

*Sławomir Dudzik and Nina Póltorak\**

## **‘The Court of the Last Word.’ Competences of the Polish Constitutional Tribunal in the Review of European Union Law**

***Abstract:** In its judgment of 16 November 2011 in case SK 45/09, the Polish Constitutional Tribunal (CT) called itself ‘the court of the last word.’ This self-determination aptly characterises the entire hitherto delivered line of jurisprudence of the Tribunal in European matters. In spite of the persevering doubts as to the scope of its jurisdiction at the juncture of EU and Polish law, eventually the CT has always come to confirm its competence to review the conformity of challenged EU law provisions with the Polish Constitution. The approach of the CT reflects the way the Court understands the constitutional principle of the primacy of the Constitution as the supreme law of the land in Poland. The aim of this article is to present and analyse the legal views of the Constitutional Tribunal regarding the review in Polish courts of European Union law. Firstly the article concentrates on the review of primary EU law as to its compatibility with the Polish Constitution, and then on the review of secondary EU law. The article also tries to answer the question whether the position taken by the Constitutional Tribunal and its argumentation is consistent with both EU law and Polish constitutional law, and what the consequences are for the jurisdiction of the CT and constitutional claims.*

### **Introduction**

The aim of this work is to present and analyse the legal views of the Polish Constitutional Tribunal (CT) regarding Polish judicial review of European Union law. In the first instance this article concentrates on the review of primary EU law as to its compatibility with the Polish Constitution, and then on the review of secondary EU law. The article also tries to answer the question whether the position taken by the Constitutional Tribunal and its argumentation is consistent with both EU law and Polish constitutional law.

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\* **Sławomir Dudzik**, Ph.D. – Professor of law, Jagiellonian University in Cracow, Poland; **Nina Póltorak**, Ph.D. – Associate Professor of law, Jagiellonian University in Cracow, Poland.

The Constitutional Tribunal is one of the key organs of judicial power in Poland,<sup>1</sup> whose autonomy and independence from other authorities is established directly by the Constitution itself.<sup>2</sup> Moreover, the CT is not only independent of the legislative and executive powers, but also of other organs of judicial power, including the Supreme Court, the Chief Administrative Court, and the Tribunal of State, as well as the constitutional organ responsible for safeguarding the independence of courts and judges – the National Council of the Judiciary.<sup>3</sup> The primary function of the CT is to review the hierarchic conformity of norms, and thus to examine the conformity of normative acts and international agreements with the Polish Constitution, supplemented by the power to annul norms that are not in conformity with higher order norms.<sup>4</sup> The review of norms carried out by the Tribunal is of an abstract character, i.e. it is performed irrespective of any specific factual background in which a given norm is applied. It does not preclude the possibility of initiation of an abstract review before the CT in connection with a specific case adjudicated by other courts. A ‘specific investigation’ of this kind may take place as a consequence of a legal question referred to the CT by a court,<sup>5</sup> or a constitutional complaint initiated by an individual<sup>6</sup>.

In the light of Article 188 of the Constitution, the abstract review of norms carried out by the CT consists of an investigation into: a) the conformity of statutes and international agreements to the Constitution, b) the conformity of statutes to ratified international agreements, the ratification of which required prior consent granted by statute, c) the conformity to the Constitution of legal provisions issued by central organs of State, ratified international

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<sup>1</sup> See Art. 10, para. 2 of the Constitution and Art. 1 para. 1 Ustawa o Trybunale Konstytucyjnym (The Act of 1 August 1997 on the Constitutional Tribunal), Dziennik Ustaw (Journal of Laws) of 1997, No. 102, Item 643 as amended.

<sup>2</sup> Art. 173 of the Constitution.

<sup>3</sup> See also e.g. Z. Czeszejko-Sochacki, *Sądownictwo konstytucyjne w Polsce na tle porównawczym (Constitutional Judiciary in Poland in a Comparative Perspective)*, Warszawa 2003, pp. 89–158; B. Banaszak, *Impact of European Integration on the Law and Constitutional System in Poland*, Warszawa 2009, pp. 216–221; B. Banaszak, *Prawo konstytucyjne (Constitutional Law)*, Warszawa 2010; L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu (Polish Constitutional Law. An Outline of Lecture)*, Warszawa 2011, pp. 355–373; B. Naleziński, *Organy władzy sądowniczej (Judicial Authorities)* in: *Prawo konstytucyjne RP (Constitutional Law of the Republic of Poland)*, ed. P. Sarnecki, Warszawa 2011, pp. 399–419.

<sup>4</sup> Moreover, the CT is competent to investigate the constitutionality of the purposes or activities of political parties (Art. 188 para. 4 of the Constitution), to settle disputes over authority between central constitutional organs of the State (Art. 189 of the Constitution) as well as to determine whether there exists a temporary impediment to the exercise of the office by the President of the Republic of Poland (Art. 131 para. 1 of the Constitution).

<sup>5</sup> Art. 133 para. 2 of the Constitution.

<sup>6</sup> Art. 79 and Art. 188 para. 5 of the Constitution.

agreements, and statutes. Additionally, Article 79 paragraph 1 of the Constitution pertaining to constitutional complaints provides for the adjudication of the CT ‘*on the conformity to the Constitution of a statute or another normative act.*’ This adjudication is basically of a subsequent nature (*a posteriori*), so it is performed with reference to norms adopted by an authorized organ (such as the legislature) and already introduced into the legal order. Nevertheless, a prior investigation (*a priori*) is also possible in special cases, however only the President of the Republic of Poland (RP) is vested by the Constitution with the right to initiate such an investigation. It may refer either to an act before it is signed by the President and published in the Journal of Laws,<sup>7</sup> or to international agreements prior to their ratification by the Head of State.<sup>8</sup>

## 1. The Constitutional Tribunal and EU primary law

### 1.1. The Treaty of Accession

As has been pointed out before, the CT competences include in particular adjudication in matters pertaining to the conformity of international agreements to the Constitution. Since the Constitution does not differentiate between international agreements when defining this competence, it should be understood as referring to all international agreements, i.e. both those agreements requiring ratification and those which are not subject to ratification (i.e. unratified agreements).<sup>9</sup> Nevertheless, it has to be emphasised that only ratified international agreements are, in the light of the Constitution, a source of universally binding law in the Republic of Poland. The competence to ratify

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<sup>7</sup> Art. 122 para. 3 of the Constitution.

<sup>8</sup> Art. 133 para. 2 of the Constitution.

<sup>9</sup> See Art. 146 para. 4 point 10 of the Constitution, which, when defining the competences of the Council of Ministers, indicates both the power to conclude international agreements requiring ratification, as well as to accept and renounce other international agreements. In addressing unratified agreements, the Constitutional Tribunal admittedly concluded in one of its judgments referring to unratified agreements that ‘*it cannot be assumed that such agreements have ever constituted an element of the Polish internal legal order*’ (the CT judgment of 19 December 2002, K 33/02, Z.U. 2002/7A/97), yet this statement may not be understood as depriving unratified agreements of any effectiveness whatsoever. Although unratified agreements do not constitute sources of universally binding law in the Republic of Poland (Art. 87 para. 1 of the Constitution), they bind the State in external relations (Art. 9 of the Constitution) and may produce indirect legal effects in internal relations, creating e.g. legitimate expectations on the part of individuals. See: A. Wyzomska, *Umowy międzynarodowe. Teoria i praktyka (International Agreements. Theory and Practice)*, Warszawa 2006, pp. 599–607; M. Masternak-Kubiak, *Głosa do wyroku TK z 19 grudnia 2002 r. K 33/02 (Commentary to the judgment of 19 December 2002, K 33/02)*, “Państwo i Prawo” No. 6/2003, pp. 119–123.

international agreements is vested by the Constitution in the President. At the same time, the Constitution differentiates between a ratification requiring consent granted in a statute<sup>10</sup> or in a nationwide referendum,<sup>11</sup> and a ratification that does not require such consent.<sup>12</sup> A special ratification procedure is provided for by the Constitution with reference to an agreement specified in Article 90 paragraph 1 of the Constitution, i.e. an agreement which grants a delegation ‘*to an international organisation or international institution of the competence of organs of State authority in relation to certain matters.*’ Both during the course of work on the draft of the Constitution and after its entry into force in 1997, it was clear that this provision referred, first of all, to Poland’s accession to the European Union, and thus constitutes the systemic foundation for Poland’s membership in this organisation.<sup>13</sup> The constitutionally specific character of the ratification of the Accession Treaty, referred to in Article 90 paragraph 1 of the Constitution, manifests itself both in the special requirements pertaining to the statute granting consent to such ratification<sup>14</sup> and in the possibility of replacing the statutory consent with a consent granted in a nationwide referendum<sup>15</sup>. It should be noted that the referendum procedure was used to obtain Poland’s consent to ratification of the Accession Treaty of 2003.<sup>16</sup> Prior to Poland’s accession to the EU, there were opinions expressed in Polish legal publications that, due to the contents of the Accession Treaty, the legal consequences of its conclusion, and the special procedure for granting consent to its ratification, the only acceptable form of verification of its constitutionality was a ‘preventive review’ (in accordance with Art. 133 paragraph 2 of the Constitution) initiated by the President before the ratification process (in a weaker version, this was presented as a desirable

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<sup>10</sup> Art. 89 para. 1 and Art. 90 para 2 of the Constitution.

<sup>11</sup> Art. 90 para. 3 of the Constitution.

<sup>12</sup> Art. 89 para. 2 of the Constitution provides only that in the case of such an agreement the President of the Council of Ministers must inform the Parliament of the intention to submit it to the President of the Republic for ratification.

<sup>13</sup> See, e.g. K. Działocha, *Podstawy prawne integracji Polski z Unią Europejską w pracach nad nową konstytucją (Legal Bases of Poland's Integration with the European Union in work upon the New Constitution)*, “Państwo i Prawo” No. 4-5/1996, pp. 5–14.

<sup>14</sup> Pursuant to Art. 90 para. 2 of the Constitution, ‘*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.*’

<sup>15</sup> The choice between the statutory or referendum procedure of granting consent to the ratification of an agreement referred to in Art. 90 para. 1 of the Constitution (i.e. the Accession Treaty) is made by the Parliament in the form of a resolution passed by an absolute majority vote taken in the presence of at least half of the statutory number of Deputies (Art. 90 para. 4 of the Constitution).

<sup>16</sup> OJ 2003 L 236/17.

solution).<sup>17</sup> They ruled out therefore, or at least questioned, the legality of subsequent review (Art. 188 point 1 of the Constitution), which could take place after ratification and Poland's obtainment of membership in the EU. The President of the Republic of Poland, however, decided not to submit to the CT a motion for investigation into the constitutionality of the Accession Treaty by way of preventive review. Nevertheless, such motions were submitted after the Treaty's entry into force by three groups of MPs. In its judgment issued on the 11 May 2005, the CT concluded that its competence to adjudicate in matters pertaining to the conformity of international agreements to the Constitution, granted by virtue of Article 188 paragraph 1 of the Constitution, 'does not differentiate between the Tribunal's relevant competences depending on the mode of granting consent to ratification. [...] The Constitutional Tribunal thus remains competent to investigate the constitutionality of international agreements ratified upon the prior consent granted in the form of a nationwide referendum. For neither Article 188 paragraph 1 of the Constitution nor any other provision excludes such type of agreements from the scope of the Constitutional Tribunal's jurisdiction.'<sup>18</sup> Thus the Constitutional Tribunal ruled in this judgment that neither the special subject matter of the Accession Treaty, which delegated to a particular type of international organisation (i.e. the EU) the competences of organs of State authority in relation to certain matters, nor the special procedure for granting consent to the ratification of such a treaty limited, and even less so excluded, the Tribunal's competence to examine the constitutionality of its contents.<sup>19</sup>

The grounds for the CT's adjudication with respect to the constitutionality of the Accession Treaty was the assumption that although, in the light of the Constitution, an international agreement delegating competences has precedence over the provisions of statutes that cannot be reconciled with it,<sup>20</sup> 'in no respect' may such precedence be considered to pertain to the Constitution

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<sup>17</sup> On the subject of various viewpoints in this respect, see: S. Biernat, *Glosa do orzeczenia TK z 11 V 2005 r. (K 18/04) (Commentary to the judgment of the CT of 11 May 2005, K 18/04)*, "Kwartalnik Prawa Publicznego" No. 4/2005, pp. 187–188; K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym (Transfer of the State Powers to International Organisations)*, Kraków 2007, pp. 243–248.

<sup>18</sup> Judgment of 11 May 2005, K 18/04, Z.U. 49/5/A/2005, points III. 1.2.-1.3.

<sup>19</sup> At the same time the CT differentiated between reviewing the constitutionality of the Accession Treaty and reviewing the validity (including lawfulness) of the referendum (the Supreme Court remains competent in this matter) as well as reviewing the constitutionality of the procedure itself for obtaining consent to the ratification (the resolution of the Parliament). The latter issues remained outside the scope of the CT's adjudication in the case pertaining to the Accession Treaty of 2003.

<sup>20</sup> Pursuant to Art. 91 para. 2 of the Constitution, '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'.

itself. According to the CT, ‘*the Constitution thus remains – due to its special force – the supreme law in the Republic of Poland*’, including in relation to all international agreements binding the Republic of Poland. The above also refers to ratified international agreements delegating competences in ‘*certain matters*.’ Due to the superior legal force resulting from Article 8 paragraph 1 of the Constitution, it has the primacy of binding force and application in the territory of the Republic of Poland.<sup>21</sup> If, despite the use of a ‘friendly interpretation’ towards the application of European law, the constitutional norm cannot be reconciled with the EU law norm, it would be necessary, according to the CT, for the sovereign (the Polish People) or for the organ of authority empowered by the Constitution to represent the sovereign to take the decision to either change the Constitution or to cause changes in the EU regulations. A solution described by the CT as the last resort would be withdrawal of the Republic of Poland from the EU.<sup>22</sup> Thus the recognition of the primacy of the Constitution enabled the CT to examine the constitutionality of the Accession Treaty with reference to the specific objections raised in the motion submitted by the petitioners. The CT’s examination confirmed the conformity of the aforementioned treaty to the systemic norms remaining in force in the Republic of Poland. The Tribunal was guided by the principle, explicitly expressed in its jurisprudence, of ‘*favourable disposition towards the process of European integration and cooperation between Member States*’, as well as by the need to apply an EU-friendly interpretation.<sup>23</sup>

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<sup>21</sup> Point III of the CT judgment in the case K 18/04. Art. 8 para. 1 of the Constitution stipulates that ‘*The Constitution shall be the supreme law of the Republic of Poland*’. See also: K. Kowalik-Bańczyk, *Should We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law*, “German Law Journal” No. 6/2005, pp. 1361–1365; A. Albi, *Supremacy of EC Law in the New Member States. Bringing Parliaments into the Equation of ‘Co-operative Constitutionalism’*, “European Constitutional Law Review” No. 3/2007, pp. 34–42; B. Banaszak, *Impact of European Integration...*, op.cit., pp. 66–74; S. Biernat, *Członkostwo Polski w Unii Europejskiej w świetle orzecznictwa Trybunału Konstytucyjnego (Poland’s Membership in The European Union in the Light of the Constitutional Tribunal’s Jurisprudence)* in: *Doświadczenia prawne pierwszych lat członkostwa Polski w Unii Europejskiej (Legal Experiences of the First Years of Poland’s Membership in the European Union)*, eds. S. Biernat, S. Dudzik, Warszawa 2011, pp. 69–79; A. Łazowski, *Half Full and Half Empty Glass: The Application of EU Law in Poland (2004–2010)*, “Common Market Law Review” No. 48/2011, pp. 507–510.

<sup>22</sup> Point III.6.4. of the judgment in case K 18/04. See also: S. Biernat, *Członkostwo Polski...*, op.cit., pp. 79–83.

<sup>23</sup> See point III. 2.2., III. 6.4., III. 8.3. and III. 13.1. of the judgment in case K 18/04. The principle appeared already in an earlier judgment by the CT, i.e. in the judgment of 27 May 2003 in case K 11/03 pertaining to the constitutionality of certain provisions of the act on the nationwide referendum. In this judgment, the CT clearly stated that ‘*Such interpretation of the law that serves the purpose of realisation of the indicated constitutional principle is constitutionally correct and preferred*’ (point III.16.). CT Judgments ZU No. 5/A/2003.

The objection raised by the petitioners in case K 18/04, that there is a contradiction between the principle of primacy of the Constitution resulting from Article 8 paragraph 1 of the Constitution and the principle of primacy of the Community (Union) law, was resolved in practice by the CT by diminishing the significance of the latter principle. It was treated by the CT not as a foundation of the EU legal order resulting *implicité* from many provisions of the Treaty, but as a judicial principle enunciated by the European Court of Justice (ECJ), aimed at guaranteeing the uniform application and execution of EU law. Judicial statements of the ECJ, according to the CT, do not fall within the scope of its jurisdiction.<sup>24</sup> It may be assumed that the CT did not see, in the principle of the primacy of Community (Union) law, the characteristics of a legal norm listed among the EU legislation, but regarded it merely as a relatively stable method of argumentation, out of many employed by the ECJ in individual cases, justified by the purposes of European integration and the need for creating a common European legal space. At the same time, the statement by the CT saying that this principle does not ‘*determine the final decisions taken by sovereign Member States in the situation of a hypothetical collision between the Community legal order and a constitutional regulation*’ may be viewed as challenging the normative character of the principle of the primacy of EU law.<sup>25</sup> According to the CT, such a collision should be resolved by the norms of the constitutions in the countries in question.

In its judgment in case K 18/04, the CT included in its examination the constitutionality of both the Accession Treaty *sensu stricto* and the act pertaining to the conditions of accession (as may be guessed, together with all its appendices and protocols). This solution does not raise objections at present, as these documents – of identical legal status – jointly constitute the international agreement (the Accession Treaty *sensu largo*) which is referred to in Art. 188 paragraph 1 of the Constitution. It should be noted, however, that the CT included in its jurisdiction not only the Accession Treaty but also the Final Act to the Treaty of Accession to the European Union 2003,<sup>26</sup> regarding it as an integral part of this Treaty and as a legally binding act.<sup>27</sup> Yet, the Tribunal practically failed to substantiate its position in any way. Neither did it avail itself of the opinions of representative scholars in the Polish doctrine of international and European law, who, even before the judgment was issued, pointed out that the Final Act was not an integral part of the Accession Treaty and was not of a legally binding character (although some

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<sup>24</sup> See more in point 2.4. of this article.

<sup>25</sup> Point III.7. of the judgment in the case K 18/04.

<sup>26</sup> OJ 2003 L 236/957.

<sup>27</sup> Points III.1.4.–1.5., III.9.1., and III.19. of the judgment in the case K 18/04.

of its provisions may have some legal significance).<sup>28</sup> Moreover, in the case of another EU act of non-binding legal character – the Charter of Fundamental Rights, existing at the time in the form of an inter-institutional agreement – in the same judgment the Tribunal adjudicated that a non-binding instrument of such type may not be subject to an investigation into its constitutionality. It should be noted that in the end the CT found that the Final Act did not infringe upon any of the provisions of the Constitution that had been indicated by the applicants.

## 1.2. Treaties constituting the foundations of the European Union

More serious controversy arose over the CT's position with respect to the possibility of investigating the constitutionality of the Treaties constituting the European Union and European Communities. In its judgment in case K 18/04 pertaining to the Accession Treaty, the CT stated, in its introduction to its considerations of the subject and scope of investigation into the constitutionality of the Accession Treaty, that '*the Constitutional Tribunal is not authorised to issue an autonomous assessment as to the constitutionality of European Union primary law. It is, however, vested with such competence in relation to the Accession Treaty as a ratified international agreement (Art. 188 paragraph 1 of the Constitution)*'.<sup>29</sup> Even if we disregard the awkward formulation implicitly excluding the whole of the Accession Treaty from the scope of primary law, this statement might be deemed to entail a far-reaching self-limitation on the part of the Tribunal, which seemed to consider itself not competent to investigate the constitutionality of the Treaty on the European Union as well as the Treaty founding the European Community (at present: the Treaty on the Functioning of the European Union – TFEU). This conclusion appears false, however, in the light of the CT's further considerations. The CT's use of the

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<sup>28</sup> See, e.g. A. Wyrozumska, *Charakter prawny traktatu o przystąpieniu do Unii Europejskiej z 2003 r. (The Legal Nature of the 2003 Treaty of Accession to the European Union)* in: *Przystąpienie Polski do Unii Europejskiej. Traktat akcesyjny i jego skutki (Poland's Accession to the European Union. The Accession Treaty and its Effects)*, eds. S. Biernat, S. Dudzik, M. Niedźwiedź, Kraków 2003, pp. 23–33. The author also expressed her critical opinion on this matter after the CT had issued its judgment in the case K 18/04. See A. Wyrozumska, *Umowy międzynarodowe w wyrokach Trybunału Konstytucyjnego dotyczących traktatu o przystąpieniu do UE oraz ENA (International Agreements in the Constitutional Tribunal's Judgments the Treaty of Accession to the EU as well as the EAW)*, "Kwartalnik Prawa Publicznego" No. 4/2005, pp. 226–227. Nevertheless, C. Mik considers the declarations attached to the Final Act as an element of the Accession Treaty *sensu largo*. See C. Mik, *Traktaty konstytuujące Wspólnoty Europejskie i Unię Europejską jako specyficzny reżim prawny (Treaties Constituting the European Communities and the European Union as a Specific Legal Regime)* in: *Unia Europejska. Wspólnota Europejska. Zbiór dokumentów (The European Union. The European Community. Collection of Documents)*, eds. E. Wojtaszek-Mik, C. Mik, Kraków 2005, p. 70.

<sup>29</sup> Point III.1.2. of the judgment in the case K 18/04.

word ‘autonomous’ in the above quotation seems to be of key importance. It may be inferred that CT was talking about an independent opinion on the Treaties constituting the foundations of the EU, i.e. an opinion formulated directly, without the necessity of referring to links to a given provision of the Accession Treaty. This is further indicated by another statement of the CT, which says that ‘[o]ther acts of the Communities and the European Union primary law which are appendices to the Accession Treaty are also subject to investigation, although *indirectly*’ (emphasis by the Authors).<sup>30</sup>

In a different passage of the judgment in case K 18/04, the CT explains that the treaties founding and modifying the Communities and the European Union may be subject to an investigation into their compatibility with the Polish Constitution ‘only to the extent to which they are inseparably bound to the application of the Accession Treaty and the Act on the Conditions of Accession, which is its integral component.’<sup>31</sup> In this manner the CT, by concluding (unjustifiably) that the Final Act is an integral part (an appendix) to the Accession Treaty, opened the way for itself to conduct an indirect examination of the constitutionality of the Founding Treaties, since they were attached to the Final Act.<sup>32</sup> As a consequence, in its judgment in case K 18/04, the CT investigated the constitutionality of several provisions of the EC Treaty and the EU Treaty that had been objected to by the applicants, addressing them ‘with reference’ to the Accession Treaty. In spite of its partly ill-grounded substantiation, such action must be considered correct. It is difficult to accept that examination into the constitutionality of such an important act as Poland’s accession to the European Union should be limited to a review of the provisions of only the Accession Treaty *sensu stricto* and the act pertaining to the conditions of the accession. An examination into the contents of these documents alone (to a considerable extent of a ‘technical’ and transitional character) does not answer the fundamental questions on the character, structure, and operating principles of the EU or the consequences of Poland’s accession to this organisation. Since the President of the Republic did not avail himself of the possibility of subjecting the Accession Treaty (and indirectly also the treaties founding the EU and the EC) to a preventive review, the Tribunal did not have sufficient constitutional grounds for conducting such an examination by way of subsequent investigation. Its competence to include the EU and the EC Treaties in its scope of investigation should have been derived from Article 1 paragraph 1 of the Accession Treaty itself, according to which the acceding Member States ‘*hereby become mem-*

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<sup>30</sup> Point III.7. of the judgment in the case K 18/04.

<sup>31</sup> Point III.11.3. of the judgment in the case K 18/04.

<sup>32</sup> Point III.C. of the Final Act.

bers of the European Union and Parties to the Treaties on which the Union is founded, as amended or supplemented.’ Such an effect of the Accession Treaty justifies the conclusion that not only is the Accession Treaty itself an international agreement as referred to in Article 188 paragraph 1 of the Constitution, but so too are the treaties founding the EU and the EC, to which the Accession Agreement is clearly linked.

### 1.3. Treaties amending the Treaties on which the EU is founded

The CT also had the opportunity to adjudicate upon the matter of conformity to the Polish Constitution of an amending treaty, i.e. the Lisbon Treaty.<sup>33</sup> Selected provisions of the Treaty were referred to the CT for a ruling by some groups of MPs and Senators. In its judgment of 24 November 2010 (K 32/09), the CT repeated the thesis, already known from its judgment in case K 18/04 pertaining to the Accession Treaty, that its jurisdiction comprises all international agreements, including those whose ratification requires consent granted by statute, as well as those entered into by statute passed in compliance with the requirements referring to delegation to an international organisation of competences of organs of State authority in relation to certain matters (Article 90 of the Constitution).<sup>34</sup> It stated at the same time that the Lisbon Treaty enjoys ‘a special presumption of conformity to the Constitution.’ Two circumstances were invoked by the CT as the grounds for this presumption. Firstly, it derived from the fact that granting consent to ratification of the Lisbon Treaty by the Polish Parliament was done in the form of a statute, the passing of which required fulfilling conditions which surpassed even those needed for amending the Constitution itself (Art. 90 paragraph 2 of the Constitution). Secondly, the CT pointed out that the President of the Republic, as the authority obliged to safeguard observance of the Constitution, did not initiate a preventive review of the constitutionality of the aforementioned Treaty, which could be deemed as an expression of his conviction that it conformed to Poland’s Basic Law. According to the CT, refutation of the presumption of the constitutionality of the Treaty is possible ‘only after it has been determined that there is no such interpretation of the Treaty and no such interpretation of the Constitution that would allow a finding of the conformity of the provisions of the Treaty with the Basic Law.’<sup>35</sup>

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<sup>33</sup> Cf. A. Łazowski, op.cit., pp.510–512; M.Wendel, *Lisbon Before the Courts: Comparative Perspectives*, “European Constitutional Law Review” No. 7/2011, pp. 107–108.

<sup>34</sup> Point III.1.1.1. of the CT judgment in the case K 32/09.

<sup>35</sup> Point III.1.1.2. of the CT judgment in case K 32/09. Nevertheless, the CT excluded the possibility of an implied amendment of the Constitution via the delegation of competences to the EU and finding an interpretation that was friendly towards European integration (point III.2.5. of the CT judgment in case K 32/09).

Although the CT referenced its presumption of constitutionality directly to the Lisbon Treaty, it should undoubtedly be all the more referenced to the Accession Treaty, which was adopted by way of a nationwide referendum, and in consequence also to the Founding Treaties of the EU, to which the Accession Treaty was directly linked.

Referring to the amendments to the Founding Treaties,<sup>36</sup> the CT concluded importantly that the special procedure for delegating competences of organs of State authority to the EU, as set forth in Article 90 of the Constitution, is not exhausted by a single application. Thus each subsequent amendment of the Treaties which involve the delegation of competences (via an expansion of the catalogue of delegated competences) requires fulfilment of all the conditions specified in the aforementioned provision (including granting consent to ratification by way of statute passed by a qualified majority vote or a vote or in a nationwide referendum). This also refers to any delegation of competences which takes place in the course of a procedure other than an international agreement, i.e. via the EU's simplified procedure. As the CT pointed out in the last paragraph of its statement substantiating its ruling in case K 32/09, '*modification of treaty provisions without amending the treaty, which involve the delegation of competences to an international organisation or an international organ on the basis of an international agreement, although not via an amendment of its provisions by revision of the treaty, requires fulfilment of the same conditions as the ones indicated in Article 90 of the Constitution for an international agreement.*'<sup>37</sup> The Tribunal thus ruled that basically the same requirements that refer directly to international agreements resulting in a delegation of competence should be applied to the simplified amendment of the EU Founding Treaties by decision of the European Council (Article 48 paragraphs 6 and 7 of the TEU). Indeed, in certain passages of its statement substantiating its ruling in case K 32/09, the Tribunal seems to identify relevant decisions of the European Council taken on the grounds of Article 48 paragraphs 6 and 7 of the TEU with international agreements within the meaning of the Polish Constitution, and the requirement that Member States should approve them in accordance with their respective constitutional requirements, resulting from Article 48 paragraph 6 of the TEU, with the ratification of an international agreement in the Polish constitutional order.<sup>38</sup> In referring to the simplified procedure of

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<sup>36</sup> The petitioners argued that the procedures for amending the treaties, as specified in Art. 48 of the TEU, did not guarantee participation of the Parliament as the preliminary condition of amending the EU primary law.

<sup>37</sup> Point III.4.2.14. of the CT judgment in the case K 32/09.

<sup>38</sup> Point III.2.1. and III.2.6. of the CT judgment in the case K 32/09. It must be noted that *Ustawa o umowach międzynarodowych (the Polish Act of 14 April 2000 on international agreements)*, *Dziennik Ustaw (Journal of Laws)* of 2000, No. 39, Item 443, as amended, also extends

amendment resulting from Article 48 paragraph 6 of the TEU, the CT pointed out that an amendment in compliance with this latter provision ‘*may not increase the competence conferred on the Union in the Treaties.*’ As a consequence, according to the CT, this procedure cannot pertain to the delegation of competences of organs of State authority in certain matters, as referred to in Article 90 paragraph 1 of the Constitution. Nonetheless, even while assuming that the special procedure for the ratification of international agreements prescribed by Article 90 of the Constitution applies to the simplified revision procedures specified in Article 48 of the TEU, the CT finally concluded however that it does not apply to Article 48 paragraph 6 of the TEU.

The CT’s position on the simplified procedure of amendment resulting from Article 48 paragraph 7 of the TEU also requires a closer look. It should be recalled that, apart from the requirement of unanimity in the European Council and the consent of the European Parliament, the above provision contains the requirement that there should be no objections from any national parliament to the initiative of amending the Treaties presented to them (such objection(s) may be voiced within 6 months of the presentation of such an initiative to the national parliament). The absence of any such objection enables the European Council to adopt the relevant decision amending the Treaty/ies. Such decision, as it appears, will enter into force on the date indicated in it or, if there is no such date indicated, on the twentieth day after its publication in the EU Official Journal (Art. 297 paragraph 2 section 2 of the TFEU). After referring to the above provisions of the Treaty, the CT concluded however that the principles of delegating competences specified in Art. 90 paragraphs 1-3 of the Polish Constitution will also be applicable to a ‘*potential delegation of competence on the grounds of an international agreement, yet not in the procedure of amending an international agreement, but in the procedure of executing its provisions, which is referred to in the challenged paragraph 7 of Article 48*’ (the CT did not question the constitutionality of this last provision, by the way).<sup>39</sup> The Tribunal concluded at the same time that ‘*only by comparing the decision adopted by the European Council with the scope of competence conferred in the Treaties may a premise be formulated for assessing its conformity to the Constitution in its present form.*’<sup>40</sup> The CT’s standpoint is

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the requirement of ratification to decisions of the European Council under Art. 48 para. 6 of the TEU (Art. 12 para. 2a of the aforementioned Act). On the other hand, L. Jimena Quesada points to the autonomous character of the procedure of acceptance resulting from Art. 48 para. 6 of the TEU in relation with the procedure of ratification resulting from Art. 48 para. 4 of the TEU. See: L. Jimena Quesada, *The Revision Procedures of the Treaty in: The European Union after Lisbon*, eds. H.-S. Blanke, S. Mangiameli, Berlin, Heidelberg 2012, p. 329.

<sup>39</sup> Point III. 4.2.10. of the CT judgment in the case K 32/09.

<sup>40</sup> Point III. 4.2.14. of the CT judgment in the case K 32/09.

no clearer when it comes to its consideration, in the light of the Polish Constitution, of initiatives for replacing the unanimity formula with the formula of qualified majority voting in the European Council, and replacing the special legislative procedure with the ordinary legislative procedure, both of which are referred to in Article 48 paragraph 7 of the TEU. On the one hand, the CT states that Article 90 paragraph 1 of the Constitution does not regulate these issues (which might mean that this provision is not applicable to them), while on the other hand it assumes that changes of such a type as provided for in Article 48 paragraph 7 of the TEU may affect the sphere of competence of organs of State authority, which again directs the discussion on decisions specified in Article 48 paragraph 7 of the TEU towards the problem of delegating competences of organs of State authority in certain matters as understood in Article 90 paragraph 1 of the Constitution. In other words, according to the CT, the simplified procedure of amending the Treaties, as specified in Article 48 paragraph 7 of the TEU, is subject to the same constitutional requirements as an ordinary revision of the Treaties involving delegation of competences of organs of State authority. Although we are dealing here with a revision of an international agreement '*by way of executing its provisions,*' the decision of the European Council would need to be qualified as an international agreement, because only this category of acts is referred to by the provisions of Article 90 of the Constitution. As may be inferred, any examination of the constitutionality of such an act will be performed by the Constitutional Tribunal.<sup>41</sup>

If the above described position of the CT is correctly understood by the Authors (the CT's argumentation is capable of various interpretations), it raises some doubts. In fact the procedure of revision, as specified in Article 48 paragraph 7 of the TEU, in essence excludes ratification within the meaning of the Polish Constitution. Even if we disregard the question of the qualification of the European Council's decision as an international agreement, such ratification is not possible in terms of presenting a relevant initiative to the national parliament, because what we have at that moment is not a finally formulated text of a normative act (a concluded international agreement within the meaning of the Polish Constitution), but a mere draft of such an act. It is also doubtful whether the period of six months would be enough for the Parliament to choose the mode of granting official consent to ratification, and subsequently either pass the appropriate act or organise a nationwide referendum. On the other hand, ratification after the decision has been adopted by the European Council (in the absence of objections raised by a national parliament) would be too late, since the decision amending the Treaty has

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<sup>41</sup> On the subject of the position expressed by other Member States' constitutional courts on the matter of the modification of treaty provisions, see, e.g. M. Wendel, *op.cit.*, pp. 114–120.

already entered into force. Finally, serious doubts arise as to the question whether the change of decision-making procedures, as specified in Article 48 paragraph 7 of the TEU, may actually entail an increased delegation of competence(s) of organs of State authority to the EU. In our opinion, this procedure does not involve revision of the principles of division of competences between Member States and the European Union, but merely a revision – within precisely defined limits – of principles governing the execution by the EU institutions of those competences previously conferred to the Union level.<sup>42</sup> Article 48 paragraph 7 of the TEU gives no grounds for receipt by the EU of any new competences or for increasing the scope of competences previously conferred on it by the Member States. By ratifying the Treaty of Lisbon, which introduced, *inter alia*, the simplified procedure of revision under Article 48 paragraph 7 into EU primary law, Poland *a priori* granted its consent to possible modifications of the principles, precisely delineated in this provision, governing the decision-making process. If the European Council, availing itself of these possibilities, adopts a relevant decision, such an act should not therefore entail the necessity of initiating one of the procedures for granting consent to ratification referred to in Article 90 of the Polish Constitution.<sup>43</sup> It is worth noting that the CT presented a similar view in its judgment of 18 February 2009 in case Kp 3/08 pertaining to the constitutionality of the act authorizing the President of the Republic of Poland to submit a declaration accepting the competence of the Court of Justice on the grounds of Article 35 paragraph 2 of the TEU (in the version prior to the Lisbon reform). In this case, the President of the Republic argued that the aforementioned declaration results in conferring competences of Polish courts (thus diminishing the scope of their competence) on a Union institution, which would lead to the necessity of passing an act in accordance with the procedure specified in Article 90 of the Constitution, i.e. in a procedure applicable to delegating competences of organs of State authority in certain matters to an international organisation. In addressing the President's objection, the CT pointed out that *'the competence to submit to a prejudicial procedure under the third pillar of law of the European Union was received by the Republic of Poland together with the whole Treaty on the European Union through the medium*

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<sup>42</sup> The CT itself, while settling in its judgment of 20 May 2009 Kpt 2/08 a competence dispute between the President of the Republic and the President of the Council of Ministers on Poland's representation in the meetings of the European Council, pointed out that *'the competence of a constitutional organ of the State is authorisation of such organ by the constitution-maker or lawmaker for action that produces consequences specified by the law in a relevant sphere; the undertaking of such an action may be a legal obligation or a right of a given organ'* (point III.1.4. of the judgment). See also: K. Wojtyczek, *op.cit.*, pp. 107–111.

<sup>43</sup> A similar opinion is expressed in the dissenting opinion of judge M. Granat to the CT's judgment in the case K 32/09. See also: K. Wojtyczek, *op.cit.*, p. 121.

*of the Accession Treaty. A declaration submitted on the grounds of Article 35 paragraph 2 of the TEU signifies merely an update of this competence, and not its creation.*' Similarly, in the case of Article 48 paragraph 7 of the TEU, it could be argued that the modification specified therein of the principles for adopting decisions by the Union institutions was accepted by Poland together with the whole Treaty of Lisbon, and any decision of the European Council issued in the aforementioned simplified procedure for amending the Treaties is merely an update of one of the modes of proceeding – acceptable in the light of the Treaties – at the Union level.

It may be inferred that the CT, in suggesting that the requirements of Article 90 of the Constitution applied to both simplified procedures for amending the Treaties (Article 48 paragraphs 6 and 7 of the TEU), was aiming first of all at securing for itself the future possibility of examination of the constitutionality (under Polish law) of relevant decisions of the European Council. Although the CT states that Article 48 paragraph 6 of the TEU does not give grounds for delegating any competences of organs of State authority in certain matters, at the same time it more or less clearly assumes that in this case we are, or may be, dealing with an international agreement with respect to which the CT's competence to review, as specified in Article 188 paragraph 1 of the Constitution, may be fully applicable. Thus the CT would investigate whether a decision of the European Council does not in fact lead to conferring upon the EU a competence of organs of State authority in certain matters within the meaning of Article 90 paragraph 1 of the Constitution, and in consequence whether the 'approval' required by Article 48 paragraph 6 of the TEU was in compliance with the requirements of Article 90 paragraphs 2-4 of the Constitution. So in a case where a transfer of a competence of this kind would be out of the question, the CT would have the possibility to investigate the conformity of the decision taken by the European Council with the existing Polish constitutional patterns. It seems that the CT has adopted a similar approach to the decisions of the European Council taken on the grounds of Article 48 paragraph 7 of the TEU. In this case as well, the requirements specified in Article 90 of the Constitution are invoked, and as a consequence the possibility of a full examination of the conformity to the Constitution of such decisions taken at the Union level.

As has been stated previously, the CT's position on the simplified procedures for amending the Treaties is not expressed in a sufficiently clear manner. It may not be thus completely ruled out that the CT's reference to the requirements pertaining to ratification of an international agreement resulting in delegating to an international institution or an international organ of competence of organs of State authority in certain matters (Article 90 of the Constitution) encompasses its jurisdiction only with respect to those decisions of

the European Council, adopted on the grounds of Article 48 paragraphs 6 and 7, which have been adopted in essence *ultra vires*. In other words, the problem may concern only those decisions which, against the clear ban specified in Article 48 paragraph 6 section 3 of the TEU, lead to an increase of EU competences, or decisions that, under the pretence of replacing the requirement of unanimity with the requirement of qualified majority voting (excluding military or defence matters) or replacing the special legislative procedure with the ordinary procedure (Art. 48 paragraph 7 sections 1 and 2 of the TEU) contain a different normative content, modifying the hitherto binding provisions of the Treaties. If this in fact is the position of the CT, it would not raise objections other than the ones related to the exclusive character of the competence of the ECJ to review acts issued by the Union institutions (discussed further in section 3.5. of this article), including the acts of the European Council intended to produce legal effects *vis-à-vis* third parties (Article 263 of the TFEU). It seems significant, however, that the CT in its argumentation on the simplified procedures of revision of the Treaties, does not clearly indicate that it is referring exclusively to those cases involving such a serious infringement of Article 48 paragraphs 6 or 7 of the TEU that they could be qualified as acting *ultra vires*.

It is also important that in the judgment in the Lisbon Treaty case, the Tribunal extended its previous position, as expressed in its judgment in the Accession Treaty case, on the precedence of the Constitution with respect to the possibility of delegating competences. It emphasised that the grounds for Poland's membership in the EU had been created in the Constitution itself, and that membership in the EU does not mean a loss of sovereignty (point III. 2.1.). Poland's sovereignty is guaranteed by the Constitution hence, as the CT concluded, there must be certain competences that are banned from delegation, i.e. those that determine constitutional identity (reflect its fundamental values). The catalogue of such competences is not clearly specified, but they must comprise *'the chief principles of the Constitution as well as the provisions, pertaining to the rights of individuals, that determine the identity of the State including, in particular, the requirement of securing the protection of human dignity and constitutional rights, the principle of statehood, the principle of democracy, the principle of a legal state, the principle of social justice, the principle of subsidiarity, as well as the requirement to provide for better implementation of constitutional values and the ban on delegating the constitution-making power and the competence to create competences.'* (point III.2.1.).

#### **1.4. General Principles**

The CT also did not clearly express its opinion on the admissibility of examining the constitutionality of the general unwritten principles of the

Union legal order that have been ‘discovered’ by the ECJ in its jurisprudence.<sup>44</sup> In addressing the petitioners’ objections directed against the jurisprudence of the Court of Justice, it concluded that ‘it cannot, on the other hand, make the judicial statements of the Court of Justice of the European Communities subject to its direct examination of constitutionality.’ This pertains both to individual judgments and also to the ‘*stable line of the jurisprudence of the European Court of Justice derived from individual judgments, which line is referred to by the applicants.*’<sup>45</sup> Review of the jurisprudence of any organ of jurisdiction, either of the EC or the EU, remains outside the scope of the CT’s jurisdiction specified in Article 188 of the Constitution. At the same time, the Tribunal pointed out that the interpretation of EU law issued by the Union courts should be contained within the scope of the functions and competences conferred by Member States to the Union level. It goes on to indicate the connection of such an interpretation to the principle of subsidiarity, as well as the principle of mutual loyalty between the EU institutions and the Member States. This, in consequence, acknowledges the existence of an obligation on the part of the ECJ ‘*to be favourably inclined towards national legal systems,*’ and on the part of the Member States of an obligation to show ‘*utmost respect in approaching the Community norms.*’<sup>46</sup> The CT assumes at the same time the necessity of acceptance by the Member States (in an explicit or implicit manner) of the interpretation of EU law norms issued by the ECJ, which acceptance would go beyond the strict framework of the Treaties.<sup>47</sup>

Excluding the CT’s direct jurisdiction over the judgments of Union courts does not mean, however, that the general unwritten principles of EU law remain beyond the reach of any review from the CT. Since Article 188 of the Constitution does not mention in this context any sources of international law other than international agreements (disregarding e.g. the common law, or the practice *opinio iuris sive necessitatis*), the Tribunal could not include such general principles into its jurisdiction in a straightforward manner. Although ‘*a direct examination of the constitutionality of judicial statements*’ of the Court of Justice was ruled out, an indirect examination was not. It seems, therefore, that the CT will have the competence to examine the constitutionality of a given principle in an indirect way, i.e. in the first place addressing the specific provision of the Treaties from which the binding force of the general principle(s) is derived in the Union legal order (Article 6 paragraph 3 of

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<sup>44</sup> See, e.g. T. Tridimas, *The general principles of EU law*, Oxford 2006, pp. 313ff.

<sup>45</sup> Point III.9.1. of the judgment in the case K 18/04.

<sup>46</sup> Point III.10.2. of the judgment in the case K 18/04.

<sup>47</sup> Point III.10.3. of the judgment in the case K 18/04.

the TEU, Charter of Fundamental Rights). Taking into account the practice of the CT's operation in domestic matters, it could be assumed that in such cases a given provision of the Treaty could be deemed unconstitutional to the extent to which it allows for the construction of a legal norm which challenges a general principle of the Polish legal order.<sup>48</sup> The results of such a negative outcome of an examination of the constitutionality of a general principle should be the same as in the case of the unconstitutionality of a given norm of a Founding Treaty.

## 2. The Constitutional Tribunal and EU secondary legislation

### 2.1. Early jurisprudence pertaining to EU secondary legislation

The question of examination of the conformity with the Polish Constitution of EU secondary legislation has appeared in the CT jurisprudence several times, starting from the judgment in the Accession Treaty case. Yet the CT did not formulate a straightforward position in this matter until as late as in 2011. Previous positions were only expressed on the margins of rulings pertaining to EU primary law or the review of Polish law, and they were neither of a straightforward nor comprehensive character. Such was the case in the investigation into the Accession Treaty, when the CT had to address the European arrest warrant (EAW) Framework Decision, which was referred to it (implicitly) for a ruling.<sup>49</sup> The CT did not reject the possibility of reviewing the conformity of the EAW Framework Decision to the Constitution, but it concluded that due to its *'general and merely directional character'* it was not subject to examination. In such a situation, an examination may only take place in relation to an act implementing the Framework Decision.<sup>50</sup> At the same time the CT concluded that the Framework Decision will create an inter-governmental obligation addressed to the Polish government, and thus may not be regarded as a source of law that is binding on the territory of Poland (this position was not repeated in subsequent judgments and can

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<sup>48</sup> Cf. M. Florczak-Wątor, *Orzeczenia Trybunału Konstytucyjnego i ich skutki prawne (Judgments of the Constitutional Tribunal and Their Legal Effects)*, Poznań 2006; J. Pinkowski, *Skutki wyroków Trybunału Konstytucyjnego w świetle orzecznictwa (Effects of the Constitutional Tribunal's Judgments in the Light of Jurisprudence)*, "Państwo i Prawo" No. 1/2005, p. 56; K. Gonera, E. Łętowska, *Wieloaspektowość następstw stwierdzania niekonstytucyjności (Multi-faceted Forms of Consequences of Declaring Unconstitutionality)*, "Państwo i Prawo" No. 5/2008, p. 27.

<sup>49</sup> Judgment K 18/04; the Council Framework Decision No. 2002/584/JHA on the European arrest warrant and the surrender procedures between Member States, OJ 2002 L 190/1-20.

<sup>50</sup> Point III.18.9 of the judgment K 18/04.

hardly be considered correct).<sup>51</sup> It seems, therefore, that the CT rejected the possibility of reviewing a framework decision, treating it as a directional act that is not directly a part of the legal order in the Republic of Poland. A further characteristic of framework decisions was presented by the CT in 2009 in another judgment pertaining to the constitutionality of the act authorizing the submission of a declaration on accepting the competence of the ECJ in the former third pillar.<sup>52</sup> It emphasised, first of all, the obligation to implement framework decisions into the domestic order as well as the role of the ECJ jurisprudence in providing a uniform and consistent interpretation of the secondary legislative acts in the Union third pillar, thus securing a comparable level of protection of individual rights in the territory of the entire European Union.

In another case in which the CT adjudicated on the conformity to the Constitution of the national provisions implementing the aforementioned Framework Decision on the EAW, it did not limit in any way its competence to adjudicate on the constitutionality in question by the fact that the examined provisions were in execution of EU law.<sup>53</sup> It concluded at the same time that the obligation to implement the framework decisions is a constitutional requirement, and the fundamental constitutional function of the Constitutional Tribunal is examination of the conformity of normative acts to the Constitution, including in situations in which the allegation of unconstitutionality pertains to an act serving to implement European Union law.<sup>54</sup> In this judgment, the CT finally ruled that the Polish provisions implementing the Framework Decision did not conform to the Constitution, as the Constitution did not admit the extradition of a Polish citizen, which was allowed under the provisions implementing the Framework Decision. By virtue of this judgment, Polish provisions permitting the surrender of a Polish citizen were declared invalid. The CT perceived further that the simple invalidation of those provisions did not secure a state of conformity to the provisions of the Constitution, because the Framework Decision remained in force and still

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<sup>51</sup> The ECJ states for example that ‘*The national court is required to take into consideration all the rules of national law and to interpret them, so far as possible, in the light of the wording and purpose of the Framework Decision*’. See: C-105/03 Maria Pupino [2005] ECR I-5285, para. 61.

<sup>52</sup> Judgment of 18 February 2009, case ref. No. Kp 3/08.

<sup>53</sup> See A. Łazowski, *op.cit.*, p. 512.

<sup>54</sup> Judgment of 27 April 2005, P 1/05, point III.2.4. See: K. Kowalik-Bańczyk, *op.cit.*, pp. 1358–1361; A. Nußberger, *Poland: The Constitutional Tribunal on the implementation of the European Arrest Warrant*, “*International Journal of Constitutional Law*” No. 6/2008, pp. 162–170; O. Pollicino, *The New Relationship between National and the European Courts after the Enlargement of Europe: Towards a Unitary Theory of Jurisprudential Supranational Law?*, “*Yearbook of European Law*” No. 29/2010, pp. 78–85.

had to be implemented into Polish law by virtue of EU law as well as Polish constitutional obligations.<sup>55</sup> In order to achieved correct implementation, the CT did not rule out amending the Constitution so that it permitted the extradition of Polish citizens on the grounds of the EAW. This is indeed what happened after the judgment.<sup>56</sup>

In the CT jurisprudence, we may also find considerations upon the nature of EU Regulations in the context of the Constitution. In its judgment of 2009, the CT concluded that, pursuant to Article 92 paragraph 1 of the Constitution authorizing the issuance of executive acts on the basis of a statute, the meaning of the term ‘statute’ does not include Union regulations. As a consequence, a Union regulation may not be the basis for the direct issuance by Polish lawmakers of an executive act.<sup>57</sup> Consistently, the CT was of the opinion that authorisation for the issuance of an executive act, which has to be contained in a statute and cannot be of a blanket nature, may not be supplemented by a Union regulation. Therefore the CT investigates only the statutory authorisation, even if the statute is issued for the purpose of implementing a Union regulation. Additionally, the entry into force of a Regulation that, by virtue of direct effect and primacy, may affect the scope of application of a statute under examination, does not revoke the competence of the Constitutional Tribunal to adjudicate on the conformity to the Constitution of the statutory provision referred to it for ruling.<sup>58</sup> Such a ruling may also be understood as indirectly contesting the possibility of limiting constitutional rights and freedoms directly in EU law – the Constitution admits such a limitation exclusively by virtue of a statute.<sup>59</sup>

## **2.2. Review of EU secondary legislation**

For the first time the Polish CT addressed the question of reviewing secondary legislation in a direct manner only on the margins of a ruling of 2009,<sup>60</sup> in which it concluded that the *[a]bsence of EU secondary legislation*

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<sup>55</sup> The CT derived this obligation from Art. 9 of the Constitution, which stipulates that *‘the Republic of Poland shall respect international law binding upon it’*.

<sup>56</sup> See S. Biernat, *Członkostwo Polski...*, op.cit., p. 76.

<sup>57</sup> Order of 24 March 2009, Case ref. No. U 6/07. Art. 92 para. 1 provides: *‘Regulations shall be issued on the basis of specific authorisation contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution’*.

<sup>58</sup> Judgment of 13 October 2010, case ref. No. Kp 1/09 (point III.5). Four dissenting opinions were submitted to this ruling, pointing out that in the process of an adjudication on the constitutionality of a statute, the EU regulation which affected the scope of its application must have necessarily been taken into account.

<sup>59</sup> Cf. the dissenting opinion of judge S. Biernat to the judgment of 13 October 2010. Case ref. No. Kp 1/09 (point III.5.).

<sup>60</sup> Order of the CT of 17 December 2009, U 6/08 OTK 2009, No. 11, Item 178.

*in the enumerative catalogue contained in Article 188 paragraphs 1-3 of the Constitution makes it impossible for the Tribunal to adjudicate on the question of its conformity to the Constitution. The lack of the Tribunal's competence in this respect means that the allegations raised in a matter relating to the conformity of Community secondary legislation with the Polish Constitution may not be investigated by the Tribunal.'* It concluded, therefore, that the national provisions regulating the Tribunal's jurisdiction stand in the way of an investigation into the constitutionality of EU secondary legislation, yet it did not address the arguments pertaining to the EU law itself or the hierarchy of EU law and the national law.

The CT did not issue a judgment addressing this problem directly or substantiate its position in an exhaustive manner until November 2011.<sup>61</sup> On the basis of constitutional arguments, the CT basically recognised its competence to review EU secondary legislation within the framework of a constitutional complaint. It repeated its earlier standpoint that the Constitution is the supreme law in the Republic of Poland, from which it derived the right to also review the conformity to the Constitution of acts of EU secondary legislation. The case that led to the issuance of this judgment pertained to a constitutional complaint filed by an individual person against Council Regulation no 44/2001 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters. In her complaint, the complainant claimed that the provisions of the Regulation are inconsistent with Article 45 of the Constitution, i.e. with the right to a fair trial in court. The main issue concerned the absence of the possibility for a debtor to make any submissions in court of first instance proceedings aimed at establishing the enforceability of a judgment of a foreign court.

### **2.3. The constitutional complaint as an instrument for review of EU secondary legislation**

The fundamental question that had to be ruled upon by the CT was whether a constitutional complaint may refer to EU secondary legislation. Doubts resulted from the provisions of the Constitution which define the competence of the CT as review of conformity to the Constitution of statutes, international agreements and provisions issued by central organs of State (Article 188 points 1-3). The above catalogue does not include acts issued by an international organisation, which are referred to in Article 91 paragraph 3 of the Constitution. While this question was addressed in the

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<sup>61</sup> The judgment issued by the CT adjudicating *en banc* on 16 Nov. 2011, ref. No.45/09, available in English at [http://www.trybunal.gov.pl/eng/summaries/documents/SK\\_45\\_09\\_EN.pdf](http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf) (last visited 27 February 2013).

judgment of 2009 cited above, the previous case pertained to so-called abstract review, whereas the 2011 case pertained to a constitutional complaint filed by an individual in a specific case. This procedure gave the CT the possibility to apply the provisions of the Constitution with reference to constitutional complaints, contained in Article 79 of the Constitution, which provisions indicate that the subject of such a complaint may be a '*statute or another normative act*'. At the same time, the CT resolved the controversy pertaining to the relation between both constitutional provisions and came out in favour of the autonomous interpretation of the provisions referring to the constitutional complaint. In consequence, the CT concluded that a constitutional complaint may refer to a normative act understood not only as an act issued by Polish organs but also as an international agreement<sup>62</sup> or acts issued by organs of an international organisation, i.e., first of all to EU secondary legislation. Moreover, a constitutional complaint may refer to a normative act on the basis of which a final court ruling was issued concerning the complainant's rights or obligations. Quoting from the ECJ jurisprudence, the Tribunal concluded that an EU Regulation may be the basis of such a ruling. It seems that the same should be assumed with reference to EU decisions as long as they are of a general character (compare Article 288 paragraph 4 of the TFEU), thus they may constitute a normative act within the meaning of the provisions of the Polish Constitution. The CT did not address the issue of directives, i.e. whether they too may be subject to a constitutional complaint as normative acts on the basis of which a court or administrative decision is issued. It mentioned only that it will not always be easy to ascertain whether a court issued its ruling on the basis of EU law or on the basis of Polish law implementing or executing an act of EU law – above all a directive, but also a Regulation. It seems to be suggested that in a situation when the basis for a decision are the provisions of a directive, i.e. as directly applicable in a situation of non-implementation or incorrect implementation thereof, it is also possible to file a constitutional complaint against the directive. It is unclear, however, whether according to the CT such a complaint will be admissible if the decision has been issued on the basis of Polish law which correctly implements a directive. Such a complaint would have to refer indirectly to the directive as the source of inconsistency with the Polish Constitution. It seems, however, that the CT would consider such a complaint as a complaint against an act directed against Polish law, and not EU law. The ECJ states in its jurisprudence that the con-

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<sup>62</sup> The CT had ruled earlier that a constitutional complaint might refer to an international agreement, such as the European Agreement (judgment of 18 December 2007, ref. No.SK 54/05).

stitutional review of national provisions implementing directives may infringe upon the competence of the ECJ. As stated by the ECJ, ‘... *the Court could thus, in practice, be denied the possibility, at the request of the court’s ruling on the substance of cases in the Member State concerned, of reviewing the validity of that directive in relation to the same grounds relating to the requirements of primary law, and in particular the rights recognised by the Charter of Fundamental Rights of the European Union, to which Article 6 TEU accords the same legal value as that accorded to the Treaties.*’<sup>63</sup> Contrary to this position, the CT admits the possibility of review of the constitutionality of provisions implementing directives, and also, as it appears, of the directives themselves when they directly constitute the basis for a ruling.

The CT’s judgment pertained to one of the modes of reviewing constitutionality, and it ascertained its procedural competence by quoting from the special provisions in the Constitution specifying this mode. There is no doubt that EU secondary legislation may not be subject to an abstract review,<sup>64</sup> yet it is not clear whether it may be referred to in a legal question of a court adjudicating a given case. Pursuant to Article 193 of the Constitution, each court may refer a question to the Constitutional Tribunal on the conformity of a normative act with the Constitution if the adjudication of a case pending before such court depends on the answer to such legal question. Similarly to the provisions on constitutional complaint, this provision uses the term ‘normative act’, which, according to the CT, includes EU secondary legislation. Yet the competence to decide a legal question is not listed among CT competences as separate from other competences, as in the case of the constitutional complaint, which served as a basis for the CT to substantiate the autonomy of regulations in such a complaint as comprising normative acts. This argumentation may not be transferred directly to legal questions, so the term ‘normative acts’ with reference to those questions should be interpreted as referring only to acts enumerated directly within the competences of the CT – i.e. statutes, international agreements and provisions issued by central organs of State. Such an interpretation would also enable achievement of at least a partial compliance with the EU law requirements, as it would rule out the possibility of a court referring to the CT a legal question on the conformity to the Constitution of EU secondary legislation, and as a consequence it

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<sup>63</sup> C-188/10 and C-189/10 Melki, Abdeli [2010] ECR I-5667, para. 55.

<sup>64</sup> Such review pertains to statutes, provisions of law issued by central organs of the State, as well as international agreements, and the latter term, used in Art. 188 of the Constitution, is not extended by the CT to include acts issued on the basis of international agreements (cf. the CT judgment 45/09, point III. 1.2.).

would not limit the court's options to refer such a question to the ECJ for a preliminary ruling.<sup>65</sup>

#### **2.4. Competences of the CT and the principle of primacy of EU law**

The ruling on the CT's procedural competence to adjudicate a constitutional complaint concerning EU secondary legislation was of a preliminary nature. The CT had to address the principle of primacy and the consequences resulting there from for its constitutional review. In this respect, the CT repeated its previous position that EU law has no precedence over the Constitution (in this case, however, it recognised the principle of primacy not only as a principle of ECJ jurisprudence, as was the case in its judgment referring to the Accession Treaty, but also as resulting indirectly from the provisions of the Treaties). Since the Constitution is the supreme law in the Republic of Poland, according to the CT, it is admissible to revise EU secondary norms in order to conform to it.

The thesis is derived, first of all, from the principle of the supremacy of the Constitution. This principle has a broad scope and refers to any constitutional norm, not only to the rights and freedoms of individuals. Yet, the CT reserved its right to review the constitutionality of secondary legislation by way of a constitutional complaint to the investigation into infringements of constitutional rights and freedoms. Thus the CT will not be able to use the procedure of the constitutional complaint for the purpose of investigating the conformity of EU secondary legislation to other principles of the Constitution. By virtue of this limitation, it will not be able to examine whether a given act is or is not an *ultra vires* act, i.e. whether it remains within the scope of competence conferred by Poland on the EU etc. If, however, an *ultra vires* action resulted in an infringement of Polish constitutional rights and freedoms, the complaint would have to be considered admissible. Nevertheless, if the CT claimed the right to review EU law also within the framework of legal questions referred to it by Polish courts, such a review would not be, pursuant to the Constitution, limited to individual rights and freedoms, but it could pertain to other constitutional principles. As has been pointed out above, the right to review within the framework of legal questions has no grounds in the provisions concerning the CT's competence, and thus it is not very likely.

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<sup>65</sup> As recognized by the CT, the national procedure, including that for reviewing the conformity to the Constitution, may not limit the competence of the court to refer a question for a preliminary ruling. Cf. C-188/10 Melki, op.cit., para. 56.

## 2.5. Competences of the CT and competences of the ECJ

The CT also addressed the issue of division of jurisdiction between the constitutional court and the ECJ. It pointed to the necessity of distinguishing between constitutional review and review of conformity to EU primary law. The latter is obviously reserved for the ECJ, while constitutional review is performed by the CT. Review is thus of a parallel-track character, and the tribunals should not be viewed as competing with each other. Yet, the CT perceived that some situations might lead to a potential collision between the rulings of both tribunals, which would result in ‘*a dysfunctionality in the relations between the EU legal order and the Polish one*’ (point III.2.4.). It was thus necessary to maintain ‘*due caution and restraint*’ (point III.2.5). By invoking both the principle of sincere cooperation on the part of the Member States as well as respect for national identity on the part of the EU, the CT indicated that it sees the above obligation as bilateral. In consequence, the constitutional review of Regulations should be regarded as independent, yet subsidiary, in relation to the jurisdiction of the ECJ. This means that before declaring the non-conformity to the Constitution of an act of EU secondary legislation, the CT must refer a question to the ECJ for a preliminary ruling to be certain as to its interpretation of, or the validity of, those provisions that raise doubts. As a result of a ruling of the ECJ, it may turn out that the content of the challenged act is consistent with the Constitution. The ECJ may also rule that a challenged provision does not conform to EU primary law, which would render the CT’s constitutional review moot. It is worth noting that the CT reserved the obligation to refer a question to the ECJ to a situation ‘*before declaring the non-conformity of an act of secondary legislation to the Constitution.*’ It did not perceive such an obligation in a situation when the CT would issue a ruling finding a challenged provision in conformity with the Constitution. The question remains open whether the CT accepts the principles of EU law resulting from Article 267 of the TFEU, i.e. basically that being a court against whose decisions there is no judicial remedy, it falls under an obligation to bring a matter before the ECJ. In the case in question, the CT did not refer the matter to the ECJ, stating that ‘*it had no doubts as to the conformity of the challenged regulation to EU primary law,*’ (point III.8.1.), and invoking the judgment in the Foto-Frost<sup>66</sup> case, it concluded that there was no need to refer a question to the ECJ. The CT did not, however, address the question of interpretation – and not just the examination of validity – of an EU law. Recognizing the competence of the ECJ as to the inter-

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<sup>66</sup> Judgment of 22 October 1987 in case 314/85 Foto-Frost vs. Hauptzollamt Lubeck-Ost [1987] ECR 4199.

pretation of EU secondary legislation, it should establish whether, in the light of the *acte claire* and *acte éclairé* doctrine, there is a need for such interpretation.

As far as the division of jurisdiction between the CT and the ECJ is concerned, the judgment accepts the conclusions made by Bundesverfassungsgericht – the German Federal Constitutional Tribunal ('FCT'), especially those from the Honeywell case, which was cited several times by the CT in the substantiation statement to its judgment. In the Honeywell judgment, the FCT ruled that insofar as the ECJ had no possibility of examining the validity or interpretation of an act of EU secondary legislation, the FCT may not adjudicate such an act to be unconstitutional.<sup>67</sup>

The CT therefore recognised the necessity of some mechanism limiting the competitive character of rulings issued by both courts, which mechanism consists in the subsidiarity of the CT's review (conducting it only after a review done by the ECJ, which is performed on the basis of a different review pattern). Yet it unequivocally reserved for itself the position of the court of the last word. This position results from the hierarchy recognised by the CT, i.e. the supremacy of the Constitution over EU law. The consequence of this hierarchy is the supremacy of the review of constitutionality exercised by the CT over the review of conformity to EU primary law exercised by the ECJ. Yet, should the consequences of this principle reach as far as secondary legislation? In its previous jurisprudence, the CT admitted its right to examine EU primary law, which is a consequence of the supremacy of the Constitution. Since the CT may examine the primary law, and it leaves to the ECJ the adjudication on the conformity of secondary legislation to the primary law, the review of the constitutionality of secondary legislation may be seen as actually superfluous. It will always be reduced to the situation in which it is the primary law that violates the Constitution. If secondary legislation does not conform to the primary law, the review by the CT will be useless, because, according to the CT's declaration, the ECJ will have done such a review prior to the CT's adjudication. If, on the other hand, it is compliant with EU primary law, the review will have to – albeit indirectly – refer to the primary law. Dismissing the possibility of reviewing secondary legislation by the CT would not deprive the Tribunal of any important competences resulting from the supremacy – established and recognised by the CT – of the Constitution. It would still be able to examine '*the source of incompatibility with*

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<sup>67</sup> Judgment of the FCT of 6 July 2010, Honeywell 2 BvR 2661/06, point 60. The CT emphasized, however, the different character of the Honeywell case as consisting in the fact that the subject of the review was not an act of the secondary legislation, but a judgment issued by the ECJ, and the constitutional allegation did not concern fundamental rights, but an *ultra vires* action.

*the Constitution,*' which will arise from the primary law. Nevertheless, from the point of view of individuals, this would in practice exclude the possibility of filing a constitutional complaint, as the grounds for a final ruling of a court or an organ would necessarily be an act of secondary legislation issued on the basis of the primary law. It has to be added, however, that the constitutional complaint is an extraordinary legal remedy and its availability is limited by the restrictive jurisprudence of the CT. The basic form for reviewing the constitutionality of the primary law, due to the consequences of such review, should be an abstract examination exercised *ex ante*.

It thus appears that the CT may retain its competence stemming from the supremacy of the Constitution without the need to review secondary legislation, which would entail interference in the competence of the ECJ.

## **2.6. The EU standard and the constitutional standard**

This issue has to be examined in light of the CT's further statements concerning the comparability of the EU standard and the constitutional one within the scope of fundamental rights. As recognised by the CT, non-conformity to the Constitution would occur if the EU law implemented a lower level of protection than that provided for in the Polish Constitution. A higher standard of protection, as it seems, would be admissible and compliant with the Constitution. This is a risky conclusion to a certain degree since granting certain rights a higher level of protection may entail lowering the level of protection of other rights. Such situation would probably be considered by the CT as inconsistent with the Constitution to the extent to which it leads to a decrease in the protection provided for in Polish legislation. Thus EU law is to guarantee a comparable scope of protection for all the rights and freedoms guaranteed in the Constitution (as referred to in the catalogue of these rights and the scope of admissible interference). This issue refers to a general standard, and not to the necessity of identical protection of each right.

But is this general standard in the EU law identical to the constitutional standard, according to the CT? There is an 'important common axiology' between these legal systems (point 2.10), which the CT substantiated by referring to the significance of fundamental rights in EU law and Article 6 of the TEU, the Charter of Fundamental Rights, as well as the planned accession of the EU to the European Convention on Human Rights. Nevertheless, the CT did not conclude that the common axiology is guaranteed by the EU law or the ECJ. The CT's judgment does not contain a statement which would directly confirm that the EU standard of fundamental rights conforms as a whole to the Polish constitutional standard. The Tribunal invoked the statements of the FCT's judgment in the Case *Solange II and Bananenmarktord-*

nung, in which the FCT confirmed that a constitutional complaint or a legal question may concern an infringement of fundamental rights by secondary legislation only when its grounds state that the evolution of European law since the *Solange II* decision, including the rulings of the ECJ, has resulted in a decline of protection below the necessary standard required by the (German) Constitution.<sup>68</sup>

The CT also cited the jurisprudence of the European Court of Human Rights (ECtHR) in the *Bosphorus* case, and the thesis stemming there from on the comparability of protection provided for by the Convention and by the EU.<sup>69</sup> Yet, the CT did not itself formulate a statement similar to the opinions expressed by the FCT and the ECtHR. The judgment of the CT does not contain a thesis that the EU law generally guarantees a level of protection comparable to the constitutional one, or that the ECJ guarantees the protection of such fundamental rights.<sup>70</sup> Such a thesis would have to lead, as it did in the case of the FCT and the ECtHR, to the refusal to examine the constitutionality of secondary legislation unless and until the EU standard of protection has decreased below the constitutional standard. Yet, the CT did examine the constitutionality of the regulation which was the ground for the constitutional complaint and did not, as a principle, rule out such future examinations in situations concerning comparable standards.

Despite the statement of the CT that there are premises for adopting a similar approach to the examination of the constitutionality of EU law in Poland to the approach adopted by the FCT and the ECtHR, its approach in fact is not completely similar. Bundesverfassungsgericht limits its jurisdiction, to a certain extent, in matters concerning the conformity of EU law to the German Basic Law. It formally presents the position of the supremacy of the Basic Law over EU law, yet it recognises that legal questions referred by courts or a constitutional complaint may be grounded on the allegation of infringement of fundamental rights by EU secondary legislation only when it has been demonstrated that the level of protection guaranteed in the EU law (including the jurisprudence of the ECJ) does not correspond to the standard of protection provided for in the Basic Law of Germany and, in fact, that it has decreased since the *Solange II* judgment, in which the German Tribunal concluded that the Communities provide protection of fundamental rights that is equal to the protection resulting from the German Con-

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<sup>68</sup> Judgment of 7 June 2000, 2 BvL 1/97210; similarly, the decision of 9 January 2002, 1 BvR 1036/99211.

<sup>69</sup> Judgment of the ECHR of 30 June 2005 in the case 45036/98 *Bosphorus vs. Ireland*, Official Reports (Series A) 2005-VI (2006) 42 EHRR 1, point 155ff.

<sup>70</sup> As it was stated by the FCT, whose role is limited to general safeguarding of the permanent standard of the rights – judgment of 12 October 1993, 2 BvR 2134, 2159/92172.

stitution.<sup>71</sup> In consequence, the German Tribunal does not examine the conformity to its Basic Law of acts of EU secondary legislation, including directives as well as the domestic law implementing them.<sup>72</sup> The French Conseil d'État has expressed a similar view.<sup>73</sup>

The FCT and the ECtHR concluded that the present levels of protection under EU law, both in the Basic Law of Germany as well as the European Convention on Human Rights (ECHR), are comparable. The CT, on the other hand, merely acceded to a presumption of conformity to the Constitution. At the same time, it cited its previous judgment in the Lisbon Treaty case and the substantiation of the presumption contained therein, stemming from the fact of Treaty ratification. Such a presumption may be overcome only after determining that ‘*there is no such interpretation of the Treaty and no such interpretation of the Constitution which would allow to state the conformity of the provisions of the Treaty to the Constitution.*’ (point 8.4.).

According to the CT, such presumption has consequences in the form of procedural limitations in accepting a constitutional complaint concerning EU secondary legislation. In filing such a complaint, the complainant must ‘show probable cause 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’ (point 8.5.). This is a different requirement from the one indicated by the FCT or the ECtHR. It does not require an indication that the level of protection in the EU law overall has declined in comparison to the standard guaranteed previously and considered by the FCT and the ECtHR as compliant with the standards of the German Constitution and the ECHR respectively. In the Pol-

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<sup>71</sup> Judgment of 7 June 2000, 2 BvL 1/97210; judgment of 9 January 2001, 1 BvR 1036/99211; judgment of 22 October 1986, FCT, 2 BvR 97/83 – see: *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej (Relationships between Constitutional Law and the Community Law in Jurisprudence of the Constitutional Tribunals of the European Union's Member States)*, eds. B. Banaszkiwicz, P. Bogdanowicz, at: [http://www.trybunal.gov.pl/epublikacje/download/EUROPA\\_2006.pdf](http://www.trybunal.gov.pl/epublikacje/download/EUROPA_2006.pdf) (last visited 27 February 2013).

<sup>72</sup> Judgment of 13 March 2007, 1 BvF 1/05.

<sup>73</sup> See X. Groussot, *EU law principles in French public law: Un Accueil Reserve*, “Review of European Administrative Law” No. 1/2007, pp. 14ff, as well as the opinion of the Advocate General Maduro in the case C-127/07 Arcelor [2008] ECR 9895, para. 11. Conseil d'État is not, of course, a constitutional court, but its viewpoint is relevant for the relations between EU law and constitutional law, especially considering the initial firm refusal of the Conseil d'État to recognise the precedence of EU law. The Conseil Constitutionnel adopted a similar argumentation to the one presented by the Conseil d'État in the *Arcelor* case, and concluded that only the European Court of Justice might examine the conformity of a directive to the EU provisions, including the fundamental rights guaranteed by virtue of Art. 6 of the TEU – Decision of 10 June 2004, 2004–496 DC and of 1 July 2004, 2004–497 DC.

ish procedure, the complainant has to present probable cause that an act of the EU law infringes the Constitution by ‘*a considerable decline in the standard of protection*’ as compared to the constitutional standard. In each constitutional complaint, the complainant has to present probable cause that to a certain extent the challenged act infringes the Constitution, i.e. has to substantiate the infringement of the constitutional principles by the act in question, and the complaint itself is subject to preliminary examination and may be refused adjudication on the grounds that it is ‘*obviously unfounded*.’ Does this condition introduced by the CT really grant special guarantees to EU law? This will depend on the practical interpretation of the condition of presenting probable cause concerning the considerable decline in protections *vis-à-vis* the protection guaranteed in the Constitution. If this condition is interpreted in a restrictive way – as a necessity to refute the presumption of consistency between the standards of the Constitution and the EU law and requiring the necessity to indicate in practice that the EU law as such grants a considerably lower standard of protection, then perhaps this condition will come close to the conclusions of the FCT and the ECtHR concerning their basic refusal to review constitutionality. The formulation of this condition, however, also gives grounds for adopting a different interpretation, leading basically to acceptance and adjudication by the CT of constitutional complaints based on the formal allegation of the non-conformity of EU legal acts to the Constitution.

The CT emphasised the analogy between its ruling and the standpoints of the FCT and the ECtHR and invoked numerous arguments in favour of finding comparable standards of protection, yet given the absence of a clearly formulated thesis on the existence of a comparable standard at present, it in fact left the door open for finding constitutional complaints concerning EU law admissible. It is true that the admissibility of such complaints has been limited by an additional procedural condition, but this condition has been formulated in such broad terms that it leaves the CT considerable room as to its application. Meanwhile, since the rulings of the FCT and the ECtHR, the standard of protection of the fundamental rights in the EU has been additionally confirmed in the Treaty of Lisbon by Article 6 of the TEU, including granting the Charter of Fundamental Rights the force of primary law. The status of the ECJ as an institution guaranteeing the observance of these rights has been strengthened by giving it the power to adjudicate on the conformity of acts of secondary legislation to the Charter.<sup>74</sup> The identical character of the

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<sup>74</sup> In case C-92/09 (one of joined cases C-92/09 and C-93/09) *Volker und Markus Schecke GbR v. Land Hessen* [2010] ECR I-11063, the ECJ for the first time ruled some provisions of secondary legislation invalid on the grounds of their non-conformity to the Charter.

EU standard of fundamental rights and the same standard in the Constitution has also been confirmed indirectly in the CT jurisprudence concerning EU primary law (the judgment in the Accession Treaty case, and in particular in the Treaty of Lisbon case).<sup>75</sup> Yet by emphasizing the common axiology of the Constitution and the EU and at the same time declining to formulate a direct thesis on the present identical character of the protection of fundamental rights, the CT appears to reserve for itself the role of *'the court of the last word,'* not only in the future but also at present in the event it deems that the fundamental rights guaranteed in EU law acquire, especially due to ECJ jurisprudence, a content inadequate to the Polish constitutional standard. This is most probably the consequence of its thesis on the non-transferable competences creating the constitutional identity, which identity comprises, first of all, fundamental rights.

### **2.7. Consequences of a negative review of the constitutionality of EU secondary legislation**

It is also necessary to examine the effects of a CT judgment adjudicating that an act of EU law does not conform to the Constitution. Pursuant to Article 190 of the Constitution, the effect of such a finding of non-conformity in a judgment of the CT is that the challenged provision loses its legally binding force. Taking into consideration that, with respect to acts of EU secondary legislation such a result would be impossible on an EU wide basis, as it is not the organs of the Polish state that decide whether such acts are legally binding or not, the CT stated that the consequence of a finding of non-conformity by the CT with respect to EU secondary legislation would have to be *'ruling out the possibility that the acts of EU secondary legislation would be applied [...] and would have any legal effects in the territory of the Republic of Poland.'* According to the CT, this means *'suspending the application of the unconstitutional norms of EU law in the territory of the Republic of Poland'* (point III.2.7.).

A fundamental doubt arises whether the Constitution admits such an effect of a CT judgment. In light of the Constitutional provision stipulating that the only effect of a judgment declaring a normative act in non-conformity with the Constitution is that the act loses its binding force (Article 188 and Article 190 paragraph 3 of the Constitution), it is, to say the least, doubtful the Constitution itself permits the specially-crafted effect that the CT outlined. It should be noted that with respect to CT judgments declaring the non-confor-

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<sup>75</sup> Reference to this standard was also made in the draft of the amendments to the Constitution, which eventually were not adopted. The draft spoke of Poland's membership in the EU, an organisation which does not infringe fundamental rights.

mity of an international agreement to the Constitution, it is indicated that their effect is only of a declarative character, and does not result in the agreement losing its binding force. However, the CT did not recognise acts of EU secondary legislation as elements of an international agreement with respect to the requirements for adjudicating on a constitutional complaint. Therefore, as it seems, the consequence of such a judgment for EU secondary legislation must be that a given provision loses its binding force, but of course only on the territory of Poland. The CT also has the option of deferring the date on which the provision is to lose its binding force for twelve months (Article 190 paragraph 3 of the Constitution), and such deferral is required, according to the CT, by the constitutional principle of friendly disposition towards European integration and the principle of loyalty. The deferral, however, may only refer to the loss of binding force by the normative act in question (Article 190 paragraph 3 of the Constitution), and not to the declarative adjudication on the non-conformity to the Constitution itself, which confirms the fact that a CT judgment finding an act of EU secondary legislation in non-conformity to the Constitution will have the effect of the act in question losing its binding force (with the option of deferring this loss). It would thus be necessary, during the deferral period, to undertake actions to eliminate the inconsistency, i.e. measures aimed at either amending the EU law or the Constitution. The CT seems to realise that a judgment by the Court which gives grounds for depriving an act of secondary legislation of its legally binding force in the territory of Poland would constitute an infringement of Poland's obligations under the Treaties and result in initiating proceedings under Article 258 TFEU, and thus considers any finding of non-conformity of the EU law with the Constitution to constitute an *ultima ratio* ruling.

Considering the reference the CT made, within its line of argumentation, to its ruling in the EAW case, which resulted in amending the Constitution, a constitutional complaint filed against EU secondary legislation may in certain cases contribute to the review of the conformity of the Constitution to EU law rather than the other way around, and result in adjusting the constitutional standard to the EU standard.

## Conclusions

In its judgment of 16 November 2011 in case SK 45/09, the CT called itself '*the court of the last word.*' This self-determination characterises well the whole hitherto delivered line of jurisprudence of the Tribunal in European matters. In spite of the persevering doubts as to the scope of its jurisdiction at the juncture between EU and Polish law, eventually the CT has always

come to confirm its competence to review the conformity of the challenged EU law provisions to the Constitution. This pertains not only to the EU founding Treaties or the Amending and Accession Treaties, but even to the Final Act to the Treaty of Accession to the European Union 2003 and to the decisions of the European Council issued using the simplified procedures of amending the Treaties. The CT also considers itself competent to examine the conformity of EU secondary legislation to the Constitution, by way of a constitutional complaint, insofar as the norms of such legislation infringe on constitutional freedoms or rights of individuals. It has not been determined yet whether the review of EU secondary legislation by the CT is possible by virtue of questions referred to it by Polish courts.

The above-described approach of the CT to the question of its jurisdiction seems to be motivated, first of all, by the CT's understanding of the principle of the primacy of the Constitution as the supreme law in the Republic of Poland. The CT seems to perceive this principle in a conservative way. There is an impression that the CT is somehow unwilling to recognise the full consequences, in the constitutional sphere, of Poland's accession to the EU as well as of the recent changes within the EU itself, including, first of all, the changes in the field of protection of fundamental rights (i.e. the legally binding status of the Charter of Fundamental Rights and the intended accession to the European Convention on Human Rights). Although the CT will always remain the guardian of the Constitution, its primacy does not necessarily have to lead to the inclusion of EU secondary law within the scope of its constitutionality review. As far as the application of EU law is concerned, constitutional freedoms and rights of individuals are at present fully protected, including at the level of the EU. Although the CT indicated that the Charter of Fundamental Rights, the European Convention on Human Rights, as well as Member States' constitutional traditions set a high standard of human rights protection in the EU, and also that there is 'a common axiology' in this respect between the Polish and the EU norms, the CT refrained from stating clearly that the level of protection of such rights and freedoms in EU law corresponds, in principle, to the Polish constitutional standard of protection thereof.

We should not, however, forget about certain limitations regarding the scope of review of EU law review that were self-imposed by the CT. They refer, first of all, to the principle of friendly disposition towards the process of the European integration and cooperation between Member States, derived by the CT from the provisions of the Constitution. From these stem the postulate of a pro-EU interpretation, the presumption of constitutionality of EU primary and secondary legislative acts, and also the postulate of maintaining caution and restraint when examining the conformity of these acts to the Con-

stitution. A declaration of non-conformity to the Constitution of an EU norm is perceived by the CT as an *ultima ratio* solution, which should be applied only in extraordinary situations.

The CT also seems relatively open to dialogue with the European Court of Justice. It mentions the possibility that, in the future, it might refer questions to the ECJ for a preliminary ruling, concerning both the interpretation of EU law and the validity of acts of secondary legislation, limiting, however, this possibility (at least *explicité*) to situations involving adjudication of the non-conformity of an act of secondary legislation to the Constitution. While admitting the possibility of reviewing EU secondary law by way of constitutional complaint, the CT strives to introduce certain procedural limitations. It imposes upon the complainant the obligation of presenting probable cause that the challenged act considerably lowers the level of protection of rights and freedoms in comparison to the constitutional standard. Failure to present probable cause will result in a refusal by the CT to proceed with the complaint. All these efforts on the part of the CT, which are aimed at ensuring that Poland observes its legal obligations resulting from the Treaties and limiting the area of potential conflict of jurisdictions between the CT and the ECJ, are certainly worthy of praise. Yet the key question is how, in the future, these generally defined requirements will be implemented in practice by the CT – to what extent will the Polish Constitutional Tribunal, having marked out very broadly its jurisdiction in the matter of the EU acts, decide to implement the aforementioned limitations and to engage in dialogue with the ECJ? At present it is difficult to predict the direction of the CT's future jurisprudence in this respect.