

Mieczysława Zdanowicz

University of Białystok

**THE POWERS OF THE CONSTITUTIONAL TRIBUNAL
TO VERIFY THE CONFORMITY
OF THE LAW OF THE EUROPEAN UNION
WITH THE CONSTITUTION**

Introduction

The Constitution of the Republic of Poland¹ adopted in 1997 does not determine directly the powers of the Constitutional Tribunal to adjudicate cases of the law of the European Union. Only Article 188 of the Constitution determines that the Constitutional Tribunal shall adjudicate regarding the conformity (...) of international agreements to the Constitution. Therefore, this regulation embraces also the primary law of the European Union.

The purpose of this article is to present the hitherto practice of the Tribunal related to the analysis of conformity with the constitution of agreements concluded within the European Union as well as evaluation whether there is a possibility to investigate the conformity of the secondary law of the European Union with the Constitution.

**1. Activity of the Constitutional Tribunal in adjudicating
the accordance of the primary law of the European Union
with the Constitution**

The Tribunal has been engaged twice in international agreements being the primary law of the European Union. The Constitutional Tribunal emphasized the fact that it is not authorised to autonomous evaluation of constitutionality of the primary law of the European Union. Such a com-

¹ Dz. U. z 1997 r., No. 78, poz. 483 with further amendments.

petence serves it as far as primary law is concerned to ratify international agreements.²

The first of the cases concerned the analysis of the conformity of the accession Treaty and certain decisions of the Treaty establishing the European Community and the Treaty on European Union to the Constitution.

Proceedings before the Constitutional Tribunal were initiated by three groups of Deputies.³ The applicants reproached non-conformity to the Constitution of the following treaty provisions: tp

- Article 1 (1), Article 1 (3) of the Accession Treaty, Article 2 of the Act of Accession;
- Article 8 , 12, 13 (1), 19 (1), 33, 105, 190, 191, 202, 203, 234, 249, 308 of the Treaty establishing the European Community;
- Article 6 (2) of the Treaty on European Union and;
- Article 17 of the Charter of Fundamental Rights.

To support the reproach of nonconformity of the terms of accession to the Constitution of the Republic of Poland, the applicants referred to the preamble to the Constitution, especially to the part concerning ‘the possibility of a sovereign and democratic determination of the fate of Homeland’ by the Nation and about the independence of Poland. Furthermore, the Deputies referred to the principle of the sovereignty of the Polish People (Article 4 (1) of the Constitution) and the superiority of the Constitution of the Republic of Poland in Polish legal order (Article 8 (1) of the Constitution). They also indicated the constitutional limits upon transferring ‘to an international organization or international institution the competence of organs of State authority in relation to certain matters’ (Article 90 (1)), which, according to the applicants, were exceeded.

The Tribunal in the conclusion of the judgment did not state the non-conformity of the quoted regulations of agreements to the Constitution of the Republic of Poland, whereas in the reasons for the judgment it referred to numerous issues concerning the relations between the law of the EU and the national law.

The Tribunal worked on the primary law of the European Union for the second time following an application of parliamentary group and senators

² Wyrok Trybunału Konstytucyjnego K 18/04 z dnia 11 maja 2005 roku, Zbiór Urzędowy OTK 2005/5A/49, pkt 1.2 uzasadnienia.

³ Application of Parliamentary group of April 19 2004 (represented by the deputy J. Łopuszański). Application of a parliamentary group of April 30 2004 (represented by the deputy M. Kotlinowski). Application of a Parliamentary group of September 2, 2004 (represented by the deputy A. Macierewicz).

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of PiS (Prawo i Sprawiedliwość). It concerned the conformity of the Treaty of Lisbon with the Constitution. The Tribunal stated that:⁴

- Article 1 Section 56 of the Treaty of Lisbon amending the Treaty on European Union and the Treaty determining the European Community drawn up on 13 December 2007 and determining the tenor of Article 48 of the Treaty on European Union and in relations to Article 2 of the Treaty of Lisbon determining the tenor of Article 2 (2), Article 3 (2) and Article 7 of the Treaty on the Functioning of the European Union is in accordance with Article 8 (1) and Article 90 (1) of the Constitution of the Republic of Poland;
- Article 2 of the Treaty of Lisbon determining the tenor of Article 352 of the Treaty on the functioning of the European Union is in accordance with Article 8 (1) and Article 90 (1) of the Constitution.

The Tribunal has so far worked on investigating the conformity with the Constitution of international agreements constituting the primary law of the European Union which have already come into force. In both cases the Tribunal did not state any incompatibility with the provisions of the Constitution. There was no need therefore, to take a decision of how to eliminate a possible discrepancy. According to the fundamental principle of the international law, every treaty in force is binding upon the parties to it and must be performed by them in good faith (*pacta sunt servanda*). In such a situation the state should modify the regulations of the constitution or renounce an international agreement. Therefore, it should be considered whether a preventive control exercised before the final agreement of the state to be bound by a contract would not be more relevant.

2. The Constitutional Tribunal vs. Secondary law of the European Union

Article 188 (1) of the Constitution allows to control the conformity of international agreements to the Constitution, and thus also the primary law of the European Union. This control cannot comprise, however, the acts of the secondary law. L. Garlicki emphasises that Article 188 of the Constitution adopts enumeration technique and does not mention clearly the secondary law. Accordingly, the secondary law belonging to a different legal order than the domestic law and the international law, is beyond the power of the Con-

⁴ Wyrok Trybunału Konstytucyjnego K 32/09 of 24 November 2010, Zbiór Urzędowy OTK 2010/9A/108.

stitutional Tribunal.⁵ The author also indicates that the Constitution does not determine the competence of other organs of judicial authority in this scope.⁶ B. Banaszak as well, shares the view that competence established in Article 188 (2) provides for that the Constitutional Tribunal as a model of control of Acts may apply norms of such agreements, that is primary law of the EU but not the secondary law.⁷ J. Barcz thinks also that the secondary law of the EU is not subject to control of constitutionality by the Tribunal.⁸

The problem of evaluation of the secondary law as an element of Polish legal order, introduced to it as a consequence of implementation of the law of the EU appeared, however, in the arbitration activity of the Tribunal. E. Łętowska emphasised unequivocally that an act of internal law being a transposition of an act of community law may be subject to control of conformity to constitution executed by the Constitutional Tribunal.⁹

The Tribunal has repeatedly worked on such cases, among them: controversy over the bicomponents in fuels¹⁰, participation of foreigners in European Parliament election¹¹ and application of the European arrest warrant to Polish citizens.¹² In these cases the Tribunal did not investigate directly the acts of secondary law but of domestic law implementing the law of the EU.

The key importance for the analysed subject was related to the provision of the Tribunal concerning the European arrest warrant. The Tribunal

⁵ L. Garlicki, *Sądy i Trybunały*, in: L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. V, Warsaw 2007, p. 20.

⁶ L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu*, 12th edition, Warsaw 2008, p. 435.

⁷ B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warsaw 2009, pp. 825–826.

⁸ J. Barcz, *Konstytucyjne uwarunkowania członkostwa Polski w Unii Europejskiej*, in: J. Barcz (ed.), *Ustrój Unii Europejskiej*, 2nd edition, Warsaw 2010, p. VII–94.

⁹ E. Łętowska, *Prawo europejskie wobec trybunałów konstytucyjnych państw członkowskich: możliwość rewizji implicite konstytucji?*, in: M. Granat (ed.), *Stosowanie prawa międzynarodowego i wspólnotowego w wewnętrznym porządku prawnym Francji i Polski. Materiały z polsko-francuskiej konferencji naukowej Warszawa 21–22 października 2005 roku*, Warsaw 2007, p. 147. M. Masternak-Kubiak wskazuje na istnienie luki w unormowaniu konstytucyjnym w tym zakresie. M. Masternak-Kubiak, *Zasada autonomii Prawa wspólnotowego praktyka jego stosowania w Polsce*, in: M. Granat (ed.), *Stosowanie prawa międzynarodowego...*, p. 82.

¹⁰ Wyrok Trybunału Konstytucyjnego [Judgment of the Constitutional Tribunal] K33/03 of 21 April 2004, Zbiór Urzędowy OTK 2004/4A/31.

¹¹ Wyrok Trybunału Konstytucyjnego K 15/04 of 31 May 2004, Zbiór Urzędowy OTK 2004/5A/47.

¹² Wyrok Trybunału Konstytucyjnego P1/05 of 27 April 2005, Zbiór Urzędowy OTK 2005/4A/42.

decided that Article 607t § 1 of the Code of Criminal Procedure¹³, in the scope within which it allows extradition of a Polish citizen to a Member State of the European Union on the basis of the European arrest warrant, is incompatible with Article 55 (1) of the Constitution.¹⁴

The institution of the European arrest warrant was introduced in the Code of Criminal Procedure by the amendment law of 18 March 2004.¹⁵ These actions were undertaken in relation to implementation of framework decision of the Council of 13 June 2002 into Polish law concerning the European arrest warrant and the procedure transferring people between Member States (2002/584). In the reasons for the judgment the Tribunal indicated that its task is to investigate the conformity of normative acts to the constitution, nevertheless this property refers to regulations serving the implementation of the European Union law.

The consequence of such stand of the Constitutional Tribunal was the modification of Article 55 of the Constitution.¹⁶

On 6 December 2009 the Speaker of the Sejm (Parliament) received a project of amendment of the Constitution connected to enlargement of competence of the Constitutional Tribunal to investigate the conformity of the statutory law of international organisations to the Constitution of the Republic of Poland, if the Republic of Poland conferred upon them competences described in Article 90 (1) of the Constitution of RP.¹⁷

In fact, it concerns the competence to investigate the conformity of the regulations of the secondary law of the European Union to the Constitution. This is a very complicated and controversial issue. In principle, Member States of the EU have tendency to avoid the ‘confrontation’ of constitution of a state and the EU law.¹⁸ The Constitutional Tribunal have also emphasised that EU law and domestic law should coexist in a spirit of mutual interpretation and cooperative co-application.¹⁹ However, there also

¹³ Ustawa z dnia 6 czerwca 1997 r. Kodeks postępowania karnego, Dz. U. z 1997 r., No. 89, pos. 555.

¹⁴ Wyrok Trybunału Konstytucyjnego P1/05 of 27 April 2005, Zbiór Urzędowy OTK 2005/4A/42.

¹⁵ Ustawa z dnia 18 marca 2004 r. o zmianie ustawy – Kodeks karny, ustawy – Kodeks postępowania karnego oraz ustawy – Kodeks wykroczeń, Dz. U. z 2004 r., No. 69, pos. 626.

¹⁶ Ustawa z dnia 8 września 2006 r. o zmianie Konstytucji Rzeczypospolitej Polskiej, Dz. U. z 2006 r. No. 200, pos. 1471.

¹⁷ Projekt ustawy o zmianie Konstytucji Rzeczypospolitej Polskiej, druk No. 3399.

¹⁸ P. Chybalski, *Informacja prawno porównawcza w sprawie kognicji sądów konstytucyjnych odnośnie Prawa wtórnego Unii Europejskiej*, BAS WAUiP 2358/10, p. 3.

¹⁹ Wyrok Trybunału Konstytucyjnego K 18/04, point 2.2 of justification. For EU law-friendly interpretation See A. Kalisz-Prakopik, *Wykładnia i stosowanie prawa wspólnotowego*, Warsaw 2007, p. 201 and the following.

occurred judgments of constitutional tribunals which admitted the possibility to investigate constitutionality of the community/union law.²⁰

The project leads to a question whether such modifications are appropriate and justifiable from the point of view of the European Union law.

According to Article 2 of the Act concerning the conditions of the accession of Poland to the European Union ‘from the date of accession, the provisions of the original Treaties and the acts adopted by the institutions and the European Central Bank before accession shall be binding on new Member States and shall apply in those States under the conditions laid down in those Treaties and in this Act’²¹. It means that Poland undertook to abide by the law of EC/EU.

By virtue of Article 188 (1) of the Constitution of the Republic of Poland the Constitutional Tribunal is empowered to adjudicate on the conformity of an international agreement to the Constitution. The powers of the Constitutional Tribunal in this scope are of special significance if they are performed before expressing the final decision to be bound by a contract. In the case when an inconformity to the provisions of the Constitution is stated, a state may take a decision not to be bound by such an agreement, to negotiate a new contract or to modify the selected provisions of the Constitution. However, when a state agrees to be bound by agreement according to *pacta sunt servanda* principle, it should perform in good will the obligations resulting from the agreement. Article 26 of the Vienna Convention on the Law of Treaties (of which Poland is part) determines that ‘every treaty in force is binding upon the parties to it and must be performed by them in good faith.’²² Thus, ‘a state cannot shield itself with the regulations of own internal law, including the constitution, when it breaks an international agreement’.²³ Moreover, according to Article 27 of the same convention ‘a party may not invoke the provisions of its internal law as justification for

²⁰ See principally the judgment of the Federal Constitutional Court of Germany (Solange I formula amended later by Solange II) and judgments of Constitutional Courts of Italy and Spain. J. Barcz, *Wybrane problemy związane z wyrokiem niemieckiego Federalnego Trybunału Konstytucyjnego z 30.06.2009 r. na temat zgodności Traktatu z Lizbony z Ustawą Zasadniczą RFN*, Europejski Przegląd Sądowy 2009, wrzesień, p. 13 and following; R. Arnold, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej*, Studia Europejskie 1999, No. 1, p. 95 and following.

²¹ Treaty concerning the accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia, the Slovak Republic to the European Union, signed 16 April 2003, Dz. U. 2003, No. 90, pos. 864.

²² Vienna Convention on the Law of Treaties signed on 23 May 1969, Dz. U. z 1990 r., No. 74, pos. 439.

²³ M. Frankowska, *Prawo traktatów*, Warsaw 1997, p. 103.

its failure to perform a treaty'. As R. Kwiecień indicates, the Permanent Court of International Justice emphasized that the primacy of international law extends not only to common legislation of a state but also to the constitution. The Tribunal justified that a state cannot refer to its own constitution towards another state for the purpose of liberation of duties imposed on it by the international law or treaties in force'.²⁴

Also Article 13 of the Declaration on Rights and Duties of States of 1949 elaborated by the International Law Commission declares directly: 'Every State has the duty to carry out in good faith, its obligations arising from treaties and other sources of international law, and it may not invoke provisions in its constitution or its laws as an excuse for failure to perform this duty'.²⁵

As indicated above, the Constitutional Tribunal has twice expressed itself concerning the accordance of the primary law of the EU with the Constitution: once in relation to Accession Treaty and again with connection to the ratification of the Treaty of Lisbon. According to the Tribunal, the Accession Treaty (judgment of 11 May 2005, K 18/04) and the Treaty of Lisbon (judgment of 24 November 2010, K 32/09) have been recognised in conformity with the Constitution by the Tribunal. Therefore, the scope of competences transmitted to EC/EU is in accordance with the provisions of the Constitution.

The Union fulfils the conferred competences by accepting legal acts of the Union (the so-called secondary or derivative law). A hypothetical situation resulting in the secondary law being contrary to the provisions of the Constitution of the Republic of Poland, should be considered in two cases:

- 1) when an act was issued without competence or with shared competences and violation of the principle of subsidiarity and proportionality;
- 2) when an act was issued according to inherent competences.

Ad. 1)

One of the fundamental principles of the activity of the European Union is the principle of conferral expressed in Article 5 of the TEU.²⁶ According to this principle '(...) Union shall act within the limits of the competences

²⁴ R. Kwiecień, *Miejsce umów międzynarodowych w porządku prawnym państwa polskiego*, Warsaw 2000, pp. 45–46.

²⁵ Declaration on Rights and Duties of States 1949, http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/2_1_1949.pdf.

²⁶ Consolidated version of the Treaty on European Union, Dz. Urz. UE 2010/C83/13.

conferred upon it by Member States in the *Treaties* to attain the objectives set out *therein*. Competences not conferred upon the Union in the *Treaties* remain with Member States'. The Union therefore has only such competences which were conferred upon it in the founding treaties along with amending treaties. Member States are still the only subjects regulating the fields not mentioned in the *Treaties*. These are exclusive competences of the states and the European Union in such cases cannot undertake any activity including legislative activity. Competences conferred to the European Union might be divided into:

- exclusive competence of the European Union and
- shared competence.

According to Article 3 (1) of the Treaty on the Functioning of the European Union:²⁷ 'The Union shall have exclusive competence in the following areas:

- a) customs union;
- b) the establishing of the competition rules necessary for the functioning of the internal market;
- c) monetary policy for Member States whose currency is the euro;
- d) the conservation of marine biological resources under the common fisheries policy;
- e) common commercial policy.'

These are thus, the areas in which the Union may legislate and adopt binding legal acts. Member States may legislate solely authorised by the Union or in order to execute the acts of the Union.

Shared competences between the European Union and Member States apply in the following principal areas (Article 4 (2) Treaty on the Functioning of the European Union):

- a) internal market;
- b) social policy, for the aspects defined in this Treaty;
- c) economic, social and territorial cohesion;
- d) agriculture and fisheries, excluding the conservation of the Marine biological resources;
- e) environment;
- f) consumer protection;
- g) transport;
- h) trans-European networks;
- i) energy;

²⁷ Consolidated version of the Treaty on the Functioning of the European Union, Dz. Urz. UE 2010/C83/47.

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- j) area of freedom, security and justice;
- k) common safety concerns in public health matters, for the aspects defined in this Treaty.

In case of shared competences the Union and Member States may legislate and adopt legal acts binding in a given field.

When realising shared competence the Union functions according to the principle of subsidiarity and proportionality expressed in Article 5 (3) and 4 of the Treaty on European Union. The Union therefore, undertakes activities only when and within such a scope in which the goals of the intentional action cannot be achieved in a sufficient way by Member States (both on the central, regional and local levels), and because of the size and effects of the suggested activity their improved achievement is possible on the Union level. This principle is to be a materialisation of the assumption about taking decisions on the lowest level possible “as closely as possible to the citizen”.

If it happened that the institutions of the European Union passed legal acts not having been granted the competence or shared competence in this field, with violation of the principle of subsidiarity and proportionality, Member States might file a complaint on the basis of Article 263 of the Treaty on the Functioning of the European Union. The appropriate court to consider a complaint about the invalidity of an act is the Court of Justice of the European Union. The state courts of Member States are deprived of jurisdiction in this scope. Under Article 263 of the Treaty on Foundation of the European Union, the Court of Justice controls the legality of legislative acts of the Council, Commission and the European Central Bank other than the recommendations and opinions, as well as the Acts of the European Parliament and council aiming at generating legal effects with respect to third subjects. The task of the Court is to determine if the institutions act according to the competence conferred to the European Union. The aim of the complaint filed under Article 263 is to eliminate the defective legal act from legal transactions.

Therefore, according to the law of the European Union, exclusive competence to interpret and control the validity of the acts of secondary law belongs to the Court of Justice of the European Union.

Ad. 2)

A situation when adopted legal acts of the EU comply with the competence vested in the EU and there is some inconsistency with constitutional regulations of the state, should be considered from the point of view of the principle of supremacy of the EC/EU law.

This principle has been formulated in judgments of the Court of Justice. It is confirmed by the Declaration 17 concerning primacy attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon.²⁸

The principle of primacy of the EU law concerns all legal regulations of Member States independently of the place they occupy in the system of sources of law, including constitutional regulations. The Tribunal had emphasised this principally in its judgment of 17 December 1970 concerning the case C-11/70: ‘the law stemming from the treaty, an independent source of law, cannot because of its very nature be overridden by rules of national law, however framed, without being deprived of its character as community law and without the legal basis of the community itself being called in question. Therefore the validity of a community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of its constitutional structure 2. Recourse to the legal rules or concepts of national law in order to judge the validity of measures adopted by the institutions of the community would have an adverse effect on the uniformity and efficacy of community law . The validity of such measures can only be judged in the light of community law.’²⁹

A similar stand was taken by the Tribunal in its judgment of 2 July 1996 in case C-473/93: ‘Recourse to provisions of the domestic legal systems to restrict the scope of the provisions of Community law would have the effect of impairing the unity and efficacy of that law’. Consequently the fact that the Grand Duchy of Luxembourg refers to the second paragraph of Article 11 of the Luxembourg Constitution, which provides that only Luxembourgers may occupy civil and military posts cannot be accepted.³⁰

The essence of the precedence was explained by the Tribunal in the judgment of March 9 1978 in Case 106/77: ‘A national court which is called upon, within the limits of its jurisdiction, to apply provisions of Community law is under a duty to give full effect to those provisions, if necessary refusing of its own motion to apply any conflicting provision of national legislation,

²⁸ Declaration referring to primacy attached to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon signed on 13 December 2007, Dz. Urz. UE 2010/C83/335.

²⁹ Judgment of the Court of 17 December 1970. – Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel, Case 11–70, European Court reports 1970, p. 01125.

³⁰ Judgment of the Court of 2 July 1996, Commission of the European Communities v Grand Duchy of Luxembourg, Case C-473/93, *European Court reports 1996*, p. I-03207.

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even if adopted subsequently, and it is not necessary for the court to request or await the prior setting aside of such provisions by legislative or other constitutional means.³¹ It results from this that a national law regulation contrary to the community law does not lose binding force but cannot be applied in a given case.

The doctrine emphasises that the supremacy principle is a principle of precedence of application and not precedence of operation.³²

J. Barcz indicates that precedence of EU law over national law of Member States is not of derogatory character, that is, it does not cause invalidity of norms of national law which are contrary to European law. From this principle results the duty of Member States to guarantee the efficiency to EU law and adequate adaptation (amendment, annulment, passing) of the national law (including the constitution).³³

W. Czapliński emphasises as well, that if conferring competences to EC/EU took place in accordance with the Constitution of the Republic of Poland in fields in which the Community had been granted the competence to act, community law should get absolute precedence over any norm of internal law including constitutional norms.³⁴

Conclusion

The Constitutional Tribunal has already twice adjudicated the conformity of agreements being elements of primary law of the EU with the Constitution of the Republic of Poland.

The project of amendments to the Constitution of the Republic of Poland relating to the extension of competence of the Constitutional Tribunal to investigate the conformity with the Constitution of the law proclaimed by and international organisation if the Republic of Poland conferred upon them competence mentioned in Article 90 (1) of the Constitution of the Republic of Poland, introduces solutions incompatible with the law of the European Union since:

³¹ Judgment of the Court of 9 March 1978. – *Amministrazione delle Finanze dello Stato v Simmenthal SpA*. – Case 106/77, *European Court reports 1978*, p. 00629.

³² A. Wróbel (ed.), *Stosowanie prawa Unii Europejskiej przez sądy*, Kraków 2005, p. 112.

³³ J. Barcz, *Konstytucyjne uwarunkowania członkostwa Polski w Unii Europejskiej*, in: J. Barcz (ed.): *Ustrój Unii Europejskiej*, vol. II, 2nd edition, Warsaw 2010, p. VII–88.

³⁴ W. Czapliński, Gloss to the decision of the Constitutional Tribunal of May, 11 2005 (accordance of the Treaty of Accession with the Constitution of the Republic of Poland) K 18/04 (Glosa No. 3), *Kwartalnik Prawa Publicznego* 2005, No. 4, p. 210.

- firstly, if the discrepancy of the secondary law acts with the Constitution of the Republic of Poland appeared because of lack of competence, the only organ which could decide about the invalidity of such an act is the Court of Justice of the European Union;
- secondly, if the discrepancy between the act of the secondary law and the Constitution of the Republic of Poland appeared as a result of actions compatible with competences conferred upon the EU, the principle of precedence of the EU law including the precedence over the constitutional norms is applicable.

S U M M A R Y

The Constitution of the Republic of Poland adopted in 1997 does not directly determine the powers of the Constitutional Tribunal to adjudicate cases of the European Union law. Only Article 188 of the Constitution determines that the Constitutional Tribunal shall adjudicate regarding the conformity (...) of international agreements to the Constitution. Therefore, this regulation embraces also the primary law of the European Union.

The Tribunal has been engaged twice in international agreements being the primary law of the European Union (the Accession Treaty and the Treaty of Lisbon). In any of these cases the Tribunal has not stated the inconformity of the analysed agreements to the Constitution of the Republic of Poland.

The Constitution does not also adjudicate whether the Constitutional Tribunal shall control the conformity of the secondary law of the EU to the Constitution. In practice the Tribunal engaged in cases which concerned the relations between the domestic and EU law. However, in these cases the Tribunal did not examine directly the Acts of secondary law but domestic law implementing the EU law.

Evaluating the project of amendments of the Constitution of the Republic of Poland related to expanding the powers of the Constitutional Tribunal to verify the conformity of the statutory law of international organisations to the Constitution of the Republic of Poland, if the Republic of Poland conferred upon them competences described in Article 90 (1) of the Constitution of RP from the perspective of the EU law, it should be stated that the suggested solutions are questionable since:

- firstly, if the discrepancy of the secondary law acts with the Constitution of the Republic of Poland appeared because of lack of competence, the only organ which could decide about the invalidity of such an act is the Court of Justice of the European Union;
- secondly, if the discrepancy between the act of the secondary law and the Constitution of the Republic of Poland appeared as a result of actions compatible with competences conferred upon the EU, the principle of precedence of the EU law including the precedence over the constitutional norms is applicable.