Ref. No. SK 45/09

J U D G M E N T

IN THE NAME OF THE REPUBLIC OF POLAND

Warsaw, 16 November 2011

The Constitutional Tribunal, in a bench composed of:

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat – Judge Rapporteur
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 16 November 2011, in the presence of the complainant and the Public Prosecutor-General, a constitutional complaint submitted by Ms Anna Supronowicz, in which she requested the Tribunal to examine the conformity of:

Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and

the recognition and enforcement of judgments* in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution of the Republic of Poland,

adjudicates as follows:

Article 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended) **is consistent with Article 45(1) and with Article 32(1) in conjunction with Article 45(1) of the Constitution of the Republic of Poland.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) and Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, of 2000 No. 48, item 552 and No. 53, item 638, of 2001 No. 98, item 1070, of 2005 No. 169, item 1417, of 2009 No. 56, item 459 and No. 178, item 1375, of 2010 No. 182, item 1228 and No. 197, item 1307 as well as of 2011 No. 112, item 654), **to discontinue the proceedings as to the remainder.**

STATEMENT OF REASONS

I

1. In a constitutional complaint of 9 July 2007 submitted to the Tribunal, and supplemented with a procedural letter of 13 August 2007, Ms Anna Supronowicz (hereinafter: the complainant) requested the Tribunal to determine the non-conformity of Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended;

* Whenever the term 'judgment' is used here in the context of the Council Regulation (EC) No 44/200, it should be understood pursuant to Article 32 of the said Regulation, which stipulates the following: "For the purposes of this Regulation, 'judgment' means any judgment given by a court or tribunal of a Member State,whatever the judgment may be called, including a decree, order, decision or writ of execution, as well as the determination of costs or expenses by an officer of the court.

hereinafter: the Council Regulation (EC) No 44/2001) to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution of the Republic of Poland.

1.1. The constitutional complaint was submitted on the basis of the following facts.

In its decision of 23 December 2004 (Ref. No. 1289/2004), the Court of Appeal in Brussels - adjudicating with reference to motions submitted by the Belgian Public Prosecutor's Office and by Mr Jacques-Andre De Leeuw, a civil plaintiff – ordered the complainant to pay the amount of EUR 12 500. The said decision was issued as part of criminal proceedings pending against the complainant, in which she was convicted of an offence against life and health of Jacques-Andre De Leeuw. The amount of EUR 12 500 was ordered, in accordance with the civil procedure, to be paid as compensation for material and moral damage which the aggrieved party incurred as a result of the offence having been committed against him. The appellate proceedings were carried out after appeals against a judgment of the Criminal Court in Brussels had been lodged both by the complainant (in a criminal and civil case), as well as by the Belgian Public Prosecutor's Office.

On 11 May 2006, Mr Jacques-Andre De Leeuw requested that the enforceability of the decision of the Belgian court be declared in the territory of Poland, as regards the amount ordered to be paid to him. In its decision of 24 August 2006 (Ref. No. III Co 33/06), *Sąd Okręgowy Warszawa-Praga* (the Circuit Court) in Warsaw declared that the decision issued by the Court of Appeal in Brussels was enforceable. In the substantiation for its decision, the Polish court indicated that necessary premisses had been met in order to declare the enforceability of the judgment issued by the foreign court, as set out in the Council Regulation (EC) No 44/2001. On 20 October 2006, the complainant lodged an appeal with the Court of Appeal in Warsaw, requesting the said court to revoke the decision of the Circuit Court on the application for a declaration of enforceability concerning the judgment of the foreign court. The complainant argued that the Council Regulation (EC) No 44/2001 might not be applied in the case, as the judgment of the foreign court had been issued in criminal proceedings, and also that the declaration of enforceability of that judgment was manifestly contrary to public policy in the Republic of Poland. In its decision of 9 March 2007 (Ref. No. VI ACz 1877/06), the Court of Appeal in Warsaw, 6th Civil Division, dismissed the appeal of the complainant. The court determined that the application for a declaration of enforceability of the judgment issued

by the Court of Appeal in Brussels was justified in the light of the Council Regulation (EC) No 44/2001. The said decision of the Court of Appeal in Warsaw is legally effective, and it may not be appealed against.

1.2. To substantiate her constitutional complaint, the complainant presented the following arguments:

The complainant stated that the challenged provisions of the Council Regulation (EC) No 44/2001 did not provide for any submissions to be made in first instance proceedings concerning the enforceability of a judgment of a foreign court by the participant against whom the judgment had been issued by the foreign court. In the present case, the right to a fair trial in first instance proceedings was guaranteed only to the applicant, since the complainant – as a participant – had no right to take part in the proceedings. In the opinion of the complainant, within the meaning of Article 45 of the Constitution, each court proceedings should be based on the principle of a fair and public hearing. What constitutes the essence of fair court proceedings is an adversarial procedure, i.e. the right of a party to present evidence, assertions and arguments. In her view, the law in accordance with which a party is not informed by a court about proceedings instituted against the party, is not consistent with the principle of a fair and public hearing, as well as with the party's right to two stages of proceedings. Even in the event where – as in the present case – the party had accidentally learnt about the proceedings pending against her, the party still had no opportunity to participate in the proceedings and to present her arguments, due to the wording of the challenged provisions of the Council Regulation (EC) No 44/2001. Presenting evidence by the complainant in the proceedings before the court of first instance, in order to argue that the application for a declaration of enforceability was unjustified, had no effect on the adjudication in that case, since the said court could not take the evidence into account. Consequently, according to the complainant, the proceedings before the court of first instance were reduced to fiction, as the challenged provisions of the Council Regulation (EC) No 44/2001 do no provide for the party against whom enforcement is sought (the debtor) to have the right to participate in proceedings and make any submissions.

In the view of the complainant, the essence of proceedings before a circuit court as the court of first instance is inconsistent with the principle of appeal against judgments and decisions made at first stage, which arises from Article 78 and 176(1) of the Constitution. The complainant does not question that, in the court proceedings carried out

on the basis of the challenged provisions of the Council Regulation (EC) No 44/2001, she maintained the right to lodge an appeal against a ruling issued by the court of first instance. However, the complainant argues that the principle of two stages of court proceedings does not consist solely in the possibility of appealing rulings issued by a court of lower instance, but means the right to actively participate in proceedings before a court of any instance. According to the complainant, in the case under discussion, one may not speak of the right to appeal against rulings issued in first instance, since - in those proceedings - the dispute was not examined as to its substance. In the proceedings before a circuit court only an applicant may participate and only his/her arguments are presented. By contrast, in appeal proceedings, the case was not examined anew, as it was only then that the participants presented evidence and their arguments. Consequently, in the view of the complainant, proceedings for the issue of a declaration of enforceability concerning a judgement of a foreign court, in accordance with the challenged provisions of the Council Regulation (EC) No 44/2001, are in fact one-stage proceedings, which is inconsistent with Article 78 and Article 176(1) of the Constitution.

In the opinion of the complainant, the challenged provisions of the Council Regulation (EC) No 44/2001 also infringe the principle of equality, provided for in Article 32 of the Constitution, which stipulates the requirement of equal treatment by public authorities, including the organs of the judiciary. In court proceedings, parties should have equal rights as regards presenting their arguments. In the case of proceedings based on the challenged provisions of the Council Regulation (EC) No 44/2001, only one of the parties (the applicant) had the right to present his arguments and statements to the court of first instance.

Also, the complainant indicated that Article 8 of the Constitution set out the absolute primacy of the Constitution in the system of sources of law. In the case where an EU regulation imposes restrictions on the rights and freedoms set out in the Constitution, there is no obligation to adhere to the provisions of that legal act. Article 91(3) of the Constitution concerns only the primacy of EU law in the event of its unconformity with statutes. The above regulation does not, however, concern the provisions of the Constitution.

2. In a letter of 22 March 2010, the Public Prosecutor-General requested that the proceedings be discontinued on the basis of Article 39(1)(1) of the Constitutional Tribunal

Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act) on the grounds that issuing a ruling was inadmissible.

The Public Prosecutor-General expressed the view that the subject of a constitutional complaint might only be the statutes and normative acts of the organs of the state mentioned in Article 188(1)-(3) of the Constitution, ruling out the possibility of examining international agreements, referred to in Article 188(1), in the course of review proceedings commenced by way of constitutional complaint, as such agreements were not normative acts. Taking into consideration the content of Article 79(1) and Article 188(1)-(3) of the Constitution, the Public Prosecutor-General stated that it was the statutes and normative acts of central state organs that were the subject of a constitutional complaint. Neither the acts of local self-government law nor the norms of international law may be the subject of the complaint, although one could theoretically imagine that a final decision referred to in Article 79(1) might rely on such bases.

The Public Prosecutor-General stated that the provisions of the Treaties ruled out the competence of the courts of the EU Member States, including their constitutional courts, as regards adjudication on the invalidity or interpretation of the acts of EU law. Adjudicating in the indicated cases by the courts of the Member States, including constitutional courts, should be regarded, in the light of the provisions of the Treaties, as the manifestation of the non-fulfilment of the unconditional obligations of the Member States. The Public Prosecutor-General also shared the view presented in the decision of 17 December 2009, in the case U 6/08, in which the Constitutional Tribunal stated that it had no jurisdiction to review the constitutionality of directly applicable EU secondary legislation.

For the above reasons, the Public Prosecutor-General requested that the proceedings be discontinued on the grounds that issuing a ruling was inadmissible.

3. The Sejm and the Minister of Foreign Affairs were summoned to participate in the proceedings by the Presiding Judge of the bench, on the basis of Article 38(4) of the Constitutional Tribunal Act.

4. Acting on behalf of the Sejm, in a procedural letter of 26 July 2010, the Marshal of the Sejm presented the view that Article 41 of the Council Regulation (EC)

No 44/2001 was not inconsistent with Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution, with Article 45(1) in conjunction with Article 32(1) of the Constitution, as well as with the principle of a public hearing, expressed in Article 45(1) of the Constitution. Moreover, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the proceedings before the Constitutional Tribunal should be discontinued as to the remainder, on the grounds that issuing a ruling is inadmissible.

According to the Sejm, the review of the acts of EU secondary legislation by the Constitutional Tribunal, in the course of review proceedings commenced by way of constitutional complaint, is admissible. In the opinion of the Marshal of the Sejm, the content and structure of Article 188 of the Constitution do not exclude the review of the acts of EU secondary legislation, in the course of review proceedings commenced by way of constitutional complaint, from the jurisdiction of the Tribunal. The Marshal of the Sejm made reference to the judgment of the Constitutional Tribunal in the case SK 42/02, which concerned the review of the acts of local self-government law, in the course of review proceedings commenced by way of constitutional complaint. In the said judgment, the Tribunal stated that, in the course of review proceedings commenced by way of constitutional complaint, it was also admissible to challenge other normative acts, than the acts indicated in Article 188(1)-(3) of the Constitution. In the opinion of the Marshal of the Sejm, the Council Regulation (EC) No 44/2001 may be included among the "normative acts" referred to in Article 79(1) of the Constitution. What weighs in favour of the inclusion in the category of normative acts is not the national character of the organ that enacts a given legal act. Moreover, the normative character of a given legal act is determined by its content. An EU regulation has a general and abstract character, and also is directly applicable in the national legal systems.

What weighs in favour of the admissibility of reviewing the EU secondary legislation by the Constitutional Tribunal is the Tribunal's systemic roles of: a guarantor of the primacy of the Constitution in the system of sources of law and an organ of protection of constitutional rights and freedoms of the individual. The aptness of the thesis about the admissibility of the Tribunal's review of every normative act, in the course of review proceedings commenced by way of constitutional complaint, stems – in the view of the Sejm – from two circumstances. Firstly, such interpretation aims at enhancing protection of the principle of primacy of the Constitution in the system of sources of law, and hence it ensures the internal coherence of the system. Secondly, it allows for the fulfilment of the

basic function of a constitutional complaint, which is to guarantee the constitutional rights and freedoms of the individual.

With regard to the challenged provisions, the Marshal of the Sejm indicated that, in fact, the complainant challenged the legal norm expressed in Article 41 of the Council Regulation (EC) No 44/2001, pursuant to which the judgment should be declared enforceable immediately on completion of the formalities in Article 53 and the party against whom enforcement was sought should not at that stage of the proceedings be entitled to make any submissions on the application. Not only were Articles 36, 40 and 42 of the Council Regulation (EC) No 44/2001, indicated in by the complainant, not cited in the operative parts of decisions, but above all they did not constitute either a formal or a substantive element of the decisions and the argumentation presented in the statements of reasons for the decisions issued in the complainant's case. Consequently, in the view of the Sejm, the proceedings within the scope of the review of constitutionality of Articles 36, 40 and 42 of the Council Regulation (EC) No 44/2001 should be discontinued on the grounds that issuing a ruling is inadmissible.

Subsequently, the Marshal of the Sejm made reference to the higher-level norms for the constitutional review, indicated in the constitutional complaint. He indicated that it had been consistently assumed in the previous jurisprudence of the Tribunal that, in review proceedings commenced by way of constitutional complaint, it was inadmissible to regard Article 8 of the Constitution as a higher-level norm for review. Issuing a ruling by the Tribunal within that scope is inadmissible and the proceedings should be subject to discontinuation. As regards the other higher-level norms for the review, indicated in the constitutional complaint, the Marshal of the Sejm stated that, in fact, the complainant alleged that the challenged regulation infringed the principle of equality expressed in Article 32(1) of the Constitution, the principle of a public hearing, arising from Article 45(1) of the Constitution, as well as the principle of two stages of court proceedings, as provided for in Article 78 and Article 176(1) of the Constitution. As a result, the Sejm requested that the proceedings with regard to the other higher-level norms for the constitutional review, indicated by the complainant, be discontinued.

The Marshal of the Sejm pointed out that the Council Regulation (EC) No 44/2001, governing the simplified procedure for declaring the enforceability of judgments, left certain scope to be regulated by the national law of particular Member States. In accordance with Article 39(1) of the Council Regulation (EC) No 44/2001, which indicates competent authorities to carry out the first stage of proceedings for the

issue of a declaration of enforceability concerning a judgment by a court of another Member State; the application shall be submitted to "the court or competent authority". Pursuant to Annex II to the Council Regulation (EC) No 44/2001, applications for a declaration of enforceability may be submitted to a circuit court (Pl *sąd okręgowy*). An appeal against the ruling of the circuit court may be lodged with a court of appeal (Pl *sąd apelacyjny*), whereas the ruling of the court of second instance may be appealed against with a cassation appeal (Pl *skarga kasacyjna*). In the opinion of the Marshal of the Sejm, regardless of procedural and institutional solutions which were adopted by Poland - within the scope of freedom provided for by the EU law – the literal interpretation of the Council Regulation (EC) No 44/2001 leaves no doubt that the decision on the application for a declaration of enforceability does not have, at the first stage of proceedings – which are *ex parte* in character - be issued by a court. The fact that the decision on the application for a declaration of enforceability concerning a judgment by another Member State may be given by an authority other than a court is closely related to the subject of rulings issued by relevant authorities indicated by the Member States. The said decisions – made at the first stage of proceedings – do not resolve any disputes between the creditor and the debtor, and they do not result from the examination of the disputes. At this stage, the subject of assessment comprises the formal requirements of the application, the enforceability of a given judgment as well as the admissibility of applying the Council Regulation (EC) No 44/2001, as regards its scope ratione materiae and its territorial scope. The solutions are to simplify and expedite proceedings, and also are aimed at achieving the goal of the act of EU secondary legislation under discussion, i.e. the free movement of judgments. In the light of the above remarks, the Marshal of the Sejm stated that the complainant's demand that all standards of the right to a fair trial be met – during the first stage of proceedings for the issue of a declaration of enforceability concerning a judgment from another EU Member State - was constitutionally groundless. The Council Regulation (EC) No 44/2001 does not assign a judicial character to the stage of *exequatur* proceedings under analysis. The above conclusion weighs in favour of the lack of common points of reference and a necessary connection, which would enable assessment of the mutual relation between the provision of EU secondary legislation, being under examination, and Article 45 of the Constitution, regardless of the fact which aspect of the right to a fair trial would be taken into account. In the view of the Marshal of the Sejm, the higher-level norm for the review indicated by the complainant is inadequate, and therefore Article 41 of the

Council Regulation (EC) No 44/2001 is not inconsistent with Article 45(1) of the Constitution.

In the opinion of the Marshal of the Sejm, the procedure for the issue of a declaration of enforceability of judgments, which is regulated at the level of EU law, does not prevent its elements from being shaped in Poland in compliance with the constitutional principle of a public hearing, the principle of appeal against judgments and decisions made at first stage and the principle of equality of parties. However, the Marshal of the Sejm voiced an opinion that the current model of redress procedures, adopted as a result of the application of the Council Regulation (EC) No 44/2001, was consistent with the Constitution.

5. In a letter of 18 August 2010, the Minister of Foreign Affairs requested that the proceedings be discontinued, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling was inadmissible.

The Minister of Foreign Affairs indicated that the Polish law did not clearly determine the admissibility of the constitutional review of an EU regulation. In the light of Article 188(1)-(3) of the Constitution, there is no doubt that the Constitutional Tribunal has no jurisdiction to examine the conformity of an EU regulation to the Constitution. However, what raises doubts as to the scope of the Tribunal's jurisdiction is the ambiguous wording of Article 188(5) of the Constitution, which in conjunction with Article 79(1) of the Constitution constitutes the basis of a constitutional complaint. From the point of view of the present case, the priority is to determine whether the term "another normative act", used in Article 79(1) of the Constitution, also encompasses the acts of EU secondary legislation, and in particular EU regulations. In the view of the Minister of Foreign Affairs, the character of an EU regulation appears to correspond to the concept of a normative act, upon which basis a court or organ of public administration has made a final decision on the rights or freedoms of the complainant.

Further on, the Minister of Foreign Affairs made reference to the principle of the primacy of EU law over the national law, which had been established in the jurisprudence of the Court of Justice of the European Union. The adoption of the principle of the primacy of EU law means that no organ of the state, including constitutional courts, may question the validity of the norms of EU law, by revoking them or defaulting on the application thereof. The only institution which is competent to adjudicate upon the validity of the acts

of EU law is the Court of Justice of the European Union. The Minister of Foreign Affairs indicated that one may not overlook the possible effects of the declaration of unconstitutionality of an EU regulation, in the case of allowing for the possibility of a review of the acts of EU secondary legislation. A ruling on unconstitutionality entails that a given act, or some of its provisions, shall cease to have effect. The Tribunal's ruling about the unconstitutionality of an EU regulation could not lead to such results at the level of international law, as this would mean the possibility of adjudicating, by an organ of one of the Member States, that a given act of EU law shall cease to have effect in the legal system of that State. The derogation of the unconstitutional provision of an EU regulation, or a prohibition against the application of the unconstitutional norm in the Polish legal system, would result in the non-compliance of the actions of state organs with the EU law, and consequently – pursuant to Article 258 of the Treaty on the Functioning of the European Union – in Poland's liability for the infringement of EU law. The Member State is liable in damages for the infringement of EU law, also in the case where such an infringement stems from the ruling of a court of highest instance.

The Minister of Foreign Affairs drew attention to the fact that the Council Regulation (EC) No 44/2001 was an act of EU law which had been adopted by Poland prior to its accession to the European Union. Therefore, the Regulation constituted part of *acquis communautaire*, adopted by Poland at the moment of becoming a Member State of the European Union. By accepting the provisions of the Treaty of Accession, Poland adopted the body of Community law, which comprised not only the established jurisprudence of the Court of Justice (including the principle of primacy), but also the provisions of the Council Regulation (EC) No 44/2001. The review of the constitutionality of such an act was implied in the act of sovereign accession to the European Union. The inadmissibility of the subsequent review of such legal act also stems, in this case, from the delegation of competence vested in the organs of state authority, in accordance with Article 90(1) of the Constitution.

Consequently, according to the Minister of Foreign Affairs, if the Constitutional Tribunal recognised its jurisdiction within the scope of adjudicating on the validity of the provisions of EU secondary law, and possibly adjudicated on the invalidity of the Council Regulation (EC) No 44/2001, this would mean that the Republic of Poland breached the Treaty obligations. For the above reasons, a constitutional complaint in the present case is inadmissible.

II

At the hearing on 16 November 2011, the representative of the complainant withdrew the constitutional compliant with regard to Articles 36, 40 and 42 of the Council Regulation (EC) No 44/2001 as well as Article 8, Article 32(2), Article 45(2) and Article 176(2) of the Constitution, requesting that the proceedings be discontinued in that regard. As a result, the representative of the complainant requested the Tribunal to determine the conformity of Article 41 of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution, to Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution, as well as to Article 32(1) in conjunction with Article 45(1) of the Constitution. As regards the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution, the representative of the complainant entirely agreed with the views presented by the Sejm. He indicated that the inadmissibility of the review of such legal acts did not arise from Article 188 of the Constitution, and in particular from Article 188(5) of the Constitution, which concerned constitutional complaints. The review of normative acts, in the course of review proceedings commenced by way of constitutional complaint, should be carried out regardless of the fact whether a given legal act has been issued by the organs of the Polish state or the organs of the European Union. The representative of the complainant indicated that the effect of a ruling declaring the unconstitutionality of Article 41 of the Council Regulation (EC) No 44/2001 might not be the invalidity of the said provision, but the exclusion of the application thereof in the territory of the Republic of Poland.

The representative of the Public Prosecutor-General maintained his stance about the inadmissibility of reviewing the acts of EU secondary legislation by the Constitutional Tribunal. Additionally, he emphasised that Article 27 and Article 52(1) of the Constitutional Tribunal Act did not provide for measures which would allow the representatives of the Council of the European Union, as the organ of the EU which issued the challenged normative act, to participate in proceedings before the Tribunal. Moreover, Article 190(2) of the Constitution does not provide for the possibility of publishing a ruling of the Constitutional Tribunal in the Official Journal of the European Union. In case the Tribunal did not take into account the motion for the discontinuation of the proceedings, the representative of the Public Prosecutor-General presented the view that Article 41 of the Council Regulation (EC) No 44/2001 was consistent with Article 45(1) in conjunction

with Article 31(3) of the Constitution as well as was not inconsistent with Article 78 and Article 176(1) of the Constitution.

The representatives of the Sejm and the representatives of the Minister of Foreign Affairs, who took part in the hearing as authorities summoned to participate in the proceedings pursuant to Article 38(4) of the Constitutional Tribunal Act, maintained their stances presented in writing.

III

The Constitutional Tribunal has considered as follows:

1. The admissibility of the constitutional complaint.

1.1. What constitutes the subject of review in the present case is the provisions of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ L 12, 16.1.2001, p. 1, as amended; hereinafter: the Council Regulation (EC) No 44/2001), i.e. an act of the secondary legislation of the European Union (formerly: the European Community). Never before has the Constitutional Tribunal examined a case where it had to determine the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution. Hitherto, the Tribunal has only examined the conformity of the Treaties to the Constitution, which constitute the EU primary law (cf. the judgment of 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/ 2005 item 49, the judgment of 24 November 2010, Ref. No. K 32/09, OTK ZU No. 9/A/2010, item 108) as well as the statues implementing the EU secondary legislation (cf. the judgment of 27 April 2005, Ref. No. P 1/05, OTK ZU No. 4/A/2005 item 42, the judgment of 5 October 2010 , Ref. No. SK 26/08, OTK ZU No. 8/A/2010, item 73).

Bearing in mind the special character of the normative which has been challenged in the present case as regards its constitutionality, a prerequisite for examining the constitutional complaint as to its substance is examination whether there are no negative premisses which would cause the discontinuation of proceedings. The Constitutional Tribunal has the power to carry out such a review at any stage of proceedings.

Therefore, it should be considered whether legal acts enacted by the EU institutions may constitute the subject of review, in the course of review proceedings commenced by way of constitutional complaint, as set out in Article 79(1) of the Constitution.

1.2. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be submitted to the Tribunal for it to determine "the conformity to the Constitution of a statute or another normative act", upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. What is of fundamental importance in the present case is to determine whether an EU regulation is "another normative act" within the meaning of Article 79(1) of the Constitution, and hence whether it may constitute the subject of a constitutional complaint.

First of all, this entails determining a relation between Article 188(1)-(3) and Article 79(1) of the Constitution, and establishing whether the subject of constitutional complaints - to which Article 188(5) of the Constitution refers to – may be the legal acts mentioned in Article 188(1)-(3) of the Constitution, or whether this could also be other normative acts. Various views are presented on that issue in the literature on the subject. What is characteristic is that they were presented primarily in the context of the admissibility of reviewing the conformity of the acts of EU secondary legislation to the Constitution by the Constitutional Tribunal (cf. the presentation of various viewpoints of the representatives of the doctrine in that regard, T. Jaroszyński, *Rozporządzenie Unii Europejskiej jak składnik systemu prawa obowiązującego w Polsce*, Warszawa 2011, pp. 337-338, K. Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, pp. 323-328). Moreover, the said issue refers to the acts of local self-government law and collective labour agreements.

To put it succinctly, in the opinion of one group of authors, the scope of jurisdiction of the Tribunal has exhaustively been specified in Article 188(1)-(3) of the Constitution, which enumerates legal acts that are subject to review by the Tribunal, by mentioning the types of such acts or by indicating them by pointing out their characteristics: "legal provisions issued by central State organs" (where legal provisions mean provisions containing general and abstract norms). Therefore, legal acts which are not mentioned in the indicated provision may not be the subject of review by the Constitutional Tribunal. With reference to the acts of EU secondary legislation, it is noted

in the literature on the subject that those legal acts neither have the status of international agreements nor may be classified as provisions issued by central state organs. Consequently, Article 188(1)-(3) of the Constitution determines that the EU secondary legislation does not fall within the scope of the Tribunal's jurisdiction to conduct a judicial review.

By contrast, the authors belonging to the other group share the view that the provisions of Article 188(1)-(3) of the Constitution do not fully indicate the scope ratione materiae of the jurisdiction of the Constitutional Tribunal. In their opinion, Article 188(5) mentions a separate power of the Tribunal, namely the power to adjudicate on constitutional complaints, as referred to in Article 79(1) of the Constitution. The last indicated provision stipulates that "(...) everyone whose constitutional freedoms or rights have been infringed, shall have the right to appeal to the Constitutional Tribunal for its judgment on the conformity to the Constitution of a statute or another normative act (...)". In accordance with the unquestionable stance of science of law, a normative act is every legal act which contains norms that are general (addressed to a specified group of addressees) and that set conduct which is, in principle, repetitive (abstract legal act). Such a substantive concept of a normative act has been assumed in the previous jurisprudence of the Constitutional Tribunal. As early as in the ruling of 7 June 1989 (Ref. No. U. 15/88, OTK of 1989, item 10), relying on the views presented in the literature on the subject, the Tribunal stated that: "a normative act is a legal act that establishes legal norms which are general in character (and thus addressed to a certain group of addressees singled out due to a common characteristic shared by them) as well as abstract in character (i.e. they establish certain models of conduct)". The analysis of the previous jurisprudence of the Tribunal indicates that the scope of normative acts, the challenging of which was regarded as admissible in the course of review proceedings commenced by way of constitutional complaint, is broader than what follows from Article 188(1)-(3) of the Constitution. However, such a view was presented only in exceptional cases. For instance, the Constitutional Tribunal allowed a constitutional complaint which challenged certain provisions of local self-government law to be examined on its merits, but the proceedings did not end with a judgment (see the decision of 6 October 2004, Ref. No. SK 42/02, OTK ZU No. 9/A/2004, item 97). Likewise, in the decision of 6 February 2001, Ref. No. Ts 139/00 (OTK ZU No. 2/2001, item 40), the Tribunal recognised the possibility of filing a constitutional complaint against the acts of local self-government law, as long as they were normative in character. In the view of the Tribunal, "the scope of provisions

which are subject to review (the subject of a constitutional complaint) is set autonomously and exhaustively by Article 79(1) of the Constitution of the Republic of Poland".

In the present case, the Constitutional Tribunal assumes that the scope ratione materiae of normative acts which may be subject to constitutional review, in the course of review proceedings commenced by way of constitutional complaint, has been set out in Article 79(1) of the Constitution, autonomously and independently from Article 188(1)-(3). Indeed, the examination of constitutional complaints constitutes a separate kind of proceedings. The arguments for such a conclusion are threefold.

Firstly, this is indicated by the systematics of the Constitution. Article 188, which regulates the scope of the jurisdiction of the Constitutional Tribunal, stipulates in its point 5 that the Constitutional Tribunal shall adjudicate on constitutional complaints, as specified in Article 79(1). The last-mentioned provision is also referred to in Article 191(1)(6) of the Constitution, with regard to the subjects that may make application to the Constitutional Tribunal to institute review proceedings. This indicates that, when distinguishing between several types of proceedings before the Constitutional Tribunal, the constitution-maker has rendered proceedings involving the examination of constitutional complaints separately from the other types of proceedings before the Tribunal.

Secondly, Article 188(1)-(3) of the Constitution regulates the powers of the Tribunal within the scope of reviewing the hierarchical conformity of normative acts. It should also be added that the powers in that regard have been divided between the Constitutional Tribunal and administrative courts, which are authorised to adjudicate "on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration" (Article 184 of the Constitution). Thus, the powers to adjudicate on the hierarchical conformity of normative acts have been clearly separated from the powers to adjudicate on constitutional complaints.

Thirdly, the basic function of a constitutional complaint is the protection of constitutional rights and freedoms of the individual. Therefore, it would be unjustified to assume an interpretation of Article 188 of the Constitution which would narrow down the subject of review carried out in the course of review proceedings commenced by way of constitutional complaint, for such an interpretation would not facilitate the effective protection of rights and freedoms of the individual. By contrast, the view that every normative act may be the subject of the Tribunal's review, as long as it constitutes basis upon which a court or organ of public administration has made a final decision on the individual's rights or freedoms – is definitely justified in the light of constitutional values.

The Constitutional Tribunal indicates that the situation in the present case is different from the case U 6/08, which ended with the decision of 17 December 2009 (OTK No. 11/A/2009, item 178). In the statement of reasons for that decision, the Tribunal *obiter dicta* expressed the view that the constitutional review of norms of EU secondary legislation was inadmissible. However, the proceedings in that case were instituted by an application submitted by a group of Sejm Deputies, and they concerned an abstract review of norms. In such context, the scope of jurisdiction of the Tribunal is exhaustively specified in Article 188(1)-(3) of the Constitution.

1.3. The subject of a constitutional complaint may be a statute or another normative act. The jurisprudence of the Constitutional Tribunal has hitherto showed the adoption of the so-called substantive concept of a normative act (cf. point 1.2.). The term "normative act" has so far been referred, in the previous jurisprudence of the Tribunal, to the acts which result from the law-making activity of the organs of the Polish state. However, in its judgment of 18 December 2007, Ref. No. SK 54/05 (OTK ZU No. 11/A/2007, item 158), the Tribunal adjudicated that a normative act within the meaning of Article 79(1) of the Constitution might also be an international agreement. In the said case, the complainant challenged the constitutionality of Protocol 4 to the Europe Agreement establishing an Association between the European Communities and their Member States, of the one part, and the Republic of Poland, of the other part, signed at Brussels on 16 December 1991.

In the opinion of the Constitutional Tribunal, a normative act within the meaning of Article 79(1) of the Constitution may not only be a normative act issued by one of the organs of the Polish state, but also – after meeting further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns the acts of EU law, enacted by the institutions of that organisation. Such legal acts constitute part of the legal system which is binding in Poland and they shape the legal situation of the individual.

1.4. The legal acts of the EU institutions are varied. The catalogue of the legal acts and the characteristics thereof are specified in Article 288 of the Treaty on the Functioning of the European Union (hereinafter: the TFEU; ex Article 249 of the Treaty establishing the European Community). Due to the subject of the present case, the Constitutional

Tribunal considers it indispensable to examine whether an EU regulation has the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

Pursuant to Article 288, second paragraph, of the TFEU: "A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States". Thus, the norms of a regulation are general and abstract in character. The addressees of the norms of a regulation are not only the Member States and the organs of those States, but also individuals (private parties).

The indicated thesis is confirmed by the jurisprudence of the Court of Justice of the European Union. What follows therefrom is that a regulation is "a measure which applies to objectively determined situations and produces legal effects with regard to categories of persons regarded generally and in the abstract" (the judgment of 5 May 1977, in the case 101/76, Koninklijke Scholten Honig, ECR 1977, p. 797). Also, the Court of Justice expressed the view that: "A measure does not cease to be a regulation because it is possible to determine more or less exactly the number or even the identity of the persons to whom it applies at any given time as long as it established that such application takes effect by virtue of an objective legal or factual situation defined by the measure in question in relation to its purpose" (the judgment of 30 September 1982 in the case 242/81, SA Roquette Frères, ECR 1982, p. 3213). In accordance with the established jurisprudence of the Court of Justice, "general application" is a criterion distinguishing a regulation from individual and specific legal acts, in particular decisions indicating the addressee. The essential characteristics of such decisions involve limiting the group of addressees to which they are addressed. Some authors compare an EU regulation to a statute in a national legal order (see D. Lasok, *Zarys prawa Unii Europejskiej*, Toruń 1995, p. 176).

Therefore, the Constitutional Tribunal states that an EU regulation bears the characteristics of a normative act within the meaning of Article 79(1) of the Constitution.

1.5. Another prerequisite for a constitutional complaint to be admissible is the fact that its subject must be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. When applying that requirement to EU regulations, it should be stated that they are legal acts which are directly applicable in the legal order of the Member States, and do not require implementation into national law (cf. the judgment of the Court of Justice of 10 October 1973 in the case 34/73,

F.LLI Variola SpA, ECR 1973, p. 981). They may constitute the legal basis of administrative decisions and court rulings in the Member States, including Poland.

The norms of EU regulations may be a source of the rights and obligations of individuals (cf. the judgment of the Court of Justice of 17 September 2002 in the case C-253/00, Antonio Muñoz y Cia SA, ECR 2002, p. 7289). When participating in proceedings before national courts, individuals and legal entities may rely on the norms of EU regulations and derive their rights therefrom. The doctrine and jurisprudence of the Court of Justice mention in this regard that the norms of EU law, including regulations, have a direct effect. The Court of Justice stated that the attribute of "direct effect" is assigned to the provisions of regulations which are clear and precise, and do not leave any margin of discretion to the authorities of the Member States (cf. the judgment of the Court of Justice of 24 October 1973 in the case 9/73, Schlüter, ECR 1973, p. 1135).

Taking the above into consideration, the Constitutional Tribunal states that EU regulations may contain norms upon which basis a court or organ of public administration has made a final decision on the individual's freedoms or rights or on his/her obligations specified in the Constitution.

At the same time, it should be noted that it is not always easy to determine whether a court or organ of public administration has actually made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution on the basis of EU law. Frequently, courts or the organs of public administration adjudicate on the basis of the Polish law, which has been enacted in order to implement the EU law. This concerns directives, and also – in some cases – regulations. Also, there can be a situation where the legal basis of an individual act of applying the law is a legal norm constructed on the basis of EU and Polish provisions. Determining what legal act constitutes the legal basis of a decision of a court or organ of public administration is essential for determining the subject of review carried out in accordance with Article 79(1) of the Constitution. Dispelling doubts in this regard will depend on, *inter alia*, determining the content of the provisions of EU law and their effects.

It should be stated in the conclusion that EU regulations, as normative acts, may be subject to constitutional review in the course of review proceedings commenced by way of constitutional complaint. The fact that they are the acts of EU law, also constituting part of the Polish legal order, results in a special character of the review conducted in such a case by the Constitutional Tribunal.

2. The secondary legislation of the European Union as the subject of constitutional review.

2.1. The stance presented in part III point 1.5 above, in accordance with which the norms of EU regulations may be the subject of constitutional complaints, is based on an analysis of the characteristics of the indicated category of the legal acts of EU secondary legislation, in the light of Article 79(1) of the Constitution. The said analysis needs to be supplemented and broadened in the context of the place and role of EU law in the Polish constitutional and legal order.

The Constitutional Tribunal has presented its views in that regard in numerous rulings, and in particular in the rulings concerning the Treaty of Accession (see the judgment in the case K 18/04) and the Treaty of Lisbon (see the judgment in the case K 32/09).

In the said judgments, the Constitutional Tribunal indicates that at present the legal order in Europe is – for the EU Member States – a multi-ingredient order: which encompasses the norms of the Treaties and those established by the EU institutions as well as norms enacted in the national order. Also, it is a dynamic system: the relation between the EU order and the national one keeps evolving along with the changes in the EU law. The Tribunal stated that, in the territory of the Republic of Poland, apart from the norms (provisions) enacted by the national law-maker, what also applies is regulations (provisions) created outside of the system of law-making organs of the Polish state.

2.2. EU regulations are normative acts whose position in the Polish constitutional system has been determined in Article 91(3) of the Constitution.

What at present constitutes the basis of the European Union as an international organisation is the following: the Treaty on European Union (hereinafter: the TEU) and the Treaty on the Functioning of the European Union. One of the constitutional principles of EU law is the principle of the primacy of EU law (formerly Community law) over the law of the Member States. The said principle has been formulated in the jurisprudence of the Court of Justice, but also it can be derived indirectly from various Treaty provisions, and in particular from those that specify the obligations of the Member States as regards the implementation of EU law (Article 4(3) of the TEU, Article 19(1) of the TEU, Article 291(1) of the TFEU and Articles 258-260 of the TFEU). What follows from Article 91(3) of the Constitution is the primacy of the norms of EU regulations in the event

of their unconformity with statutes. By contrast, the Constitution retains its superiority and primacy over all legal acts which are in force in the Polish constitutional order, including the acts of EU law. The said position of the Constitution is enshrined in Article 8(1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal.

In the judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal underlined that the Constitution remains – due to its special significance – "the the supreme law of the Republic of Poland" in relation to all international agreements binding the Republic of Poland. This also refers to ratified international agreements concerning the delegation of competence "in relation to certain matters". The Constitution takes precedence as regards having effect and being applied in the territory of the Republic of Poland. The indicated stance has also been confirmed in the Tribunal's judgment concerning the Treaty of Lisbon (Ref. No. K 32/09). That thesis, formulated in the context of the relation between the Constitution and the Treaties, should also be referred to the legal acts of the EU institutions.

Due to the indicated status of the Constitution as the supreme law of the Republic of Poland, it is admissible to examine whether the norms of EU regulations are consistent therewith.

2.3. The Constitutional Tribunal points out that it is necessary to draw a distinction between examining the conformity of the acts of EU secondary legislation to the Treaties, i.e. the EU primary law, on the one hand, and examining their conformity to the Constitution, on the other. The institution that ultimately determines the conformity of EU regulations to the Treaties is the Court of Justice of the European Union, and as regards the conformity to the Constitution – the Constitutional Tribunal.

The Member States have competence to bring actions to the Courts of the European Union, for them to review the legality of the acts of EU secondary legislation (Article 263 of the TFEU). Moreover, the courts of the Member States refer questions, in relation to pending proceedings, to the Court of Justice of the European Union for a preliminary ruling concerning the validity of acts of the institutions, bodies, offices or agencies of the Union (Article 267 of the TFEU). The Court of Justice has expressed the view that the national courts have no jurisdiction to declare that the acts of Community institutions are invalid. The Courts of the European Union have exclusive jurisdiction in

that regard (cf. the judgment of the Court of 22 October 1987, in the case C-314/85, Foto-Frost, ECR 1987, p. 4199).

2.4. Particular Member States may have influence on the content of EU regulations and other acts of EU secondary legislation in the course of their enactment. What should be emphasised here is the role of the representatives of the Member States (ministers) in the Council, which is an EU institution involved in enacting EU legislative acts, together with the European Parliament (cf. Article 16(1) of the TEU and Article 289(1) and (2) of the TFEU). An essential role is also played by national Parliaments, which apart from being national law-makers, jointly participate in the process of enacting the EU law (Article 12 of the TEU and the Protocol on the role of national Parliaments in the European Union, annexed to the Treaty of Lisbon).

As the Constitutional Tribunal indicated in its decision of 19 December 2006, Ref. No. P 37/05, the Court of Justice safeguards the EU law. By contrast, the Constitutional Tribunal is to safeguard the Constitution. In such context, there may potentially be conflicts between the rulings issued by the Constitutional Tribunal and those delivered by the Court of Justice.

Taking the above into consideration, it should be stated that, also due to the content of Article 8(1) of the Constitution, the Constitutional Tribunal is obliged to perceive its position in such a way that - as regards fundamental matters concerning systemic issues - it is “the court which will have the last word” with regard to the Polish Constitution. The Court of Justice and the Constitutional Tribunal may not be juxtaposed as courts competing with each other. The point is not only to eliminate the overlapping of the jurisdiction of the two courts or concurrent rulings on the same legal issues, but also any dysfunctionality in relations between the EU legal order and the Polish one. What is essential is to take into consideration the indicated differences between the roles of the Court of Justice and the Constitutional Tribunal (see OTK ZU No. 11/A/2006, item 177).

2.5. Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is the need to maintain due caution and restraint in that regard. The EU law binds all Member States (currently 27). One of the systemic principles of EU law is the principle of sincere cooperation. Pursuant to Article 4(3) of the TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties.

The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. What would be difficult to reconcile with that principle is granting powers to particular Member States which would allow them to declare the norms of EU law to be no longer legally binding.

By contrast, within the meaning of Article 4(2) of the TEU, the Union shall respect the national identities of the Member States, inherent in their fundamental structures, political and constitutional. National identity and constitutional identity, which is the essential component thereof, have already been discussed by constitutional courts, including the Constitutional Tribunal (cf. the aforementioned judgment in the case K 32/09). Also, the Court of Justice makes reference in its jurisprudence to the necessity to take into account the national identities of particular Member States (cf. the judgment of 22 December 2010, in the case C-208/09 Sayn-Wittgenstein, not yet reported as well as the judgment of 12 May 2011, in the case C-391/09 Runevič-Vardyn, not yet reported).

2.6. In that context, attention should be drawn to the various ways of avoiding the state of non-conformity of EU law to the Constitution.

As it has been indicated above, the Constitution has been explicitly guaranteed the status of the supreme law of the Republic of Poland. At the same time, that regulation is accompanied by the requirement of respect and favourable regard for the regulations of international law that are properly drafted and binding in the territory of Poland. In the judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal emphasised that the subsystems of legal regulations which came from different law-making centres should co-exist on the basis of mutually acceptable interpretation and cooperative application. Any contradictions should be eliminated by applying interpretation that respects the relative autonomy of EU law and national law**.** Moreover, the said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. The said assumption gives rise to an obligation, on the part of the Court of Justice, to be favourably inclined towards national legal systems, whereas on the part of the Member States – the obligation to approach the EU norms with the utmost respect.

Additionally, the review of conformity of an EU regulation to the Constitution, conducted by the Constitutional Tribunal, should be regarded as independent, and also subsidiary, in relation to the jurisdiction of the Court of Justice.

When acceding to the European Union, the Republic of Poland delegated the competence of organs of public authority in relation to certain matters to the EU institutions (Article 90(1) of the Constitution). This also encompasses the delegation of competence to enact law. Consequently, the legal acts enacted by the EU institutions are binding in Poland. Pursuant to the principle of conferral (Article 5(1) of the TEU), which is fundamental to the law of the European Union, the competences of the Union, including law-making competences, shall be exercised only within the limits set by the Member States in the Treaties.

Moreover, the Republic of Poland accepted the division of powers with regard to the review of legal acts (cf. the judgment in the case K 18/04, cited above, and the judgment of 18 February 2009, Ref. No. Kp 3/08, OTK ZU No. 2/A/2009 item 9). The result of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU law and to ensure that the interpretation is observed consistently in all Member States, as well as to have an exclusive power to determine the conformity of the acts of EU secondary legislation to the Treaties and the general principles of EU law. In such context, one should analyse the subsidiary character of the jurisdiction of the Constitutional Tribunal to examine the conformity of EU law to the Constitution. Before adjudicating on the non-conformity of an act of EU secondary legislation to the Constitution, one should make sure as to the content of the norms of EU secondary legislation which are subject to review. This may be achieved by referring questions to the Court of Justice for a preliminary ruling, pursuant to Article 267 of the TFEU, as to the interpretation or validity of provisions that raise doubts. A similar view was presented by the Federal Constitutional Court of Germany in its judgment of 6 June 2010 in the case Honeywell (Ref. No. 2 BvR 2661/06).

As a result of the ruling of the Court of Justice, it may turn out that he content of the challenged EU norm is consistent with the Constitution. Another possibility is that the Court of Justice adjudicates on the non-conformity of the challenged provision to the EU primary law. In those instances, issuing a ruling by the Constitutional Tribunal would be useless. Although the Court of Justice and the Constitutional Tribunal differ as regards the scope of jurisdiction, still – due to the similarity of the values enshrined in the Constitution and the Treaties (cf. part III, point 2.10), there is a considerable likelihood that

the assessment of the Court of Justice will be analogical to the assessment of the Constitutional Tribunal.

2.7. What needs to be considered is the effects of a judgment of the Constitutional Tribunal in the case of adjudication that the norms of EU secondary legislation are inconsistent with the Constitution. In the context of the acts of Polish law, the said non-conformity results in declaring the unconstitutional norms to be no longer legally binding (Article 190(1) and (3) of the Constitution). With regard to the acts of EU secondary legislation, such a result would be impossible, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. The consequence of the ruling of the Constitutional Tribunal would be to rule out the possibility that the acts of EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland. Therefore, the ruling of the Constitutional Tribunal would result in suspending the application of the unconstitutional norms of EU law in the territory of the Republic of Poland.

What should be noted is that such a consequence of the Tribunal's ruling would be difficult to reconcile with the obligations of a Member State and the aforementioned principle of sincere cooperation (Article 4(3) of the TEU). The said situation could lead to proceedings against Poland conducted by the European Commission and an action brought against Poland before the Court of Justice of the European Union for the infringement of obligations under the Treaties (Articles 258-260 of the TFEU).

Undoubtedly, the ruling declaring the non-conformity of EU law to the Constitution should have the character of *ultima ratio*, and ought to appear only when all other ways of resolving a conflict between Polish norms and the norms of the EU legal order have failed. In its judgment concerning the Treaty of Accession (Ref. No. K 18/04), the Constitutional Tribunal indicated that, in such situations, there were three possible reactions in Poland to the occurrence of non-conformity between the Constitution and the EU law: a/ amending the Constitution, b/ taking up measures aimed at amending the EU provisions, or c/ taking a decision to withdraw from the European Union. Such a decision should be made by the Polish sovereign, i.e. the Polish Nation, or the organ of the state which, in accordance with the Constitution, may represent the Nation.

Leaving aside the last solution, which should be reserved for the exceptional cases of the most serious and irreconcilable conflicts between the bases of the constitutional order of the Republic of Poland and the EU law, after the Constitutional Tribunal issues the

ruling declaring the non-conformity of particular norms of EU secondary legislation to the Constitution, measures should be undertaken forthwith in order to eliminate the conflict.The constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of the Tribunal's ruling be deferred in time, pursuant to Article 190(3) of the Constitution. A similar view was already presented by the Constitutional Tribunal in its judgment of 27 April 2005, in the case P 1/05, which concerned the European arrest warrant (OTK ZU No. 4/A/2005, item 42). In the said judgment, the Constitutional Tribunal deferred the date on which a statute implementing certain provisions of EU law was to lose its binding force, mentioning the constitutional obligation of the Republic of Poland to respect international law binding upon it, and also due to the fact that Poland and other EU Member States are bound by shared systemic principles aimed at ensuring the proper administration of justice.

2.8. The jurisprudence of the constitutional courts of the EU Member States (constitutional councils, supreme courts) that concerns the place of EU law in the national legal orders is very extensive (cf. *Relacje między prawem konstytucyjnym a prawem unijnym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej,* K. Zaradkiewicz (ed.), Warszawa 2011). Generally, the rulings of the constitutional courts concerned two categories of issues. Firstly, they stemmed from the review of conformity of the Treaties constituting the basis of the Union, i.e. the EU primary law, to particular constitutions. The said review was usually carried out in relation to subsequent amendments made to the Treaties or, in the case of new countries acceding to the Union; in the latter case, also, the Treaties of Accession were the subject of the review. Secondly, the rulings of the constitutional courts concerned the constitutionality of statutes or other national legal acts which implemented the EU law or the content of which was otherwise related to the membership in the European Union. In fact, this category comprises the largest number of rulings.

It should be noted that only a direct review of conformity of the acts of EU secondary law to the national constitutions was carried out only in exceptional instances, as it is in the present case. This confirms the thesis that there is certain caution in that regard. In this context, reference should be made to the jurisprudence of the Federal Constitutional Court of Germany – the decision of 22 October 1986, in the case "Solange II" (Ref. No. 2 BvR 197/83) and the order of 7 June 2000, in the case

Bananenmarktordnung (Ref. No. 2 BvR 1/97). In these cases, no rulings on the merits (judgments) were issued, cf. part III, point 8.2.

2.9. In the context of the present case, it should be considered, in greater detail, what kind of non-conformity of EU secondary legislation to the Constitution may be the subject of review in the course of review proceedings commenced by way of constitutional complaint. Due to the content of Article 79(1) of the Constitution, it should be assumed that the point is the allegation that the norms of EU secondary legislation infringe the constitutional rights and freedoms of the individual, and in particular those mentioned in the provisions of Chapter II of the Constitution.

The Constitutional Tribunal has previously expressed the view that the lower level of protection of the individual's rights that arises from the EU law, in comparison with the level of protection guaranteed by the Constitution, would be unconstitutional. The constitutional norms from the realm of the rights and freedoms of the individual set a threshold which may not be lowered or challenged as a result of the introduction of EU regulation. Interpretation "consistent with the EU law" has its limits. It may not lead to results which contradict the explicit wording of the constitutional norms and which are incompatible with the minimum of the guarantees provide by the Constitution (cf. the aforementioned judgement in the case K 18/04).

The scope of the powers of an international organisation a member of which is the Republic of Poland should be delineated in such a way so that the protection of human rights could be guaranteed to a comparable extent as in the Polish Constitution. The comparability concerns the catalogue of the rights, on the one hand, and the scope of admissible interference with the rights, on the other. The requirement of appropriate protection of human rights pertains to their general standard, and does not imply the necessity to guarantee identical protection of each of the rights analysed separately (cf. likewise K. Wojtyczek, *op.cit*, pp. 285-286).

2.10. What should be noted is that the protection of fundamental rights has been assigned great significance in the law of the European Union. The Constitutional Tribunal has already drawn attention to that fact, emphasising that the consequence of common axiology of the legal systems, shared by all the Member States, is the fact that the EU law does not emerge in an abstract European area and is free from the influence of the Member States and their communities. It is not created in an arbitrary way by the EU institutions,

but it results from joint actions of the Member States (cf. the aforementioned judgment in the case K 18/04, as well as the confirmation of the said stance in the judgement in the case K 32/09). Moreover, both the Polish law and the EU law include the principle of proportionality. These circumstances diminish the risk that there will be different standards of protection of fundamental rights. The protection of fundamental rights in the EU law was initially based on the jurisprudence of the Court of Justice, and later on it had its basis in the Treaty norms (currently it arises from Article 6 of the TEU). In accordance with Article 6(1) of the TEU, the Union recognises the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties. Pursuant to Article 6(2) of the TEU, the Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms (Journal of Laws - Dz. U. of 1993 No. 61, item 284, as amended; hereinafter: the Convention). At present, the European Union is carrying out negotiations as regards acceding to the Convention. In accordance with Article 6(3) of the TEU, fundamental rights, as guaranteed by the Convention and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law. The extensive catalogue of rights, freedoms and principles included in the Charter of Fundamental Rights stems, to a large extent, from the European Convention for the Protection of Human Rights and Fundamental Freedoms; the parties to the Convention also include the Republic of Poland. Pursuant to Article 52(3) and (4) of the Charter of Fundamental Rights, in so far as this Charter contains rights which correspond to rights guaranteed by the Convention, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions. By contrast, on the basis of Article 53 of the Charter, nothing in the Charter shall be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognised, in their respective fields of application, by Union law and international law and by international agreements to which the Union or all the Member States are party, including the Convention, and by the Member States' constitutions.

Therefore, the Charter of Fundamental Rights, the Convention as well as the constitutional traditions of the Member States set a high level of protection of fundamental rights (human rights) in the European Union.

The above circumstances prove a significant axiological concurrence between the Polish law and the EU law. However, this does not mean that the legal solutions in the two legal orders are identical. It would be hard to assume that the EU law will contain norms which will fully concur with the norms of the Polish law. This arises from differences related to the way of enactment of EU law, with the participation of all the Member States, as well as from the different character of the two comparable legal orders (on the one hand - the law of the state, on the other hand – the law of the international organisation).

3. The general characteristics of the Council Regulation (EC) No 44/2001

3.1. The provisions of the Council Regulation (EC) No 44/2001 that have been challenged by the complainant constitute an element of a broader legal regulation which concerns declaring the enforceability of judgments of foreign courts within the scope of judicial cooperation in civil matters among the EU Member States. The Council Regulation (EC) No 44/2001 regulates the procedure for recognition and enforcement which may be applied to judgments and other legal acts from the Member States, which have been issued in civil or commercial matters. The aim of the legal institution of declaring the enforceability of foreign judgments - which together with recognition constitutes a basic form of ensuring the effectiveness of judgments issued by the courts of the EU Member States - is to make it possible to enforce those judgments outside the borders of the Member State of origin by making them enforceable in the territory of another Member State.

3.2. The procedure for declaring the enforceability of judgments which has been set out in the Council Regulation (EC) No 44/2001 is based on “mutual trust in the administration of justice” in relations between the EU Member States (points 16–17 of the preamble of Council Regulation (EC) No 44/2001), which should determine and provide guidance for any actions of courts in cases related to the application of the Regulation. The national court of the Member State in which enforcement is sought should, in accordance with that principle, manifest its trust in a foreign court, and in fact in a foreign legal order within the European Union and its administration of justice.

The principle of mutual trust in the administration of justice considerably expedites proceedings for the issue of a declaration of enforceability and thus facilitates the enforcement of judgments coming from the EU Member States. The aim of proceedings for the issue of a declaration of enforceability, regulated in the Council Regulation (EC) No 44/2001, is to grant legal protection to a party concerned, by allowing for enforcement to be carried out on the basis of a judgment issued in another Member State. The scope of jurisdiction of the court which issues a declaration of enforceability amounts to the examination of the premisses of enforcement in the Member State in which enforcement is sought. However, the subject of examination carried out by the court is not a relationship in substantive law, in the context of which a judgment has been issued. Also, proceedings for the issue of a declaration of enforceability may not be perceived as part of enforcement proceedings in the Member State in which enforcement is sought, as they do not directly lead to the compulsory satisfaction of a claim, but merely assign an attribute of enforceability to the judgment stating the existence of the claim, which constitutes merely one of the premisses of commencing enforcement proceedings in that Member State. Preserving the dependencies which exist between: examination carried out by a foreign court, proceedings for the issue of a declaration of enforceability and national enforcement proceedings – the solutions adopted in the Council Regulation (EC) No 44/2001 make the procedure for making a foreign judgment enforceable analogical to the procedure concerning a Polish ruling (cf. part III, point 6.5).

3.3. Regulations as regards the recognition and declaration of enforceability of judgments (granting exequatur), contained in the Council Regulation (EC) No 44/2001 are, to a large extent, modelled on the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Brussels in 1968(OJ C 27, 26.1.1998, p. 1; hereinafter: the Brussels Convention) as well as the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, done at Lugano on 16 September 1988, since 1 February 2000, Poland has also been the party to the Convention (OJ 2000 No. 10, item 132; hereinafter: the Lugano Convention).

The basic aim of the provisions of the Council Regulation (EC) No 44/2001 concerning the recognition and declaration of enforceability of judgments is to ensure “the free movement of judgments” within the EU Member States. The above aim is achieved at several levels. Firstly, the Regulation broadly renders the category of judgments and other

legal acts which may be subject to recognition or declaration of enforceability. Secondly, it limits the terms (premisses) of recognition and declaration of enforceability, in comparison with the extensive regulations of particular Member States. Thirdly, it regulates the procedure for the so-called automatic recognition of judgments and other instruments from the EU Member States as well as the simplified and expeditious proceedings for the issue of a declaration of enforceability (cf. K. Weitz, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Warszawa 2006, first edition, p. 570). The Court of Justice of the European Union has on a number of occasions indicated in its jurisprudence that the aim of proceedings provided for in the Council Regulation (EC) No 44/2001 is to simplify formalities related to mutual recognition and enforcement of judgments. As far as enforcement is concerned, the principal aim is to facilitate, to the greatest possible extent, the free movement of judgments by providing for a simple and rapid enforcement procedure whilst giving the party against whom enforcement is sought an opportunity to lodge an appeal (cf. the judgment of 16 February 2006 in the case C-3/05 Verdoliva, ECR 2006, p. 1579 and the jurisprudence cited therein).

4. Proceedings for the issue of a declaration of enforceability in the case of a judgment by a court of an EU Member State, in accordance with the Council Regulation (EC) No 44/2001.

Pursuant to Article 38(1) of the Council Regulation (EC) No 44/2001: "A judgment given in a Member State and enforceable in that State shall be enforced in another Member State when, on the application of any interested party, it has been declared enforceable there". The parties to the proceedings are the applicant (usually the creditor or his/her legal successor) and the party against whom a given judgment was issued in the Member State of origin, i.e. the debtor. First instance proceedings have been provided for as unilateral proceedings (*ex parte* proceedings), instituted by the applicant and taking place without the participation of the debtor.

The prohibition against making submissions by the debtor at the stage of the examination of the application, provided for in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is nothing new. In fact, it corresponds to the norm contained in Article 34, first sentence, of the Brussels Convention and Article 34, first sentence, of the Lugano Convention. The indicated solution is aimed at expediting proceedings at their

initial stage so that the applicant interested in the rapid enforcement of a judgment or another instrument issued in an EU Member State could as soon as possible commence the enforcement of the judgment or the instrument in the Member State in which enforcement is sought. The principle of unilateral proceedings before the court of first instance is also aimed at preserving the so-called "surprise effect" in the case of the debtor. This consists in the fact that the debtor does not know that proceedings for the issue of a declaration of enforceability have been instituted against him/her, and therefore s/he has no possibility of removing property that may be subject to enforcement from the Member State in which enforcement is sought, or disposing of them in any other way.

By contrast, having been awarded the declaration of enforceability in first instance proceedings, the applicant may – pursuant to Article 47(2) of the Council Regulation (EC) No 44/2001 - proceed to any protective measures against the property of the debtor. The applicant may not, however, institute enforcement aimed at satisfying his/her claim until the lapse of the time specified for an appeal or until any such appeal against the judgment has been determined (Article 47(3) of the Council Regulation (EC) No 44/2001). It follows from the above that proper enforcement is possible only after the debtor has been heard as part of examining the appeal or has had the opportunity to be heard.

In the light of the provisions of the Regulation, cases concerning the issue of a declaration of enforceability in first instance proceedings are examined by the court or competent authority. The competence of courts or competent authorities are specified in statements submitted by the EU Member States and are mentioned in the list constituting Annex II to the Council Regulation (EC) No 44/2001. Therefore, in the light of the Regulation, it is not only courts that may issue the declaration of enforceability of judgments in first instance proceedings, but these may also be other competent authorities, for instance quasi-judicial or administrative authorities, depending on the choice made by particular Member States. In the context of Poland, competence in that regard has been granted to circuit courts (Pl *sąd okręgowy*). At the first stage of proceedings, the said court examines merely the formal aspects of an application for *exequatur*, and documents set out in Article 53 of the Council Regulation (EC) No 44/2001 attached to the application as well as determines, on such basis, whether the judgment is enforceable in accordance with the law of the Member State of origin. Article 45 of the Regulation stipulates that under no circumstances may the foreign judgment be reviewed as to its substance.

Within the scope which is not regulated by the Council Regulation (EC) No 44/2001, as regards proceedings for the issue of a declaration of enforceability in the

case of a judgment by a court of an EU Member State, the provisions of national law are applicable, as long as they are not contrary to the provisions of the Regulation. In the light of the Polish law, the applicable provisions are the regulations of the Act of 17 November 1964 – the Code of Civil Procedure (Journal of Laws - Dz. U. No. 43, item 296, as amended; hereinafter: the Code of Civil Procedure) which concern international civil proceedings, and in particular provisions which govern proceedings to determine the enforceability of judgments pursuant to Articles 1150 to 1152 of the said Code (por. J. Maliszewska-Nienartowicz, [in:] *Stosowanie prawa Unii Europejskiej przez sądy*, A. Wróbel (ed.), Vol. I, Warszawa 2010, p. 424). In that regard, it should be indicated that pursuant to Article 1151(1) of the Code of Civil Procedure, as amended by the amending Act of 5 December 2008 (Journal of Laws - Dz. U. No. 234, item 1571), the declaration of enforceability is done by issuing an enforcement clause for the judgment of a foreign court. The application for a declaration of enforceability is considered by the court in camera (Article 1151^1(2) of the Code of Civil Procedure).

Article 42(1) of the Council Regulation (EC) No 44/2001 requires that the decision on the application for a declaration of enforceability shall forthwith be brought to the notice of the applicant in accordance with the procedure laid down by the law of the Member State in which enforcement is sought. Moreover, it is necessary that the declaration of enforceability, i.e. a ruling about granting *exequatur*, was formally served on the debtor (cf. the decision of the Supreme Court of the Republic of Poland, dated 6 January 2010, Ref. No. I PZP 6/09, OSNP No. 13-14/2011, item 183). An appeal is to be lodged by the debtor within one month of service thereof; the period provided for in that regard in the national law of the Member State in which enforcement is sought is excluded. However, if the debtor is domiciled in a Member State other than that in which the declaration of enforceability was given, the time for appealing shall be two months and shall run from the date of service, either on him/her in person or at his/her residence. In the case of the Polish law, parties lodge an appeal to a court of appeal (Pl. *sąd apelacyjny*) via a circuit court (Pl. *sąd okręgowy*) (pursuant to Annex III to the Council Regulation (EC) No 44/2001 as amended by the Commission Regulation (EC) No. 280/2009 of 6 April 2009, OJ L 93, 7.4.2009, p. 13). In the doctrine, it is indicated that an appeal lodged by the debtor may be based solely on the allegations that the requirements for the declaration of enforceability have been fulfilled. This concerns a situation where the judgment - the enforceability of which has

been declared - is not a judgment within the meaning of Article 32 of the Council Regulation (EC) No 44/2001, the said judgment may not be enforced, or there are grounds to refuse a declaration of enforceability on the basis of Articles 34 or 35 of the Council Regulation (EC) No 44/2001 (cf. J. Ciszewski, T. Ereciński, *Kodeks postępowania cywilnego. Komentarz. Część czwarta. Przepisy z zakresu międzynarodowego postępowania cywilnego,* commentary to Article 1151, Warszawa 2009). Adopting a solution in accordance with which, during the proceedings for the issue of a declaration of enforceability in the case of a foreign judgment, the judgment may not be reviewed as to its substance does not allow to consider allegations concerning the content of the judgment. A decision of the court of appeal given on the appeal concerning the declaration of enforceability of a judgment by a foreign court (or refusal to issue the declaration of enforceability) may be contested by a cassation appeal (Pl. *skarga kasacyjna*) lodged by either of the parties with the Supreme Court of the Republic of Poland (Article 44 in conjunction with Annex IV to the Council Regulation (EC) No 44/2001).

5. The indication of the subject of review and higher-level norms for the review.

5.1. In the constitutional complaint submitted to the Tribunal, the complainant challenged Article 36, Article 40, Article 41 as well as Article 42 of the Council Regulation (EC) No 44/2001, from the point of view of their conformity to Article 8, Article 32, Article 45, Article 78 as well as Article 176 of the Constitution. Due to the withdrawal of the complaint by the representative of the complainant at the hearing, with regard to Article 36, Article 40 and Article 42 of the Council Regulation (EC) No 44/2001 as well as the higher-level norms for the review included in Article 8, Article 32(2), Article 45(2) and Article 176(2) of the Constitution, the Tribunal decided to discontinue the proceedings in that regard, on the basis of Article 39(1)(2) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act).

As a result, after modifying her complaint, the complainant requested the Tribunal to determine the conformity of Article 41 of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution, to Article 45(1) in conjunction with Article 78 and

Article 176(1) of the Constitution as well as to Article 32(1) in conjunction with Article 45(1) of the Constitution.

Article 41 of the Council Regulation (EC) No 44/2001, challenged by the complainant, reads as follows: "The judgment shall be declared enforceable immediately on completion of the formalities in Article 53 without any review under Articles 34 and 35. The party against whom enforcement is sought shall not at this stage of the proceedings be entitled to make any submissions on the application".

5.2. Within the meaning of Article 79 of the Constitution, the subject of the constitutional complaint may only be a normative act upon which basis a court or organ of public administration has made a final decision on a complainant's freedoms or rights or on his/her obligations specified in the Constitution. The basis of adjudication encompasses the entirety of legal provisions (norms) applied by the organs of public authority in order to issue an act of applying the law. The basis understood in this way comprises not only the provisions of substantive law, but also procedural provisions as well as basic systemic provisions which provide for a given organ of public authority and vest relevant powers therein (cf. the judgment of the Constitutional Tribunal of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108).

5.3. In the present case, the final decision is the decision of 9 March 2007 issued by the Court of Appeal in Warsaw, in which the court dismissed the complainant's appeal against the decision on the application for a declaration of enforceability concerning the decision by the Court of Appeal in Brussels, which had been deemed enforceable in the territory of Poland. It should be noted that the allegations in the constitutional complaint are not addressed against the ruling of the Belgian court where compensation was ordered to be paid by the complainant. The complainant clearly links the infringement of her constitutional rights and freedoms with the aforementioned legally effective decision of the Polish court.

The analysis of the content of the constitutional complaint indicates that the complainant alleges that her subjective rights were infringed due to the fact that she was excluded from proceedings before the court of first instance, in the case where the proceedings regarded the enforceability of a foreign judgment. The complainant did not raise the said allegation in the appeal; however, the court of appeal made reference in the

substantiation for its decision to the content of Article 41 of the Council Regulation (EC) No 44/2001, examining the issue of time-limit and manner of resorting to the redress procedure. Therefore, it may be assumed that the norm contained in the challenged provision fell within the scope of the basis of the ruling on the rights and obligations of the complainant, constituting an element of procedural regulation.

As regards Article 41, first sentence, of the Council Regulation (EC) No 44/2001, the Constitutional Tribunal states that neither in her constitutional complaint nor at the hearing did the complainant formulate any allegations concerning contradictions with the indicated higher-level norms for the review. This justifies the discontinuation of the proceedings in that regard, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

Consequently, the Constitutional Tribunal concludes that the subject of the review conducted by the Constitutional Tribunal may only be the legal norm expressed in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, in accordance with which the party against whom enforcement is sought (the debtor) shall not at the first stage of the proceedings be entitled to make any submissions on the application.

5.4. The complainant has indicated the following higher-level norms for the review: Article 45(1) of the Constitution, Article 45(1) in conjunction with Article 78 and Article 176(1) of the Constitution as well as Article 45(1) in conjunction with Article 32(1) of the Constitution.

A constitutional complaint is a special means of legal protection which is aimed at eliminating - from the legal system - regulations that are inconsistent with constitutional provisions concerning rights or freedoms. Article 79(1) of the Constitution clearly stipulates that a premiss authorising the submission of a constitutional complaint is not any infringement of the Constitution, but only the infringement of constitutional norms which regulate the rights or freedoms of the individual and citizen. Thus, a constitutional complaint must include the indication of a specific person whose rights or freedoms have been infringed, the indication which of the rights or freedoms enshrined in the Constitution have been infringed as well as the indication of a manner of the infringement. For the effectiveness of the instrument for protection of rights and freedoms, i.e. a constitutional complaint, it does not suffice to determine the non-conformity of a given normative act, or part thereof, to any higher-level norm for review,

but to constitutional norms constituting the basis for the rights or freedoms of the individual.

5.5. In the opinion of the complainant, the challenged regulation is inconsistent with Article 45(1) of the Constitution in conjunction with Article 78 of the Constitution as well as with Article 176(1) of the Constitution.

What follows from Article 78 of the Constitution is the right to appeal against judgments and decisions made at first stage. A party that has doubts as to the validity of the conclusions reached in a ruling issued in first instance has the right to appeal against the ruling in order to verify (review) the validity of the ruling (cf. the judgments of: 16 November 1999, Ref. No. SK 11/99, OTK ZU No. 7/1999, item 158; 18 May 2004, Ref. No. SK 38/03, OTK ZU No. 5/A/2004, item 45).

Article 176(1) of the Constitution expresses the principle of two stages of court proceedings. It should be noted that Article 176(1) of the Constitution has a twofold character. On the one hand, it is a systemic provision, as it specifies the way of organising court proceedings, and thus the way of organising the system of courts. On the other hand, Article 176(1) of the Constitution is a guarantee provision since – by supplementing the provisions of Article 78 – it specifies the content of the individual's right to two stages of court proceedings (see the judgment of 13 July 2009, Ref. No. SK 46/08, OTK ZU No. 7/A/2009, item 109; the decision of 8 June 2009, Ref. No. SK 26/07, OTK ZU No. 6/A/2009, item 92; the decision of 21 July 2009, Ref. No. SK 61/08, OTK ZU No. 7/A/2009, item 120). In accordance with the established jurisprudence of the Constitutional Tribunal, the constitutional principle of two stages of court proceedings implies, in particular, the following: a) access to a court of second instance, and thus providing parties with proper redress procedures which institute actual review of rulings issued by a court of first instance; b) assigning the examination of a given case in second instance proceedings to – in principle – a court of higher instance; c) devising a procedure before a court of second instance in an appropriate way, so that the court could thoroughly examine a given case and issue a ruling on its merits (see the judgment of 31 March 2009, Ref. No. SK 19/08, OTK ZU No. 3/A/2009, item 29).

The complainant does not question the fact that she retained the right to appeal against the ruling issued in her case by the Circuit Court in Warsaw, i.e. the court of first instance in that regard. In the substantiation for her complaint, she explicitly indicated that:

"Pursuant to the challenged provisions of the Regulation, a participant in proceedings undoubtedly has the right to appeal against rulings issued in first instance proceedings". The complainant's allegation amounts to challenging the standard procedure at the stage when a case is examined by a court of first instance. It should be noted that Article 176(1) of the Constitution, to a certain extent, guarantees proper court proceedings, but not before the court of first instance, but – as it has been indicated above – the court of second instance.

In the opinion of the Constitutional Tribunal, the complainant has not indicated in what way Article 41, second sentence, of the Council Regulation (EC) No 44/2001 allegedly infringes Article 78 of the Constitution. It should be pointed out that the content of the challenged provision of the Council Regulation (EC) No 44/2001 does not concern redress procedures provided for a ruling issued in first instance proceedings, but pertains to devising a court procedure for first instance proceedings. Therefore, the provision challenged in the case under examination does not affect the possibility of lodging an appeal against a ruling in the court of higher instance. What is indisputable is the fact that a ruling issued in first instance proceedings, concerning the enforceability of a judgment delivered by a court of another Member State, is subject to appeal. Article 43(1) of the Council Regulation (EC) No 44/2001 explicitly stipulates that the decision on the application for a declaration of enforceability may be appealed against by either party. As regards the Polish law, in accordance with Annex III to the Council Regulation (EC) No 44/2001, parties lodge an appeal with a court of appeal via a circuit court.

In the present case, there is no doubt that the complainant exercised the right to appeal against a ruling issued in her case in first instance proceedings, by lodging an appeal with the Court of Appeal in Warsaw against the decision delivered by the Circuit Court in Warsaw. Thus, she exercised the right to appeal against court rulings, guaranteed by Article 78 of the Constitution, and the right to (at least) two stages of court proceedings, which arises from Article 176(1) of the Constitution.

The complainant has not made it probable, though this is required in the light of Article 79(1) of the Constitution, that the above-mentioned constitutional rights have been infringed.

In particular, the complainant's arguments indicating that, in her opinion, the first instance procedure has not been devised in a proper way may not serve as justification for the allegation of infringement of the constitutional provisions which stipulate the right to

appeal against rulings issued in first instance proceedings and the principle of two stages of court proceedings.

For the above reasons, the Constitutional Tribunal has decided to discontinue the proceedings as regards the review of conformity to Article 78 and Article 176(1) of the Constitution, on the basis of Article 39(1)(1) of the Constitutional Tribunal Act, on the grounds that issuing a ruling is inadmissible.

5.6. Consequently, the Constitutional Tribunal states that the subject of review in the present case is Article 41, second sentence, of the Council Regulation (EC) No 44/2001 in the context of its conformity to Article 45(1) and Article 32(1) in conjunction with Article 45(1) of the Constitution.

6. The assessment of conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 45(1) of the Constitution.

6.1. The subject of the assessment is a procedural solution adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001, pursuant to which the party against whom enforcement is sought (the debtor) shall not at the first stage of proceedings be entitled to make any submissions. The first instance proceedings are carried out without the participation of the debtor (*ex parte* proceedings). The allegations raised by the complainant amount to the infringement of the complainant's right to a fair and public hearing in first instance proceedings concerning the enforceability of a foreign judgment in the territory of the Republic of Poland, which has been issued against the complainant. Two basic allegations formulated by the complainant regard the infringement of the right to a fair hearing and the right to a public hearing, understood in the context of a party's participation in proceedings.

6.2. As the Constitutional Tribunal has indicated on a number of occasions, the right to a fair trial comprises the following: the right of access to a court, i.e. the right to institute proceedings before a court – an organ of the state with particular characteristics (impartial and independent); the right to a proper court procedure which complies with the requirements of a fair and public hearing; the right to a court ruling, i.e. the right to have a given case determined in a legally effective way by a court as well as the right to have cases

examined by the organs of the state with an adequate organisational structure and position (see the judgments of : 10 July 2000, Ref. No. SK 12/99, OTK ZU No. 5/2000, item 143 as well as of 24 October 2007, Ref. No. SK 7/06, OTK ZU No. 9/A/2007, item 108). Moreover, the Tribunal has stated that another element of the right to a fair trial is the right to enforce a legally effective ruling in the course of enforcement proceedings (cf. the judgment of 4 November 2010 Ref. No. K 19/06, OTK ZU No. 9/A/2010, item 96).

What is relevant in the present case is one of the elements of the right to a fair trial; namely, the right to a proper court procedure which complies with the requirements of a fair and public hearing. In this context, it ought to be emphasised that there is a need for procedural measures which will allow for appropriate determination of procedural positions of parties.

Explaining the point of that constitutional guarantee, the Constitutional Tribunal has, in its previous jurisprudence, expressed the view that a fair court procedure should ensure that parties enjoyed procedural rights which are relevant to the subject of pending proceedings. The requirement of a fair trial implies that the principles of the trial are adjusted to the specific character of particular cases under examination (see the judgment of the Constitutional Tribunal of 13 May 2002, Ref. No. SK 32/01, OTK ZU No. 3/A/2002, item 31, the judgment of 11 June 2002, Ref. No. SK 5/02, OTK ZU No. 4/A/2002, item 41, p. 554). As the Tribunal has pointed out on a number of occasions, constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of procedure – the same set of procedural instruments which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them. Making a different assumption, one could question all procedural differences, within the scope of civil proceedings, which are meant to guarantee a quicker and more effective protection of the rights and interests of the subjects that invoke their rights before the court. It would be unjustified to assume, relying on constitutional provisions, that there is a necessity to create solutions which would reflect – with regard to every type of case, regardless of its character and other factors, usually closely related to the requirement of effectiveness of applied procedures – the same ideal and abstract model of proceedings, which actually does not exist (cf. the view expressed in the judgment of 23 October 2006, Ref. No. SK 42/04, OTK ZU No. 9/A/2006, item 125; of 28 July 2004, Ref. No. P 2/04, OTK ZU No. 7/A/2004, item 72; of 14 October 2008, Ref. No. SK 6/07, OTK ZU No. 8/A/2008, item 137). Consequently, it should be stated

that not every difference or special character in the context of court proceedings must *a priori* be regarded as a restriction imposed on the right to a fair trial and the related procedural guarantees of parties. In fact, it does not follow from the Constitution that every court procedure has to involve the same procedural instruments.

The freedom of the legislator (as well as of the EU law-maker) with regard to devising proper procedures does not entail that it is admissible to introduce arbitrary solutions which excessively and unjustly restrict the procedural rights of parties, the exercise of which constitutes a prerequisite for a proper and fair determination of a given case. The constitutional guarantees related to the right to a fair trial would be infringed if a restriction imposed on the procedural rights of a party was disproportionate to the pursuit of such goals as enhancing the effectiveness and pace of proceedings, and at the same time it would make it impossible to balance the procedural positions of parties. Therefore, in this context, one should consider the point and significance of restricting the possibility of the debtor's participation in first instance proceedings concerning the enforceability of a judgment delivered by a foreign court, in the light of Article 41, second sentence, of the Council Regulation (EC) No 44/2001.

6.3. The proceedings regulated in the Council Regulation (EC) No 44/2001 aim at balancing the rights and contradictory interests of the applicant (the creditor) and the debtor. For that purpose, the EU law-maker has provided for a two-stage procedure. It reflects the general assumption of proceedings for the issue of a declaration of enforceability in the case of a judgment of another Member State, which are to reconcile the necessary "surprise effect", in the case of the debtor, with respect for his/her right to a fair hearing (cf. the judgment of the Court of Justice of 11 May 2000 r. in the case C-38/98, Régie Nationale des Usines Renault, ECR 2001, p. 2973).

The said regulation of first instance proceedings as *ex parte* proceedings serves the protection of the applicant's interests. S/he also has the right to apply protective measures on the basis of a first-instance decision concerning his/her application. However, the rights of the debtor are subject to protection in the course of appellate proceedings. The debtor may raise allegations as regards the non-fulfilment of requirements for the issue of a declaration of enforceability, the scope of application of the Council Regulation (EC) No 44/2001 as well as other formal allegations which concern the course of proceedings before the court of first instance. S/he may also raise allegations with regard to refusal to

enforce a judgment for the reasons enumerated in Article 34 or Article 35 of the Council Regulation (EC) No 44/2001 (which are also the reasons for refusal to recognise a judgment), *inter alia*: if a judgment is contrary to public policy in the Member State in which recognition is sought, if the right to be defended has been infringed, if the judgment is irreconcilable with a judgment given in a dispute between the same parties in the Member State in which recognition is sought or if the judgment conflicts with some provisions of the Regulation concerning jurisdiction. Moreover, the court may, on the application of the party against whom enforcement is sought (the debtor), stay the proceedings (Article 46(1) of the Council Regulation (EC) No 44/2001) or the court may also make enforcement conditional on the provision of such security as it shall determine (Article 46(3) of the Council Regulation (EC) No 44/2001).

In the literature on the subject, it is pointed out that notifying the debtor by the court of first instance about proceedings pending against him/her with regard to the issue of a declaration of enforceability concerning a judgment of a foreign court could weaken or even eliminate the surprise effect for the debtor, the achievement of which is one of the goals of those proceedings. Notifying the debtor *ex officio* by the court would contradict the purpose of the said regulation and would undermine the procedural position of the applicant (the creditor), which is guaranteed by the provisions of the Council Regulation (EC) No 44/2001 (cf. K. Weitz, *op. cit.*, p. 606.).

6.4. What is of significance in that context is the fact that proceedings concerning the enforceability of a judgment of another Member State are secondary in character in relation to the court proceedings which ended with the judgment in the Member State of origin, which ordered compensation to be paid to the plaintiff by the defendant. In proceedings for the issue of a declaration of enforceability, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. The said presumption is based on mutual trust in the administration of justice in the EU Member States.

The right to a fair trial is guaranteed in the constitutions and statutes of the EU Member States. Moreover, it arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Also, it is a general principle which constitutes part of EU law (Article 6(3) of the Treaty on European Union; Article 47

in conjunction with Article 51(1) of the Charter of Fundamental Rights). Necessity for procedural guarantees in the national law order, which would arise from the EU principle of a fair trial, has been indicated many times in the jurisprudence of the Court of Justice (cf. the judgments of the Court of Justice of: 15 May 1986 in the case 222/84 Johnston, ECR 1986, p. 1651; 15 October 1987 r. in the case 222/86 Heylens, ECR 1987, 4097; of 7 May 1991 r. in the case C-340/89 Vlassopoulou, ECR 1991, s. 2357; 3 December 1992 r. in the case C-97/91 Borelli, ECR 1992, s. 6313; 25 July 2002 r. in the case C-50/00 P Unión de Pequeños Agricultores, ECR 2002 s. 6677; of 13 March 2007 r. in the case C-432/05 Unibet, ECR 2007, p. 2271. Cf. also N. Półtorak, *Ochrona uprawnień wynikających z prawa Unii Europejskiej w postępowaniach krajowych,* Warszawa 2010, p. 153 and subsequent pages).

The presumption that the guarantees of a fair procedure were ensured in the Member State of origin may be rebutted, as a result of the debtor's allegation, raised before a court of second instance, that the enforcement of a judgment is contrary to public policy in the Member State in which enforcement is sought (Article 45 in conjunction with Article 34(1) of the Council Regulation (EC) No 44/2001). Among premisses related to that kind of allegation, the Court of Justice indicated the infringement – when the case was being heard before a court of the Member State of origin – the right to be defended, the principle of equality of parties, impartiality of a judge, misleading a party, or no mention grounds for a ruling (cf. the judgment of the Court of Justice of 28 March 2000 in the casa C-7/98, Krombach, ECR 2000, p. 1935). Regardless of the above, the party against whom enforcement is sought is entitled to the allegation of the infringement of the right to be defended, in the case of proceedings instituted in the Member State of origin, as provided for in Article 45 in conjunction with Article 34(2) in the Council Regulation (EC) No 44/2001.

6.5. The provisions of the Council Regulation (EC) No 44/2001 regulate only general issues related to simplified proceedings concerning the enforceability of a judgment of a foreign court, leaving other solutions to be specified in the law of particular Member States. In Poland, these are governed by Article 1151(1) of the Code of Civil Procedure, pursuant to which a judgment of a foreign court is declared enforceable by issuing an enforcement clause thereto.

It should be noted that proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another EU Member State has been specified in the Polish Code of Civil Procedure in a similar way to proceedings concerning the enforceability of judgments of Polish courts.

However, it should be emphasised that issuing an enforcement clause, in the case where a judgment of a foreign court is declared enforceable, plays a double role. Firstly, it implies consent to execute a foreign enforced collection order (the so-called *exequatur*). Secondly, it confirms that a given enforced collection order constitutes authorisation for enforcement, as is in the case of issuing an enforcement clause for a Polish enforced collection order.

In the Polish law, an executive title which constitutes the basis for enforcement is an enforced collection order with an enforcement clause (Article 776 of the Code of Civil Procedure). In the doctrine and jurisprudence of the Constitutional Tribunal, it is assumed that an enforcement clause is a declarative court decision which states that a given legal document presented by the creditor meets the statutory criteria for an enforced collection order, and that it is admissible to institute relevant enforcement proceedings, in order to collect a given debt from the debtor by means of state coercion (cf. the judgment of 15 October 2002 , Ref. No. SK 6/02, OTK ZU No. 5/A/2002, item 65 and the literature on the subject cited therein). Proceedings to issue an enforcement clause are carried out without the participation of the debtor. In principle, the court examines cases concerning enforcement in camera (Article 766 of the Code of Civil Procedure). The court's decision on the issue of an enforcement clause may be appealed against. The time for lodging an appeal by the debtor shall run from the date of service of a notice about the commencement of enforcement (Article 795 of the Code of Civil Procedure). *Ratio legis* in the case of first instance proceedings for the issue of a declaration of enforceability for a judgment of a foreign court and in the case of proceedings to issue an enforcement clause in the Polish law is the same.

The goal is to prevent the debtor from hiding or disposing of his/her property with the intention to make it impossible for the creditor to exercise his/her rights arising from a ruling issued to the creditor's advantage.

6.6. Moreover, the Constitutional Tribunal notes that the legal construct of *ex parte* proceedings, i.e. proceedings without the participation of the other party – being analogical to the construct adopted in Article 41, second sentence, of the Council

Regulation (EC) No 44/2001 at the first stage of proceedings for the issue of a declaration of enforceability – occurs also in relation to some proceedings at a later stage, which have been regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at expeditious examination of certain types of civil cases, i.e. injunction proceedings (Article 484^1 and subsequent provisions of the Code of Civil Procedure) and proceedings concerning orders to pay (Article 497^1 and subsequent provisions of the said Code). In those proceedings, the court examines a given case in camera, upon a request of the plaintiff contained in his/her petition. The defendant is notified about proceedings pending against him/her no earlier than at the moment when s/he is being served with an injunction to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning protective measures. (Article 730 and subsequent provisions of the Code of Civil Procedure) and the aforementioned proceedings to issue an enforcement clause (Article 781 and subsequent provisions of the Code of Civil Procedure). The said cases are examined in camera by the court, upon applications by plaintiffs (creditors). A given defendant is notified about the application of protective measures or the issue of an enforcement clause no earlier than at the moment when s/he is being served with a court decision. The exclusion of defendants (debtors) at the first stage of the above-mentioned proceedings has not been challenged before the Constitutional Tribunal so far.

The legal construct of *ex parte* proceedings is justified by the special character, subject or function of given proceedings. In particular, it reflects the need for granting, even temporary, legal protection quickly or achieving the surprise effect. Without that kind of proceedings, it would be impossible in many cases to fulfil the function of civil proceedings, namely to grant legal protection. This means that taking into account the interests of the two parties to proceedings may justify postponing the exercise of the right to a hearing of one party (e.g. the debtor, the defendant) to proceedings at a later stage.

6.7. For the above reasons, the Tribunal states that ruling out the possibility of making any submissions by the debtor at the first stage of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, pursuant to Article 41, second sentence, of the Council Regulation (EC) No 44/2001, does achieve the above-mentioned significant goals, is not arbitrary in character and does not infringe the

right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judgments within the EU (as part of cooperation in judicial matters among the Member States) and the principle of mutual trust in the administration of justice in the EU Member States, which also apply to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court, with the existing restrictions imposed on a party against whom enforcement is sought in first instance proceedings, infringes the right to a fair trial, guaranteed by the Constitution.

Taking the above into consideration, the Tribunal states the Article 41, second sentence, of the Council Regulation (EC) No 44/2001 is consistent with Article 45(1) of the Constitution.

7. The assessment of conformity of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 to Article 32(1) in conjunction with Article 45(1) of the Constitution.

The complainant does not present extensive argumentation for the infringement of the principle of equality by the challenged Regulation in the court proceedings. She only generally states that there is a necessity for ensuring the equal rights of parties to court proceedings, as regards the possibility of making submissions. Thus, it may be assumed that, in the opinion of the complainant, the infringement of Article 32(1) in conjunction with Article 45(1) of the Constitution by the challenged provision consists in differentiating between the situations of participants to first instance proceedings.

The subject of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State has a special character. As it has already been clarified in point 6.4 above, the said proceedings are subsequent to proceedings as to the substance of the case conducted before a court of another Member State, during which parties had equal rights as regards the possibility of making submissions.

Moreover, the subject and aim of proceedings for the issue of a declaration of enforceability justifies differences in the shaping of rights granted to the creditor and the

debtor. For the effective conduct of proceedings for the issue of a declaration of enforceability concerning a judgment of a court of another Member State and for the protection of rights granted to the creditor, it is necessary to preserve the "surprise effect" (for more details see part III, point 6.3).

In the opinion of the Constitutional Tribunal, due to a special character of proceedings for the issue of a declaration of enforceability concerning a judgment of a foreign court which have been instituted by the creditor who has been awarded a judgment ordering compensation to be paid to him, it is admissible to differentiate between procedural rights of parties in first court proceedings. Therefore, it does not follow from Article 41, second sentence, the Council Regulation (EC) No 44/2001 that the applicant (the creditor) was excessively and unjustly privileged as opposed to the participant in the proceedings (the debtor).

Taking the above into consideration, the Constitutional Tribunal has concluded that Article 41, second sentence, the Council Regulation (EC) No 44/2001 does not infringe Article 32(1) in conjunction with Article 45(1) of the Constitution.

8. Preliminary review of the admissibility of a constitutional complaint in the case of challenging the conformity of acts of EU secondary legislation to the Constitution.

8.1. The review of the challenged provision of the Council Regulation (EC) No 44/2001 showed that the provision infringes neither the right to a fair trial (Article 45(1) of the Constitution) nor the principle of equality of parties to court proceedings (Article 32(1) in conjunction with Article 45(1) of the Constitution).

In the present case, the Constitutional Tribunal has directly reviewed the conformity of the norms of EU secondary legislation to the Constitution for the first time. Therefore, the Tribunal first determined the issue of admissibility of a constitutional complaint, and then the issue of its substantive validity. Due to that new situation, the Tribunal decided to thoroughly examine the allegations, comparing the challenged EU provisions with the higher-level norms for the constitutional review, indicated by the complainant. This is similar to the approach taken by the Federal Constitutional Court of Germany in the aforementioned judgment in the case Honeywell. However, there is a difference; namely, in that case the subject of review was not an act of EU secondary

legislation, but a judgment of the Court of Justice of the European Union, and the allegation of non-conformity to the Basic Law for the Federal Republic of Germany did not concern fundamental rights, but the issue of going beyond the scope of competences conferred upon the European Union (*ultra vires* action).

In the present case, the Constitutional Tribunal had no doubts as to the conformity of the challenged Council Regulation (EC) No 44/2001 to the EU primary law, and hence – within the meaning of the Foto-Frost doctrine – there was no need to refer a question to the Court of Justice of the European Union for a preliminary ruling.

8.2. The Constitutional Tribunal notes that there is a need to determine, for the future, the manner of reviewing the constitutionality of the norms of EU law (the Treaties and secondary legislation) in the course of review proceedings commenced by way of constitutional complaint. What may be useful here is to examine the approaches of other courts as regards the review of EU law.

With regard to the standard of protection of human rights in the EU law and the review of EU secondary legislation, the Federal Constitutional Court of Germany has presented its stance. In the aforementioned "Solange II" decision, the said court stated that as long as (*solange*) the European Communities, in particular European Court case law, generally ensure effective protection of fundamental rights which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the Constitution, and in so far as they generally safeguard the essential content of fundamental rights, the Federal Constitutional Court of Germany will no longer review secondary Community legislation by the standard of the fundamental rights contained in the Basic Law. The principle established in the said decision was maintained in the subsequent rulings. In the above-mentioned order in the case Bananenmarktordnung, the Federal Constitutional Court stated that a submission by a national court of justice or of a constitutional complaint which puts forward an infringement by secondary European Community Law of the fundamental rights guaranteed in the Basic Law is admissible only if its grounds state that the evolution of European law, including the rulings of the Court of Justice of the European Communities, has resulted in a decline below the standard of fundamental rights required unconditionally by the Basic Law since the "Solange II" decision. This requires, in each instance, a comparison of the protection of fundamental rights on the national and on the Community level similar to the one made by the Federal Constitutional Court in the “Solange II“ decision. Otherwise, the Federal Constitutional

Court leaves a submission by a national court of justice or a constitutional complaint without any substantive examination thereof.

8.3. In the jurisprudence of the European Court of Human Rights (ECHR), there has been a presumption that the protection of human rights by the EU law and by the Court of Justice of the European Union can be considered to have been equivalent to the protection provided for by the Convention (cf. in particular the judgment of 30 June 2005, application no. 45036/98, Bosphorus). In view of the ECHR, the level of protection should only be "comparable" and not "identical" to that guaranteed by the Convention. The actions of EU Member States are compliant with the Convention as long as the European Union protects human rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides. The indicated presumption concerns cases where obligations to apply the EU law leave no room for the independent exercise of discretion by the Member States (cf. the judgment of 21 January 2011, Application No. 30696/09, M.S.S.). It follows from the above that the ECHR is competent merely in exceptional cases to assess whether the actions or the lack thereof on the part of the EU institutions and bodies comply with the Convention - namely where the presumption of equivalent protection is rebutted and the protection of human rights at the EU level is manifestly deficient. The Bosphorus doctrine has been maintained in the subsequent jurisprudence of the ECHR. In the judgments of 10 October 2006, the case of Cooperative des Agriculteurs de Mayenne (Application No. 16931/04) and of 9 December 2008, the case of Societe Etablissements Biret (Application No. 13762/04), the ECHR found the applications to be inadmissible on the grounds that the applicants had not shown that the protection of human rights at the EU level was manifestly deficient.

8.4. There are premisses to take an analogical approach with regard to reviewing the constitutionality of EU law in Poland. In the judgment concerning the Treaty of Lisbon (Ref. No. K 32/09), the Constitutional Tribunal presented the view that the said Treaty enjoyed a special status in the legal order of the Republic of Poland, which affected the way of examining its conformity to the Constitution. Treaty of Lisbon was ratified by the President of the Republic of Poland, upon consent granted by statute enacted in accordance with the requirements specified in Article 90 of the Constitution. Ratifying the Treaty, the President of the Republic, being obliged to ensure observance of the Constitution, manifested

his conviction that the ratified legal act was consistent with the Constitution. Based on the above grounds, the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution.

An analogical approach to the examination of conformity to the Constitution also regards the legal acts of the EU institutions. The legal acts prior to Poland's accession to the EU were adopted, pursuant to the Treaty of Accession, in the Polish legal system on the day of the accession (cf. Article 2 of the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded, with regard to the conditions of EU membership, Journal of Laws - Dz. U. of 2004 No. 90, item 864). Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of the representatives of the competent organs of the Polish state. What further justifies the assumption about a special status of EU secondary legislation, which is an analogical approach to that taken by other courts are the following aforementioned arguments: the great significance of fundamental rights in the EU legal order, the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration as well as the principle of loyalty of the Member States towards the Union.

8.5. The said approach has important procedural consequences. Pursuant to Article 79(1) of the Constitution, a constitutional complaint may be filed in accordance with principles specified by statute. Article 47(1)(2) of the Constitutional Tribunal Act imposes an obligation on a complainant to, *inter alia*, indicate in what manner regulations challenged in a given constitutional complaint have infringed the complainant's constitutional rights or freedoms.

In the case of filing a constitutional complaint which challenges the conformity of a legal act of EU secondary legislation to the Constitution, the fulfilment of the above obligation acquires a qualified character. When indicating what is the nature of the infringement of his/her rights or freedoms, i.e. when presenting arguments for the substantive unconstitutionality of provisions constituting the subject of his/her

complaint, a given complainant should, at the same time, be required to make probable that the challenged act of EU secondary legislation causes a considerable decline in the standard of protection of rights and freedoms, in comparison with the standard of protection guaranteed by the Constitution. Making this probable is an essential element of the requirement to indicate the manner in which rights or freedoms have been infringed.

The need for such more specific rendering is justified by the character of the acts of EU law, which enjoy a special status in the legal order of the Republic of Poland and which come from legislative centres other than the organs of the Polish state. What confirms that the obligation arising from Article 47(1)(2) of the Constitutional Tribunal Act needs to be imposed on the complainant in a qualified form is the circumstances presented in point 2 of this statement of reasons. The requirement to make probable that the level of protection of rights and freedoms has been lowered, in comparison with the level of protection guaranteed by the Constitution, follows from the allocation of the burden of proof in review proceedings commenced by way of constitutional complaint. This is not tantamount to possible indication (proof) that there has been an infringement of the Constitution, which is the task of the Tribunal.

When the indicated requirements are not fulfilled by the complainant, the Tribunal concludes that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, issues a decision in which it refuses to proceed with further action (Article 36(3) in conjunction with Article 49 of the Constitutional Tribunal Act) or in which it discontinues proceedings, on the grounds that issuing a ruling is inadmissible (Article 39(1)(1) of the Constitutional Tribunal Act).

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

Translated into English by Magda Wojnowska
Translator in the Office of the Constitutional Tribunal