

EXPLANATION

Assessment of the conformity to the Polish Constitution of selected provisions of the Treaty on European Union

On 7 October 2021, the Constitutional Tribunal considered the Prime Minister's application lodged with the Constitutional Tribunal to assess the conformity to the Polish Constitution of selected provisions of the Treaty on European Union.

The Constitutional Tribunal adjudicated as follows:

1. Article 1, first and second paragraphs, in conjunction with Article 4(3) of the Treaty on European Union (consolidated version: OJ C 202, 7.6.2016) – insofar as the European Union, established by equal and sovereign states, creates “an ever closer union among the peoples of Europe”, the integration of whom – happening on the basis of EU law and through the interpretation of EU law by the Court of Justice of the European Union – enters “a new stage” in which:

a) European Union authorities act outside the scope of the competences conferred upon them by the Republic of Poland in the Treaties;

b) the Constitution is not the supreme law of the Republic of Poland, which takes precedence as regards its binding force and application;

c) the Republic of Poland may not function as a sovereign and democratic state

– is inconsistent with Article 2, Article 8 and Article 90(1) of the Constitution of the Republic of Poland.

2. Article 19(1), second subparagraph, of the Treaty on European Union – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law – it grants domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competences to:

a) bypass the provisions of the Constitution in the course of adjudication – is inconsistent with Article 2, Article 7, Article 8(1), Article 90(1) and Article 178(1) of the Constitution;

b) adjudicate on the basis of provisions which are not binding, having been revoked by the Sejm and/or ruled by the Constitutional Tribunal to be inconsistent with the Constitution

– is inconsistent with Article 2, Article 7, Article 8(1), Article 90(1), and Article 178(1) and Article 190(1) of the Constitution.

3. Article 19(1), second subparagraph, and Article 2 of the Treaty on European Union – insofar as, for the purpose of ensuring effective legal protection in the areas covered by EU law and ensuring the independence of judges – they grant domestic courts (common courts, administrative courts, military courts, and the Supreme Court) the competences to:

a) review the legality of the procedure for appointing a judge, including the review of the legality of the act in which the President of the Republic appoints a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 179 in conjunction with Article 144(3)(17) of the Constitution;

b) review the legality of the National Council of the Judiciary's resolution to refer a request to the President of the Republic to appoint a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 186(1) of the Constitution;

c) determine the defectiveness of the process of appointing a judge and, as a result, to refuse to regard a person appointed to a judicial office, in accordance with Article 179 of the Constitution, as a judge – are inconsistent with Article 2, Article 8(1), Article 90(1) and Article 179 in conjunction with Article 144(3)(17) of the Constitution.

Moreover, the Tribunal decided to discontinue the proceedings as to the remainder.

The ruling was adopted by a majority vote.

There were two dissenting opinions, filed respectively by Judge Piotr Pszczółkowski and Judge Jarosław Wyrembak.

I.

1. The Constitutional Tribunal pointed out that, pursuant to Article 87(1) of the Constitution, the system of the sources of law in the Republic of Poland has a hierarchical structure. International agreements ratified with prior consent granted by statute, such as the Treaty on European Union (hereinafter: the TEU, the Treaty), are placed in that hierarchy below the Constitution, which is the supreme law in the Polish system of the sources of law. Constituting part of that system from the moment of its ratification and publication in the Journal of Laws, an international agreement must remain consistent with the Constitution. Thus, in the hierarchy of the sources of law, the TEU occupies a position that is lower than that of the Constitution, and just as any ratified international agreement, and just as any part of the Polish legal system, the TEU must be consistent with the Constitution.

2. Pursuant to Article 188(1) of the Constitution, the Constitutional Tribunal adjudicates with regard to the conformity of international agreements to the Constitution. The scope of competence delineated in such a way also comprises conducting a review of constitutionality with regard to the treaties of EU primary law, which constitute international agreements (similar views were presented in the Constitutional Tribunal's judgments ref. nos.: K 18/04 and K 32/09, SK 45/09 and P 7/20; as well as its decision ref. no. P 37/05; by contrast, in the judgment ref. no. U 2/20, the Tribunal examined the conformity of the norms of Polish law to an EU-Treaty norm, nota bene also Article 4(3) of the Treaty).

3. When examining the conformity to the Constitution of the norms of EU primary law, both those directly arising from the Treaties as well as the meaning assigned thereto by the Court of Justice of European Union (hereinafter: the CJEU), the Constitutional Tribunal does not provide an autonomous interpretation of EU law. The Constitutional Tribunal respects the exclusive jurisdiction of the Court of Justice of the European Union within that scope. The thought process of the Polish Constitutional Tribunal merely consists in determining the substance of those norms and in verifying their conformity to the Constitution of the Republic of Poland.

4. The Constitutional Tribunal did not see it justified to make a referral for a preliminary ruling to be issued by the CJEU, deeming that there was no useful purpose and no need to present the CJEU with issues concerning the conformity of the norms of the TEU to the Polish Constitution. The CJEU has exclusive jurisdiction to provide an interpretation of EU law, whereas the Constitutional Tribunal is the court of the last word as regards the conformity of any norms, including EU norms, to the Constitution of the Republic of Poland.

5. What lingers as a side remark to the above statements is an obvious doubt arising from the course of the Tribunal's hearing held on 30 September 2021, namely the doubt as to what extent the CJEU remains an independent court in the light of the Polish constitutional standards, and in particular in the context of appointing judges to the CJEU by executive authorities, or even considering the unlimited number of terms of office that may be served by one judge of the CJEU. Contrary to the above, the Polish Constitution, in its Article 179, provides that judges shall be appointed for an

indefinite period, whereas Article 180(1) thereof ensures that judges shall not be removable. By contrast, judges of the Constitutional Tribunal may be appointed – on the basis of Article 194(1) of the Constitution – only for one term of office of 9 years. This entails that Polish judges do not have to aim to please executive authorities for the purpose of being reappointed.

II.

6. The essence of the Prime Minister's application concerns relations between Treaty provisions and the principle of the precedence of the Polish Constitution, and thus – the Polish sovereignty. Indicated in the context of Article 1, first and second paragraphs, in conjunction with Article 4(3) of the TEU, the constitutional issue indicated by the applicant amounts to the determination of constitutional boundaries for “an ever closer union among the peoples of Europe”, referred to in Article 1, second paragraph, of the said Treaty. This is linked with ensuring the loyal (or rather sincere) fulfilment of the obligations arising from the Treaties, as stated in Article 4(3) of the TEU, at the so-called new stage of European integration.

7. Of fundamental significance is the first point in the petitum of the Prime Minister's application concerning Article 1, first and second paragraphs, of the TEU. The essence of that provision amounts to the following: when conferring competences upon the Union for the purpose of carrying out common tasks, sovereign Member States agree that the law created by the European Union has a direct impact in the Member States, which is a departure from the understanding of states' legal sovereignty as it used to be construed. Hence, none of EU Member States sovereignly exercises its rights in an absolute sense, as the exercise thereof has been restricted in some respect as a result of the conferral upon the European Union of the competence of state authorities in certain areas. However, it should be stressed that the Union as the fiduciary of those competences must exercise them while respecting the national and constitutional identities of Member States as well as observing the principles of proportionality and subsidiarity, which follows from Article 4(2) and Article 5(1) of the TEU.

8. In its judgment of 11 May 2005, ref. no. K 18/04, delivered by a full bench of the Constitutional Tribunal, presided over by the then President of the Constitutional Tribunal, Prof. Marek Safjan, the Constitutional Tribunal stated that the boundaries of the integration (i.e. the close union) would be crossed if the scope of the conferral of competences would prevent the Republic of Poland from functioning as a sovereign and democratic state. By taking such a stance in 2005, the Constitutional Tribunal stressed that its stance, in principle, remained concurrent with the stances taken by the Federal Constitutional Court of Germany and the Supreme Court of the Kingdom of Denmark. By accepting the aforementioned stance, the Constitutional Tribunal, in its current composition, made it the starting point for a further discussion, as manifested in point 1 of the operative part of the judgment in the present case.

9. On that basis, with regard to Article 1, first and second paragraphs, of the TEU, which mentions “a new stage in the process of creating an ever closer union among the peoples of Europe”, the Constitutional Tribunal stated that, in the situation where the following three conditions are met:

- 1) EU authorities act within the scope of conferred competences;
- 2) a new stage in creating ever closer cooperation (Art. 1, second paragraph, of the TEU) does not result in depriving the Polish Constitution of its primacy i.e. its precedence as regards its binding force and application before any other norms in the legal realm in the territory of the Republic of Poland;
- 3) the Republic of Poland preserves its functions as a sovereign and democratic state;

– Article 1, first and second paragraphs, of the TEU remains consistent with the Constitution of the Republic of Poland.

However, if the new stage of ever closer cooperation entails that the norms of EU law, especially those derived by the CJEU, happen to be situated outside the scope of the competences conferred by the Republic of Poland as well as above the Constitution of the Republic of Poland, thus causing the loss of sovereignty, then the stage of “an ever closer union” (Art. 1, second paragraph, the TEU) infringes the Constitution of the Republic of Poland.

10. The scope of the competences conferred by EU Member States is primarily regulated in the Treaties, and in particular in Art. 3(1) and Article 4(2) of the TFEU. Those competences comprise neither the functioning of the judicial system nor the organisational structure thereof. The functioning or organisational structure of state authorities, including courts, does not belong to “the competence of organs of State authority in relation to certain matters”, as referred to in Article 90(1) of the Constitution. Moreover, there is no doubt that EU Member States, as sovereign parties to the Treaties, when determining the boundaries of the competences conferred upon the Union, did not entrust the EU authorities with the power either to presume competences or to derive new competences from those already existing.

11. A distinction between the area of conferred competences and those exclusively reserved for the EU Member States is also essential for specifying the boundaries of the so-called principle of the primacy of EU law. It is obvious that, in the light of Article 91 of the Constitution, EU law is applied directly, taking precedence in the case of a conflict with statutes, only within the scope of the conferred competences, which was deemed a number of times by the Constitutional Tribunal in its judgments ref. nos. K 18/04 and K 32/09, and more recently in the case ref. no. P 7/20.

12. Consent to the situation where an international organisation – including the European Union and its authorities – would create norms with regard to the Republic of Poland outside the realm of conferred competences and the declaration of their precedence not only before statutes but also before the Constitution would mean the loss of sovereignty on the part of Poland. The Constitutional Tribunal categorically stated that no authority of the Republic of Poland may accept such a state of affairs.

13. The above conclusion remains consistent with Article 9 of the Constitution, which stipulates that the Republic of Poland shall respect international law binding upon it. Indeed, the subject of “respecting” is the law binding the Republic of Poland. In the case of law created by the institutions and bodies of the European Union, what is exclusively binding is the law enacted within the limits of the competences conferred on the Union in the Treaties as well as set by the obligation to respect the constitutional identity and the fundamental functions of the state (Art. 4(2) of the TEU), and moreover within the limits arising from the principles of proportionality and subsidiarity (Art. 5(1) of the TEU). Any provisions created outside those limits do not constitute binding international law for the Republic of Poland, which is referred to in Article 9 of the Constitution.

14. What also delineates the boundary of the conformity of the process of European integration with the Constitution is the democratic legitimacy of EU authorities, which was aptly pointed out by the Constitutional Tribunal in its judgment of 11 May 2005, ref. no. K 18/04. Indeed, the democratic legitimacy of EU authorities as regards enacting legal norms which are binding in the Republic of Poland exists only to the extent to which the Polish sovereign (the Polish nation) grants consent thereto. It should indeed be borne in mind that – in principle – Polish citizens, similarly to the citizens of the other EU Member States, have no influence over the appointment of EU executive authorities and judges selected to the CJEU.

III.

15. The second and third points of the operative part of the judgment refer to Article 19(1), second subparagraph, of the TEU, which stipulates that Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. The said wording of the provision was used by the CJEU to derive its competence to adjudicate on the organisational structure of Polish courts. To confirm the existence of such an interpretation, the Polish Prime Minister, in his application to the Constitutional Tribunal, indicated the following judgments of the CJEU, dated: 24 June 2019 in the case C-619/18; 5 November 2019 in the case C-192/18; 19 November 2019 in the joined cases C-585/18, C-624/18, and C-625/18; 26 March 2020 in the joined cases C-558/18 and C-563/18; as well as 2 March 2021 in the case C-824/18. Additionally, the application made reference to the judgment of the Polish Supreme Administrative Court of 6 May 2021, ref. no. II GOK 2/18.

16. Judgments delivered by the CJEU do not – in the light of the Treaties – constitute a source of law of the European Union, and views on their legal significance are divided. The Constitutional Tribunal noted that the rulings of the CJEU are hybrid in character, namely they partly display the characteristic features of the system of statute (continental) law, and partly – those of the system of the Anglo-Saxon common law. They are formulated in the way which assigns the norms of the Treaties with a specific meaning, including statements imposing obligations (requirements and prohibitions). Within that meaning, the judgments are frequently executed by their addressees, which is, for example, manifested in the latest rulings of the following Polish courts: the Supreme Administrative Court and the Supreme Court. Within that meaning, they are also subject to a review of their conformity to the Polish Constitution, carried out by the Constitutional Tribunal.

17. The norms of the Treaties, within the meaning assigned thereto by the CJEU, subjected to the review in the present proceedings, directly concern the organisational structure of courts in the Republic of Poland, i.e. the subject matter which does not fall within the category of competences that are subject to conferral on the basis of Article 90(1) of the Constitution. The subject matter belongs to the Polish constitutional identity, which has been pointed out by the Constitutional Tribunal a number of times before, also in its recent judgment ref. no. P 7/20.

18. Article 19(1) of the TEU, from which the CJEU derives its competence to adjudicate on the organisational structure of Polish courts, constitutes an obligation of EU Member States and that obligation is not tantamount to the conferral of competences (even negative ones) on EU authorities, and in particular on the CJEU. The treaty obligation of an EU Member State is not synonymous with the scope of the competences of EU institutions, bodies, offices and agencies. The deriving of the CJEU's competences to control the functioning and organisational structure of the judicial system in an EU Member State from Article 19(1), second subparagraph, of the TEU constitutes an example of creating new competences on the part of the CJEU.

19. The Constitutional Tribunal stressed that also Article 2 of the TEU – which contains the catalogue of values on which the Union is based – may not constitute the source of the CJEU's competences to adjudicate on the organisational structure of Polish courts. The values mentioned in Article 2 of the TEU are merely of axiological significance, and they are not legal principles. The organisational structures of the judicial systems in EU Member States do not at all fall under the common constitutional identity of the Member States, which apply different procedures for appointing judges. The principle of the rule of law does not specify a way of appointing judges, but requires that they be independent and impartial. However, the said independence is not inextricably linked with the way of appointing a judge and it may not be examined *ex ante* as well as *in gremio*, i.e. before an appointment is made to the office of judge and with regard to all judges without distinction. The independence of a judge is linked with a specific case on which the judge is adjudicating. The Constitution of the Republic of Poland, similarly to earlier constitutions, formulates the framework of the legal guarantees for the

independence of judges. Those constitutional standards may not be replaced with the CJEU's interpretative guidelines.

20. The interpretation of the Polish Constitution provided by the Constitutional Tribunal, as well as the interpretation of Article 2 and Article 19(1), second subparagraph, of the Treaty, arrived at the CJEU, should lead to identical conclusions. Indeed, the Polish Constitution provides in its Article 2, Article 45, Article 78 and Article 176(1) for a much higher standard of the protection of the right to an impartial and independent court than do EU legal provisions, including Article 47 of the Charter of Fundamental Rights of the European Union or Article 6(1) and Article 13(1) of the Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, there is room for sincere and mutual cooperation between the European Union and Poland.

IV.

21. In the doctrine of law, with reference to the jurisprudence of the Constitutional Tribunal, at times it is asserted that in the case of recognising an irremovable conflict between EU law and the Polish Constitution, the following consequences are possible: amending the Constitution; changing EU law; or leaving the EU. Such an assertion may only be deemed admissible in academic rhetoric. Above all, an irremovable conflict occurs very rarely, if it at all exists outside of the theory of law. In the event of a conflict of norms, what is necessary is a mutual, sincere dialogue, which constitutes an obligation arising from the principle of loyalty, which is characteristic for European legal culture.

22. It should be underlined that the Constitutional Tribunal occupies a special position within the Polish system of supreme public authorities; by safeguarding the Polish Constitution – a legal act that constitutes the foundation of the Polish normative system, the Tribunal safeguards the rudiments of legal security and order, and thus the sovereignty of the Polish state, at least in the normative dimension. By contrast, according to the well-established stance of the CJEU, its case law not only develops but also co-creates the legal order of the EU, and consequently the legal order of EU Member States, including the Republic of Poland. As any EU law being hierarchically subordinate to the Constitution of the Republic of Poland falls within the scope of the jurisdiction of the Constitutional Tribunal, it should be stated that not only normative acts within the meaning set out in the CJEU's case law, but also the CJEU's case law itself will – as part of the EU normative order, and from the point of view of its conformity with the highest legal act in Poland – be subject to assessment by the Tribunal. In the light of the principle of sincere cooperation, dialogue, mutual respect and mutual support, the Tribunal refrains from executing the said constitutional competence. However, if the practice of the CJEU's progressive activism – which consists, in particular, in interfering with the exclusive competences of Polish state authorities, in undermining the position of the Constitution as the supreme law in the Polish legal system, in challenging the fact that the judgments of the Constitutional Tribunal are of universally binding application and are final, and ultimately in questioning the status of judges of the Tribunal – is not refrained from, the Tribunal does not rule out that it will resort to exercising the said competence and will subject the CJEU's rulings to direct assessment of their conformity to the Constitution, including their elimination from the Polish legal order.

The Constitutional Tribunal en banc examined the case; the Presiding Judge was the President of the Constitutional Tribunal, Judge Julia Przyłębska, and the Judge Rapporteur was Judge Bartłomiej Sochański.