regulation (EC) No 44/2001 allegedly infringes Article 78 of the Constitution. It should be pointed out that the content of the challenged provision of the Council Regulation (EC) No 44/2001 does not concern redress procedures provided for a ruling issued in first instance proceedings, but pertains to devising a court procedure for first instance proceedings. Therefore, the provision challenged in the case under examination does not affect the possibility of lodging an appeal against a ruling in the court of higher instance. What is indisputable is the fact that a ruling issued in first instance proceedings, concerning the enforceability of a judgment delivered by a court of another Member State, is subject to appeal. Article 43(1) of the Council Regulation (EC) No 44/2001 explicitly stipulates that the decision on the application for a declaration of enforceability may be appealed against by either party. As regards the Polish law, in accordance with Annex III to the Council Regulation (EC) No 44/2001, parties lodge an appeal with a court of appeal via a circuit court.

In the present case, there is no doubt that the complainant exercised the right to appeal against a ruling issued in her case in first instance proceedings, by lodging an appeal with the Court of Appeal in Warsaw against the decision delivered by the

Circuit Court in Warsaw. Thus, she exercised the right to appeal against court rulings, guaranteed by Article 78 of the Constitution, and the right to (at least) two stages of court proceedings, which arises from Article 176(1) of the Constitution.

The complainant has not made it probable, though this is required in the light of Article 79(1) of the Constitution, that the above-mentioned constitutional rights have been infringed.

In particular, the complainant's arguments indicating that, in her opinion, the first instance procedure has not been devised in a proper way may not serve as justification for the allegation of infringement of the constitutional provisions which stipulate the right to appeal against rulings issued in first instance proceedings and the principle of two stages of court proceedings.

For the above reasons, the Constitutional Tribunal has decided to discontinue the proceedings as regards the review of conformity to Article 78 and Article 176(1) of the Constitution, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

5.6. Consequently, the Constitutional Tribunal states that the subject of the review in the present case is Article 41, second sentence, of the Council Regulation (EC) No 44/2001 in the context of its conformity to Article 45(1) and Article 32(1) in conjunction with Article 45(1) of the Constitution.

6. The assessment of the conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution.

6.1. The subject of the assessment is a procedural solution adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, pursuant to which the party against whom enforcement is sought (the debtor) shall not at the first stage of proceedings be entitled to make any submissions. The first instance proceedings are carried out without the participation of the debtor (*ex parte* proceedings). The allegations raised by the complainant amount to the infringement of the complainant's right to a fair and public hearing in first instance proceedings concerning the enforceability of a foreign judgment in the territory of the Republic of Poland, which has been issued against the complainant. Two basic allegations formulated by the complainant regard the infringement of the right to a fair hearing and the right to a public hearing, understood in the context of a party's participation in proceedings.

6.2. As the Constitutional Tribunal has indicated on a number of occasions, the right to a fair trial comprises the following: the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state with particular characteristics (impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court as well as the right to have cases examined by the organs of the state with an

adequate organisational structure and position (see the judgments of: 10 July 2000, ref. no. SK 12/99, OTK ZU No. 5/2000, item 143 as well as of 24 October 2007, ref. no. SK 7/06, OTK ZU No. 9/A/2007, item 108). Moreover, the Tribunal has stated that another element of the right to a fair trial is the right to enforce a legally effective ruling in the course of enforcement proceedings (cf. the judgment of 4 November 2010 ref. no. K 19/06, OTK ZU No. 9/A/2010, item 96).

What is relevant in the present case is one of the elements of the right to a fair trial; namely, the right to a proper court procedure which complies with the requirements of a fair and public hearing. In this context, it ought to be emphasised that there is a need for procedural measures which will allow for appropriate determination of procedural positions of parties.

Explaining the point of that constitutional guarantee, the Constitutional Tribunal has, in its previous jurisprudence, expressed the view that a fair court procedure should ensure that parties enjoyed procedural rights which are relevant to the subject of proceedings that are pending. The requirement of a fair trial implies that the principles of the trial are adjusted to the specific character of particular cases under examination (see the judgment of the Constitutional Tribunal of 13 May 2002, ref. no. SK 32/01, OTK ZU No. 3/A/2002, item 31, the judgment of 11 June 2002, ref. no. SK 5/02, OTK ZU No. 4/A/2002, item 41, p. 554). As the Tribunal has pointed out on a number of occasions, constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of procedure – the same set of procedural instruments which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them. Making a different assumption, one could question all procedural differences, within the scope of civil proceedings, which are meant to guarantee a quicker and more effective protection of the rights and interests of the subjects that invoke their rights before the court. It would be unjustified to assume, relying on constitutional provisions, that there is a necessity to create solutions which would reflect – with regard to every type of case, regardless of its character and other factors, usually closely related to the requirement of effectiveness of applied procedures – the same ideal and abstract model of proceedings, which actually does not exist (cf. the view expressed in the judgment of 23 October 2006, ref. no. SK 42/04, OTK ZU No. 9/A/2006, item 125; of 28 July 2004, ref. no. P 2/04, OTK ZU No. 7/A/2004, item 72; of 14 October 2008, ref. no. SK 6/07, OTK ZU No. 8/A/2008, item 137). Consequently, it should be stated that not every difference or special character in the context of court proceedings must *a priori* be regarded as a restriction imposed on the right to a fair trial and the related procedural guarantees of parties. In fact, it does not follow from the Constitution that every court procedure has to involve the same procedural instruments.

The freedom of the legislator (as well as of the EU law-maker) with regard to devising proper procedures does not entail that it is admissible to introduce arbitrary solutions which excessively and unjustly restrict the procedural rights of parties, the exercise of which constitutes a prerequisite for a proper and fair determination of

a given case. The constitutional guarantees related to the right to a fair trial would be infringed if a restriction imposed on the procedural rights of a party was disproportionate to the pursuit of such goals as enhancing the effectiveness and pace of proceedings, and at the same time it would make it impossible to balance the procedural positions of parties. Therefore, in this context, one should consider the point and significance of restricting the possibility of the debtor's participation in first instance proceedings concerning the enforceability of a judgment delivered by a foreign court, in the light of Article 41, second sentence, of the Council Regulation (EC) No 44/2001.

6.3. The proceedings regulated in the Council Regulation (EC) No 44/2001 aim at balancing the rights and contradictory interests of the applicant (the creditor) and the debtor. For that purpose, the EU law-maker has provided for a two-stage procedure. It reflects the general assumption of proceedings for the issue of a declaration of enforceability in the case of a judgment of another Member State, which are to reconcile the necessary “surprise effect”, in the case of the debtor, with respect for his/her right to a fair hearing (cf. the judgment of the Court of Justice of 11 May 2000 r. in the case C-38/98, *Régie Nationale des Usines Renault*, ECR 2001, p. 2973).

The said regulation of first instance proceedings as *ex parte* proceedings serves the protection of the applicant's interests. S/he also has the right to apply protective measures on the basis of a first-instance decision concerning his/her application. However, the rights of the debtor are subject to protection in the course of appellate proceedings. The debtor may raise allegations as regards the non-fulfilment of requirements for the issue of a declaration of enforceability, the scope of application of the Council Regulation (EC) No 44/2001 as well as other formal allegations which concern the course of proceedings before the court of first instance. S/he may also raise allegations with regard to refusal to enforce a judgment for the reasons enumerated in Article 34 or Article 35 of the Council Regulation (EC) No 44/2001 (which are also the reasons for refusal to recognise a judgment), *inter alia*: if a judgment is contrary to public policy in the Member State in which recognition is sought, if the right to be defended has been infringed, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought or if the judgment conflicts with some provisions of the Regulation concerning jurisdiction. Moreover, the court may, on the application of the party against whom enforcement is sought (the debtor), stay the proceedings (Article 46(1) of the Council Regulation (EC) No 44/2001) or the court may also make enforcement conditional on the provision of such security as it shall determine (Article 46(3) of the Council Regulation (EC) No 44/2001).

In the literature on the subject, it is pointed out that notifying the debtor by the court of first instance about proceedings pending against him/her with regard to the issue of a declaration of enforceability concerning a judgment of a foreign court could weaken or even eliminate the surprise effect for the debtor, the achievement of which is one of the goals of those proceedings. Notifying the debtor *ex officio* by

the court would contradict the purpose of the said regulation and would undermine the procedural position of the applicant (the creditor), which is guaranteed by the provisions of the Council Regulation (EC) No 44/2001 (cf. K. Weitz, *op. cit.*, p. 606.).

6.4. What is of significance in that context is the fact that proceedings concerning the enforceability of a judgment of another Member State are secondary in character in relation to the court proceedings which ended with the judgment in the Member State of origin, which ordered compensation to be paid to the plaintiff by the defendant. In proceedings for the issue of a declaration of enforceability, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. The said presumption is based on mutual trust in the administration of justice in the EU Member States.

The right to a fair trial is guaranteed in the constitutions and statutes of the EU Member States. Moreover, it arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, it is a general principle which constitutes part of EU law (Article 6(3) of the Treaty on European Union; Article 47 in conjunction with Article 51(1) of the Charter of Fundamental Rights). Necessity for procedural guarantees in the national legal order, which would arise from the EU principle of a fair trial, has been indicated many times in the jurisprudence of the Court of Justice (cf. the judgments of the Court of Justice of: 15 May 1986 in the case 222/84 *Johnston*, ECR 1986, p. 1651; 15 October 1987 in the case 222/86 *Heylens*, ECR 1987, 4097; of 7 May 1991 in the case C-340/89 *Vlassopoulou*, ECR 1991, p. 2357; 3 December 1992 in the case C-97/91 *Borelli*, ECR 1992, p. 6313; 25 July 2002 in the case C-50/00 *P Unión de Pequeños Agricultores*, ECR 2002 p. 6677; of 13 March 2007 in the case C-432/05 *Unibet*, ECR 2007, p. 2271. Cf. also N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych*, Warszawa 2010, p. 153 and the subsequent pages).

The presumption that the guarantees of a fair procedure were ensured in the Member State of origin may be rebutted, as a result of the debtor's allegation, raised before a court of second instance, that the enforcement of a judgment is contrary to public policy in the Member State in which enforcement is sought (Article 45 in conjunction with Article 34(1) of the Council Regulation (EC) No 44/2001). Among premisses related to that kind of allegation, the Court of Justice indicated the infringement – when the case was being heard before a court of the Member State of origin – the right to be defended, the principle of equality of parties, impartiality of a judge, misleading a party, or no mention grounds for a ruling (cf. the judgment of the Court of Justice of 28 March 2000 in the case C-7/98, *Krombach*, ECR 2000, p. 1935). Regardless of the above, the party against whom enforcement is sought is entitled to the allegation of the infringement of the right to be defended, in the case of proceedings instituted in the Member State of origin, as provided for in Article 45 in conjunction with Article 34(2) in the Council Regulation (EC) No 44/2001.

6.5. The provisions of the Council Regulation (EC) No 44/2001 regulate only general issues related to simplified proceedings concerning the enforceability of a judgment of a foreign court, leaving other solutions to be specified in the law of particular Member States. In Poland, these are governed by Article 1151(1) of the Code of Civil Procedure, pursuant to which a judgment of a foreign court is declared enforceable by issuing an enforcement clause thereto.

It should be noted that proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another EU Member State has been specified in the Polish Code of Civil Procedure in a similar way to proceedings concerning the enforceability of judgments of Polish courts.

However, it should be emphasised that issuing an enforcement clause, in the case where a judgment of a foreign court is declared enforceable, plays a double role. Firstly, it implies consent to execute a foreign enforced collection order (the so-called *exequatur*). Secondly, it confirms that a given enforced collection order constitutes authorisation for enforcement, as is in the case of issuing an enforcement clause for a Polish enforced collection order.

In the Polish law, an executive title which constitutes the basis for enforcement is an enforced collection order with an enforcement clause (Article 776 of the Code of Civil Procedure). In the doctrine and jurisprudence of the Constitutional Tribunal, it is assumed that an enforcement clause is a declarative court decision which states that a given legal document presented by the creditor meets the statutory criteria for an enforced collection order, and that it is admissible to institute relevant enforcement proceedings, in order to collect a given debt from the debtor by means of state coercion (cf. the judgment of 15 October 2002, ref. no. SK 6/02, OTK ZU No. 5/A/2002, item 65 and the literature on the subject cited therein). Proceedings to issue an enforcement clause are carried out without the participation of the debtor. In principle, the court examines cases concerning enforcement in camera (Article 766 of the Code of Civil Procedure). The court's decision on the issue of an enforcement clause may be appealed against. The time for lodging an appeal by the debtor shall run from the date of service of a notice about the commencement of enforcement (Article 795 of the Code of Civil Procedure). *Ratio legis* in the case of first instance proceedings for the issue of a declaration of enforceability for a judgment of a foreign court and in the case of proceedings to issue an enforcement clause in the Polish law is the same.

The goal is to prevent the debtor from hiding or disposing of his/her property with the intention to make it impossible for the creditor to exercise his/her rights arising from a ruling issued to the creditor's advantage.

6.6. Moreover, the Constitutional Tribunal notes that the legal construct of *ex parte* proceedings, i.e. proceedings without the participation of the other party – being analogical to the construct adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 at the first stage of proceedings for the issue of a declaration of enforceability – occurs also in relation to some proceedings at a later

stage, which have been regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at expeditious examination of certain types of civil cases, i.e. injunction proceedings (Article 484¹ and subsequent provisions of the Code of Civil Procedure) and proceedings concerning orders to pay (Article 497¹ and subsequent provisions of the said Code). In those proceedings, the court examines a given case in camera, upon a request of the plaintiff contained in his/her petition. The defendant is notified about proceedings pending against him/her no earlier than at the moment when s/he is being served with an injunction to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning protective measures. (Article 730 and subsequent provisions of the Code of Civil Procedure) and the aforementioned proceedings to issue an enforcement clause (Article 781 and subsequent provisions of the Code of Civil Procedure). The said cases are examined in camera by the court, upon applications by plaintiffs (creditors). A given defendant is notified about the application of protective measures or the issue of an enforcement clause no earlier than at the moment when s/he is being served with a court decision. The exclusion of defendants (debtors) at the first stage of the above-mentioned proceedings has not been challenged before the Constitutional Tribunal so far.

The legal construct of *ex parte* proceedings is justified by the special character, subject or function of given proceedings. In particular, it reflects the need for granting, even temporary, legal protection quickly or achieving the surprise effect. Without that kind of proceedings, it would be impossible in many cases to fulfil the function of civil proceedings, namely to grant legal protection. This means that taking into account the interests of the two parties to proceedings may justify postponing the exercise of the right to a hearing of one party (e.g. the debtor, the defendant) to proceedings at a later stage.

6.7. For the above reasons, the Tribunal states that ruling out the possibility of making any submissions by the debtor at the first stage of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, pursuant to Article 41, second sentence, of the Council Regulation (EC) No 44/2001, does achieve the above-mentioned significant goals, is not arbitrary in character and does not infringe the right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judgments within the EU (as part of cooperation in judicial matters among the Member States) and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, with the existing restrictions imposed on a party against whom enforcement is sought in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution.

Taking the above into consideration, the Tribunal states the Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is consistent with Article 45(1) of the Constitution.

7. The assessment of conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 32(1) in conjunction with Article 45(1) of the Constitution.

The complainant does not present extensive argumentation for the infringement of the principle of equality by the challenged Regulation in the court proceedings. She only generally states that there is a necessity for ensuring the equal rights of parties to court proceedings, as regards the possibility of making submissions. Thus, it may be assumed that, in the opinion of the complainant, the infringement of Article 32(1) in conjunction with Article 45(1) of the Constitution by the challenged provision consists in differentiating between the situations of participants to first instance proceedings.

The subject of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State has a special character. As it has already been clarified in point 6.4 above, the said proceedings are subsequent to proceedings as to the substance of the case conducted before a court of another Member State, during which parties had equal rights as regards the possibility of making submissions.

Moreover, the subject and aim of proceedings for the issue of a declaration of enforceability justifies differences in the shaping of rights granted to the creditor and the debtor. For the effective conduct of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State and for the protection of rights granted to the creditor, it is necessary to preserve the “surprise effect” (for more details see part III, point 6.3).

In the opinion of the Constitutional Tribunal, due to a special character of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court which have been instituted by the creditor who has been awarded a judgment ordering compensation to be paid to him, it is admissible to differentiate between procedural rights of parties in first court proceedings. Therefore, it does not follow from Article 41, second sentence, the Council Regulation (EC) No 44/2001 that the applicant (the creditor) was excessively and unjustly privileged as opposed to the participant in the proceedings (the debtor).

Taking the above into consideration, the Constitutional Tribunal has concluded that Article 41, second sentence, the Council Regulation (EC) No 44/2001 does not infringe Article 32(1) in conjunction with Article 45(1) of the Constitution.

8. Preliminary review of the admissibility of a constitutional complaint in the case of challenging the conformity of acts of EU secondary legislation to the Constitution.

8.1. The review of the challenged provision of the Council Regulation (EC) No 44/2001 showed that the provision infringes neither the right to a fair trial (Article 45(1) of the Constitution) nor the principle of equality of parties to court proceedings (Article 32(1) in conjunction with Article 45(1) of the Constitution).

In the present case, the Constitutional Tribunal has directly reviewed the conformity of the norms of EU secondary legislation to the Constitution for the first time. Therefore, the Tribunal first determined the issue of admissibility of a constitutional complaint, and then the issue of its substantive validity. Due to that new situation, the Tribunal decided to thoroughly examine the allegations, comparing the challenged EU provisions with the higher-level norms for the constitutional review, indicated by the complainant. This is similar to the approach taken by the Federal Constitutional Court of Germany in the aforementioned order in the case *Honeywell*. However, there is a difference; namely, in that case the subject of the review was not an act of EU secondary legislation, but a judgment of the Court of Justice of the European Union, and the allegation of non-conformity to the Basic Law for the Federal Republic of Germany did not concern fundamental rights, but the issue of going beyond the scope of competences conferred upon the European Union (*ultra vires* action).

In the present case, the Constitutional Tribunal had no doubts as to the conformity of the challenged Council Regulation (EC) No 44/2001 to the EU primary law, and hence – within the meaning of the Foto-Frost doctrine – there was no need to refer a question to the Court of Justice of the European Union for a preliminary ruling.

8.2. The Constitutional Tribunal notes that there is a need to determine, for the future, the manner of reviewing the constitutionality of the norms of EU law (the Treaties and secondary legislation) in the course of review proceedings commenced by way of constitutional complaint. What may be useful here is to examine the approaches of other courts as regards the review of EU law.

With regard to the standard of protection of human rights in the EU law and the review of EU secondary legislation, the Federal Constitutional Court of Germany has presented its stance. In the aforementioned “Solange II” decision, the said court stated that as long as (*solange*) the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court of Germany will no longer review secondary Community legislation by the standard of the fundamental rights contained in the Basic Law. The principle established in the said decision was maintained in the subsequent rulings. In the above-mentioned order in the case *Bananenmarktordnung*, the Federal Constitutional Court stated that a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law is admissible only if its grounds state that the evolution of European law, including the rulings of the Court of Justice of the

European Communities, has resulted in a decline below the standard of fundamental rights required unconditionally by the Basic Law since the “Solange II” decision. This requires, in each instance, a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the “Solange II” decision. Otherwise, the Federal Constitutional Court leaves a submission by a national court of justice or a constitutional complaint without any substantive examination thereof.

8.3. In the jurisprudence of the European Court of Human Rights (ECHR), there has been a presumption that the protection of human rights by the EU law and by the Court of Justice of the European Union can be considered to have been equivalent to the protection provided for by the Convention (cf. in particular the judgment of 30 June 2005, application no. 45036/98, *Bosphorus*). In view of the ECHR, the level of protection should only be “comparable” and not “identical” to that guaranteed by the Convention. The actions of EU Member States are compliant with the Convention as long as the European Union protects human rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. The indicated presumption concerns cases where obligations to apply the EU law leave no room for the independent exercise of discretion by the Member States (cf. the judgment of 21 January 2011, Application No. 30696/09, *M.S.S.*). It follows from the above that the ECHR is competent merely in exceptional cases to assess whether the actions or the lack thereof on the part of the EU institutions and bodies comply with the Convention – namely where the presumption of equivalent protection is rebutted and the protection of human rights at the EU level is manifestly deficient. The *Bosphorus* doctrine has been maintained in the subsequent jurisprudence of the ECHR. In the judgments of 10 October 2006, the case of *Cooperative des Agriculteurs de Mayenne* (Application No. 16931/04) and of 9 December 2008, the case of *Societe Etablissements Biret* (Application No. 13762/04), the ECHR found the applications to be inadmissible on the grounds that the applicants had not shown that the protection of human rights at the EU level was manifestly deficient.

8.4. There are premisses to take an analogical approach with regard to reviewing the constitutionality of EU law in Poland. In the judgment concerning the Treaty of Lisbon (Ref. No. K 32/09), the Constitutional Tribunal presented the view that the said Treaty enjoyed a special status in the legal order of the Republic of Poland, which affected the way of examining its conformity to the Constitution. The Treaty of Lisbon was ratified by the President of the Republic of Poland, upon consent granted by statute, and enacted in accordance with the requirements specified in Article 90 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested his conviction that the ratified legal act was consistent with the Constitution. Based on the above

grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution.

An analogical approach to the examination of conformity to the Constitution also regards the legal acts of the EU institutions. The legal acts prior to Poland's accession to the EU were adopted, pursuant to the Treaty of Accession, in the Polish legal system on the day of the accession (cf. Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, with regard to the conditions of EU membership, Journal of Laws – Dz. U. of 2004 No. 90, item 864). Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of the representatives of the competent organs of the Polish state. What further justifies the assumption about a special status of EU secondary legislation, which is an analogical approach to that taken by other courts are the following aforementioned arguments: the great significance of fundamental rights in the EU legal order, the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration as well as the principle of loyalty of the Member States towards the Union.

8.5. The said approach has important procedural consequences. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be filed in accordance with principles specified by statute. Article 47(1)(2) of the Constitutional Tribunal Act imposes an obligation on a complainant to, *inter alia*, indicate in what manner regulations challenged in a given constitutional complaint have infringed the complainant's constitutional rights or freedoms.

In the case of filing a constitutional complaint which challenges the conformity of a legal act of EU secondary legislation to the Constitution, the fulfilment of the above obligation acquires a qualified character. When indicating what is the nature of the infringement of his/her rights or freedoms, i.e. when presenting arguments for the substantive unconstitutionality of provisions constituting the subject of his/her complaint, a given complainant should, at the same time, be required to make probable that the challenged act of EU secondary legislation causes a considerable decline in the standard of protection of rights and freedoms, in comparison with the standard of protection guaranteed by the Constitution. Making this probable is an essential element of the requirement to indicate the manner in which rights or freedoms have been infringed.

The need for such more specific rendering is justified by the character of the acts of EU law, which enjoy a special status in the legal order of the Republic of Poland and which come from legislative centres other than the organs of the Polish state. What confirms that the obligation arising from Article 47(1)(2) of the Constitutional

Tribunal Act needs to be imposed on the complainant in a qualified form is the circumstances presented in point 2 of this statement of reasons. The requirement to make probable that the level of protection of rights and freedoms has been lowered, in comparison with the level of protection guaranteed by the Constitution, follows from the allocation of the burden of proof in review proceedings commenced by way of constitutional complaint. This is not tantamount to possible indication (proof) that there has been an infringement of the Constitution, which is the task of the Tribunal.

When the indicated requirements are not fulfilled by the complainant, the Tribunal concludes that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, issues a decision in which it refuses to proceed with further action (Article 36(3) in conjunction with Article 49 of the Constitutional Tribunal Act) or in which it discontinues proceedings, on the grounds that issuing a ruling is inadmissible (Article 39(1)(1) of the Constitutional Tribunal Act).

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

JUDGMENT of 12 December 2011 – Ref. No. P 1/11

[Regional Operational Programmes – Constitutional Requirements for the Enactment of Law in the Context of EU Membership]

In the Name of the Republic of Poland**The Constitutional Tribunal, in a bench composed of:**

Sławomira Wronkowska-Jaśkiewicz – Presiding Judge

Wojciech Hermeliński – Judge Rapporteur

Małgorzata Pyziak-Szafnicka

Stanisław Rymar

Andrzej Wróbel,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 12 December 2011, in the presence of the Sejm and the Public Prosecutor-General, a question of law referred by the Voivodeship Administrative Court in Łódź:

as to whether Article 5(11), Article 30b(1) and (2) as well as Article 30c(1) of the Act of 6 December 2006 on rules for carrying out the development policy (Journal of Laws – Dz. U. of 2009 No. 84, item 712, as amended) are consistent with Article 2, Article 7, Article 31(3), Article 87 and Article 184 of the Constitution of the Republic of Poland,

adjudicates as follows:

I

- 1. Article 5(11) of the Act of 6 December 2006 on rules for carrying out the development policy** (Journal of Laws – Dz. U. of 2009 No. 84, item 712, as amended, hereinafter: the Act on the Development Policy), **by the fact that it provides for regulating the rights and obligations of applicants in the course of the procedure for selecting projects to be funded under an operational programme that falls outside the system of the sources of universally binding law, is inconsistent with Article 87 of the Constitution of the Republic of Poland.**
- 2. Article 30b(1), first sentence, and Article 30b(2) of the Act referred to in point 1, insofar as they provide for regulating the means of appeal available to applicants in the course of the procedure for selecting projects to be funded under an operational programme that falls outside the system of the sources of universally binding law, are inconsistent with Article 87 of the Constitution.**

- 3. Article 30c(1) of the Act referred to in point 1, insofar as it correlates the right to file an appeal at an administrative court with the exhaustion of the means of appeal provided for in acts that do not constitute a source of universally binding law, is inconsistent with Article 87 of the Constitution.**

II

The provisions mentioned in part I, within the scope indicated above, will cease to have effect after the lapse of 18 (eighteen) months from the date of the publication of this judgment in the Journal of Laws of the Republic of Poland.

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), to discontinue the proceedings as to the remainder.

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

[...]

3. The assessment of the conformity of the challenged regulations to Article 87 of the Constitution.

3.1. In the opinion of the court referring the question of law, the basic flaw of the challenged provisions is that they require that the regulation of certain rights and freedoms of individuals (in the procedure concerning a call for projects in general terms – Article 5(11) of the Act on the Development Policy, and in particular in an appellate procedure – Article 5(11) *in fine*, Article 30b(1), first sentence, and Article 30b(2) as well as Article 30c(1) of the Act on the Development Policy) should be provided outside the sources of universally binding law.

3.2. The constitutional system of the sources of law is dual in character. It is based on the division of the sources of law into the sources of universally binding law (which is particularly manifested in Article 87 of the Constitution) and the sources of law that is internal in character (Article 93 of the Constitution). Confirming

the division adopted by the constitution-maker, in its judgment of 28 June 2000, ref. no. K 25/99 (OTK ZU No. 5/2000, item 141), the Constitutional Tribunal ruled out the possibility of the existence of a third, in-between, category of the sources of law.

The constitutional regulation of the sources of universally binding law has taken the form of the enumeration of universally binding normative acts and authorities that are competent to issue them. Universally binding acts have (generally) been enumerated in Article 87 of the Constitution, although – which has been noted by the Tribunal – this is not a complete list, for universally binding acts have also been indicated in other provisions of the Constitution (cf. e.g. Article 234). Such a solution means that the catalogue of the universally binding sources of law has been set out in the Constitution (though in its various provisions) as a closed list within the scope *ratione materiae*: the forms of the said kind of acts have been enumerated in the Constitution in an exhaustive way. By contrast, the closed character of the catalogue setting out the sources of universally binding law in its aspect *ratione personae* is manifested in the fact that only authorities indicated in the Constitution may issue those acts (cf. Article 87(2), Article 93(1), Article 95(1), Article 142(1), Article 146(4)(2), Article 148(3), Article 149(2) and (3), Article 213(2), Article 234 as well as Article 235 of the Constitution). Also, it should be added that the procedure for enacting universally binding acts is regulated in the Constitution or relevant statutes. Thus, the Constitution has determined that the acts of universally binding law are constitutionally legitimate.

The term ‘a universally binding act’, as opposed to the term ‘an internal legal act’, has been taken over from the doctrine by the constitution-maker, and has consistently been manifested in the text of the Constitution. The acts of universally binding law are acts for the issuance of which the law-maker needs to be authorised by the Constitution (or – in the case of regulations – by a statutory provision that fulfils the requirements set out in Article 92(1) of the Constitution), which have the form provided for in the Constitution, which have been enacted in accordance with the procedure set out in the Constitution or statutes, and such whose norms may concern every addressee (individuals, the organs of public authority, public and private organisations) as well as may determine the rights and freedoms of all those groups. What follows from this, for the law-making activity, is the absolutely binding conclusion that: if the law-maker intends to regulate the legal situation of the above-indicated persons, he must be vested with a power to do so by the Constitution and he must do this in the form of a normative act indicated in the Constitution (e.g. a statute, a regulation that has the force of a statute, a regulation or an enactment of local law), and moreover – he must promulgate the said act properly (cf. Article 88 of the Constitution).

A different approach has been taken in the Constitution with regard to regulating the sources of law that is internal in character. Due to imprecise constitutional regulations in that respect, it has been adopted in the jurisprudence of the Constitutional Tribunal and in the doctrine that the system of the sources of law that is internal

in character is not closed as regards its scope *ratione personae*: acts of that type may be issued not only by the Council of Ministers and the President of the Council of Ministers, i.e. the Prime Minister, (cf. Article 93(1) of the Constitution), but also by other authorities, if they have been authorised to do so by statute and if the acts are addressed to organisational units that are subordinate to them. Also, the Constitution does not exhaustively set out the forms of acts of law that is internal in character, mentioning only resolutions (of the Council of Ministers) as well as orders (of the Prime Minister). This is confirmed by the Tribunal in the judgment of 1 December 1998, ref. no. K 21/98 (cf. ZU No. 7/1998, item 116), which states that “the system of internal legal acts has – unlike the system of acts which constitute the sources of universally binding law – the character of an open-ended system, at least as regards its scope *ratione personae*” (cf. also the above-mentioned judgment in the case K 25/99, as well as the judgment of 8 October 2002, ref. no. K 36/00, OTK ZU No. 5/A/2002, item 63). By analogy with the Tribunal’s statement, in the practice of law, the view is becoming more and more popular that the forms of internal legal acts should be unified to resolutions (in the case of the organs of public authority) as well as orders (in the case of officials). The discussion of the constitutional character of internal legal acts as well as the jurisprudence of the Constitutional Tribunal lead to the conclusion that these acts may only be issued on the basis of statutes, they may bind only organisational units that are subordinate to authorities that issue them, they are subject to the review of their conformity to universally binding law as well as they may not constitute the basis of decisions issued with regard to citizens, legal entities as well as other persons (cf. the cited rulings). Thus, as regards internal legal acts, the constitution-maker has provided for a relatively narrow scope *ratione materiae* of regulation; in the dual system of the sources of law, he has given clear preference to the sources of universally binding law (cf. K. Działocha, “Zamknięty system źródeł prawa powszechnie obowiązującego w Konstytucji i praktyce”, [in:] *Konstytucyjny system źródeł prawa w praktyce*, A. Szmyt (ed.), Warszawa 2005, p. 9).

3.3. From the point of view of the case examined by the Tribunal and the allegations raised by the court referring the question, it is essential to provide an answer to the question about the legal character of the implementation system in the light of the Act on the Development Policy, i.e. to determine which entity creates the implementation system, in accordance with what procedure the said system is adopted, and what the said system comprises (does it contain descriptions, guidelines, proposals, and binding procedural norms as well as who are the addressees thereof?).

3.3.1. The Act on the Development Policy does not clearly determine the type of documents that comprise the implementation system.

On the one hand, the wording of Article 5(11) of the said Act indicates that the term is construed as the sum of “rules and procedures” that are binding for participants in a given operational programme. In that sense, the implementation

system could comprise different types of normative acts, including some that fall within the category of the sources of universally binding law (e.g. statutes, regulations, Community acts), as well as programme documents, resolutions, guidelines, rules of procedure, or even explanations provided by institutions that are responsible for carrying out particular stages of the implementation of operational programmes.

On the other hand, Article 17(1)(6) of the Act on the Development Policy requires that “basic assumptions underlying the implementation system” should be included in programmes. The programmes are adopted “by resolutions or decisions issued by competent organs of public authority” (Article 15(1), second sentence, of the Act on the Development Policy; in the case of regional operational programmes – by resolutions issued by the governing body of a given voivodeship, cf. Article 20(2) of the Act on the Development Policy). Thus, “assumptions underlying the implementation system” may not include guidelines for the acts of universally binding law. In particular, resolutions may not determine the content of statutes (the legislator’s freedom is indeed limited only by the Constitution), or may not bind a competent minister for regional development (as s/he is a member of the Council of Ministers that manage the government administration, and is not an authority that is subordinate due to an organisational structure to the governing body of a voivodeship – cf. Article 146(3) of the Constitution). However, there are no obstacles for “basic assumptions underlying the implementation system” included in operational programmes to be taken into consideration when further regulations are drafted by the governing bodies of voivodeships (or possibly by organisational units that are subordinate to them). Therefore, it should be assumed that implementation systems for operational programmes will (in principle) take the form of resolutions issued by the governing bodies of voivodeships.

The above conclusion is also confirmed by practice. Implementation systems for regional operational programmes were usually adopted in the form of resolutions issued by the governing bodies of voivodeships: either as one relatively short document with numerous annexes, or as several equivalent acts that are related to each other.

For instance, *System realizacji regionalnego programu operacyjnego województwa mazowieckiego 2007-2012* (Eng. The implementation system for the regional operational programme of Mazowieckie Voivodeship 2007-2012), which constitutes an annex to the Resolution No. 1052/350/10 of the Governing Body of Mazowieckie Voivodeship, dated 26 May 2010, comprises (without annexes) 93 pages (available in Polish at: <http://www.mazovia.pl/unia-europejska/rpo-wm-2007-2013/>). It is divided into ten parts, comprising:

- the lists of acts that regulate the implementation of the said programme (Community law, national law, guidelines issued by the Minister for Regional Development, internal legal acts, a brief description of the said programme, its purposes and priorities);
- the description of the institutional system for the implementation of the programme;

- rules for selecting projects (*inter alia* a schedule for the call for applications, the description of evaluation criteria, procedures for selecting a project, the stages of evaluating applications, detailed rules for an appellate procedure – an appeal at a pre-court stage and at the stage of administrative-court proceedings);
- rules for financing and settling expenditure;
- applicable accounting principles;
- rules for reporting any irregularities and recovering funds;
- rules for enhancing publicity and communication;
- evaluation rules;
- glossary;
- a list of annexes.

By contrast, The implementation system for the regional operational programme of Łódzkie Voivodeship 2007-2012 comprises more than ten documents (available in Polish at: http://www.rpo.lodzkie.pl/wps/wcm/connect/rpo/rpo/strona_glowna/), which together make up over 200 pages. The most significant among them are:

- *Szczegółowy Opis Osi Priorytetowych Regionalnego Programu Operacyjnego Województwa Łódzkiego na lata 2007-2013* (Eng. The detailed description of priority axes for the regional operational programme of Łódzkie Voivodeship 2007-2013), which includes information concerning, *inter alia*, general rules for the implementation of the programme and the implementation system, priority actions, the examples of the types of projects, potential beneficiaries, the ways of providing funding and the complementary character of the programme with regard to other programmes, criteria for selecting projects, as well as applications for funding;
- *Szczegółowy opis kryteriów wyboru projektów w ramach Regionalnego Programu Operacyjnego Województwa Łódzkiego na lata 2007-2013* (Eng. Detailed criteria for selecting projects under the regional operational programme of Łódzkie Voivodeship 2007-2013), which contains guidelines about particular criteria for the formal and substantive evaluation of projects;
- *Zasady wyboru projektów w trybie konkursu zamkniętego w ramach Regionalnego Programu Operacyjnego Województwa Łódzkiego na lata 2007-2013* (Eng. Rules for selecting projects in a competition with a fixed time-limit for the submission of applications under the regional operational programme of Łódzkie Voivodeship 2007-2013) – the document determines the way of calling for, evaluating and selecting competition projects, the stages of a competition with a fixed time-limit for the submission of applications, a procedure for the formal and substantive evaluation of projects, the way of taking decisions on granting funding for a project, the manner of announcing competition results as well as the procedure for signing agreements on funding, beneficiaries' obligations as regards keeping records and documents related to the implementation of projects, as well as issues related to the dissemination of information pertaining to the process of the implementation of the operational programme;

- *Zasady procedury odwoławczej w ramach Regionalnego Programu Operacyjnego Województwa Łódzkiego na lata 2007-2013* (Eng. Rules for an appellate procedure under the regional operational programme of Łódzkie Voivodeship 2007-2013), providing information on the types of available means of appeal and a procedure for resorting to them.

As a side remark, it may be noted that the issue of the legal form of implementation systems has also been addressed by administrative courts. In one of the first cases, in the context of the Act on the Development Policy, it was held that the legislator had not directly regulated “a legal form in which the said system was to be specified” (the judgment of the Supreme Administrative Court of 2 March 2010, ref. no. II GSK 126/10). However, the said issue was quickly resolved; in the judgment of 27 October 2010, ref. no. II GSK 1097/10, the Supreme Administrative Court stated that: “the implementation system for a programme acquires a legal form that is typical for the actions of a given managing authority – in the case of a regional operational programme that proper form is a resolution issued by the governing body of a given voivodeship”.

In the view of the Constitutional Tribunal, neither the consistent practice of the organs of administration nor the consistent jurisprudence of administrative courts may replace the direct regulation of the legal form of implementation systems in the challenged Act. The issue which entities may regulate, and in what way, the situation of participants in competitions organised within the scope of regional operational programmes is not only of practical relevance but also of legal significance. The fact that the said issue has been overlooked in the Act on the Development Policy may be assessed in the light of the principle of protection of citizens’ trust in the state and its laws, and subsequently – also in the context of the principle of appropriate legislation. As the Constitutional Tribunal is bound by the scope of the allegation indicated in the question of law (cf. Article 66 of the Constitutional Tribunal Act), the above statement may not be included in the operative part of the ruling, but it nevertheless constitutes a vital element of the assessment of the regulations under examination.

3.3.2. The question about the place of implementation systems among the sources of law has been analysed in more than 100 rulings issued by administrative courts, including several dozen times when it was analysed in the context of Article 184 of the Constitution. The established line of jurisprudence within that scope is very consistent, which is confirmed by identical wording repeated in subsequent rulings issued by voivodeship administrative courts (the largest number of rulings which comprise findings on the legal status of implementation systems – over 30 – were issued by the Voivodeship Administrative Court in Bydgoszcz; also, numerous rulings in that respect were issued by the Voivodeship Administrative Court in Wrocław, the Voivodeship Administrative Court in Opole and the Voivodeship Administrative Court in Warsaw). The following three theses are characteristic of the said line of jurisprudence:

The implementation system does not constitute a source of universally binding law within the meaning of Article 87 of the Constitution. Indeed, the said legal act: “does not fall within the catalogue of the sources of universally binding law, set out in Article 87(1) and (2) of the Constitution. Nor is it issued by an authority that has been granted the power to issue legal provisions by the Constitution. Moreover, the implementation system for a programme is not published in a way that is generally accepted for the publication of normative acts” (the judgment of the Supreme Administrative Court of 4 August 2010, ref. no. II GSK 797/10; the thesis was maintained in the subsequent rulings of the Supreme Administrative Court of: 18 May 2011, ref. no. II GSK 817/11; 16 December 2010, ref. no. II GSK 1377/10; 16 November 2010, ref. no. II GSK 1234/10; 5 November 2010, ref. no. II GSK 1208/10; 27 October 2010, ref. no. II GSK 1097/10; 20 October 2010, ref. no. II GSK 1110/10; 19 October 2010, ref. no. II GSK 1129/10; and it was repeated in over a dozen judgments issued by voivodeship administrative courts, e.g.: in Gorzów Wielkopolski on 15 June 2011, ref. no. I SA/Go 309/11; in Opole on 3 March 2011, ref. no. II SA/Op 29/11; in Wrocław on 24 November 2010, ref. no. III SA/Wr 673/10; in Białystok on 27 October 2010, I SA/Bk 484/10 and in Warsaw on 5 May 2010, ref. no. V SA/Wa 451/10).

However, “the term ‘law which constitutes the basis of activity carried out by the organs of public administration and which is used as a criterion for the assessment of the said activity by administrative courts’ does not exhaust the characteristics of a source of law referred to in the Constitution” (the judgment of the Supreme Administrative Court of 20 October 2010, ref. no. II GSK 1110/10; likewise: the judgment of the Supreme Administrative Court of 16 December 2010, ref. no. II GSK 1377/10). “In administrative law, the term ‘law’ is assigned a special, broader, meaning. The term ‘sources of administrative law’ is construed to include any normative act, i.e. an act that contains at least one legal norm which is general and abstract in character, and which may constitute a basis of a determination in an individual case, which has been issued in the course of activities carried out by competent organs of the state, and which renders the said norm binding” (the judgment of the Supreme Administrative Court of 20 October 2010, ref. no. II GSK 1110/10; likewise: the judgment of the Supreme Administrative Court of 16 December 2010, ref. no. II GSK 1377/10; implementation systems in the context of the special kinds of sources of law, specified in the doctrine as “informal sources of law”, “special sources of law”, or “sources that are not organised”, have been addressed in over 20 rulings issued by the Voivodeship Administrative Court in Bydgoszcz – cf. e.g. the judgment of 27 April 2010, ref. no. I SA/Bd 285/10; the said concept has also been referred to by other courts cf. e.g. the judgment of the Voivodeship Administrative Court in Warsaw, dated 5 May 2010, ref. no. V SA/Wa 451/10, as well as by the Voivodeship Administrative Court in Wrocław, dated 11 August 2010, ref. no. III SA/Wr 409/10).

As a result, it has been stated that the implementation system may be regarded as “the extension of normative criteria for diligent and unbiased evaluation”, which are

referred to in Article 31(1) of the Act on the Development Policy (the said wording was repeated in several rulings issued by the Voivodeship Administrative Court in Białystok, beginning with the judgment of 12 May 2010, ref. no. I SA/Bk 94/10). The implementation system should be assigned “the character of a source of law, but not one that is universally binding, but the one which binds persons that have applied for funding for a project, carried out in accordance with the above-cited Act on the Development Policy, as well as authorities and institutions that conduct their activity on the basis of the Act” (the judgment of the Supreme Administrative Court of 18 May 2011, ref. no. II GSK 817/11; likewise: the judgment of the Supreme Administrative Court of 16 November 2010, ref. no. II GSK 1234/10 and 18 May 2011, ref. no. II GSK 817/11; analogical wording was used in rulings issued by the Voivodeship Administrative Courts in Gliwice and Opole – cf. e.g. the judgments of: 20 September 2010, ref. no. III SA/Gl 1836/10, as well as 20 October 2010, ref. no. I SA/Op 566/10).

The most frequently mentioned argument for rendering implementation systems as sources of law was the fact that they display certain characteristics of the sources of law: they are general in character – are addressed to an unspecified group of addressees which is bound by them (the said thesis has appeared in a majority of rulings cited above). Also, it has been stressed that implementation systems are issued on the basis of the Act on the Development Policy and “constitute the subject of relevant resolutions issued by the organs of public authority that implement them” (the judgment of the Supreme Administrative Court of 18 May 2011, ref. no. II GSK 817/11; likewise: the judgment of the Supreme Administrative Court of 4 August 2010, GSK 797/10).

Additionally, it has been indicated that – if the implementation system for a given programme did not display the character of a source of law – a review conducted by an administrative court on the basis of Article 30c of the Act on the Development Policy “would not be possible. Indeed, the essence of exercising judicial power consists in resolving legal cases and disputes which arise in the course of applying or enacting the law” (the judgment of the Supreme Administrative Court of 4 August 2010, ref. no. II GSK 797/10; the said thesis was repeated *inter alia* in the judgments of: the Supreme Administrative Court of 16 November 2010, ref. no. II GSK 1234/10; the Voivodeship Administrative Court in Gliwice of 20 September 2010, ref. no. SA/Gl 1836/10 and the Voivodeship Administrative Court in Opole of 20 October 2010, ref. no. I SA/Op 566/10).

In some rulings, the above theses were supplemented with the statement that: “a person applying for funding for a submitted project, being aware of the requirements arising from the implementation system, at the same time accepts the terms set out in that system (otherwise the person would not be submitting the application). Therefore, the person also accepts that – in the course of the application process as well as during the period when funding is granted on the basis of the Act on the Development Policy – the provisions of the Code of Administrative Procedure will not be applied, but certain EU (Community) provisions will be applied directly as well as that the submitted project will be evaluated in accordance with criteria set

out for a given operational programme, by taking account of other documents issued within the scope of the programme” (the judgment of the Supreme Administrative Court of 14 September 2010, ref. no. II GSK 965/10; similar judgments of: the Voivodeship Administrative Court in Gliwice of 8 June 2011, ref. no. III SA/Gl 650/11 and the Voivodeship Administrative Court in Szczecin of 23 February 2011, ref. no. I SA/Sz 1012/10).

As regards the application of implementation systems by administrative courts, it has been indicated that the said acts may constitute a basis for a review conducted “together with relevant provisions of universally binding law” (the said view was explicitly expressed for the first time in the judgment of the Voivodeship Administrative Court in Warsaw on 5 May 2010, ref. no. V SA/Wa 451/10, but it has been manifested in practice by all the above-mentioned judgments of administrative courts).

At the same time, administrative courts have clearly delineated the extent to which the implementation system may be regarded as a source of law.

First of all, it has been stressed that it is necessary to respect the hierarchical structure of the system of law: before an administrative court applies documents that make up a given implementation system as higher-level norms for an administrative-court review, the court “may and should examine their conformity to the provisions of universally binding law, i.e. primarily to the provisions of statutes and the Constitution” (the judgment of the Supreme Administrative Court of 20 January 2011, ref. no. II GSK 1493/10; likewise: the judgment of the Supreme Administrative Court of 4 August 2010, ref. no. II GSK 797/10). Indeed, the documents that make up the implementation system for an operational programme may not be “drafted and interpreted contrary to the acts of universally binding law that directly concern a specific realm of public-law activity, in particular contrary to the provisions of the Act on the Development Policy – which contain certain (though surely limited) guidance on requirements concerning programmes providing financial assistance within the scope of the development policy – as well as constitutional standards” (the judgment of the Supreme Administrative Court of 30 March 2010, ref. no. II GSK 314/10; the thesis was repeated in the judgment of the Supreme Administrative Court of 18 November 2010, ref. no. II GSK 1252/10).

Secondly, it has been emphasised that “one should consider the constitutional principle in accordance with which judges, within the exercise of their office, shall be subject only to the Constitution and statutes (Article 178(1) of the Constitution). This means that a higher-level norm for reviewing the activity of the organs of public administration, which is created and applied on the basis of the said special sources of law by a relevant court, is not binding for the court in the sense that it needs to be reviewed as regards its conformity to the universally binding law. Thus, it is a law that the court applies as a tool for exercising its power to carry out an administrative review, and not the law which binds the court when it exercises its powers” (the judgment of the Voivodeship Administrative Court in Warsaw of 14 July 2010, ref. no. V SA/Wa 1333/10).

The analysis of the entire jurisprudence of administrative courts within the said scope leads to a conclusion that the view about regarding implementation systems as *sui generis* sources of law, which are not the acts of universally binding law within the meaning of Article 87 of the Constitution, has been widely adopted in jurisprudence. Departures from such categorisation of implementation systems were incidental in character and occurred only at the initial phase of adjudication by courts on the Act on the Development Policy. To give an example, one may indicate the judgment of the Supreme Administrative Court of 20 January 2010, ref. no. II GSK 1/10, in which a document regarded as an element of the implementation system (*Regulamin Oceny Wniosków i Komisji Konkursowych oceniających wnioski złożone w ramach Programu Operacyjnego Województwa Mazowieckiego 2007-2013* [Eng. Rules for the evaluation of applications and rules of procedure for competition committees evaluating applications submitted under the operational programme of Mazowieckie Voivodeship 2007-2013], constituting an annex to the Resolution of the Governing Body of Mazowieckie Voivodeship, dated 24 February 2009, No. 363/215/2009) was categorised as universally binding provisions, which may shape the rights and obligations of the beneficiaries of operational programmes (and, in particular, was categorised as “enactments of local law”).

The Constitutional Tribunal shares the view presented in the above-mentioned jurisprudence of administrative courts that implementation systems may not be included in the category of the sources of universally binding law (cf. the above-mentioned arguments). Indeed, implementation systems are not issued by authorities that have been granted, by the Constitution, the power to issue acts of universally binding law, and they do not have the form indicated for those acts in the Constitution. At the same time, there is no doubt that they contain norms which are general and abstract in character (cf. the judgment of 12 July 2001, ref. no. SK 1/01, OTK ZU No. 5/2001, item 127), the observance of which is a prerequisite for obtaining funding allocated within the scope of a given operation programme – and thus they set the rights and obligations of certain persons. Therefore, they do not constitute acts of applying the law or elements of particular pre-formulated standard contracts. The Constitutional Tribunal rejects the assumption adopted in the course of legislative work on the Act of 7 November 2008 on amendments to certain acts with regard to structural funds and the Cohesion Fund (Journal of Laws – Dz. U. No. 216, item 1370; hereinafter: the amending Act of 2008), which assigned the challenged provisions with the wording that is under examination, namely that: “the implementation system, in particular in the part concerning the process of applying for funding, may be regarded as certain rules of procedure” (cf. the explanatory note for the government’s bill, the Sejm Paper No. 950/6th term of the Sejm, pp. 32-40, as well as the criticism of that view in: K. Kokosińska, “Opinia prawna na temat rządowego projektu ustawy o zmianie niektórych ustaw w związku z wdrażaniem funduszy strukturalnych i Funduszu Spójności (druk nr 950) z 14 października 2008 r.”, [http://orka.sejm.gov.pl/RexDomk6.nsf/0/5C7DC67624F27137C12574CE003F7DC4/\\$file/i2511_08.rtf](http://orka.sejm.gov.pl/RexDomk6.nsf/0/5C7DC67624F27137C12574CE003F7DC4/$file/i2511_08.rtf), pp. 9-11).

3.3.3. The above statement requires a thorough analysis and may not constitute a single ground for declaring the non-conformity of the challenged provisions to Article 87 of the Constitution. What may constitute such a ground is a finding that the content of the implementation system, provided for by the challenged regulations, must be regulated in the acts of universally binding law. The determination of the scope *ratione personae* of the indicated regulations does not cause any considerable difficulties, despite the use of an imprecise term ‘participating institutions’ in Article 5(11) of the Act on the Development Policy (cf. on that topic: K. Borowicz, *Zasady prowadzenia polityki rozwoju. Ustawa z dnia 6 grudnia 2006 r. z komentarzem*, Warszawa 2008, p. 40). They are definitely addressed to the organs of the state that play different roles within the scope of operational programmes, but this is not the entire group of their addressees. Given that participation in the implementation of a given operational programme also implies taking part in a project competition (and not merely implementing projects after funds have been granted), it should be deemed that all those provisions also delineate relations between applicants submitting projects and various organs of public administration (or – in the case of Article 30c(1) of the Act on the Development Policy – courts; the view on the binding character of implementation systems for participants in competitions is explicitly expressed in the jurisprudence of administrative courts; cf. e.g. the judgment of the Supreme Administrative Court of: 18 May 2011, ref. no. II GSK 817/11; 16 November 2010, ref. no. II GSK 1234/10; 4 August 2010, ref. no. II GSK 797/10; as well as numerous rulings of the Voivodeship Administrative Courts in Opole and Gliwice, e.g. the judgments of: 15 September 2010, ref. no. I SA/Op 536/10 and 20 September 2010, ref. no. III SA/Gl 1836/10). The above regulations also determine the situation of individuals, legal entities or organisational units that have no legal personality, but which have legal capacity (such a conclusion is drawn from the definition of a beneficiary, i.e. an applicant that has been granted funds – cf. Article 5(1) of the Act on the Development Policy) and apply for EU funds. In the light of the Constitution and jurisprudence that is based thereof, the said parties may not be categorised as “units that are organisationally subordinate” to an organ of public authority which has issued a given implementation system (i.e. the governing body of a voivodeship). Thus, regulating their situation by means of the implementation system is absolutely inadmissible. The said evaluation is not changed by possible consent of participants to accept competition regulations (cf. the above-mentioned focus on that issue in the jurisprudence of certain administrative courts).

A similar conclusion may be drawn from an analysis of the scope *ratione materiae* of the above provisions. They require that the implementation system should comprise issues that have direct effect on the exercise of the rights and freedoms of citizens and for that reason they constitute the subject-matter that is reserved for the acts of universally binding law. As it follows from the above characteristics of the documents, they contain autonomous provisions *inter alia* on the regulations of competitions, the criteria for the evaluation of projects or an appellate procedure for challenging the negative results of competitions at the pre-court stage (including

time-limits and the form of an appeal, as well as institutions that are responsible for considering the appeals).

What constitutes a particularly drastic infringement of Article 87 of the Constitution is “authorisation” to regulate the recourse to an appellate procedure, available to participants in competitions, in the implementation system (Article 5(11) *in fine*, Article 30b(1), first sentence, and Article 30b(2) as well as Article 30c(1) of the Act on the Development Policy). Indeed, within that scope, what should be applied is a number of explicit provisions of the Constitution which require that a regulation should specify a procedure for appealing “decisions issued at the first stage of proceedings” (i.e. the results of project evaluation) in an act of universally binding law, and more precisely – by statute (Article 78 of the Constitution). The constitutional standard that is binding in this context concerns – which should clearly be emphasised – not only administrative decisions within the meaning of administrative law, but all individual and specific acts which shape the legal situation of the subjects of rights and obligations, regardless of the form and name of a given act of applying the law (cf. K. Działocha, comments on Article 93, [in:] L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 1999, Vol. I, p. 17 as well as L. Garlicki, comments on Article 78, [in:] L. Garlicki, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 2007, Vol. V, pp. 5-6). This is also applicable to information received by the applicant with relation to their application for funding for projects under an operational programme, which – pursuant to Article 30g of the Act on the Development Policy – are not administrative decisions (cf. the decision of 15 December 2008, ref. no. K 32/07, OTK ZU No. 10/A/2008, item 188).

In the light of the above, it should be deemed that the challenged regulations are inconsistent with Article 87 of the Constitution. The Constitutional Tribunal has shared the reservations raised by the court referring the question as to the possibility of regulating the rights and obligations of applicants submitting projects in implementation systems (i.e. in acts which are not acts of universally binding law), especially where the said rights and obligations concern an appellate procedure.

[...]

A critical assessment of implementation systems for operational programmes in the context of the sources of Polish law was also provided after the enactment of the amending bill of 2008 [...]. In the view of the Constitutional Tribunal the said opinions confirm the aptness of doubts raised by the court referring the question.

3.3.4. Finally, one should also make reference to a thesis that has been put forward in the course of the review proceedings that the necessity to regulate the rights of competition participants in implementation systems is determined not only by the challenged provisions, but also by the acts of the European Union, and in particular the above-mentioned Council Regulation (EC) No 1083/2006. The said act does not at all address the issue as to what legal form “the management and control

system” should take. This leads to the conclusion that the issue of selecting relevant instruments for fulfilling goals was left at the discretion of the EU Member States.

However, the freedom of the Member States within the scope mentioned above is relative, as it has been restricted by the obligation to respect the general systemic principles of the EU. In particular, this concerns the principles of subsidiarity and proportionality (recital 65 of the Preamble to the Council Regulation (EC) No 1083/2006 makes reference to those principles) as well as the obligation to ensure the uniform and efficient application of EU law, as well as to guarantee that the said law will be fully effective in the national legal order (cf. Article 291 of the Treaty on the Functioning of the European Union as well as recital 62 of the Preamble to the said Regulation: “Member States should adopt adequate measures to guarantee the proper functioning of their management and control systems”). Also, what is of great significance is the principle of institutional autonomy, which is manifested in Article 12 of the Council Regulation (EC) No 1083/2006, which stipulates that the implementation of operational programmes shall be the responsibility of Member States “at the appropriate territorial level”, “in accordance with the institutional system specific to each Member State”. According to the well-established jurisprudence of the Court of Justice of the European Union (cf. e.g. the judgments of: 7 January 2004, in the case C 201/02, *Delena Wells v Secretary of State for Transport, Local Government and the Regions* [2004] ECR I-00723, paragraph 67; 19 September 2006, in the cases C-392/04 and C-422/04 *i-21 Germany GmbH and Arcor AG & Co. KG v Bundesrepublik Deutschland*, [2006] ECR I-08559, paragraph 57, as well as earlier judgments cited therein), if EU law, regulating certain matters (e.g. the implementation of operational programmes) has not provided for principles that protect the rights of the individual arising from EU law (e.g. the principle of non-discrimination – Article 16 of the Council Regulation (EC) No 1083/2006), the proper provisions of proceedings are the provisions of national law. They may not be less advantageous for persons concerned than regulations applied in similar situations for the purpose of protecting the rights of the individual that arise solely from the domestic law of the EU Member States (the principle of equivalence); nor may they lead to a situation where the exercise of rights granted in the EU legal order would become “practically impossible” or “excessively difficult” (the principle of effectiveness).

Irrespective of the above obligations that follow from EU law, the Polish legislator is also bound by the principles and rules of the national constitutional order: even in matters regulated by EU law, the Constitution remains “the supreme law of the Republic of Poland” (cf. Article 8(1) of the Constitution as well as the judgments of: 27 April 2005, ref. no. P 1/05, OTK ZU No. 4/A/2005, item 42; 11 May 2005, ref. no. K 18/04, OTK ZU No. 5/A/2005, item 49; 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108). In the present case, the Constitution requires that rules and procedures for cases concerning applications for funds granted under operational programmes be specified in the provisions of universally binding law. In the view of the Constitutional Tribunal, the fulfilment of that requirement does not

imply the weakening of the EU principle of effectiveness, but on the contrary – it leads to the enhancement thereof. Setting out the rules and procedures for cases concerning applications for funds granted under operational programmes in several normative acts which are not universally binding, and which also contain varied and diverse procedural-law solutions – depending on the area where they are applicable and which authority has established them – infringes not only the above-mentioned provisions of the Constitution, but also hinders the exercise of rights arising from the Council Regulation (EC) No 1083/2006 by those who are entitled thereto. Thus, a change in the way of regulating the rights and obligations of participants in the competitions, which follows from this judgment, will at the same time restore conformity to the Constitution and will result in more effective implementation of obligations arising from Poland's membership in the European Union.

[...]

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

JUDGMENT of 26 June 2013 – Ref. No. K 33/12

[Procedure for the Ratification of the European Council Decision 2011/199/EU
amending Article 136 of the TFEU]

In the Name of the Republic of Poland**The Constitutional Tribunal, in a bench composed of:**

Andrzej Rzepliński – Presiding Judge

Stanisław Biernat

Zbigniew Cieślak

Mirosław Granat

Leon Kieres

Marek Kotlinowski

Teresa Liszcz

Małgorzata Pyziak-Szafnicka

Stanisław Rymar

Piotr Tuleja – Judge Rapporteur

Sławomira Wronkowska-Jaśkiewicz

Andrzej Wróbel

Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

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

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

adjudicates as follows:

The Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws – Dz. U. item 748) is not inconsistent with Article 90 in conjunction with Article 120, first sentence in

fine, of the Constitution of the Republic of Poland as well as with Article 48(6) of the Treaty on European Union (Journal of Laws – Dz. U. of 2004 No. 90, item 864/30, as amended).

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

[...]

The Constitutional Tribunal has considered as follows:

1. The subject of the allegation.

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

The wording of the challenged Act reads as follows:

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

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

The challenged Act expresses consent to the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws – Dz. U. item 748;

hereinafter: the European Council Decision 2011/199/EU). Amended Article 136 has been included in Part Three, Title VIII, chapter 4 of the Treaty on the Functioning of the European Union (Journal of Laws – Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), entitled “The Provisions Specific to Member States Whose Currency is the Euro”.

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

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

The European Council Decision 2011/199/EU amending Article 136 of the TFEU has been adopted by “having regard to” Article 48(6) of the Treaty on European Union (Journal of Laws – Dz. U. of 2004 No. 90, item 864/30, as amended; hereinafter: the TEU). On the basis of Article 12(2a) of the Act of 14 April 2000 on International Agreements (Journal of Laws – Dz. U. No. 39, item 443, as amended; hereinafter: the Act on International Agreements), the EU legal acts referred to in Article 48(6) of the TEU are subject to ratification; this fulfils the requirement indicated in Article 48(6) of the TEU, which states that decisions should be adopted in this way in compliance with relevant constitutional requirements of the Member States. The President of the Republic of Poland ratified the European Council Decision 2011/199/EU on 25 October 2012.

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

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

1.2.1. In the view of the applicants, the challenged Act on the ratification of the European Council Decision 2011/199/EU created procedural bases for conferring

competences vested in the organs of state authority, in relation to certain matters, upon an international organisation – the European Stability Mechanism (hereinafter: the ESM). Therefore, consent to the ratification of the European Council Decision 2011/199/EU should have been granted in accordance with the procedure set out in Article 90 of the Constitution, and not in accordance with the procedure provided for in Article 89(1) of the Constitution. In the context of that allegation, the applicants indicated the infringement of Article 90 in conjunction with Article 120, first sentence, of the Constitution, and additionally the infringement of Article 219 and Article 146 of the Constitution, due to “creating legal bases for restricting the powers of the Sejm to implement a budgetary policy as well as the power of the Council of Ministers to implement an economic policy, by way of granting the European Commission the competence to specify the terms of a mechanism correcting the financial economy of the state”.

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

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

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

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

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

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

Pursuant to Article 42 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), the Tribunal shall, while adjudicating on the conformity of the normative act or ratified international agreement to the Constitution, examine both the contents of the said act or agreement as well as the power and observance of the procedure required by provisions of the law to promulgate the act or to conclude and ratify the agreement. Despite its unique subject and normative content, a statute on ratification is still a statute, and no provision delineating the scope of jurisdiction of the Constitutional Tribunal excludes that statute from the possibility of being reviewed by the Tribunal. A constitutional review of a statute on ratification may concern all elements of the statute: the content of the statute, powers to enact it, as well as a procedure for enacting it (Article 42 of the Constitutional Tribunal Act). In practice, not the succinct wording of such a statute, but the existence of powers to issue the statute as well as compliance with a procedure for enacting the

said statute (due to doubts arising in the doctrine and the practice of applying the law as to the understanding of some of its elements) may be of most significance (see K. Działocha, comment 6 on Article 89 of the Constitution [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 1999).

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

2.3. The view presented above is also up to date in the light of the Constitution of 1997, which is currently in force. It should be assumed that by reviewing statutes granting consent to ratification, a review of international agreements is indirectly carried out, in accordance with the assumption that if an agreement contains provisions that are inconsistent with the Constitution, then a statute granting consent to the ratification of such an agreement is also inconsistent with the Constitution (see L. Garlicki, comment 13 on Article 188 [in:] *Konstytucja...*, Warszawa 2007). Obviously, this is not a review of the constitutionality of an international agreement within the meaning of Article 188(1) of the Constitution, but an analysis of its content, as a prerequisite for the enactment of a constitutional statute granting consent to ratification. In the case of a formal allegation, the said review is limited to determining whether a given international agreement belongs to the category of agreements referred to in Article 90(1) of the Constitution, and thus whether the legislator adopted an appropriate procedure for the enactment of the relevant statute concerning ratification.

2.4. The indicated scope of the examination of a statute granting consent to the ratification of an international agreement is justified in the case where the choice of a procedure for the said ratification is alleged to be inconsistent with the Constitution. Hitherto the Constitutional Tribunal has not examined such a statute, but has made reference to issues related to the procedure for enacting a statute that

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

2.5. In the view of the Constitutional Tribunal, the character of the Act challenged in these proceedings and the scope of the formulated allegations require taking account not only of the content of the European Council Decision 2011/199/EU, which is subject to ratification, but also of a broader normative context that is linked to the ratification of the said Decision. However, this is not tantamount to the assessment of the constitutionality of Article 135(3) of the TFEU, the ESM Treaty or the Fiscal Compact.

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

3.1. The deepening of the financial crisis considerably hindered the economic growth and led to an increase in the level of deficit and the debt level of the EU Member States. Consequently, this led to a severe deterioration of the borrowing conditions of several Member States. The EU Member States noticed that the said problem may pose a serious threat to the financial stability of the European Union as a whole. A need arose to undertake stability actions, also within the scope of the EU. The

first financial assistance was granted to Greece, which was in the most urgent need, and took the form of bilateral loans granted together with multi-lateral assistance provided by the International Monetary Fund and coordinated by the Commission (cf. Council Decision of 12 July 2011 addressed to Greece with a view to reinforcing and deepening fiscal surveillance and giving notice to Greece to take measures for the deficit reduction judged necessary to remedy the situation of excessive deficit (2011/734/EU), (OJ L 296, 2.7. 2011, p. 38).

3.1.1. Further remedial measures taken within the scope of the EU were based on Article 122(2) of the TFEU, which provided for the possibility of awarding financial aid to an EU Member State which was in difficulties or was seriously threatened with severe difficulties caused by exceptional occurrences beyond its control. It was deemed that such difficulties might be caused by considerable deterioration of the economic and financial circumstances. For this reason, the Council Regulation (EU) No. 407/2010 of 11 May 2010 established a European Financial Stabilisation Mechanism (OJ L 118, 11.5.2010, p. 1; hereinafter: the EFSM), the purpose of which was to preserve the financial stability of the European Union. The said mechanism was to allow the Union to respond in a coordinated, rapid and effective manner to acute difficulties in a particular Member State. At the same time, the European Financial Stability Facility was established (hereinafter: the EFSF) as a public limited liability company (FR. *société anonyme*) under Luxembourgish law, with its office in Luxembourg. Funds for loans and lines of credit under the EFSM were acquired by the European Commission by issuing debt instruments on the European market, which were guaranteed by the budget of the European Union. By contrast, assistance provided by the EFSF was financed from the issuance of bonds or other debt instruments guaranteed by the euro area Member States. The EFSF was authorised to act on the basis of a precautionary programme, to grant loans for capitalising financial institutions to States that had not been included under a macro-economic adjustment programme as well as to intervene in the secondary bond markets (on the basis of a decision of the ECB as well as a unanimous decision of EFSF Shareholders). In extraordinary situations, the EFSF could also intervene in the primary bond market. Hitherto assistance under the temporary rescue mechanism has been provided to the following euro area Member States: Ireland, Portugal, Greece, Spain and Cyprus.

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

3.1.2. At the meeting of the European Council in October 2010, the Heads of State or Government agreed on the need for the Member States to establish a permanent crisis mechanism. Main findings constituting the basis for establishing the ESM

were adopted at the meetings of the European Council on 16-17 December 2010. The European Council concluded that since such a mechanism was to safeguard the stability of the euro area as a whole then it would supplement funds granted so far on the basis of Article 122(2) of the TFEU. The consequence of such a stance was the statement that the establishment of the stability mechanism does not increase the competences conferred on the Union in the Treaties and the introduction of a norm that provides for the establishment thereof was admissible in accordance with Article 48(6) of the TEU.

At its meetings on 24 and 25 March 2010, the European Council unanimously adopted the European Council Decision 2011/199/EU, amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro, and requested the Member States to commence national ratification procedures expeditiously – so that the said Decision would enter into force on 1 January 2013. By the European Council Decision 2011/199/EU, paragraph 3 has been added to Article 136 of the TFEU, which explicitly provides that the Member States whose currency is the euro may establish a stability mechanism. Pursuant to Article 48(6) of the TEU, the said Decision was to be approved by the EU Member States in accordance with their respective constitutional requirements. At the same time, it should be emphasised that Article 122 of the TFEU was not deleted, and the Union has maintained the competence granted to it in that provision.

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

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

First of all, attention should be drawn to the fact that the provision does not in itself establish a stability mechanism that is subject to the EU law; nor does it impose on the EU Member States, nor even on the EU Member States whose currency is the euro, an obligation to establish one. Within that scope, its normative content amounts to recognising the powers of the Member States to establish such a mechanism by means of international law instruments. Indeed, one may not have any doubts that the EU Member States have – within the scope of their sovereignty – competence to conclude international agreements, provided this does not violate commitments assumed by the States in the Treaties on which the European Union is founded, taking into account Article 3 of the TFEU. In this context, the newly introduced norm, in greater detail, specifies that the establishment of the said mechanism, outside the EU institutional framework, neither infringes the sole competence of the Union to carry out the monetary policy of the euro area, nor violates a prohibition expressed in Article 125 of the TFEU. Also, one may not overlook the fact that the norm set

out in Article 136(3) of the TFEU does not precisely specify the legal character or the detailed construction of the stability mechanism. It merely contains a very general recommendation that the mechanism established may, first of all, be activated if indispensable to safeguard the stability of the euro area as a whole and will, secondly, be made subject to strict conditionality. The said provision does not oblige the EU institutions to cooperate within the framework of the newly created mechanism; nor does it specify what competences are to be assigned to those institutions.

3.2.2. As it has been mentioned above, before the establishment of the ESM, the legal basis for granting financial assistance within the EU was Article 122(2) of the TFEU. Pursuant to that provision, where a Member State is in difficulties or is seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control, the Council, on a proposal from the Commission, may grant, under certain conditions, Union financial assistance to the Member State concerned. At the same time, the said provision mentions exceptional and extraordinary circumstances; however, no treaty provisions provide for the possibility of establishing a permanent crisis or stability mechanism.

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

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

Doubts concerning the meaning of Article 125(1) of the TFEU constituted a significant argument in the context of establishing the ESM. The “requirement” of the introduction of Article 136(3) of the TFEU, referred to in recital 2 of the European Council Decision 2011/199/EU, should be construed, in this context, as

satisfying the need to preserve the certainty of law which consisted in a prohibition against taking over liabilities of other Member States as well as a prohibition against establishing mechanisms that discourage the EU Member States from carrying out a balanced budget policy. What serves the last-mentioned purpose is, in particular, second sentence added to Article 136(3), pursuant to which: “The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”. Such a version of Article 136(3) of the TFEU does not contain any new normative content, but merely confirms the fact that the EU Member States, including those whose currency is the euro, are entitled to competence – which is only to an insignificant extent limited by the content of Article 125(1) of the TFEU – to conclude international agreements, also those agreements the purpose of which is the establishment of assistance mechanisms.

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

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

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

4.1. The character of the ESM Treaty.

4.1.1. In July 2011, the euro area Member States signed the first version of the Treaty establishing the European Stability Mechanism. The final version of the Treaty – after the introduction of changes that arose from intergovernmental agreements aimed at enhancing the effectiveness of that instrument – was signed on 2 February 2012. The Treaty provides for the Contracting Parties to establish

an international institution to be named the “European Stability Mechanism”; the Contracting Parties are to be ESM Members (Article 1 of the ESM Treaty).

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

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

The ESM constitutes an intergovernmental institution, with full legal personality (Article 32(2) of the ESM Treaty), with its seat and principal office in Luxembourg (Article 31(1) of the ESM Treaty), which is subject to international law. It has been related to the European Union in such a way that certain tasks have been assigned to

the European Commission acting in cooperation with the ECB. After a request for stability support is lodged by a given Member State, the tasks comprise the following:

- assessing the existence of a risk to the financial stability of the euro area as a whole or of its Member States, to assess whether public debt is sustainable, as well as to assess the actual or potential financing needs of the ESM Member concerned (Article 13(1) of the ESM Treaty);
- carrying out negotiations concerning a memorandum of understanding detailing the conditionality attached to the financial assistance facility (Article 13(3) of the ESM Treaty);
- monitoring compliance with the conditionality attached to the financial assistance facility (Article 13(7) of the ESM Treaty).

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

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

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

The Board of Governors shall approve the application for accession of the new ESM Member and the detailed technical terms related thereto, as well as adaptations to be made to the ESM Treaty as a direct consequence of the accession. Following the approval of the application for membership by the Board of Governors, new

ESM Members shall accede upon the deposit of the instruments of accession with the depositary, who shall notify other ESM Members thereof. The contribution key of a new member acceding to the ESM shall be calculated in accordance with rules that bind other ESM Members, i.e. in compliance with the key for the subscription of the ECB's capital (Article 2(3) in conjunction with Article 11 of the ESM Treaty). It should be emphasised that pursuant to Article 47 of the ESM Treaty, the Treaty shall be subject to ratification, approval or acceptance by the signatories.

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

4.2. Accession upon an application for membership

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

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

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

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

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

Pursuant to Article 48 of the ESM Treaty, the said Treaty was to enter into force on the date when instruments of ratification, approval or acceptance had been deposited by signatories whose initial subscription represented no less than 90% of the total subscriptions set forth in Annex II to the ESM Treaty. Thus, for the entry into force of that regulation, it was admissible if only some euro area Member States adopted the provisions of the said Treaty. And that was the case. The ESM Treaty entered into force on 27 September 2012, after the completion of the ratification process by 16 out of 17 euro area Member States (see *Bekanntmachung über das Inkrafttreten des Vertrags zur Einrichtung des Europäischen Stabilitätsmechanismus (ESM)*, BGBl, Part II No. 30 of 9 October 2012; *Bundesgesetzblatt für die Republik Österreich*, Part III No. 138 of 28 September 2012). In the context of Estonia, the ESM Treaty entered into force after the documents of ratification were submitted on 3 October 2012. Thus, only since 3 October 2012, all euro area Member States have been ESM Members.

4.3. The Fiscal Compact.

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

process in the case of the European Council Decision 2011/199/EU was independent of the process of binding Poland by the provisions of the Fiscal Compact.

4.3.2. The compact is fully applicable to the EU Member States whose currency is the euro. The remaining EU Member States – provided that they have signed the compact – are only bound by the provisions included in Title V (Article 14(4) of the Fiscal Compact). With reference to the Member States with a derogation which have ratified the compact, it will become fully effective as of the day of abrogating the derogation, unless the Member State concerned declares that it wishes to be bound by all or some provisions of Titles III and IV of the Fiscal Compact.

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

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

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

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

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

5. Procedures for the ratification of an international agreement

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

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

By contrast, pursuant to Article 12(2a) of the Act on International Agreements (added on the basis of Article 23(1) of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union; Journal of Laws – Dz. U. No. 213, item 1395): “Ratification shall apply to the legal acts of the European Union referred to in Article 48(6) of the Treaty on European Union as well as Article 25, Article 218(8), second subparagraph, second sentence, Article 223(1), Article 262 or Article 311, third subparagraph, of the Treaty on the Functioning of the European Union”. The said provision has been introduced due to the necessity to specify, by statute, a proper way of proceeding with the legal acts of the European Union.

Pursuant to Article 15(5) of the Act on International Agreements, Article 15(1)-(4) of the said Act shall be applied accordingly to resolutions of the Council of Ministers concerning the submission of an EU legal act referred to in Article 12(2a) of the said Act to the President of the Republic for ratification. This entails that the submission of an EU legal act to the President for ratification occurs after consent mentioned in Article 89(1) or Article 90 of the Constitution is obtained or after the Sejm has been informed about such an intention to submit the act for ratification, as stated in Article 89(2) of the Constitution (see Article 15(3) of the Act on International Agreements).

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

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

Pursuant to Article 89(1) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute – if such an agreement concerns: 1) peace, alliances, political or military treaties; 2) freedoms, rights or obligations of citizens, as specified in the Constitution; 3) the Republic of Poland's membership in an international organisation, 4) considerable financial responsibilities imposed on the State, 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute. Thus, undoubtedly, Article 89(1) of the Constitution specifies a procedure for the ratification or renunciation of an international agreement the content of which is of special significance to the state as well as the said provision sets out the catalogue of such agreements. The above-mentioned procedure (referred to as complex ratification, large ratification) consists in granting consent, by statute, to the ratification of an international agreement before it is ratified by the President. This constitutes part of the entire ratification process that takes place at the level of the constitutional law (see K. Działocha, *op. cit.*, comment 2 on Article 89). Due to the lack of special regulations pertaining to a procedure for enacting a statute by means of which consent shall be granted for ratification in accordance with Article 89(1) of the Constitution, it is subject to general requirements outlined in Articles 118-123 of the Constitution. This means that the Sejm shall pass bills by a simple majority vote, in the presence of at least half of the statutory number of Deputies (Article 120, first sentence *in principio*, of the Constitution).

An agreement referred to in Article 90(1) of the Constitution, i.e. an international agreement, by virtue of which the Republic of Poland may confer the competence of

organs of state authority in relation to certain matters on an international organisation or international institution, needs to be bound by tighter restrictions. The certain “tightening” of the procedure involves raising the level of a majority in the Sejm and the Senate from a simple majority to the level of a two-thirds majority vote both in the Sejm and the Senate. The said majority required in the Sejm and the Senate, as specified in Article 90(2) of the Constitution, in the case of granting consent to the ratification of an international agreement on the conferral of competences, is considerably higher than a majority required for the enactment of (ordinary) statutes. It is equivalent to the qualified majority in the Sejm and is higher in the context of the Senate, in comparison with a majority required to adopt a bill to amend the Constitution (Article 235(4) of the Constitution). Thus, in quantitative categories, it should be concluded that the requirements under discussion are at least equivalent – from the point of view of representation and legitimacy – to requirements which are to be met in the case of amendments to the Constitution. The said circumstance is an additional argument for the assessment that the conferral of competences vested in the organs of state authority “in relation to certain matters” takes place with the preservation of high standards of representation and the scale of acceptance of solutions to be adopted (see the judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04). It should be stressed that the procedure provided for in Article 90 of the Constitution enhances the position of the Senate in the course of the legislative process. Also, the separate character of that procedure consists in the fact that the two houses of the Polish Parliament have equal rights when it comes to enacting such a bill, as without consent of either of the houses the bill may not be enacted. This means that Article 121 of the Constitution is not applicable; the said Article specifies the competence of the Senate in the course of enacting bills and sets out a procedure for the Sejm to consider the Senate’s resolutions concerning bills passed by the Sejm (see the judgment of the Constitutional Tribunal of 27 May 2003, ref. no. K 11/03, OTK ZU No. 5/A/2003, item 43). The said circumstance is an additional argument for the assessment that the conferral of competences vested in the organs of state authority “in relation to certain matters” takes place with the preservation of high standards of representation and the scale of acceptance of solutions to be adopted. In that respect, the Sejm and the Senate function as the organs of the state that represent the Nation – the sovereign, pursuant to the principle expressed in Article 4(2) of the Constitution.

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

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

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

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

The catalogue of matters mentioned in Article 89(1)(1)-(5) of the Constitution indicates that a majority of ratified international agreements affect (modify) the way of exercising competences by the organs of state authority. In many cases, the said agreements do not introduce a restriction as to the exercise of competences by the organs of state authority or impose obligations on those organs which do not arise from national law (e.g. agreements on the enforcement of rulings issued by foreign courts). Moreover, the said catalogue indicates that the subject of those agreements may be of particular constitutional significance. However, with reference to those agreements, such a restrictive procedure is not applied as the one in the case of agreements referred to in Article 90(1) of the Constitution. Therefore, it should be assumed that not every agreement that affects the way of exercising competences vested in the organs of state authority, and restricts or modifies the scope of the said competences by imposing new obligations on the said organs, constitutes the conferral of competences within the meaning of Article 90 of the Constitution. Making a contrary presumption would result in almost complete overlap of the scope *ratione materiae* of Article 89 and Article 90 of the Constitution. This would be inconsistent with the intention of the rational constitution-maker, as he has assumed that, in the case of constitutionally significant matters which lead to the modification of the scope of competences vested in the organs of state authority, the procedure indicated in Article 89(1) of the Constitution is the proper one, and merely in the event of conferring the competences, the proper procedure is the one set out in Article 90 of the Constitution.

The uniqueness of Article 90 of the Constitution should also be recognised in its role that has been historically assigned thereto. There is no doubt that the present version of Article 90 of the Constitution was understood as a provision that was to make accession to the EU possible, although this does not directly follow from its content (see K Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 25, see also R. Chruściak, “Procedury przystąpienia Polski do Unii Europejskiej w pracach nad Konstytucją”, *Państwo i Prawo* Issue No. 5/2003, p. 53). Regarded as “an integration clause”, Article 90 of the Constitution has introduced a special procedure for the ratification of international agreements on the basis of which Poland intends to “delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters”. A ratification statute considered in accordance with

the procedure set out in Article 90 of the Constitution constitutes a special type of a statute not only due to strict requirements for the enactment thereof, but mainly due to its objective which is to grant consent to the ratification of agreements that make it possible for Poland to participate in integration processes. The procedure and terms of granting consent to ratification in accordance with Article 90 of the Constitution have been intentionally distinguished by the constitution-maker from the procedure for enacting ordinary bills, including other ratification bills referred to in Article 89 of the Constitution. That distinction is based on agreements concerning participation in integration processes in forms that ultimately affect the practical dimension of the principle of the sovereignty of the state, which is enshrined in chapter I of the Constitution (see Z Kędzia, “Opinia w sprawie wybranych aspektów prawnych ratyfikacji umowy międzynarodowej”, *Przegląd Sejmowy* Issue No. 1/2009, p. 184).

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

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

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

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

It should be noted that, at the stage of legislative work, draft resolution was submitted on the procedure for expressing consent for the ratification of the European Council Decision 2011/199/EU (the Sejm Paper No. 114/7th term). The resolution provided that a statute granting consent to ratification would be enacted in accordance with Article 90(2) of the Constitution. It was pointed out in the explanatory note that the said Decision: "creates a treaty basis for conferring – upon a supranational level – competences vested in the organs of state authority, unless the Government decide to renegotiate the TFEU in that respect before joining the euro area". The draft resolution was dismissed at the 14th sitting of the Sejm on 10 May 2012. The Sejm began to work on the bill in accordance with the procedure provided for in Article 89(1) of the Constitution.

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

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

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

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

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

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

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

Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu, P. Radziewicz (ed.), Warszawa 2010, p. 28).

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

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

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

Fundamental controversies arise from the "narrow" or "broad" interpretation of that premiss, which means correlating Article 90 of the Constitution – in the first place – with international agreements, on the basis of which competences are conferred directly (see the Treaty of Accession or the Treaty of Lisbon) and, in the second case, also with agreements that bring about changes within the scope of conferred competences or changes within the scope of exercise of competences conferred earlier.

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

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

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

According to J. Barcz and J. Kranz, the conferral of competences within the meaning of Article 90 of the Constitution comprises the following elements: 1) opening up the national legal system to exclusive competences that have legal effects and are vested in an international organisation (international institution), that directly shape legal relations (direct application and direct effects) in the realm of its binding law (with regard to subjects, objects, events or situations – primarily within the scope of jurisdiction of its member states); 2) permanently renouncing some of its competences that have legal effects (in particular law-making competences) by the state in relation to certain matters; 3) conferring competences that have legal effects, also within a broader scope than the competences renounced by the state, upon an international organisation (international institution) (see J. Barcz, J. Kranz, “Powierzenie kompetencji na rzecz UE a Traktat o Europejskim Mechanizmie Stabilności i Traktat o unii fiskalnej. Uwagi w świetle orzecznictwa niemieckiego FTK i wyroku TSUE w sprawie C-370/12”, *Przegląd Sejmowy* Issue No. 4/2013, p. 23 and the subsequent pages).

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

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

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

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

6.3.1. Although the Constitutional Tribunal has underlined the special character of a statute that grants consent to the ratification of an international agreement, hitherto it has not provided an interpretation of terms used in Article 90 of the Constitution. In its two vital judgments (of 11 May 2005, ref. no. K 18/04, as well as of 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108), the Tribunal assumed that the conferral of competences had already taken place and focused on the questions whether the conferral of competences had at all been

admissible in the light of the principle of the sovereignty of the Republic of Poland and whether, in the context of a particular international agreement (the Treaty of Accession, the Treaty of Lisbon) “conferral” had met the criteria set out in Article 90(1) of the Constitution (and in particular, whether competences had been conferred in relation to only “certain matters”). The Constitutional Tribunal held the view that Article 90 of the Constitution manifested the fact that the constitution-maker had, in a sovereign way, opened up to the possible – determined by certain conditions – extension of the catalogue of legal acts that are to be universally applicable in the territory of the Republic of Poland. However, neither Article 90(1) nor Article 91(3) of the Constitution may constitute a basis of conferring, upon an international organisation (or an organ thereof), competence to enact legal acts or take decisions that would be inconsistent with the Constitution.

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

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

maintain ‘the competence of competences’, and the model of European integration is a form of international organisation.

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

6.3.4. In the jurisprudence of the Constitutional Tribunal, attention has also been drawn to the “activation of competence”. Such categorisation was made by the Constitutional Tribunal, by analysing the validity of possible application of Article 90 of the Constitution in the course of enacting the Act of 10 July 2008 on authorising the President of the Republic of Poland to submit a declaration on acceptance of the jurisdiction of the Court of Justice of the European Communities pursuant to Article 35(2) of the Treaty on European Union (the judgment of 18 February 2009, ref. no. Kp 3/08). The Constitutional Tribunal did not share the view that the effect of the said declaration is the conferral of the competence of Polish courts or – in accordance with another wording – the narrowing down of judicial powers of Polish courts for the sake of an international organisation, i.e. the Court of Justice. What supposed to be the effect of such categorisation was the requirement to enact the challenged Act in accordance with Article 90 of the Constitution. The Constitutional Tribunal has stated that the competence within the scope of the Third Pillar of the European Union was adopted by the Republic of Poland together with the entire TEU, by means of the Treaty of Accession. “The declaration submitted pursuant to Article 35(2) of the EU Treaty means only activation of that competence, and not its emergence”. In the doctrine, it has been pointed out that, in practice, in the light of the Act analysed in the case Kp 3/08, there was a situation where the provisions

of an international agreement provided for the possibility of conferring competence, but the effectiveness and enforcement of such conferral were dependent on a separate decision of the organs of the Polish state (see P. Czarny, “O niektórych problemach proceduralnych związanych z ‘wielką’ i ‘dużą’ ratyfikacją umów międzynarodowych”, [in:] *Państwo i prawo wobec współczesnych wyzwań. Zagadnienia prawa konstytucyjnego. Księga jubileuszowa Profesora Jerzego Jaskierni*, R.M. Czarny, K. Spryszak (eds.), Toruń 2012, pp. 365-367).

The Constitutional Tribunal has defined the term ‘competence’ in the light of Article 189 of the Constitution. In the decision of 20 May 2009, ref. no. Kpt 2/08 (OTK ZU No. 5/A/2009, item 78), the Tribunal stated that the competence of a constitutional organ of the state was the power granted by the constitution-maker or the legislator to act with legally specified consequences within the specified scope *ratione materiae*; undertaking such action might be a legal obligation or entitlement of a given organ of the state. In this context, the Constitutional Tribunal stressed that the powers understood in this way should not be regarded as tantamount to the systemic roles of state organs (the roles fulfilled within the constitutional system), to the duties (i.e. legally specified objectives and consequences of functioning of particular state organs), or to the scope *ratione materiae* (the areas of actions specified in respect of their objects).

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

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

6.4.1. The interpretation of Article 90 of the Constitution should take into account the fact that the said provision was intended by the constitution-maker as a basis for opening up Poland to international law, and in particular – as a clause providing for integration, facilitating accession to the EU. At present, after Poland’s accession to the EU, despite its succinctness, the provision has also become a European clause, i.e. a provision that specifies principles in accordance with which Poland functions in the EU. At the same time, it should be remembered that nowadays the legal order in Europe comprises numerous elements for the EU Member States, namely: treaty norms, norms introduced by EU institutions as well as norms existing in the national order. At the same time, this is a dynamic system: a relation between the EU order and the national order is subject to evolution resulting from changes in the EU law. Therefore, a Member State that confers competence must assume that the way of exercising the competence may be subject to changes. This may be required

to ensure that a given organisation functions effectively and, at the same time, these are not changes that may be understood as conferral of “competence of organs of State authority” (see the judgment of 24 November 2010, K 32/09).

The Constitution sets out relations between international law and domestic law, primarily in accordance with the principle that the Republic of Poland shall be for the common good of all its citizens, the principle of sovereignty, the principle of a democratic state ruled by law as well as the principle that Poland shall respect international law binding upon it. On the basis of those principles, one may draw a conclusion that Poland opens up to the international legal order. The effect of conferral of competences is often a complicated network of dependencies between the state, the organs of the state and an international organisation. Hence, the conferral of competences should always be assessed from the point of view of principles that shape the constitutional identity. The guarantee of preserving the constitutional identity of the Republic is Article 90 of the Constitution and boundaries of conferral of competences set therein (see the judgment of 24 November 2010, ref. no. K 32/09).

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

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

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

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

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

6.5. The competence of the organs of state authority

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

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

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

6.5.2. The term 'competence' has not been defined in law, and moreover it is rarely used by the legislator in the binding law. By contrast, the term 'competence' has been used in the legal register for a long time. The way in which 'competence' is specified and defined varies in the science of Polish law, both in the light of the theory of law as well as in the context of particular dogmas (see M. Zieliński, *Wykładnia prawa: Zasady, reguły, wskazówki*, Warszawa 2002, pp. 24-31; M. Matczak, "Z rozważań nad koncepcją normy kompetencyjnej" [in:] *Z zagadnień teorii i filozofii prawa: Konstytucja*, A. Bator (ed.), Wrocław 1999, p. 201 and the subsequent pages; A. Bator,

Kompetencja w prawie i prawoznawstwie, Prawo CCLXXXVII, Wrocław 2004; W. Jedlecka, “Suwerenność państw członkowskich a kompetencje wyłączne Unii Europejskiej” [in:] *Z zagadnień teorii i filozofii prawa. Kompetencja ze stanowiska teorii i filozofii prawa*, W. Jedlicka (ed.), Wrocław 2004, pp. 85-86).

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

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

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

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

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

been established. The said lack of precision may stem from the particular character of the organisation, the way its objectives have been formulated, the particular character of its bodies or authorities and, also, from the legal language used in international law.

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

6.5.3. Taking account of views expressed by the representatives of the doctrine and presented in the jurisprudence of the Constitutional Tribunal, it should be stated that ‘competence’ in the light of Article 90(1) of the Constitution entails authorising a given organ of public authority to take certain actions. The said actions, in principle, have legal effects and are related to issuing legally binding acts. The said acts may interfere with the realm of the legally protected personal interests of the individual. In order to determine whether given competence is competence construed in the light of Article 90 of the Constitution, it is required to at least indicate an organ of state authority in which the competence is vested, entities or individuals that are governed by that competence, the content of the rights of the said organ and the obligations of subordinate entities or individuals which correspond to the said rights. Given that Article 90(1) of the Constitution mentions competence “in relation to certain matters”, merely specifying the scope of activity carried out by an organ of state authority or a generally formulated right to regulate a given category of matters does not constitute competence within the meaning of the said provision. Also, it may not be the subject of conferral.

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

When establishing necessary findings, one should bear in mind the complex character of the term ‘competence’ as used in Article 90(1) of the Constitution as well as requirements concerning the formulation of international agreements that provide for conferral of competences. Since the scope of competences that are to be conferred does not have to be reflected in the content of an international agreement in a simple way, one should assume that the above-indicted elements of competence do not have to be explicitly formulated in a provision of the international agreement.

Thus, the criterion that verifies the fulfilment of the premiss concerning Article 90(1) of the Constitution is also the criterion for the effect of an international agreement or an equivalent act, e.g. a decision issued by the European Council under Article 48(6) of the TEU (the bridging clause). If one may conclude from the agreement that the application of the agreement will provide grounds for distinguishing the above-indicated elements, one should opt for the procedure set out in Article 90(1) of the Constitution.

6.5.4. In the view of the Constitutional Tribunal – in the light of analysing the content of the European Council Decision 2011/199/EU from the point of view of elements that must occur if one is to speak of ‘competence of an organ of state authority’ – there are no grounds to state that the challenged Act, which grants consent to the ratification of the European Council Decision amending Article 136(3) of the TFEU, leads to the conferral of ‘the competence of organs of State authority’, within the meaning of Article 90 of the Constitution. It does not follow from Article 136(3) of the TFEU that competence which was previously vested in given organs of state authority would become part of the scope of competence of an international organisation or international institution. The said provision mentions neither an international organisation nor any competence of an organ of state authority which is to be conferred. The amendment to Article 136 of the TFEU has not created a relation of subordination with regard to an international organisation (an international institution). That conclusion eliminates a need to interpret the other terms used in Article 90(1) of the Constitution.

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

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

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

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

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

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

Article 90(2) of the Constitution if, on the basis of the agreement, the competence of state authority is to be conferred.

It should be added that the acceptance of the thesis about the necessity to apply Article 90 of the Constitution to an amendment introduced into an agreement concluded in accordance with that procedure would entail assuming that a reverse operation (“the return of competence”) would also require the application of such a procedure, but this would be contrary to the *ratio legis* of Article 90 of the Constitution.

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

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

6.6.4. To sum up, even if we assume that in the case of amending an agreement the subject of which has been the conferral of competences vested in the organs of state authority, there exists a certain presumption that, also on the basis of that amendment, the conferral of competences will take place, then this presumption is relative and may not be accepted in the present case. One may not devise a general rule that consent to an amendment introduced to an agreement ratified in accordance with Article 90 of the Constitution must be granted in accordance with the same

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

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

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

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

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

In this context, it should be noted that two norms may be derived from Article 120, first sentence, of the Constitution. The first one determines the issues of a majority and the minimal number of Deputies present during a vote; the regulation only refers to the Sejm (it follows from Article 124 of the Constitution that Article 120 of the Constitution is applied accordingly to proceedings in the Senate). The second norm which may be derived from Article 120, first sentence *in fine*, of the Constitution is the following: bills are not passed by a simple majority vote, where the Constitution provides for a different majority or a different minimal number of Deputies present during the vote. Thus, the first norm constitutes a basic rule which is applied unless another provision of the Constitution provides for a different majority. Such an exception is Article 90(2) of the Constitution. As the Sejm has aptly argued, the joined reconstruction (reading provisions together) of the higher-level norm in the context of the allegation raised by the applicants (the legitimacy of the applying the procedure set out in Article 90 of the Constitution) is therefore possible solely on the

basis of Article 90 and Article 120, first sentence *in fine*, of the Constitution. Consequently, the higher-level norm for the review comprises Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution.

7.2. A formal aspect – the bridging clause

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

The Republic of Poland consented to such a revision procedure of the TFEU, by ratifying the Treaties that constitute the basis of the functioning of the EU, and in particular the Treaty of Lisbon. In its judgment of 24 November 2010, ref. no. K 32/09, the Constitutional Tribunal has stressed that the simplified revision procedure, provided for in Article 48(6) of the TEU, corresponds with the requirements set out in Article 90(1) of the Constitution, as it allows for an amendment on the basis of a decision of the European Council only in the cases where this does not lead to an increase in the competences conferred on the Union in the Treaties. Possible conferral of competences of organs of state authority in relation to certain matters as a result of that amendment would be possible only by adhering to the requirements set out in Article 90 of the Constitution, which concern the conferral of competences on the basis of an international agreement. “However, any conferral of competences in that respect is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision shall not increase the competences conferred on the Union in the Treaties. Therefore, there will be no conferral of ‘competence of organs of State authority in relation to certain matters’. Thus, the point is not the conferral of competences”. The European Council Decision 2011/199/EU, in its recital 6, emphasises that: “The amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties”.

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

Article 136 of the TFEU (see point 7.4 in part III of this statement of reasons for the Tribunal's judgment).

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

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

In the view of the Constitutional Tribunal, the scope of the amendment introduced into Article 136 of the TFEU matches the criterion mentioned in Article 89(1) (3) of the Constitution. At the same time, an analysis of the character of the new regulation leads to the conclusion that the said amendment is not tantamount to the conferral of competences within the meaning of Article 90(1) of the Constitution. The subject of the European Council Decision 2011/199/EU does not comprise the competences of organs of state authority, and thus they could not be conferred. However, since Article 136 of the TFEU was amended on the basis of the said Decision, one may consider whether the amendment – as it has been argued by the applicant – creates legal and treaty bases for conferring the competences of organs of state authority in relation to certain matters on an international organisation (the ESM) within the meaning of Article 90 of the Constitution. It should be borne in mind that in accordance with Article 136(3) of the TFEU: “The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality”.

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

participate in establishing the ESM and may not be a beneficiary of the assistance granted under the said mechanism.

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

However, what is left outside of the normative scope of the provision introduced into the TFEU pursuant to the European Council Decision 2011/199/EU, which is referred to in the challenged Act on the ratification of the said Decision, is the question about the participation of the EU bodies in the ESM. Indeed, their competences in this mechanism are shaped not by the challenged amendment to the TFEU, but by particular provisions of the ESM Treaty. It should be emphasised once again that Article 136(3) of the TFEU only manifests the recognition of competences vested in the Member States to which it is addressed.

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

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

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

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

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

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

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

from their sovereignty, to enter into an agreement such as the ESM Treaty may not be interpreted as one that imposes a legal obligation to participate in the mechanism on the part of EU Member States that are not involved in creating the said mechanism.

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

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

One may agree that it is the ESM Treaty that provides for such a possibility, but – in the light of the jurisprudence of the Constitutional Tribunal – merely ‘providing for such a possibility’ is not tantamount to the conferral of competences. The Constitutional Tribunal, in a sense, dealt with a similar issue in its judgment of 24 November 2010 in the case K 32/09. When analysing the Treaty of Lisbon, the Constitutional Tribunal stated that the applicants’ allegations regarded the possibility of applying the provisions of the Treaty in a way that broadened the scope of competences that had already been conferred, and therefore: “they refer to the ideas of the applicants concerning the way of applying the Treaty in the future. The Constitutional Tribunal is not competent to assess hypothetical way of applying the Treaty of Lisbon. Such practice remains outside the jurisdiction of the constitutional court as long as it does not take the form of concrete regulations subject to review by the Constitutional Tribunal, pursuant to Article 188 of the Constitution. The conclusions concerning the potential application of the Treaty, in a way which would be inconsistent with the Treaty, fall outside the jurisdiction of the Constitutional Tribunal” (see part III point 2.6 of the statement of reasons for the judgment in the case K 32/09).

The decision whether to accede to the ESM Treaty, and in accordance with what (ratification) procedure will be made in the future. Also, the assessment of

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

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

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

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

7.4.1. The stance of the Constitutional Tribunal corresponds to the stance presented by the Court of Justice of the European Union in its judgment of 27 November 2012 in the case *Pringle*. It should be emphasised that, when assessing the constitutionality of the Act on the ratification of the European Council Decision 2011/199/EU, the Constitutional Tribunal recognised that the CJEU’s statements were binding as regards

the fact that the addition of paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union (paragraph 73 of the CJEU's judgment), as well as the validity and interpretation of the European Council Decision 2011/199/EU.

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

7.4.2. The CJEU stated, first of all, that the provisions of the TEU and TFEU did not confer any specific competence on the Union to establish a stability mechanism of the kind envisaged by the European Council Decision 2011/199/EU. Admittedly, Article 122(2) of the TFEU conferred on the Union the power to grant *ad hoc* financial assistance to a Member State which was in difficulties or was seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the Preamble to its Decision 2011/199, Article 122(2) of the TFEU did not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that Decision. The fact that the mechanism envisaged was to be permanent and that its objectives were to safeguard the financial stability of the euro area as a whole meant that such action could not be taken by the Union on the basis of that provision of the TFEU. Even if Article 143(2) of the TFEU also enabled the Union, subject to certain conditions, to grant mutual assistance to Member States, that provision covered only Member States whose currency was not the euro. As regards the question whether the Union could establish a stability mechanism comparable to that envisaged by the Decision 2011/199 on the basis of Article 352 of the TFEU, the CJEU held that the Union had not used its powers under that article and that, in any event, that provision did not impose on the Union any obligation to act.

7.4.3. With regard to the issue of increasing the scope competences conferred on the Union in the Treaties, by virtue of adding the paragraph by the European Council Decision 2011/199/EU, the CJEU stated that Article 136(3) of the TFEU confirmed that the Member States had the power to establish a stability mechanism and was further intended to ensure, by providing that the granting of any financial assistance under that mechanism would be made subject to strict conditionality, that the mechanism would operate in a way that would comply with European Union law. That amendment did not confer any new competence on the Union, as it created

no legal basis for the Union to be able to undertake any action which had not been possible before the entry into force of the amendment to the TFEU. The CJEU pointed out that even though the ESM Treaty made use of the Union's institutions, in particular the Commission and the ECB, that fact was not, in any event, capable of affecting the validity of the Decision 2011/199, which in itself provided only for the establishment of a stability mechanism by the Member States and was silent on any possible role for the Union's institutions in that connection.

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

7.4.4. The CJEU also made reference to a relation between the ESM and Article 125 of the TFEU, in accordance with which neither was the Union nor a Member State to 'be liable for (...) the commitments' of another Member State or 'assume [those commitments]'. In the view of the CJEU, that norm was not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State. The said provision prohibited the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy was diminished. However, Article 125 of the TFEU did not prohibit the granting of financial assistance by one or more Member States to a Member State which remained responsible for its commitments to its creditors provided that the conditions attached to such assistance were such as to prompt that Member State to implement a sound budgetary policy. The activation of financial assistance by means of a stability mechanism such as the ESM was not compatible with Article 125 of the TFEU unless it was indispensable for the safeguarding of the financial stability of the euro area as a whole and was subject to strict conditionality. The instruments for stability support of which the ESM might make use under Articles 14 to 18 of the ESM Treaty demonstrated that the ESM would not act as guarantor of the debts of the recipient Member State. The latter would remain responsible to its creditors for its financial commitments.

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

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

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

The Federal Constitutional Court examined the constitutionality of a statute which granted consent to the adoption of the European Council Decision 2011/199/EU. The Federal Government proposed that the said statute should be enacted in accordance with an ordinary procedure (Article 23(1) in conjunction with Article 59(1) of the Basic Law for the Federal Republic of Germany), emphasising in the statement of reasons for its judgment that no sovereign rights were transferred. “Article 136(3) TFEU does not itself put a stability mechanism into effect, but merely gives the Member States the possibility of establishing such mechanisms on the basis of an international agreement. In this way, at all events, no competencies are transferred to the bodies of the European Union; on the contrary, the competencies of Member States are to be taken up and their relationship to the rules and regulations on European Union currency law is to be laid down. At the same time, by way of a stability mechanism in treaty law, it will be guaranteed that the only Member States liable are those which participate in it. Regarded in this light, Article 136(3) TFEU confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established” (paragraph 236)

Declaring the said statute to be constitutional, the Federal Constitutional Court drew analogical conclusions to those presented by the CJEU. First of all, the Federal Constitutional Court underlined that paragraph 3 added to Article 136 of the TFEU introduced a legal basis only for establishing a stability mechanism which might be activated if indispensable to safeguard the stability of the euro area as a whole, and any financial assistance granted under the mechanism would be made subject to “strict conditionality”. The Federal Constitutional Court formulated the main conclusion, stating that the provisions of Article 136(3) of the TFEU did not entail any transfer of sovereign rights by the Federal Republic of Germany, and thus one might not, in principle, refer to evaluation criteria arising from to the principle of democracy,

expressed in the Basic Law: “The enactment of a statute concerning Article 136(3) of the TFEU does not entail that the *Bundestag* grants other actors any political and budgetary competences. (...) Article 136(3) of the TFEU itself does not establish a stability mechanism, but merely opens up the possibility of establishing such a mechanism for Member States on the basis of international law. Consequently, on no account are competences conferred on the institutions of the European Union” (see J. Barcz, J. Kranz, *Powierzenie kompetencji...*, p. 23 and the subsequent pages).

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

7.6. Conclusions.

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

By contrast, the provisions of the ESM Treaty do not concern the Member States that have not joined the Economic and Monetary Union, i.e. those with a derogation. The establishment of the ESM has not changed the rules for adopting the common currency; as the Tribunal has noted earlier on, the treaty provisions concerning the revocation of the derogation have not changed. However, it should be noted that as part of the decision-making process concerning the adoption of the euro, the Member States with a derogation, which in the future may possibly include Poland, will be obliged to consider the necessity to join the ESM. The issue of ratification of the ESM Treaty will become one of the vital elements of a future political decision concerning the adoption of the euro, provided that the said Treaty will still be binding at that time. Due to the dynamic character of changes that have been taking place

in the European Union, it is however difficult to evaluate today whether, until the moment of the introduction of the euro by Poland, the ESM Treaty will remain an international agreement that will be binding (on a voluntary basis) for only the Member States whose currency is the euro, or whether attempts will be made to incorporate the Treaty into the EU legal system.

Still, paragraph 3 added to Article 136 of the TFEU has not primarily changed the fact that joining the euro area depends – apart from the necessity to fulfil the criteria of economic convergence – also on the fulfilment of the criteria of legal convergence. In the case of Poland, this will require the introduction of amendments to many normative acts. Statutes aimed at adjusting Polish law to the requirements of the euro area, as well as a possible statute granting consent to the ratification of the ESM Treaty, will be potential subjects of constitutional reviews to be carried out by the Constitutional Tribunal (Article 188(1) of the Constitution).

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

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

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

7.7. The other higher-level norms for the review

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

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

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

The lack of justification for the allegation constitutes a negative procedural premiss which rules out the substantive examination of the application and thus results in the necessity to discontinue the review proceedings (see the judgments of the Constitutional Tribunal of: 3 June 2002, ref. no. K 26/01, OTK ZU No. 4/A/2002, item 40; and 15 July 2009, ref. no. K 64/07, OTK ZU No. 7/A/2009, item 110). Pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the Constitutional Tribunal has decided to discontinue its proceedings within the scope of examining the conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 219 and Article 146 of the Constitution.

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

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

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

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

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

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

The quoted passage from the analysis of the Constitutional Tribunal refers to the allegation of the unconstitutionality of Article 234 of the Rome Treaty (at present Article 267 of the TFEU) – in the part concerning questions referred for a preliminary

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

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

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

the judgment of the Court of 22 October 1987, in the case C-314/85, *Foto-Frost*, ECR 1987, p. 4199”.

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

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

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

8.4. The applicants have also raised the allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 88 of the Constitution. Pursuant to that provision, the condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof (para. 1); the principles of and procedures for promulgation of normative acts shall be specified by statute (para. 2); international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute (para. 3).

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

9. An application for “an interpretation”.

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

It may be assumed that the applicants are aware of that fact, and thus allege that the Act on International Agreements lacks a certain regulation. However, the applicants do not indicate an appropriate higher-level norm for the review, and the mere application for “providing an interpretation” has not been included in the *petitum* of the letter, but in the final fragment of the reasoning. Thus, it is impossible to treat a claim formulated this way as the subject of the allegation (e.g. Article 2 of

the Act on International Agreements, insofar as it does not provide for...). Even if the issue formulated this way was to be examined, the lack of the said regulation would have to be regarded as legislative omission. However, it seems that the reconstruction of the subject of the allegation on the basis of the principle *falsa demonstratio non nocet* is groundless in the present case (cf. the judgment of 24 November 2010, ref. no. K 32/09, point 1.2 in part III of the statement of reasons – the Constitutional Tribunal classified that legislative omission was the lack of a detailed regulation of the mechanism for cooperation between the Council of Ministers and the Sejm and the Senate in matters pertaining to Poland's membership in the EU).

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

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

Dissenting Opinion

of Judge Zbigniew Cieślak

to the Judgment of the Constitutional Tribunal

of 26 June 2013, Ref. No. K 33/12

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 26 June 2013 of the Constitutional Tribunal in the case K 33/12.

I agree with the argumentation presented by Judge Mirosław Granat in his dissenting opinion to the judgment. I hold the view that the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) is inconsistent with Article 90 of the Constitution (Journal of Laws – Dz. U. item 748; hereinafter: the Act on the ratification of the European Council Decision 2011/199/EU). In addition, I wish to point out that the hearing in the case K 33/12 revealed that there were discrepancies in the interpretations of the basic expressions used in that provision of the Constitution. In particular, this refers to the category of ‘competence’ which constitutes a semantic axis of Article 90 of the Constitution. Hence, there is necessity not so much to re-define as to define the term ‘competence’ for the sake of the application of that provision of the Constitution. As the scope *ratione personae* of state authority is broad and diverse, one should begin (or at least should attempt to do so) with a meaning that is as general as possible, the content of which departs from the typical rendering thereof in administrative law – e.g. competence within the meaning of Article 90 of the Constitution means conferring – on the basis of

an international agreement and upon an international organisation or as part of the scope of powers vested in an international institution – an area of legally specified activity of an organ of state authority the constitutive features of which comprise the content and manner of decision-making in matters conferred as well as assigning responsibility to an entity on to which the activity is conferred. Without sorting out the meaning of the above term, it is virtually impossible to correctly understand and apply Article 90 of the Constitution.

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

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

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

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

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

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

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

1. In the view of the Constitutional Tribunal, in the light of Article 136(3) of the Treaty on the Functioning of the European Union (Journal of Laws – Dz. U of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), there is no case of 'conferral of competences' within the meaning of Article 90 of the Constitution. Poland is not the addressee of the provision under examination. It imposes no obligation on our country as we are outside the euro area. It is impossible to be subject to the requirements of the European Stability Mechanism (hereinafter: the ESM), since the premiss concerning Poland's membership in the euro area has not been fulfilled. By contrast, in the context of the Member States whose currency is the euro to which Article 136(3) of the TFEU is addressed, the said provision does not impose new obligations or tasks and does not provide for new areas of activity and responsibility whether for the European Union as a whole or for its particular institutions. In this case, the meaning of that provision amounts to recognising the competence of the euro area Members States to enter into treaties with each other. Article 126(3) of the TFEU. Thus, the Tribunal has regarded Article 136(3) of the TFEU as one that has no legal effects, in particular for a Member State that remains outside the euro area. With regard to the euro area Member States, the said provision confirms their right to enter into treaties with each other.

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

The meaning of Article 136(3) of the TFEU entails that the ESM (and, at the same time, euro area) Member States, by entering into treaties in the light of the provision under examination, co-decide about the functioning of the euro area (“as a whole”), without the participation of Poland, where Poland is obliged to become a euro area Member State by virtue of the Treaty of Accession. The said amendment will bind our country at the moment of joining the euro area, as Poland must accede to the Treaty establishing the European Stability Mechanism (hereinafter: the ESM Treaty). At the moment of accession to the euro area, the said provision will shape the terms of exercising competences vested in the organs of state authority conferred on the basis of the Treaty of Accession. In the light of that provision, there is a functional relation between the European Stability Mechanism and membership in the euro area; where the said membership (in the euro area) is a commitment made at the moment of accession. On that basis, the States determine (the ESM has already been functioning) the terms of Poland’s participation in the monetary union. The indicated relation between the ESM membership and the euro area membership determines a relation between the provision under examination and Article 90 of the Constitution. Article 136(3) of the TFEU updates the terms of our membership in the euro area. It sets at least the terms on which competences vested the organs of state authority are to be conferred. The longer the period when Poland is a Member State with a derogation, the longer the period when our country does not participate in the shaping of the euro area, but is obliged to join the said euro area. The said functional relation changes the terms of our membership in the euro area, which were specified at the moment of the ratification of the Treaty of Accession. Other Members States are also involved in determining the terms of our membership in the euro area. This leads to the conclusion that there is substantive modification of the way in which conferred competences are exercised, to which our country needs to adjust. Therefore, there are no grounds to assert that Article 136(3) of the TFEU “does not concern Poland”. In the light of the provision, a change occurs in the terms of Poland’s membership in the monetary union (I will refrain here from evaluating whether this change is advantageous or disadvantageous). The ratification of the amendment to the TFEU is actually the only moment when Poland co-decides about the shape of the said new terms of participation in the euro area. At the same time, once again attention should be drawn to the fact that the ESM has already been functioning. It is not at all merely a potential mechanism.

The legal significance of Article 136(3) of the TFEU may also be expressed in this way that it brings about an effect which I perceive as one comprising both an obligation and a requirement. In the light of that provision, Poland is obliged to

confer the competences of organs of state authority on the ESM no later than at the moment of abrogating a temporary derogation. The term from Article 136(3) of the TFEU that the Member States “may” establish [...] does not mean freedom to join the ESM, as the Constitutional Tribunal appears to interpret this. In fact, the point is the obligation to adopt the ESM Treaty by the Member States in order to fulfil the obligation assumed by means of the Treaty of Accession. The word “may” merely indicates here the possibility of joining the ESM at different times.

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

3. The Tribunal has stated that the applicants’ view that Article 136(3) of the TFEU includes an obligation of the euro area Member States to participate in the stability mechanism has too far-reaching implications. The Tribunal has indicated no grounds on which it has deemed the applicants’ assumption to be inapt. The Tribunal’s view that the provision under examination may not be assigned such far-reaching implications is deprived of a solid basis. It is questionable when we consider the wording of other provisions of the ESM Treaty. Recital 7 of the Preamble to the ESM Treaty stipulates that “all euro area Member States will become ESM Members”. The systemic interpretation of the ESM Treaty provisions seem to indicate that, as regards the meaning of Article 136(3) of the TFEU, the applicants are right.

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

my opinion, the said higher-level norm for the review has been chosen correctly. By adjudicating in the operative part of its judgment that (let me paraphrase here for the sake of brevity) we do not have a measure in Article 90 of the Constitution for the assessment of that kind of a provision, the Tribunal narrows down the scope of the meaning of Article 90 of the Constitution.

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

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

understood as in jurisprudence was “insufficient” for the functioning of Poland in the European Union. However, the constitution-maker did not adopt those draft amendments. This would indicate the up-to-date character of the clause in Article 90 of the Constitution.

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

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

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

view of Article 90 of the Constitution – why, in the provision under analysis, in the Tribunal’s view there is no (or there is) conferral of competences. In our case, the Tribunal assumes that since Article 136(3) of the TFEU does not indicate the realm and scope of conferral of competences, nor does it mention the EU, then we do not deal with the conferral of competences. The negative outcome of the test for the conferral of competences could only lead to the conclusion that Article 89 of the Constitution is proper for a given ratification procedure.

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

I mention the issue of conducting foreign policy here as a counterargument to the statement that recognising the adequacy of Article 90 of the Constitution as a higher-level norm for the review in the present case would be tantamount to entrusting the Sejm with “conducting foreign/European affairs”. The Sejm is guaranteed to exercise supervision over them, by virtue of Article 90 of the Constitution. Such was the intention of the constitution-maker. I wished to point out that intention, by submitting this dissenting opinion.

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

Dissenting Opinion

of Judge Marek Kotlinowski
to the Judgment of the Constitutional Tribunal
of 26 June 2013, Ref. No. K 33/12

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the judgment of the Constitutional Tribunal of 26 June 2013 in the case K 33/12.

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

Dissenting Opinion

of Judge Teresa Liszcz
to the Judgment of the Constitutional Tribunal
of 26 June 2013, Ref. No. K 33/12

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to the above-indicated judgment as a whole.

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

STATEMENT OF REASONS

1.1. The challenged Act on Ratification expresses consent on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91 of 6.04.2011, p. 1; hereinafter: the said Decision). The said Decision amends the

Treaty on the Functioning of the European Union (Journal of Laws – Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), by adding paragraph 3 to Article 136, and thus creating a basis – by means of an international agreement entered into by the Member States whose currency is the euro (hereinafter: the euro area Member States)) – for conferral of certain competences of the said States, as regards foreign policy, by establishing an international organisation, which will also pertain to Poland after abrogating our derogation from adopting the euro. For this reason, in my opinion, the said Act should have been enacted in compliance with one of alternative procedures from Article 90(2) and (3) in conjunction with Article 90(4) of the Constitution, and not in accordance with the “ordinary” procedure set out in Article 120, first sentence, of the Constitution, which was actually the case.

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

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

Thus, there is no doubt that the amendment introduced to the TFEU by the Decision that was subject to ratification should be assessed in the context of treaties

entered into by the euro area Member States on the basis of Article 136(3) of the TFEU, and especially the ESM Treaty and the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between (hereinafter: the Fiscal Compact), signed on 2 March 2012 by all the EU Member States, with the exception of the Czech Republic and Great Britain. Both these treaties are interrelated and both in their preambles make reference to Article 136(3) of the TFEU. The ESM Treaty provides for an obligatory participation of the Member States in financing the stability fund (in accordance with the terms set therein), whereas the Fiscal Compact imposes numerous obligations on the Signatories thereto, as regards current financial and economic policies, and in particular the obligation to comply with the principle of structural balance in the sector of government and local self-government institutions (a lower limit of a structural deficit of 0.5 % of the gross domestic product at market prices; Article 3(1)(b) of the Fiscal Compact). In the event of significant observed deviations from the medium-term objective or the adjustment path towards it, a correction mechanism shall be triggered automatically (Article 3(1)(e) of the compact), shaped by common principles indicated by the European Commission. The Contracting Parties shall report ex-ante on their public debt issuance plans to the Council of the European Union and to the European Commission (Article 6 of the Compact). Moreover, the Fiscal Compact specifies an excessive deficit procedure and makes it more restrictive (Articles 4 and 5) as well as extends the jurisdiction of the Court of Justice of the European Union (hereinafter: the CJEU) – with regard to the Signatories – as regards fulfilling financial obligations and imposing financial sanctions due to non-compliance the CJEU judgments in that respect.

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

1.4. Unlike the majority of the bench of the Tribunal adjudicating in the present case, I hold the view that both treaties will become binding for Poland at the moment when Poland joins the euro area. Indeed, making reference to recitals 5 and 7 of the Preamble to the ESM Treaty, Prof. J. Barcz aptly stated that: “Poland – by shifting from the position of a Member State of the Economic and Monetary Union with a derogation – will have to accede to the Treaty establishing the ESM no later than on the date of joining the euro area” (J. Barcz, “Instrumenty międzynarodowe dotyczące kryzysu w strefie euro a spójność Unii i możliwość przystąpienia państw członkowskich UE spoza strefy euro”, [in:] *Traktat z Lizbony – wybrane zagadnienia*, M. Kenig-Witkowska, R. Grzeszczak (eds), Warszawa 2012, s. 106). This is even more obvious in the case of the Fiscal Compact. Indeed, pursuant to its Article 14(5),

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

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

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

The content of the challenged Act on Ratification, analysed in conjunction with the ratified Decision as well as in the context of the ESM Treaty and the Fiscal Compact, have raised doubts, not only on the part of the applicants, as to whether the Decision does not change the TFEU in a way that leads to the conferral of the competences of the Member States on an international organisation (the ESM) or the EU, and in particular the CJEU. Due to similar doubts, the said Decision was appealed to the constitutional courts of several Member States, including the Federal Constitutional Court of Germany, which adjudicated on the conformity of the said Decision to the Basic Law for the Federal Republic of Germany, and arrived at the conclusion that the amendment to the TFEU, introduced by means of the said Decision (the addition of paragraph 3 to Article 136), might not lead to the conferral of competences. Due to the same doubts, the said Decision – under the allegation of an inadmissible application of the simplified revision procedure to amend the TFEU

– was also appealed to the CJEU, which – in its judgment of 27 November 2012 (C-370/12), however found no grounds that would undermine the validity of the said Decision; nor did the CJEU find any obstacles for accession to the ESM Treaty and the ratification thereof, regardless of the entry into force of the Decision.

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

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

Dissenting Opinion

of Judge Marek Zubik

to the Judgment and Statement of Reasons of the Constitutional Tribunal
of 26 June 2013, Ref. No. K 33/12

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws – Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act), I submit my dissenting opinion to the judgment of 26 June 2013 issued by the Constitutional Tribunal in the case K 33/12.

I justify my dissenting opinion, as follows:

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

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

Firstly, the said provision constitutes a sole constitutional basis (with potential consideration of Article 55(2) and Article 91(3) of the Constitution) for such far-reaching international cooperation where Poland confers competences (which also arise from the Constitution) vested in the national organs of state authority in relation to certain matters on an international organisation or international institution. As a result of the said conferral, Poland refrains from exercising relevant competences until the moment of terminating the said international agreement. Without that provision, the integration process that took place with regard to Poland, on the basis of the Treaty of Accession of 16 April 2003 would, in my view, have been constitutionally inadmissible. This means that the procedure set out in Article 89(1)(3) of the Constitution may not be regarded as an alternative to the special procedure specified in Article 90 of the Constitution. Indeed, the two procedures refer to separate – in the light of national provisions – categories of international agreements concerning Poland’s membership in an international organisation, and the scopes of regulating the said provisions are disjunctive.

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

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

Fourthly, the meaning of Article 90 of the Constitution is autonomous and complete. It may not be perceived as complementary with regard to Article 89(1)(3) of the Constitution. In my view, it is neither constitutionally admissible nor desirable for an international agreement related to a particular international organisation or institution to be perceived at times in the light of Article 89(1)(3) of the Constitution, and at other times in the context of Article 90(1) of the Constitution. Relying on

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

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

Sixthly, Article 90 of the Constitution provides for a procedure which requires cooperation not only among different organs of state authority, but also requires cooperation of a current parliamentary majority with the opposition when carrying out that part of the foreign policy of the state which implies great significance, and a change e.g. in the functioning of organs of state authority. It is worth adding

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

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

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

for granting consent to ratification should, in principle, be concurrent with the one which was applied to grant consent for the original agreement.

In my view, what should have been regarded as a starting point is a general presumption which functions in the circle of our legal culture and is expressed *inter alia* in the constitutional provisions that any normative acts and, in general, legal juridical actions – as long as this is legally admissible – should, in principle, be amended (changed) in accordance with the same procedure in which they were originally introduced into the system of law or caused a legal effect (in that way e.g. Articles 118123 of the Constitution is applied to amending statutes; similarly, set out in statutory authorisation referred to in Article 92(1) of the Constitution, the procedure for issuing a regulation is applied accordingly to any modifications or amendments to that regulation, etc. The said thesis is also a basis of the concept of *actus contraries*, which constitutes a variant of analogy in law). The said principle has been a lasting element of the Polish parliamentary law. On numerous occasions the application thereof resulted in overcoming procedural issues in a situation where the law-maker has not clearly specified the way of departing, modifying or undertaking actions which are contrary in their results to those they concern. The principle I have here presented is not merely “a regularity”, as assumed by the Tribunal (point 6.6.2 of the statement of reasons). The use of a different procedure in the case of modification or revocation of a normative act (including effects of a legal juridical actions), even if this constitutes the case of making reference to general provisions on proceedings before an organ of state authority, is always unique in character and may only take place when there is a clear and unambiguous legal basis that necessitates a departure from the general principle of law that has been indicated by me here (as stated e.g. in Article 235 of the Constitution, as regards the procedure for drafting and enacting the Constitution of 1997; Article 149(2)(2) of the Constitution – with reference to a regulation issued by a minister that is to be revoked by the Council of Ministers; Article 231, third sentence, of the Constitution – which determines the procedure for the Sejm to adhere to when annulling a regulation of the President on the introduction of the state of emergency; and with regard to individual actions: Article 158 of the Constitution – which concerns the constructive vote of no confidence that would eliminate the effects of the appointment of the Council of Ministers, or Article 171(3) of the Constitution – which gives the Sejm a possibility to annul the effects of democratic elections in the case of an organ constituting a unit of local self-government). Thus, unlike the Tribunal has concluded in the present case, I believe that Article 90 of the Constitution is applicable not only with regard to a ratification procedure for a new international agreement by means of which the Republic of Poland originally delegated competences that have so far been exercised by the organs of state authority (cf. part III, point 2.6. the statement of reasons for the judgment in the case K 32/09). The provision also concerns every modification of the content of such an international agreement conferring competences, regardless of the scope and depth of changes introduced into the Treaty of Accession and the fact whether it directly concerns conferred competences that used to be vested in

the organs of state authority. This way, an amendment to an international agreement ratified on the basis of Article 90 of the Constitution may – in my opinion – be introduced into the national legal order, from the point of view of national legal provisions – only in compliance with the procedure expressed in that provision. At the constitutional level, there is no appropriate legal basis which would justify the application of the procedure. Therefore, I do not share the thesis which negates the presumption of introducing changes in an international agreement in accordance with the same procedure as the one applied to the ratification of the original agreement that has already taken effect.

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

4. The popularisation of the approach accepted by the Constitutional Tribunal in the present case displays yet another important aspect. The Constitution of the Republic of Poland does not provide for an obligatory preventive review of the constitutionality of a statute on ratification or an international agreement, even the one with regard to which there are doubts as to the choice of a procedure for the ratification thereof. The application of that form of a constitutional review, which allows to review the constitutionality of a statute before it is signed by the President, and the constitutionality of an agreement before Poland binds itself with international commitments, is not without significance for the interpretation of constitutional provisions on the ratification of international agreements.

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

Possible adjudication on the part of the Tribunal as to the unconstitutionality of the entry into force of a statute of ratification after the ratification of a specific international agreement considerably weakens the international position of Poland

and makes it difficult for it to fulfil its international commitments. Therefore, it does not serve the implementation of Article 9 of the Constitution.

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

5. Consequently, I hold the view that consent to the ratification of the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91, 6. 4.2011, p. 1), indicated in the application submitted by the group of Deputies, could only be granted in accordance with the procedure set out in Article 90 of the Constitution. Consent to ratification of that decision took place contrary to the content of Article 90 of the Constitution. The Act on the ratification of the European Council Decision 2011/199/EU took effect in a way that was inconsistent with Article 90(2) in conjunction with Article 120 of the Constitution.

Selected provisions from the Constitution of the Republic of Poland of 2 April 1997

Article 9

The Republic of Poland shall respect international law binding upon it.

Article 79

1. In accordance with principles specified by statute, everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act upon which basis a court or organ of public administration has made a final decision on his freedoms or rights or on his obligations specified in the Constitution.

2. The provisions of para. 1 above shall not relate to the rights specified in Article 56.

Article 90

1. The Republic of Poland may, by virtue of international agreements, delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters.

2. A statute, granting consent for ratification of an international agreement referred to in para.1, shall be passed by the Sejm by a two-thirds majority vote in the presence of at least half of the statutory number of Deputies, and by the Senate by a two-thirds majority vote in the presence of at least half of the statutory number of Senators.

3. Granting of consent for ratification of such agreement may also be passed by a nationwide referendum in accordance with the provisions of Article 125.

4. Any resolution in respect of the choice of procedure for granting consent to ratification shall be taken by the Sejm by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies.

Article 91

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (*Dziennik Ustaw*), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the enactment of a statute.

2. An international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

Article 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.

(...)

Article 133

(...)

2. The President of the Republic, before ratifying an international agreement may refer it to the Constitutional Tribunal with a request to adjudicate upon its conformity to the Constitution.

(...)

Article 188

The Constitutional Tribunal shall adjudicate regarding the following matters:

- 1) the conformity of statutes and international agreements to the Constitution;
- 2) the conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;
- 3) the conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements and statutes;
- 4) the conformity to the Constitution of the purposes or activities of political parties;
- 5) complaints concerning constitutional infringements, as specified in Article 79, para. 1.

Article 189

The Constitutional Tribunal shall settle disputes over authority between central constitutional organs of the State.

Article 191

1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:

- 1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,
- 2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
- 3) the constitutive organs of units of local government;

- 4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
- 5) churches and religious organizations;
- (...)

Article 193

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 statute, if the answer to such question of law will determine an issue currently before such court.

The full text of the Constitution is available at:

<http://trybunal.gov.pl/en/about-the-tribunal/legal-basis/the-constitution-of-the-republic-of-poland/>