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Legal Insecurity? ECJ, Sovereignty and Polish Courts on the Eve of EU Membership

> *"It is of primary importance to persuade the national judges* (…) *of the fact that the actual realisation of the position of the national judge being a European judge, and thus being part of the European judiciary, is a condition sine qua non for the future of `Europe"*
>
> Joep J.I.Verburg[1]

The accession to European Union will bring many changes into the Polish socio-economic and legal system. It will definitely effect Polish courts. However, there are some doubts regarding the quality and range of this influence upon organisation, competence and work in courts. A Polish judge may have many absolutely new questions as well as quasi-common law system, for instance: Which law is valid? How does the separation of powers in EC legal system work? Are the decision of European Court of Justice in force? What about the Strasbourg court? How can we apply for the preliminary ruling? Then, the aim of the paper is to focus on the following problems: the acceptance of EC law, the sufficient level of knowledge and some procedural changes that are to be introduced in the Polish legal system.

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[1] *Introduction to European Ambitions of the National Judiciary*, eds. R.H.M.Jansen, D.A.C.Koster, R.F.B.van Zutphen, Kluwer Law International, 1997, p.25.

The enlargement of supranational Community powers threatened to weaken the position of Member States governments in the process of the European integration. These powers are obtained by Community through the general and specific principles of the Community law. Generally, they are prescribed by the European Court of Justice. The ECJ has a specific character and it is not an international court in a classic sense. It is well known that the ECJ is an original court that operates within the field of the community law especially to serve the specific interests of the Member States within the European Community. However, it is sometimes considered in a negative sense as a creation of 'judicial legislation'. As far as this matter is concern the position of the ECJ is particular. According to the part of academy writing, it is the role of the courts to be law making agencies. As a result, a case-law becomes one of the sources of the law properly so called. Under the authority of the Treaties, it is the task of the ECJ to ensure the due observance of Community law. Furthermore, the very law is the focus of the ECJ jurisdiction. Therefore, this function creates its role as the 'Supreme Court' of the Community, which is more similar to a state court than to *e.g.* the International Court of Justice. The active role of the ECJ makes the best field for pro- and against discussions about role of the ECJ, which suppresses or maintains the sovereign relations between the Member States.

Membership in the European structures obligates to receive the Community legal system with all its principles, especially the specific principle of the separation of powers, precedence over the national law, efficiency, unanimity and legal certainty. On the one hand, this leads to some changes in the Polish legal system as well as to Polish judiciary. On the other hand, there may be some conflicts arising from the specific way of thinking, especially taking into account the procedure of preliminary ruling and the acceptance of judicial leadership of European Court of Justice in the European structure.

Poland, like the other East European states would like to integrate into the EU because of the basic advantages that the EU provides. The New Polish Constitution introduced a few important articles concern with the respect for the international obligations, and membership in international organisation. However, some provisions could be unclear and cause some troubles just a day before our accession in European Union.

1. Foundations of the EC powers separation

In order to reach the common will of the states, the Treaties were established *just* to "lay the foundations of an ever closer union" and "eliminating the barriers which divide Europe". This opening context is the result of satisfied commitment characteristic for all fathers of the Treaties. The fact is that the Treaties were constructed is such a way that have permitted to achieve the

common consensus between the negotiating parties. It is impossible to enclose specific and detailed provisions in order to conclude such international treaty of a high rank. Therefore, the Treaties are usually described as a *traité-loi* or *traité-cadre,*[2] which emphasises their specific character. As it was pointed out in the literature the objectives set out in the Treaties represent a minimum to be achieved.[3] Then, there is much critic directed at the European Court judicial activism, *e.g.* in solving cases and creating throughout the new supranational community system.[4]

Having accepted obligations arising out of the Treaty, the Member States could not separate themselves from the transferring the competencies and powers on the appointed Community institutions. Therefore, the fundamental assumption directing the functioning of communities institutions is based on the Treaties the *expressis verbis* principle of the divided powers.

On the other hand, it was necessary to set up the institutions and introduce the basic principles and aims. According to the well known principle of separation of powers (*trias politica*), it was the essential provision, guaranteeing community system of *checks and balances*, which was inserted in the Treaty. As a result the delegation of powers among the Community institutions cannot be presumed. It should be a subject to precise rules as to exclude any arbitrary decisions and to render its possiblity to review the data used. The general principle of law – *nemo iuris potest transfere qou am ipse habet* is out of discussion. It means that the delegating authority cannot confer upon the authority receiving the delegation powers, which are different from those received under the Treaty. This norm is often emphasised by the Court,[5] who says that even when it is empowered to delegate its powers the delegating authority must take an express decision transferring them. However, the delegation of powers can only involve clearly defined executive powers, the use

[2] *E.g.* G.Slynn, *The use a subsequent practise as an aid to interpretation by the Court of Justice of the European Communities*, in: *Die Dynamik des Europäischen Gemeinschaftsrechts/The dynamics of EC-law*, eds. R.Bieber, G.Ress, Baden-Baden, 1987, p.137.

[3] Ibidem, p.137.

[4] D.T.Keeling, *In Praise of Judicial Activism. But What Does it Mean? And Has the European Court of Justice Ever Practised it? Scritti in Onore di Giuseppe Federico Mancini*, vol. 2, 1998; W.van Gerven, *The Role and Structure of the European Judiciary Naw and in the Future,* "Euroepan Law Review", No. 21/1996; T.Tridimas, *The Court of Justice and Judicial Activism*, "European Law Review", No. 21/1996; P.Neill, *The European Court of Justice: a Case Study in Judicial Activism*, "European Policy Forum", 1995; T.C.Hartley, *The European Court, Judicial Obcjectivity and the Constitution of the European Union*, "The Law Quarterly Review", No. 112/1996; The Lord Howe of Aberavon, *Euro-Justice: Yes or No?,* "European Law Review", No. 21/1996.

[5] Case Meroni & Co., Industrie Metallurgiche, SpA v. High Authority of the European Coal and Steel Community, C 9-56, ECR, 1958.

of which must be entirely subjected to the supervision of the high authority. In order to delegate the discretionary power to bodies others than those which the Treaty has established, effecting and supervising the exercise of such power each within the limits of its own authority. It would render less effective guarantee resulting from the balance of powers established by art. 3 ECT.[6]

According to the traditional meaning of the powers division principle, the Community tasks are conferred with European Parliament, Council, Commission, Court of Justice, Court of Auditors and others by the Treaty.[7] The most important is a reservation stating that each institution shall act within the limits of the powers conferred upon it by the Treaty. Therefore, a theory of "system of attributed powers"[8] was created. It seems that the separation of powers principle finds is clear reflection in the Treaty provisions. Nevertheless, this presumption was criticised in the subject literature due to non-adequacy adoption of the classical conception based on the Community grounds.[9] The other reasons for this critic concentrate on the lack of the resemblance between Community as the international organisation and the already formed state system. However, the most important clause states that it is impossible neither to achieve in fact the distinction of powers nor to synonymously defined demarcation line between the legislative and executive institutions[10] in Community. It was also the cause to abandon the classical conception and adopt a new, functional approach. According to Lenaerts the *functions* of institutions are emerged in the division of powers principle. In this way the first powers are based on the "function of enacting rules with a general and abstractly defined scope of application". Next it relates to the "function of applying the said legislative rules to individual cases or specific categories of cases" and the judicial power includes "function of settling litigation that arises on the occasion of the application of the legislative rules to individual cases or specific categories of cases, and this on several possible grounds, for example, the alleged unconstitutionality of the legislative rules, the incorrect execution of theses rules or else divergent opinions about the exact tenor of the legislative or executive rules".[11] The division of powers principle being defined in this way,

[6] Ibidem.

[7] Art. 7 ECT.

[8] *The European Court and National Courts- Doctrine and Jurisprudence* (Prologue), eds. J.H.H.Weiler, A.M.Slaughter, A.S.Sweet, Oxford 1998, p.vii.

[9] E.W.Fuß, *Die Europäische Gemeinschaften und der Rechtsstaatsgedanke*, Heule 1963; Zuleeg, *Die Anwendbarkeit des Parlamentrischen Systems auf die Europäische Gemeinschaften,* "Eur R", No. 1/1972; J.H.H.Weiler, *The European Court...,* op.cit., p.vii.

[10] K.Lenaerts, *Some reflections on the Separation of Powers in the European Community*, "CMLR", No. 28/1991, p.13.

[11] K.Lenaerts, *Some reflections on the Separation of Powers...*, op.cit., p.11-12.

could function in Community order as each of these competencies are adequate to each institution, which does not mean that they are always legitimate to execute them. The best example is European Court of Justice that is under the attack of judicial activity, creating the law and being reserved to legislative activity.

The basic virtue of functional aspect of the powers division confirms its own existence in Community order. It causes some voices against the matter because it is already a small step to transform from this kind of "loans", from the state system to the similar structure.[12] Some of the pro-federal Community maintains that "it may be true that the Community is not a <state> or a <federal state>". But it does not prevent from being a federal union, that is to say a permanent linking together of states to form a corporate entity with a distinct boundary *vis-á-vis* the outside world, and possessed of two coexistent structures of government, one at the centre, and one at the level of the Member States".[13] The adherents of the federation model find the grounds on it in art. 10 ECT, which establishes "*fidelity clause*" (*Gemeinschaftstreue-Klausel*) as the division of competencies between Community and Member States obliges the last one to act in the interest of Community. Then, the model of so called *executive federalism* (*Vollzugsföderalismus*)[14] is introduced being based both on the division of competencies on the level central institution-component states and splitting the legislative from executive and judiciary.[15] It seems that such proportions have already existed in Community system because the executive functions and corresponded judiciary powers are directly executed by the administration *communautaire* in some important political fields (*i.e.* the competition policy and common market), although these are restricted.

There are specific and constructive elements of the Community legal order, according to which the Community law prevails over the national law[16] being

[12] Ad. A.Wentkowska, *Wizje federalnych przeobrażeń Wspólnot Europejskich* (*The federal vision of European transformations*), in: *Studenckie Zeszyty Naukowe Uniwersytetu Śląskiego Koła Naukowego Prawników* "*Szkice o prawie europejskim*" (*Students Scientific Fascicle at the University of Silesia, Legal Scientific Society „The outlines of Community Law"*), ed. A.Wentkowska, 1998; *Federalistyczny kierunek rozwoju strukturalnego Wspólnot Europejskich a koncepcja H. Kelsena* (*Federal Way of European Development in Concept of H. Kelsen*), in: *Studenckie Zeszyty Naukowe Uniwersytetu Śląskiego Koła Naukowego Politologów* "*Szkice o państwie i polityce*" (*Students Scientific Fascicle at the University of Silesia, Politicians Scientific Society,* "*Study on State and Policy*"), eds. M.Migalski, Sz.Kurek, 1998.

[13] M.Forsyth, *The Political Theory of Federalism. The Relevance of Classical Approaches,* in: *Federalising Europe? The Costs, Benefits, and Preconditions of Federal Political Systems*, eds. J.J.Hesse, V.Wright, Oxford University Press, 1996, p.41.

[14] K.Lenaerts, *Some reflections on the Separation of Powers...*, op.cit., p.15.

[15] Ibidem.

[16] Case Commission v. Italy, 77/69, 1972, ECR.

recognised by both the treaty law as well as the case law of the Court. Of course, the new theory of supranationality was created in this way. It simply means that *"*the governments of the member states are-in matters specified by the Treaty-bound by decisions of the Community constitutions".[17] It was confirmed that the judicial system in European Community acts on the principle of co-operation between European Courts and national courts. However, their decisions are often not unanimous. The teleological interpretation of art.220 ECT provides the assumption of powers division between the Community and national judiciary systems. Consequently, the judicial control in European Communities is hold by two kinds of courts, *i.e.* Community one and national ones, recognised as two pillars of the Community system of judicial remedies.[18] Therefore, the division of powers principle could be applied not only among the Community institutions at the level Community-Community, but also in the co-operation between European Court of Justice and Court of Instance or national courts, so at the Community-Member states level as well. This separation of judicial powers in Community system results in the important co-existence and, what is more, the co-operation of these two courts that requires a clear delimitation of jurisdiction between them.[19]

1.1. The horizontal division

The European model of the powers separation drives at executive federalism, which aims to further and profounder split of the legislative, executive and judicial powers.

In practice the EC Treaty imposed the legislative power on Commission, Parliament and Council. European Court emphasised, that there is no basis even in the Treaty provisions governing the institutions in the view of that by virtue of the very principles, which govern the division of powers and responsibilities between the community institutions, all original law-making power is vested in the council; whilst the Commission has only powers of surveillance and implementation. It follows that the limits of the powers conferred with the commission by a specific provision of the Treaty are to be inferred not from a general principle but from an interpretation of the particular wording of the

[17] Scheingold, *The Rule of Law in European Integration*, Yale University Press, 1965, p.13, case 6/64 Costa v. ENEL, ECR.

[18] R.Barents, *The preliminary procedure and the Rule of Law in the European Union*, in: *European Ambitions of the National Judiciary*, eds. R.H.M.Jansen, D.A.C.Koster, R.F.B. van Zutphen, Kluwer Law International, 1997, p.65.

[19] Ibidem, p.65.

provision in question, analysed in the light of its purpose and its place in the scheme of the Treaty.[20]

The executive power covers only these matters which were transferred to the competence of legislative power – *de facto* it is an action taken by Commission or Council. Art. 211 ECT anticipates directly that Commission, exercising the powers conferred on it by the Council and by the European Parliament is to implement the rules laid down by the latter. In performing this article a decision[21] was delivered for the purpose of facilitation, realising the executive competencies by Commission and to improve co-operation with Parliament according to procedure in Art. 251 ECT. Art. 1 of this decision confirms that "*other than in specific and substantiated cases where the basic instrument reserves to the Council the right to exercise directly certain implementing powers itself, such powers shall be conferred on the Commission in accordance with the relevant provisions in the basic instrument. These provisions shall stipulate the essential elements of the powers thus conferred*". The Court of Justice maintains this attitude, emphasising that without distorting the community structure and the institutional balance, the Council is enabled to delegate to the commission an implementing power of the appreciable scope, subject to its power to take the decision itself if necessary. The legality of this procedure cannot therefore be disputed in the context of the community's institutional structure.[22]

Finally the judicial power consists of European Court of Justice and the Court of First Instance and first of all of the national judiciary.

This order is based on the rule of law as recognised in art. 220 ECT according to which the Court of Justice "*shall ensure that in the interpretation and application of this Treaty the law is observed*". The last words "the law is observed" (*le respect du droit, die Wahrung des Rechts*) meant an appearance of the new *Community of law* patterns on the principle of *state of law*. Then, the Court pointed out that "*in contrast, the EEC Treaty, albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law*"[23] in many proceedings. The part of literature (and in some cases the Court itself) grants a crucial role to ECJ in an incessant building of Community supranational legal system, which is based on two presumption: "*the first is to give the Court of Justice jurisdiction to*

[20] Case French Republic, Italian Republic and United Kingdom of Great Britain and Northern Ireland v Commission of the European Communities, C-188, 190/80, ECR, 1982.

[21] 1999/468/EC: Council Decision of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission.

[22] Case Einfuhr- und Vorratsstelle für Getreide und Futtermittel v. Köster et Berodt & Co. Kg., C 25-70, ECR, 1970.

[23] Opinion 1/91, EEA-Agreement, ECR, 1991.

determine what Community law is. The second is to provide that whenever there is a conflict between Community law and the national law, Community law shall prevail".[24] In particular, Art. 220 of the ECT confers the Court of Justice of ensuring that the law is respected in the interpretation and application of the Treaty. Therefore, there is no provision of the Treaty that lays down the conditions upon which an institution of the community can lawfully set aside an administrative measure, creating individual rights that was adopted invalidity. Then, the Court of Justice is the only institution having legitimacy to control the law and is to decide about the question by the reference to the rules acknowledged by the legislation, the learned writing and the case-law of the member states.[25]

1.2. The vertical division

The jurisdiction and insurance of Community law could be considered at two levels that together create the Community system of jurisdiction. In future it could be transformed into the unanimous system of judiciary control following to the state system. There are sill two contrary theories evoking the question about the final arbitrability in Europe. According to the first one the only one legitimated court is the European Court of Justice, because it ensures the community law to be observed "*the ECJ thus sees itself as possessing the exclusive competence or at least the ultimate competence to adjudicate the issue of limits to competence in the Community*".[26] On the other hand, these are national courts which try to restrain the ECJ through the limitation of borders within which the Community institutions should acts.[27] In the light of the powers separation it may set apart two aspects or rather levels at which it operates. In other words "*while the Court of Justice exercises a specific competence, national courts exercise a general competence with respect to Community law disputes*".[28]

[24] A.W.Green, *Political integration by jurisprudence. The work of Court of Justice the European Communities in the European political integration*, Leyden 1964, p.319.

[25] Case Algera v. High Authority, C-7/56, 3-7/57, ECR, 1957.

[26] J.H.H.Weiler, *The European Court and National Courts...*, p.vii.

[27] Case Inrerbationale Handelsgesellschaft mbH v. Einfuhr & Vorratsstelle für Getreide & Futtermittel, BVerfGE 37, 271.

[28] R.Barents, *The preliminary procedure and the Rule of Law in the European Union*, in: *European Ambitions of the National Judiciary*, op.cit., p.66; Similar: M.Claes, *Judicial Review in the European Communities*: *the Division of Labour between the Court of Justice and National Courts*, in: *Judicial Control. Comparative essays on judicial review*, eds. R.Bakker, A.W.Heringa, F.Stroink, Maklu 1995, p.109.

The basic presumption is that the Community law "*is made, executed and implemented at two levels: a Community and national level*".[29] Hence, there must also be two systems of control, which secure the very existence of Community law. In other case the arbitrability of both institutions and Member States would lead into chaos denying the integrating idea of Community. Without those two systems of controlling Community law even the implementation would loose its effective character. As the Court held the Community in "*a community of law*" Member States and their institutions (courts) should take all measures in conformity with the basic constitutional character, the Treaty".[30] Taking into account the direct application of the community law, as in a Case *Tetra Pak*[31] art. 82 ECT, it is for the national courts to safeguard the execution of these rights. Moreover, since the application of that provision does not call into question the principles of the primacy and uniformity of Community law. It is not permissible to restrict the power of national courts on the ground that the practice in question has been granted exemption (like administrative letter, negative clearance). Thus, the assumption that courts are obliged to apply the rule of law arises from the common principle of legal theory. Therefore, neither an administrative letter nor negative clearance from the Commission prevents the national courts from reviewing a conduct in the light of the same legal provisions which the Commission employed, and reaching a different decision. Consequently, it is the principle of legal certainty and the rule of courts' independence. Such letter does not bind the national courts as it has the administrative character. Nevertheless the opinion transmitted in the letter constitutes a factor that the national courts may take into account in examining whether the agreements or conduct in question are in accordance with the Treaty provisions.[32] In other way this situation could raise the basic community law principles of legal certainty and legitimate expectations. It is unquestionable in the exemption when the situation is different, indicating that in a case of the Communities acts (*e.g.* Commission regulations) all national courts and authorities are bound by it and "*they may not circumvent the erga omnes effect of that decision*".[33]

In this form the judicial control performed by the European Court of Justice can be defined as "*the competence or powers of courts to control that the other state branches do not overstep the limits of their powers, thereby encroaching*

[29] M.Claes, *Judicial Review in the European Communities…*, op.cit., p.111.
[30] Case Les Verts, C-294/83, ECR, 1986.
[31] Case Tetra Pak Rausing SA v. Commission of EC, C T-51/89, ECR, 1990.
[32] Case Anne Marty S.A. v. Estée Lauder S.A., C-37/79, ECR, 1980.
[33] Case Tetra Pak, cited above.

upon the prerogatives of other organs and that they not infringe the rights of individual".[34]

2. General principles of EC law

2.1. Solidarity principle

It is a fact that Member States cannot operate in an active way*, taking the law into own hands*, which does not mean that they are not obliged to co-operate in a way of taking all appropriate measures to ensure the fulfilment of accepted obligations. This principle is reckoned to be the most important in the Community legal order and created the constitutional system.[35] Therefore, both the ECJ jurisprudence and literature emphasised that in the light of this solidarity principle the character of Community law, the other principles and common obligations of Member States should be analysed.[36]

This command ensued from the Art. 10 ECT and could be analysed at two or three aspects, *i.e.* two positives and one negative.[37] The first positive condition binds Member States in the realisation undertaken by Community obligations. There are above all the observation of law and, then, the common adjusting of the decisions, protecting before possible conflicts, or consulting of Member Sates with the Community institutions before adopting any corrective or protective measures designed to obviate any breach by another Member State of rules of Community law.[38] The next positive obligation is to facilitate the achievement of the Community's tasks in the form of giving some indispensable information's to Community institutions or realising tasks recommended by them. This is also the problem of taking any "corrective or protective measures".[39] On the contrary, the negative solution flows up from the obligation of abstaining from any measure, which could jeopardise the attainment of the objectives of the Treaty, *e.g.* through the levering of the community law by a way of gaps' availing in this law. The Court stating that for a State to break

[34] Case Algera v. High Authority, C-7/56, 3-7/57, ECR, 1957; ECJ Opinion 1/91; B.Weber v. European Parliament, C-314/91, ECR, 199; M.Claes, *Judicial Review in the European Communities…*, op.cit., p.109.

[35] T.Lang, *Community Constitutional Law: Article 5 EEC*, "CMLR", No. 27/1990, p.645.

[36] *E.g.* case Centre v. Au Blé Vert, C-231/83, ECR, 1985.

[37] Compare with "*Wahrung des Rechts heißt zunächst Einchaltung der Kompetenznormen, sowohl im positiven Sinne: Erfüllung der im Vertrag festgelegten Pflichten etwa bei der schrittweisen Verwiklichung des GM, als auch im negativen Sinne: Respektierung der Grenzen der Kompetenzzuweisungen und damit der Handlungsbefugnusse; angesprochen bzw. Verpflichtet sind die Organe der Gemenischaft, jetz besonders die Unternehmen-defrenne*", E.Grabitz, M.Hilf, *Das Recht der Europäischen Union*, C.H.Beck's, 1999, p.7.

[38] Case Commission v. Belgium, op.cit.

[39] Case Lomas, C-5/94, ECR, 1996.

unilaterally, according to its own conception of national interest, the equilibrium between the advantages and obligations flowing from its adherence to the Community, brings into a question the equality of Member States before Community law and creates discrimination at the expanse of their nationals. This failure being in the duty of solidarity accepted by Member States by the fact of their adherence to the Community strikes at the very root of the Community legal order.[40]

The solidarity principle in Art. 10 ECT binds the courts of Member States to ensure that in the interpretation and application of the Treaty obligations the law is observed. In the case of incompatibility with Community law, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and determine the procedural conditions governing actions at law intended to safeguard the rights, which subjects derive from the direct effect of Community law. It is beyond discussion that such conditions cannot be less favourable than those relating to similar actions of a domestic nature. Under no circumstances may they be so adapted as to make it impossible in practice to exercise the rights which the national courts have a duty to protect.[41] What is more, the co-operation between the Community institutions and judicial authorities of the Member States requires a duty and only the expression of the more general rule of genuine co-operation and assistance.[42]

The duties of Member States to take any measures to fulfil their obligations bind all national institutions. Therefore, each of the Member States institutions is obliged to execute Community provisions.[43] The special role is imposed on national courts or tribunals. They are to ensure the legal protection that individuals derive from the direct effect of provisions of Community law. However, Community law does not require national courts to raise of their own motion. It is an issue concerning the breach of provisions of Community law where the examination of that issue would oblige them to abandon the passive role assigned to them by going beyond the ambit of the dispute. It is defined by the parties themselves, relying on the facts and circumstances others than those

[40] Case European Commission v. UK (Re Tachographs) 128/78, 1979, ECR.

[41] Case Amministrazione delle finanze dello Stato v. Sas Mediterranea importazione, rappresentanze, esportazione, commercio (MIRECO), C- 826/1979, ECR, 1980; Ariete, C-811/79, ECR, 1980, sprawa R. v. Secretary of State for Transport, ex.p. Factortame, C-213/1989, ECR, 1990.

[42] D.G.Edmund Hurd v. Kenneth Jones (Her Majesty's inspector of taxes), C-44/84, ECR, 1986.

[43] Opinion of Art.G. in case International Fruit Co NV v. Produktschap voor Groenten Fruit, C-51-54/1971, ECR, 1971; Amsterdam Bulb B.V. v. Produktschap voor Siergewassen, C-50/76, ECR, 1977; Atlanta Amsterdam B.V. v. Produktschap voor Vee en Vlees, C-240/78, ECR 1979.

on which the party with an interest in an application of those provisions bases his claim.[44]

According to the general rule in art. 220 ECT, the Court seems to be the "Master of the Treaty" watching over the activities of the Member States and community institutions. Therefore, one of the Treaties' assumption of was that even when community institutions have failed to fulfil an obligation under the Community law the Member State cannot refer to this fact as a justification of its own violation of provision. The assumption is that "*the Community is founded on a common market, common objectives and common institutions*".[45] The consequence is that the Member States "*shall not take the law into their own hands*"[46] and respect the Court's autonomy position without any reservations.[47] The Court made a clear consideration that in fact the Treaty is not limited to creating reciprocal obligations between the different natural and legal people to whom it is applicable. However, it establishes a new legal order that governs the powers, rights and obligations of the people mentioned, as well as the necessary procedures for taking a cognisance and penalising any breach of it. Under no circumstances may a Member State unilaterally adopt on its own authority the corrective or protective measures designed to obviate any breach by another Member State according to the rules laid down by the Treaty.[48] Therefore, the Community is not a subject of the free disposal of Member States to be obeyed or breached in the name of their national interests. This principle realised one of the rules of inter the national law established in the Vienna Convention of the Law of Treaties, according to which a State may not invoke the fact that its consent to be bound by a treaty has been expressed in a violation of the

[44] Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, Joined cases C-430/93 and C-431/93, ECR, 1995.

[45] Case Limburg v. High Authority, 30/59, 1961, ECR.

[46] Case Commission v. Belgium and Luxembourg, C-90/63 i 91/63, ECR, 1964

[47] As in Opinion 1/91: To confer that jurisdiction on that court is incompatible with Community law, since it is likely adversely to affect the allocation of responsibilities defined in the Treaties and the autonomy of the Community legal order, respect for which must be assured exclusively by the Court of Justice pursuant to Article 164 of the EEC Treaty. Under Article 87 of the ECSC Treaty and Article 219 of the EEC Treaty, the Member States have undertaken not to submit a dispute concerning the interpretation or application of the treaties to any method of settlement other than those provided for in therein.

[48] Case Commission v Belgium, C-11/1995, ECR, 1996; similar in case Lomas, C-5/94, ECR, 1996: "*the Member States are obliged, in accordance with the first paragraph of Article 5 and the third paragraph of Article 189 of the Treaty, to take all measures necessary to guarantee the application and effectiveness of Community law. In this regard, the Member States must rely on trust in each other to carry out inspections on their respective territories and one Member State may not unilaterally adopt, on its own authority, corrective or protective measures designed to obviate any breach by another Member State of rules of Community law*".

provision of its internal law regarding competence to conclude Treaties as invalidating its consent.[49] Therefore, Member States are bind at two levels: Community and international one. It obliges also not to take any mechanisms that would lead to the disintegration which is contrary to the objectives of progressive approximation of the Member States' economic policies sat out in Article 2 of the Treaty. This article provides the idea that the Community must be promoted throughout the community development of economic activities, the raising of the living standard and closer relations among the States[50] by establishing a common market and progressively approximating the economic policies of Member States. In other way, as the Court remarked "the contrary view would be at risk raising violation of the law to the status of a principle of interpretation, a position the adoption of which would not be consistent with the task assigned to the Court by Article 164 of the Treaty".[51]

The way fixed for national courts by the ECJ, obliged them to ensure the full force and effect of Community law. European Court showed it the most expressively in *Factortame Case.*[52] This case in Mr Advocate General's opinion certainly ranks amongst those which help to define the context of relations between national courts and Community law. The Court confirmed again that "*it is for the national courts, in application of the principle of co-operation laid down in Article 5 of the EEC Treaty, to ensure the legal protection which persons derive from the direct effect of provisions of Community law*".

The last consequence that follows from the solidarity principle is the obligation of Member States to repair the damage and take all appropriate measures, whether general or particular, to ensure the implementation of Community law, and consequently to nullify the unlawful consequences of a breach of Community law.[53]

2.2. The unanimity principle

The solidarity principle mentioned above leads directly to the duty of unanimity of Community law application. Since the European Economic Community is based on the rule of law, neither its Member States nor its institutions can avoid

[49] Unless that violation was manifest and concerned a rule of its internal law of fundamental importance Art. 46.1.

[50] Joined cases 90 & 91/63 Commission v. Grand Duchy of Luxembourg and Kingdom of Belgium, ECR 1964, at p.633; Joined Cases Commissionnaires Réunis SARL v Receveur des douanes; SARL Les fils de Henri Ramel v. Receveur des douanes, C-80 and 81/77, ECR, 1978.

[51] Case Defrenne II, C-43/75, ECR, 1976.

[52] Case The Queen v. Secretary of State for Transport, ex parte: Factortame Ltd and Others, C-213/89, ECR, 1990.

[53] Andrea Francovich and Danila Bonifaci and others v. Italian Republic, Joined cases C-6/90 and C-9/90, ECR, 1990.

a review of the question on the measures adopted by them are in conformity with the basic constitutional charter, the Treaty, which established a complete system of legal remedies and procedures designed to permit the Court of Justice to review the legality of measures adopted by the institutions.[54] In other way, it could lead to the disintegration and disorder in reaching the objectives of the Treaty, which established its own system of law integrated into the legal systems of the Member States, and which must be applied by their courts. It would be contrary to the nature of such a system to allow member states to introduce or to retain measures capable of prejudicing the practical effectiveness of the Treaty. The binding force of the Treaty and of measures taken in the application must not differ from one state to another. As a result of the internal measures the functioning of the community system should be impeded and the achievement of the aims of the Treaty placed in peril.

Consequently, conflicts between the rules of the Community and national ones must be resolved by applying the principle that community law takes the precedence.[55] The ECJ confirmed this opinion in *Foglia case* that "*in exercising that power of appraisal the national court, in collaboration with the court of justice fulfils a duty entrusted to them both of ensuring that in the interpretation and application of the Treaty the law is observed*".[56]

2.3. Legal certainty principle

According to the principles of legal certainty and legitimate expectations, the application of the law in an individual case must be predictable.[57] The principle of legal certainty plays a great role in the process of interpretation, limitation the

[54] C-314/91 Beate Weber v European Parliament, ECR, 1993 similar in: "*The Community institutions' duty of sincere cooperation with the judicial authorities of the Member States which are responsible for ensuring that Community law is applied and respected in the national legal system does not preclude a refusal to disclose documents or to authorise officials to give evidence where there are legitimate grounds relating to the protection of the rights of third parties or where there may be interference with the functioning and independence of the Communities . In the case of such refusal the institution concerned must provide the Court with the information required to allow it to decide whether the refusal is justified*" Zwartfeld and Others C-2/88, ECR, 1990; also case Les Verts v. European Parliament, C-294/83, ECR, 1984.

[55] Walt Wilhelm and others v. Bundeskartellamt, Case 14-68, ECR, 1969.

[56] Case Pasquale Foglia v. Mariella Novello, C-244/80, ECR, 1981, Douaneagent der NV Nederlandse Spoorwegen v. Inspecteur der Invoerrechten en Accijnzen, C-38/75, ECR, 1975, ("subject to review by the courts responsible for applying and interpreting community law..."); Milchwerke Heinz Wöhrmann & Sohn KG, Alfons Lütticke GmbH v. Commission of the European Economic Community, C-31/62 and 33/62, ECR, 1962, Flamino Costa v. ENEL, 1964, 6/64, ECR.

[57] See for example: case Administrazione delle Finanze v. Salumi, C-217/80, ECR, 1981; case Mulder, C-120/86, ECR, 1988.

unexpected application of law and exemptions. For instance, it includes the protection of vested rights, the protection of legitimate expectations and the non-retroactively of new rules of law. The only exemption, in the opinion of ECJ, could be established by the court restricting for some person concerned the opportunity upon the provision. Thus, it is interpreted with a view of legal relationships established in good faith. It must be borne in mind that such restriction may be allowed only in the actual judgement ruling upon the strict interpretation. It means that the Court cannot go so far as to diminish the objectivity of the law. On the other hand, the principle of legitimate expectations relates primarily to permanent changes in practice as in the legal system of Community Law, particularly regarding the application of the law by Community institutions.

The next conclusion comes from the legal certainty principle. It shows that national courts, whether or not a judicial remedy exists against their decisions under the national law, themselves have no jurisdiction to declare that acts of community institutions are invalid. This conclusion is dictated, as ECJ emphasised in *Foto-Frost* case, in the first place by the requirement of Community law to be applied uniformly. The divergence's between courts in the Member States as to the validity of Community acts would be liable to place the very unity of the community legal order in jeopardy and detract from the fundamental requirement of legal certainty. Secondly, it is dictated by the necessary coherence of the judicial system of protection established by the Treaty.[58]

The basic norms of Treaty provisions obliged one institution to control the community law legitimacy. This is the European Court of Justice which has the exclusive jurisdiction to declare void an act of a community institution. The coherence of the system requires that when the validity of an act is challenged before a national court the power to declare the act invalid must also be reserved for the Court of Justice. That division of jurisdiction may have to be qualified in certain circumstances when the validity of a community act is contested before a national court in proceedings related to the application for interim measures.[59]

2.4. The sovereignty principle

"*Sovereignty is a state's capacity to be a subject of international rights and obligations through the independent performance of national competencies and resulting from a state's own free will*".[60] This definition recognises each state's

[58] Case C- Foto-frost v hauptzollamt lübeck-ost, ECR, 1987.

[59] Case C- Foto-frost v hauptzollamt lübeck-ost, ECR, 1987.

[60] A.Wentkowska, *The principle of sovereignty: theoretical and factual meaning*, in: *Studia de Lege et Civitate*, eds. A.Wentkowska, T.Pietrzykowski, University of Silesia, Legal Scientific Society, 1997.

freedom to transmit some of its inherent powers to international organisations, and simultaneously takes into consideration the international interdependencies and compliance with the rules of interthe national law. The word "independent" should be interpreted as the whole character of competencies, which are not constituted from the above like international competencies.[61] It is exclusive to the territory of the state where separate and independent political power function. Finally, independence implies self-reliance as states can exercise their competencies without taking orders from or taking cognisance of the internal laws of other states.

For the efficient functioning of the EU as an entity, it is necessary to transmit some of the sovereign states' competencies to this unique supranational institution, which will execute such competencies through its internal institutions. Member States transmit some of their own competencies to the Community but this is not tantamount to a complete loss of sovereignty. Shall we talk about "*Europe of bits and pieces*"?[62] In order to attain this kind of unprecedented legal order, Member States have diverged from the concept of absolute independence, moving in the direction of moderate monism theory. The theory affirms that all existing the national laws are unified into the system which international legal rules are of a higher legal order than is a system created by each individual state.[63]

International associations and dependencies could be treated as a reduction of state sovereignty. The adherents of the "erosion" or "absolute sovereignty" theories affirm that states lose their economic and political autonomy through the growing international co-operation between states. It results in limiting the free will of governments to form their own foreign affairs policies and a greater dependence on the decisions of other states' governments.

Taking into consideration self-interests and international correlation or interdependencies, they take part in a wider regulation, redefining the concept of sovereignty. Dependencies are defined as natural and affirmative relationships coming from the economical, technical and political development. The intensification of such relationships is associated with the creation of political

[61] The meaning was taken over from J.Kranz, *Państwo i jego suwerenność,* (*The State and its Sovereignty*), "Państwo i Prawo", No. 7/1996, p.3-25 (my own translation).

[62] D.Curtin, *The Constitutional Structure of the Union: A Europe of Bites and Pieces*, "CMLR", No. 10/1993, p.17.

[63] This doctrine of monism, which gives international law primacy, was created and advocated by H.Kelsen in: *Principles of International Law*, New York 1952, p.43. This is in opposition to the theory of dualism created by H.Triepel, D.Anzilotti, which suggests that international and national law compose two different branches of law, and, moreover, two totally distinct systems with specific matters of regulation and sources. See generally: R.Bierzanek, J.Symonides, *Prawo Publiczne Międzynarodowe* (*Public International Law*)*,* Warsaw 1995, p.20.

structures such as the EU, which extends beyond the states' internal schemes and adaptations to the international standards. There is also an idea of "collective management of interdependencies",[64] which states about problems how to carry it into an effect, creating institutions such as the European Community.

Sovereignty does not hamper the application of requirements subsequent to interdependence. In fact it states that "*lose*" means agreeing to reduce their freedom which they "*recover*" by the assertion of adequate behaviour of their partners. Therefore, States give up only a limited amount of their sovereignty by granting particular powers to the international organisations from which they hope to gain benefits.[65]

According to the second attitude that accepts the elements of the international relations mentioned above, sovereignty should not be associated with some ideal model of autonomy. States can never get an absolute autonomy as such conception of the total sovereignty does not reflect faithfully the scale of state autonomy at any stage of history. Followers of this so-called "new view" theory maintain that their concept of sovereignty is the condition sine qua non for the peaceful co-operation and keeping international order.

However, States do not lose their sovereignty by acceding the Treaty.[66] For example, if Poland and other accessing countries join the European Union, they still will be able to execute their own competencies in the capacity of the so-called "reserved sphere" ("control gap"). The Member States deliver some of their own competencies to the Community;[67] while it is tantamount to a reduction in some sovereign powers and it does not result in the relinquishment of sovereignty. First of all, there is no form of subordination to any other state. The granted competencies are taken over by the institutions commonly created, which act in a manner for the good of the Community. States give the Community some of their natural competencies as it is necessary in order to achieve the Treaty's stated purposes. "*It is not only the delivering of competencies to any form of higher power but also an order to execute the*

[64] This expression can be found in an article: Z.Czachór, *System współpracy politycznej w integrowaniu Europy* (*The System of European Political Cooperation in Integration of Europie*), Toruń 1994, p.16-21.

[65] In the EU there are rules concerning common economic, competition, agriculture and transportation policies, as well as regarding the free movement of persons, goods, services and capital.

[66] International law refuses to recognize an abandonment of sovereignty in the conclusion of any treaty by which a state undertakes to perform or refrain from performing a particular act. See, *e.g.*, Wimbledon Case, [1923] PCIJ, Ser. A, No. I, p.25, saying that "*the right of entering into international engagements is an attribute of State sovereignty*".

[67] See: footnote 14.

competencies on the base of an international treaty".[68] Thus, the Member States remain sovereign in accordance with the rules of democratic control over the realisation of the Community aims.

As an international organisation the EU is the most effective in its role or as the founder of the high level economic development and as a potential developer of the efficient structure and economic relations both within and outside the Community. For this reason, the accession of Poland to the EU would give the country a chance to increase its economic power without losing its treasured state sovereignty.

3. The Constitution of Poland and ECJ

The rules embodied in the European Constitution add troubles to the Polish Parliament's in a drafting of Poland's new Constitution.[69] Since the modern trend is interdependence and co-operation at the international arena. The newly created Polish Constitution is to express Poland's ability to assume and fulfil the obligations arising from the EC Treaty and *acquis communautaire*. Therefore, one of the first articles introduces an obligation to respect the international law in Poland.[70]

Moreover, the further provisions have a direct reference to the international law matters, which means that "*some rights of the Poland's Republic institutions can be delivered in some matters to the international organisation on the strength of the international treaty*".[71] The initial opinions of Members of Parliament have treated the prepared Article 90(1) of the Polish Constitution as "an act against the state's principle of sovereignty", and condemned the "mad speed at which some of the political parties are pursuing a total submission and dependence on the world economy".[72]

Generally speaking, the conviction that a State cannot belongs to an organisation such as the EU without accepting all of the consequences for the State's legal order, still prevails in the Polish Parliament. Nevertheless, "*Member*

[68] A.Wasilkowski, *Uczestnictwo w strukturach europejskich a suwerennosc panstwowa* (*Sovereignty of the State and Membership in the European Union*), "Państwo i Prawo", No. 5/1996, p.15-23; Similarly: J.Brownley argues in: *The Principles of International Law*, 1990, p.33-40 that: "*membership of international organizations is not obligatory and the powers of the organs of such organizations, to determine their own competencies, to take decisions by a majority vote, and to enforce decisions, depend on the consent of member states*".

[69] 2 April 1997, "Dziennik Ustaw", No. 78/1997, poz. 484.

[70] Art. 9: The Republic of Poland shall respect international law binding upon it.

[71] Art. 90(1).

[72] "Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego", No. XV, 33rd Session of Parliament Report.

States still keep their sovereign equality because they deliver their own free will and factual and material powers on the mutual terms. They make it better and more efficient to realise their own interests. Through their actions, they have the possibility of initiating profitable solutions, which could be more difficult to achieve outside the integration in EU".[73]

In opposition to some constitutions of Member States of European Community (especially German model), the Polish Constitution has no direct regulations appealing to the membership in the European Union, which seems to be a significant question to be solved. There is an exception to some Constitutional articles that lead to a confusion due to their ambiguous formulations, *e.g.* "*transmission of the competencies*", "*direct applicability of the ratifying international treaty*" or "*international organisation*".[74]

The *transmission of competencies* sometimes interferes from the basic principles of Constitution in a way that it "may concern the powers of all the categories of agencies of State authorities mentioned in Art. 10[75] of the Constitution and also to agencies of local government or others forms of self-government".[76]

The 'transmission of competencies' evokes some significant problems. Poland shall reign from the part of its power on the behalf of other than the Polish international organ. Therefore, Poland gives up only a limited amount of their sovereignty by granting specific powers to the international organisations, from which they also hope to gain some benefits. Poland still will be able to execute its own competencies in the capacity of the so-called "*reserved sphere*" ("*control gap*") if it joins the European Union. However, neither the subject nor the scope of these competencies have been defined. It is hoped that the 'open domain' of this provision will be specified in the executive regulation.

The transmission of competencies in Constitution is a general provision, which does not explain what kind of powers could be transferred to the international organ or organisations. There is not even a constitutional restriction

[73] M.P.W.Konarski, "Biuletyn Komisji Konstytucyjnej Zgromadzenia Narodowego", No. XV, 33rd Session of Parliament Report.

[74] Art. 90.1: The Republic of Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters.

[75] Art. 10 provides that:

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

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

[76] S.Biernat, *Constitutional Aspects of Poland's Future Membership in the European Union*, "Archiv des Völkerrechts", Band 36, Heft 4, December 1998, p.402.

prohibited from the negative side, which cannot be given to those institutions like in German Grundgesetz, providing the eternal quarantine clause (*die Ewigkeitklause*).[77] According to this clause, the amendments of the German Constitution affecting the division of the Federation into States, the participation on the principle of the States in legislation, or the basic principles laid down in Articles 1 and 20 are inadmissible. It seems that on the eve of Polish membership in European structures a similar provision will be introduced as well. Certainly, which would prevent Polish constitutional system from many legal misunderstandings. There are also *some matters,* which according to Art. 90, Poland could transmit however they are not mentioned at all. Taking into account the German model, it could be stated that these matters transferred by Polish institutions in future "will depend on the *status quo* in Community law and the degree if integration of the Community at the time when the matter of membership draws to a successful conclusion".[78] The limits, being similar to those stated in Grundgesetz, could be drawn out from the general and introductory provisions. They determine the system of State (Republic of Poland shall be the common good of all its citizens[79]), the basic rules (The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice[80]), the model of State (The Republic of Poland shall be a unitary State[81]) and general freedom (The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedom and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development[82]).

It can be repeated again that the most important matter and the new provision in the Constitution focuses on the reservation that the Republic of Poland shall respect interthe national law binding upon it.[83] It can be stated that the Constitution compiles upon this provisions with the requirements for the fundamental international law. Moreover, there are some supplements, which shows explicitly the relationship between the internal, legal order and the international law. According to them, the ratified, international agreement, upon its publication in the Republic of Poland's Law Journal shall constitute the part of the national legal order and shall be applied directly, unless its application

[77] Art. 79 German Basic Law.
[78] S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit., p.406.
[79] Art. 1.
[80] Art. 2.
[81] Art. 3.
[82] Art. 5.
[83] Art. 9.

depends on the enactment of a statue.[84] Here a question can be asked "What rang will secondary legislation have *acquis communataire* of the European Community in our internal legal system?". In the light of ECJ case law, the secondary community law precedes over the national law of Member States.

Then, these is the question about the hierarchy of law sources. The Polish list of law sources[85] is called 'closed catalogue', being the consequence of the principle named the rule of law (Rechtstaat). There is no place for a new source of law as *acquis communataire.* What is more, the literature dares to raise that "*art. 91 does not proclaim the principle of the precedence of Community law over the Constitution of Poland – the question then arises as to whether we should then speak a condition of the precedence of the Constitution over Community law*".[86] This question is important concerning the position of Polish Constitutional Tribunal. The Constitutional Tribunal shall adjudicate in regard to the following matters:

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

This situation may lead Poland to repeat the German lesson from *Solange I* decision[87] of Bundesverfassungsgericht. If the Constitutional Tribunal has the

[84] Art. 91: "*1. A ratified international agreement, upon its publication in Dziennik Ustaw Rzeczpospolitej Polskiej shall constitute part of the national legal order, and shall be applied directly, unless its application depends on the enactment of a statue.*

2. An international agreement that has been ratified upon prior consent granted in a statute shall have precedence over a statute, if the statute in question cannot be reconciled with the agreement.

3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the law established by such organisation shall be applied directly, and have precedence in the event of a collision with statutes".

[85] Art. 87 1) The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.

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

[86] S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit., p.419.

[87] Inrerbationale Handelsgesellschaft mbH v. Einfuhr & Vorratsstelle für Getreide & Futtermittel, BVerfGE 37, 271.

right to control the conformity of international agreements which means that it could adjudicates in principle the validity of Community law. However, it was not the aim of the founders of Polish Constitution to questionnaire the very nature of Community law, especially its basic principle on precedence over the national law.[88] As European Court of Justice emphasised the Member States may neither adopt nor allow national organisations to have the legislative power to adopt some measure, which would conceal the community nature and effects of any legal provision from the persons to whom it applies. In the Polish case it would mean the controlling functions of Constitutional Tribunal.[89] Poland may not allow or tolerate an exemption from Community law or in any way affect it adversely. Therefore, one of the proposition could be a modification of the Constitution, *e.g.* adding some articles that would relate to Polish future membership in the European Union. The validity of measures adopted by the institutions of the community can be judged only in the light of Community law. The law stemming from the Treaty or an independent source of law due to its very nature cannot be overridden by rules of the national law. However, it can be framed without being deprived of its character as Community law and without the legal basis of the Community itself being called in question .

The Constitution further provides an international agreement, which has been ratified upon the prior consent granted in a statute, shall have precedence over a statute, *e.g.* if the statute in question cannot be reconciled with the agreement. If the agreement, ratified by the Republic of Poland, establishing the international organisation provide, the law settled by such organisation shall be applied directly and have precedence in the event of collision with statutes.[90] This is first of all a new problem for Polish courts, which have to direct the application of the EC law. For instance, the problem will arise from the inadequate knowledge of the EC law and as a practical consequences the direct applying of the community law in the internal legal order.

[88] "*It would be risky, however to draw the conclusion on the basis of the foregoing analysis that the Polish Constitution will have general and absolute precedence over Community law after Poland's accession to the European Union and such a conclusion could even threaten the negotiations over Poland's future membership in the European Union*", S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit., p.419.

[89] Case Amsterdam Bulb BV v. Produktschap voor Siergewassen, Case 50-7, ECR, 1977.

[90] Art. 91.

4. Acceptance of ECJ Jurisdiction by Polish courts

4.1. Remarks *de lege lata*

The Member States' are obligated, arising from article 10 of the Treaty, to take all appropriate measures, whether general or particular, to ensure the fulfilment of that obligation. It is binding for all the authorities of Member States including the courts for all matters within their jurisdiction. In the application of the national law and in particular the provisions of a the national law the national court is required to interpret it in the light of the wording and the purpose of the Treaty law or other Community act.[91] In other words, this article "*obliges every national judge to be a Community law judge*".[92]

The accession to European Union will bring many changes into the Polish socio-economic and legal system. It will effect the Polish administration but considerably Polish courts. However, there are some doubts regarding the quality and range of this influence upon organisation, competence and work in courts. The europeanization of Polish courts activity will proceed at two levels: theoretical and practical.[93] It is clear that Polish judges first of all should reach the motions and ideas of Community law, which will not be a simple undertaking. The other issue concerns the practical application of learned provision. It would require some changes in the procedure of Polish courts. It will bring the effect on Community law if it is not obtained[94] and through it the basic principles of Community law may be violated.

"*The judicial system developed by the Court of Justice and embraced to a large extent by national courts seems complete in the sense that the application of invalid legislation can effectively be avoided, both at the national and the Community level*".[95] The process of co-operation among national courts and European Court of Justice focuses on the uniform application of Community

[91] Case Dorit Harz v. Deutsche Tradax GmbH., C-79/1983, ECR, 1984.

[92] T.Lang, *Community Constitutional Law: Article 5 EEC Treaty*, "CMLR", No. 27/1990, p.646.

[93] S.Biernat, *Constitutional Aspects of Poland's Future Membership...,* op.cit., p.416.

[94] "*The full effectiveness of Community rules would be impaired and the protection of the rights which they grant would be weakened if individuals were unable to obtain reparation when their rights are infringed by a breach of Community law for which a Member State can be held responsible. Such a possibility of reparation by the Member State is particularly indispensable where the full effectiveness of Community rules is subject to prior action on the part of the State and where, consequently, in the absence of such action, individuals cannot enforce before the national courts the rights conferred upon them by Community law. It follows that the principle whereby a State must be liable for loss and damage caused to individuals by breaches of Community law for which the State can be held responsible is inherent in the system of the Treaty*". Case Andrea Francovich and Danila Bonifaci and others v. Italian Republic, Joined cases C-6/90 and C-9/90, ECR, 1990.

[95] M.Claes, *Judicial Review in the European Communities…,* op.cit., p.131.

law. There is, of course, no need to create new rules of law by national courts while applying community law. Although the ECT has made it possible in a number of instances for private people to bring a direct action before the ECJ, it was not intended to establish new remedies in the national courts to ensure the observance of community law other than those already laid down by the national law. In that case the most important matter is to ensure that in enforcing these Community rights by national courts they also apply the principle of effectiveness.[96] Community law should be acknowledged by national courts as the part of the national law in the context of accepting legal orders. On the other hand, the system of legal protection established by the Community law (in article 234 in particular), implies that it is possible for every type of action provided by the national law to be available for the purpose of ensuring the observance of community provisions having direct effect on the same conditions. It is concerned with the admissibility and procedure as would be applied were it a question of ensuring observance of the national law.[97] In other words, "*if Community law gives a right, whatever the nature of the right (to damages, injunction, interim relief, a declaration) national courts must provide an appropriate, complete and effective remedy* (...)",[98] which in practice means the complete adaptation of national procedure in the implementation of Community rights.

The specific and general role is still given to the procedure of preliminary ruling. The rules of this procedure as the concept are very far from the knowledge of Polish judges. Moreover, according to Art. 178 paragraph 1 of the Constitution "*judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes*." However considering the law they may take into account only the provisions of Polish law, even following the fact that the international law is the part of national order. Therefore, some problems can arise from the adequate relations with European Court of Justice. Referring to the Constitution, it is an obligation for judges to respect and be subjected both to the national as international law as "*it would appear that, despite the lack of such formulation, judges will be obliged to take account of international Treaties, including also Community law. Such obligation will result from the fact that judges are subject to the Constitution, and in this case to Art. 90 paragraph 2*".[99] Furthermore, the European Court of Justice confirms that

[96] Commission v. Greece, C-68/88, ECR, 1989: "*Article 5 of the Treaty requires the Member States to take all measures necessary to guarantee the application and effectiveness of community law*".

[97] Case Rewe-Handelsgesellschaft Nord mbH et Rewe-Markt Steffen v. Hauptzollamt Kiel, C-158/80, ECR, 1981.

[98] T.Lang, *Community Constitutional Law...*, op.cit., p.650.

[99] S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit., p.416.

Article 234 is essential for the preservation of the community character and the law established by the Treaty and ensures that in all circumstances this law is the same in all States of the Community. Thus, it aims to avoid an divergence in the interpretation of community law that the national courts have to apply. It tends to ensure this application by making it available to the national judge as means of eliminating difficulties, which may be occasioned by the requirement of giving community law its full effect within the framework of the judicial systems of the Member States. Consequently, some gap in the system organised could undermine the effectiveness of the provisions of the Treaty and of the secondary community law.[100] Explaining shortly the procedure of preliminary ruling, it constitutes "*a vital mechanism to guarantee that the Community is governed by law and not by states*".[101]

4.2. Remarks *de lege ferenda*

The European national judges have already prepared for years to state on the base of ECJ case law or using the comparative methods in their judgements. The problem is more complicated in the case of the Polish judges and as one said "*this asks not only for a change of mentality of the national judge in this respect*". First of all, the Polish legal system is based on the continental model of law, meaning that it is an important issue to understand the point of the Common law system existing in a larger extend in the European system of practice. The next problem follows from the lack of knowledge in the comparative law fields, considering the fact that Polish universities are not disposed of the comparative law departments. The EC law is accepted with a kind of mistrust and at a distance by the Polish judiciary. There is a division in the judges' opinion. A part of them accepts explicitly the necessity of taking into consideration the EC law in Polish courts, the other one negates this duty and requests the transformation proceeding of each European act in the Polish law. In other words, they do not treat international law *per non est* without such transformation.

The matter is involved in the mentality and practicality principles of judicial independence and sovereignty. This is one of the examples observed once in MS courts. Nowadays, there is a tendency to defend our own national legal ruling from the foreigner influences in Polish courts. Hence, the Community law seems unfamiliar and unpopular. Certainly the Polish courts will be obliged to issue rulings on the basis of Community law, and if necessary to deny application on the norms of Polish law. It will also be the obligation of the courts to interpret Polish law in the conformity with the Community law. In the case of doubts regarding the interpretation of Community law or the validity of secondary

[100] Case Rheinuhlern, C-166/73, ECR, 1974.
[101] R.Barents, *The preliminary procedure...*, op.cit, p.70.

Community law, the Polish courts will be authorised to make a preliminary reference.

The major problems on the judiciary way to community of law could arise from the interpretation of decision (associated with the interpretation of Community law) and the validity decision about the binding of Community law.[102] For a Polish judge there are absolutely new questions as well as quasi-common law system. For instance "Which law is valid? Are the decision of European Court of Justice in force? How is it to apply for preliminary ruling?"

The next question concerns the procedure before Polish courts, which should be changed in a way of introducing the regulations providing the possibility of preliminary ruling[103] into Polish legal system. This problem has the internal as well as the community aspect. The essential question however is the possibility or necessity of suspension the procedure by the Polish court until the obtaining the preliminary ruling from the ECJ. This duty arises directly from the EC law and ECJ judgements. Then, rule will need two presumptions. The first one focuses on the rights of Polish courts of first instance should not to be strictly binding because the decision of state court should be based on the independent discretion of the court, if the preliminary ruling is necessary for the correct judgement. On the other hand the second presumption is the elimination of the questions which are unfounded, delaying the procedure before the state court. Furthermore, binding of the state court with the preliminary ruling of ECJ is the next very important problem. The ECJ states judgements not opinions, which bind not only the court that has brought the question but also the higher courts of appeals. However we could anticipate the conflict and discussion in the Polish Supreme Court, which states that the judges are only subject to law and not to the interpretation created by Polish Constitutional Court. If the Supreme Court will still accept such opinion it would mean the grave breach of Community law.

The essential question focuses on the possibility or necessity of suspension the procedure by the Polish court till the obtaining the preliminary ruling from the ECJ. This duty arises directly from the EC law and ordered in these cases to notify ECJ the decision of the court or tribunal of the Member State, which suspends its proceedings and refers a case to the Court by the court or tribunal concerned.[104] It means that in every case of the preliminary ruling the procedure

[102] J.Skrzydło, *Sędzia polski wobec perspektywy członkostwa Polski w Unii Europejskiej* (*Polish judge and perspective of Polish membership in the EU*), "Państwo i Prawo", No. 11/1996, p.36.

[103] See: S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit., p.403; J.Skrzydło, *Sędzia polski...*, op.cit, p.36; N.Półtorak, *Zmiany w postępowaniu przed sądami polskimi jako konsekwencja przystąpienia Polski do Unii Europejskiej,* in: *Polska w Unii Europejskiej – perspektywy, warunki, szanse i zagrożenia*, ed. C.Mik, 1997.

[104] Art. 20 of ECJ Statute.

must be suspended and Polish courts will be obliged to fulfil the duty on the basis of general Constitutional as well as Community provisions. As ECJ emphasised it is impossible for the authority of Community law to vary from one member state to the other as a result of domestic laws, whatever their purpose is, if the efficacy of that law and the necessary uniformity of its application in all Member States and to all those persons covered by the provisions at issue are not to be jeopardised.[105]

The next very important problem concerns the binding of the state court with the preliminary ruling of ECJ. The Community legal system gives the power to a national judge, who is to refer to the Court of Justice either of his own motion or at the request of the parties, questions relating to the interpretation or the validity of provisions in a pending action, which is very wide. It cannot be taken away by a rule of the national law whereby a judge is bound on the points of law by the rulings of superior courts. It would be different situation if the questions put by the inferior court were substantially the same as questions already put by the superior court.[106]

The Court of Justice requires the rule of the national law to prevent the procedure laid down in Article 234 ECT from being followed in this regard it must be set aside. Each case that raises the question with a national procedural provision renders the application of Community law impossible or excessively difficult and must be analysed by the reference to the role of that provision in the procedure, *i.e.* its progress and its special features and viewed as a whole, before the various national instances. In the light of that analysis, the basic principles of the domestic judicial system such as protection of the rights of the defence, the principle of legal certainty and the proper conduct of procedure are be taken into consideration.[107] The issues mentioned above are the most important elements that should be borne in mind in Polish judiciary system.

Judgements of ECJ which are often interpreted on the bases of the comparative analyses of Member States legal systems, would not be conceivable for Polish judges. While the way ECJ reached the common decision is more less self- evident for a Member State judge, a Polish judge will be required to understand the legal problem for the proper application of the law. In practice it means studying the new branches of foreign law, drawing some motions as "*only then equal treatment in equal cases can be truly guaranteed and is a uniform*

[105] Case Marguerite Maris, wife of Roger Reboulet v. Rijksdienst voor Werknemerspensioenen, Case 55-77, ECR, 1977.

[106] Case Rheinmühlen-Düsseldorf v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel, C-166-73, ECR, 1974.

[107] Jeroen van Schijndel and Johannes Nicolaas Cornelis van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten, Joined cases C-430/93 and C-431/93, ECR, 1995.

way of application of Community law possible".[108] It must be emphasised that there is no need to reach an excellent knowledge in the field of Community law and the comparative law of the Member States. The "ordinary" national judge, as arises from practice,[109] has a very few cases dealing with the questions of Community law. Hence, the idea of training and education is still popular in MS courts.[110] Returning to the educational activities, it is be pointed out that this activity introduced in the shape of courses and seminars, meets with difficulties. Then, EC law is kept at a distance by Polish judiciary.

A judge in a Member State court has (or should have) the idea of Community law. However, there is a conviction that the specialist sits in higher courts. It is obvious that more problematic and complicated cases are not the matter of trial in the ordinary courts. Polish civil litigation, among the other, requires to be presented before the District Court cases valued more than the concrete sum, determining the procedure and protection of copy rights, or some cases on unmaterial rights in civil code.[111] It can be stated that at best the judges of higher courts will have the Community law knowledge.

This situation could lead to some insecurities among the Polish society. One of the secret reports of the European Commission suggests that the arrears in Polish courts activity are huge, which could suggest that the effect of Community law could be none. There were 2 278 665 cases last year unresolved and the period of waiting for the judgement is very high. It means, that the possibility of legal security from EC law is just theoretical. According to the European Commission this is the result of courts' wrong organisation and wrong public prosecutor's offices. There are 9024 judges working in Poland (much more than in France and Italy!) but they could not work properly because of the obscure and inharmonious legal norms.

Of course, there are still not enough money for the Polish judiciary system. At least expenses for the last judiciary year rose 15,41 %. However, it is still unsatisfactory situation (*e.g.* there are 11078 computers in Polish courts!). The report also suggests that the rules defining proceedings costs are unclear, which leads to insecurities among the Polish citizens.

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[108] Ibidem, p.24.

[109] Only 16% of the respondents for the poll made by the courtesy of the Dutch Association of Judges and Public Prosecutors (NVvR) state that have to deal with Community law in the daily practice of their function regularly or more often. Ibid., p.27.

[110] One of the examples has brought the poll made by the courtesy of the Dutch Association of Judges and Public Prosecutors (NVvR), according to which 93% of the respondents defines the knowledge of judges and prosecutors as mediocre or insufficient and a group of 83% of the respondents indicates to need training and education.

[111] Art. 17 of Polish Code of Civil Procedure.

5. Conclusions

Summing up the above arguments it is to be pointed out that though Polish law is on the right way to European Union still the old practice of judges thinking require changes.[112] All these problems just signalled, first of all needs changes in the Polish legal system. It would be hard to understand Polish courts, which ECJ usually tells national courts that it cannot consider the compatibility of the national laws with EC law one. It can only clarify the meaning of EC law. The ECJ depends their interpretation of law most of all on so called "the principle of interpretation of the fundamental general clauses" (*principles géneraux de droit*). The punctilious analysis of interstate regulations that are usually at the low level in the state legal system, does not create the base of European judicial thinking. It should borne in mind that "*supremacy is a tale that has different legal rationales in different national jurisdictions*".[113] The membership in European Union enquires not only the unification with the Community legal system but after all – the direct application of law in the national system. Consequently, it means accepting of other legislative powers then Polish Parliament, according to constitutional provisions of transferring some sovereign powers. After the introduction of the new Polish Constitution, the Polish judges were obliged to direct the application of the constitutional rules. One of them focuses on the principle of the of international law's priority. As a result, it requires the new way of thinking in means of principles and general clauses, probably not today but definitely tomorrow.

As a final conclusion the words of Professor S.Biernat can be followed, who states that provisions of the Constitution of the Republic of Poland "*despite certain doubts that may be aroused by some formulations, these provisions create convenient constitutional foundations for Poland's future membership in the European Union. They correspond to the standards developed in the case law of the European Court of Justice for relations between the Union and Member States, and also between Community law and the legal orders of the Member States*".[114]

[112] J.Skrzydło, Sędzia polski wobec perspektywy... (*Polish judge and perspective…*), op.cit., p.45, writes that more important that the legal changes is the psychological aspect of adopting Polish judicial system.

[113] J.H.H.Weiler, *The European Court and National Courts – Doctrine and Jurisprudence* (Prologue), Oxford 1998, p.vii.

[114] S.Biernat, *Constitutional Aspects of Poland's Future Membership...*, op.cit, p.24.