63/5/A/2013

JUDGMENT

of 26 June 2013

Ref. No. K 33/12*

In the Name of the Republic of Poland

The Constitutional Tribunal, in a bench composed of:

Andrzej Rzepliński – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Mirosław Granat
Leon Kieres
Marek Kotlinowski
Teresa Liszcz
Małgorzata Pyziak-Szafnicka
Stanisław Rymar
Piotr Tuleja – Judge Rapporteur
Sławomira Wronkowska-Jaśkiewicz
Andrzej Wróbel
Marek Zubik,

Krzysztof Zalecki – Recording Clerk,

having considered, at the hearing on 26 June 2013, in the presence of the applicants, the Sejm and the Public Prosecutor-General, an application by a group of Sejm Deputies to determine the conformity of:

the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the

* The operative part of the judgment was published on 18 July 2013 in the Journal of Laws - Dz. U., item 825.

Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748) to Article 90 in conjunction with Article 120, first sentence, Article 88, Article 146 and Article 219 of the Constitution as well as Article 48(6) of the Treaty on European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended),

adjudicates as follows:

The Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748) **is not inconsistent with Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution of the Republic of Poland as well as with Article 48(6) of the Treaty on European Union** (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended)**.**

Moreover, the Tribunal decides:

pursuant to Article 39(1)(1) 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

[...]

III

The Constitutional Tribunal has considered as follows:

1. The subject of the allegation.

1.1. A group of Sejm Deputies (the 7th term of the Sejm) questioned the procedure applied to enact the Act of 11 May 2012 on the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the Act on the ratification of the European Council Decision 2011/199/EU). The Act on the ratification of the European Council Decision 2011/199/EU was signed by the President of the Republic of Poland on 26 June 2012, and was subsequently published in the Journal of Laws of 2 July 2012 and entered into force on 17 July 2012.

The wording of the challenged Act reads as follows:

"Article 1. Consent shall be granted to the President of the Republic of Poland to ratify the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (OJ L 91, 6. 4.2011, p. 1).

Article 2. the Act shall enter into force after the lapse of 14 days from the day of its promulgation".

The challenged Act expresses consent to the ratification of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) (Journal of Laws - Dz. U. item 748; hereinafter: the European Council Decision 2011/199/EU). Amended Article 136 has been included in chapter 4, Title VIII, Section 3, of the Treaty on the Functioning of the European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/2, as amended; hereinafter: the TFEU), entitled "The Provisions Specific to Member States Whose Currency is the Euro".

Pursuant to Article 1 of the European Council Decision 2011/199/EU, the following paragraph shall be added to Article 136 of the TFEU:

"The Member States whose currency is the euro may establish a stability mechanism to be activated if indispensable to safeguard the stability of the euro area as a whole. The granting of any required financial assistance under the mechanism will be made subject to strict conditionality".

The European Council Decision 2011/199/EU amending Article 136 of the TFEU has been adopted by "having regard to" Article 48(6) of the Treaty on European Union (Journal of Laws - Dz. U. of 2004 No. 90, item 864/30, as amended; hereinafter: the TEU).

On the basis of Article 12(2a) of the Act of 14 April 2000 on International Agreements (Journal of Laws - Dz. U. No. 39, item 443, as amended; hereinafter: the Act on International Agreements), the EU legal acts referred to in Article 48(6) of the TEU are subject to ratification; this fulfils the requirement indicated in Article 48(6) of the TEU, which states that decisions should be adopted in this way in compliance with relevant constitutional requirements of the Member States. The President of the Republic of Poland ratified the European Council Decision 2011/199/EU on 25 October 2012.

Pursuant to Article 2 of the European Council Decision 2011/199/EU: "Member States shall notify the Secretary-General of the Council without delay of the completion of the procedures for the approval of this Decision in accordance with their respective constitutional requirements. This Decision shall enter into force on 1 January 2013, provided that all the notifications referred to in the first paragraph have been received, or, failing that, on the first day of the month following receipt of the last of the notifications referred to in the first paragraph". The European Council Decision 2011/199/EU entered into force after it was approved by all the Member States in accordance with their constitutional provisions. The set deadline (1 January 2013) was not met, as the Czech Republic ratified the said Decision on 3 April 2013, and hence the said Decision entered into force on 1 May 2013 (see the Government's Statement of 26 April 2013 on the binding force of the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU); Journal of Laws - Dz. U. item 783).

1.2. The constitutional issue in the light of the raised allegations.

1.2.1. In the view of the applicants, the challenged Act on the ratification of the European Council Decision 2011/199/EU created procedural bases for conferring competences vested in the organs of state authority, in relation to certain matters, upon an international organisation – the European Stability Mechanism (hereinafter: the ESM). Therefore, consent to the ratification of the European Council Decision 2011/199/EU should have been granted in accordance with the procedure set out in Article 90 of the Constitution, and not in accordance with the procedure provided for in Article 89(1) of the Constitution. In the context of that allegation, the applicants indicated the infringement of Article 90 in conjunction with Article 120, first sentence, of the Constitution, and

additionally the infringement of Article 219 and Article 146 of the Constitution, due to "creating legal bases for restricting the powers of the Sejm to implement a budgetary policy as well as the power of the Council of Ministers to implement an economic policy, by way of granting the European Commission the competence to specify the terms of a mechanism correcting the financial economy of the state".

In the applicants' view, the Act on the ratification of the European Council Decision 2011/199/EU is also inconsistent with Article 48(6) of the TEU, due to the fact that the said Decision was issued without a legal basis, and the ratification thereof not only leads to the adoption thereof in a way that is inconsistent with Article 90 of the Constitution, but also results in a situation where "provisions that have been introduced into the Treaty on the Functioning of the European Union entered the legal order in an illegal way and, for that reason, they may not constitute a source of universally binding law, which additionally infringes Article 88 of the Constitution".

1.2.2. The allegation formulated by the applicants in point 1 of the *petitum* of the application required that it be determined whether the enactment of the Act on the ratification of the European Council Decision 2011/199/EU entails – within the meaning of Article 90 of the Constitution – conferring competences vested in the organs of state authority, in relation to certain matters, upon an international organisation or international institution. In the context of the present case, an important question has emerged, namely whether the procedure for enacting a statute that grants consent to ratification, as provided in Article 90 of the Constitution, is also required when 'the conferral of competence of organs of state authority' due to ratification of an international agreement may occur only potentially, in an unspecified future. Indeed, the applicants have alleged that the Act "provides" a basis for conferring competences, and not that such conferral took place at the moment of ratifying the European Council Decision 2011/199/EU. What suggests such reasoning on the part of applicants is their assertion that it is necessary to interpret the amendment to Article 136 of the TFEU in conjunction with the provisions of the Treaty Establishing the European Stability Mechanism (hereinafter: the ESM Treaty), as well as the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union Between the Kingdom of Belgium, the Republic of Bulgaria, the Kingdom of Denmark, the Federal Republic of Germany, the Republic of Estonia, Ireland, the Hellenic Republic, the Kingdom of Spain, the French Republic, the Italian Republic, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Grand Duchy of

Luxembourg, Hungary, Malta, the Kingdom of the Netherlands, the Republic of Austria, the Republic of Poland, the Portuguese Republic, Romania, the Republic of Slovenia, the Slovak Republic, the Republic of Finland and the Kingdom of Sweden, done at Brussels on 2 March 2012 (hereinafter: the fiscal compact).

Another allegation - the alleged infringement of Article 48(6) of the TEU by the Act on the ratification of the European Council Decision 2011/199/EU – is only indirectly linked with the main issue. The procedure in accordance with which the European Council Decision 2011/199/EU has been adopted has no direct connection with assessing the constitutionality of the Act on the ratification of the European Council Decision 2011/199/EU in the light of Article 90 in conjunction with Article 120, first sentence, of the Constitution.

2. The special character of a constitutional review in the case of a statute on ratification.

2.1. A statute granting consent to the ratification of an international agreement is a special statute, due to its normative content. There are no doubts that it is admissible for the Constitutional Tribunal to examine the Act on the ratification of the European Council Decision 2011/199/EU. In its judgment of 11 May 2005, ref. no. K 18/04 (OTK ZU No. 5/A/2005, item 49), the Tribunal has stated that: "Examining the constitutionality of a statute providing for the ratification of an agreement that confers competences falls within the scope of the jurisdiction of the Constitutional Tribunal (indeed, the said act remains a statute within the meaning of Article 188 of the Constitution). The President of the Republic of Poland may refer a bill authorising ratification to be examined in the course of *a priori* review by the Tribunal; other authorities specified in Article 191 of the Constitution (including 50 Deputies and 30 Senators) may request the Tribunal to review a statute authorising ratification after it has been passed by the Parliament".

Pursuant to Article 42 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), the Tribunal shall, while adjudicating on the conformity of the normative act or ratified international agreement to the Constitution, examine both the contents of the said act or agreement as well as the power and observance of the procedure required by provisions of the law to promulgate the act or to conclude and ratify the agreement. Despite its unique subject and normative content, a statute on ratification is still a statute,

and no provision delineating the scope of jurisdiction of the Constitutional Tribunal excludes that statute from the possibility of being reviewed by the Tribunal. A constitutional review of a statute on ratification may concern all elements of the statute: the content of the statute, powers to enact it, as well as a procedure for enacting it (Article 42 of the Constitutional Tribunal Act). In practice, not the succinct wording of such a statute, but the existence of powers to issue the statute as well as compliance with a procedure for enacting the said statute (due to doubts arising in the doctrine and the practice of applying the law as to the understanding of some of its elements) may be of most significance (see K. Działocha, comment 6 on Article 89 of the Constitution [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Warszawa 1999).

2.2. The Constitutional Tribunal has expressed its views (although in a different constitutional context) on the character and scope of review in the case of a statute granting consent to ratification. In its resolution of 30 November 1994, ref. no. W 10/94 (OTK in 1994, part 2, item 48), the Tribunal stated that this was a statute specifying competence and that its content comprised not only the indication of an organ of the state that was authorised to act, but also the character of that action; the said action is the ratification of an international agreement indicated in the statute. An analysis of the content of the statute authorising ratification must be carried out by analysing the content of a given international agreement which that statute concerns. At the same time, the Tribunal underlined that the point was only to review the statute authorising ratification, and not the international agreement as such. The Tribunal also pointed out that there were no doubts as to the jurisdiction of the Constitutional Tribunal to review the constitutionality of statutes authorising ratification – as well as of any normative acts – from the point of view of particular criteria. The Tribunal examines both the content of such an act as well as competence and the compliance with a statutory procedure required to issue such an act.

2.3. The view presented above is also up to date in the light of the Constitution of 1997, which is currently in force. It should be assumed that by reviewing statutes granting consent to ratification, a review of international agreements is indirectly carried out, in accordance with the assumption that if an agreement contains provisions that are inconsistent with the Constitution, then a statute granting consent to the ratification of such an agreement is also inconsistent with the Constitution (see L. Garlicki, comment 13 on Article 188 [in:] *Konstytucja…*, Warszawa 2007). Obviously, this is not a review of the constitutionality of an international agreement within the meaning of Article 188(1) of the

Constitution, but an analysis of its content, as a prerequisite for the enactment of a constitutional statute granting consent to ratification. In the case of a formal allegation, the said review is limited to determining whether a given international agreement belongs to the category of agreements referred to in Article 90(1) of the Constitution, and thus whether the legislator adopted an appropriate procedure for the enactment of the relevant statute concerning ratification.

2.4. – 4. [...]

5. Procedures for the ratification of an international agreement

5.1. Constitutional and statutory requirements

5.1.1. Ratification is a legal form for the Republic of Poland to bind itself by international agreements and certain special legal acts of the European Union. The Polish Constitution specifies a way in which the Republic of Poland binds itself by international agreements as well as a manner of incorporating the said agreements into the Polish legal system. Pursuant to Article 126(1) of the Constitution, the President of the Republic of Poland shall be the supreme representative of the Republic of Poland. The consequence of the above principle is Article 133(1)(1) of the Constitution, within the meaning of which the President of the Republic shall ratify international agreements. The circumstances that Poland binds itself by an international agreement and incorporates it as an element of national law require ratification by the President. This is a necessary, and sufficient, requirement. If the ratification of an international agreement does not require consent granted by statute, then the Prime Minister shall inform the Sejm of any intention to submit the agreement for ratification by the President of the Republic (Article 89(2) of the Constitution). If premisses set out in Article 89(1) or Article 90(1) of the Constitution are fulfilled, the requirement mentioned in the said provisions is to be met; namely, the ratification of an agreement requires prior consent granted by statute.

Pursuant to Article 89(3) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute. The Act on International Agreements confirms that binding the Republic of Poland by an international agreement requires consent granted by way of ratification or by approval (Article 12(1) of the Act on International Agreement). On the basis of Article 12(2) of the Act on International Agreements, ratification shall apply to international agreements referred to in Article 89(1) and Article 90 of the Constitution, as well as to other international agreements which provide for the requirement of ratification

or which allow for ratification, and special circumstances justify that.

By contrast, pursuant to Article 12(2a) of the Act on International Agreement (added on the basis of Article 23(1) of the Act of 8 October 2010 on cooperation of the Council of Ministers with the Sejm and the Senate in matters related to the membership of the Republic of Poland in the European Union; Journal of Laws - Dz. U. No. 213, item 1395): "Ratification shall apply to the legal acts of the European Union referred to in Article 48(6) of the Treaty on European Union as well as Article 25, Article 218(8), second subparagraph, second sentence, Article 223(1), Article 262 or Article 311, third subparagraph of the Treaty on the Functioning of the European Union". The said provision has been introduced due to the necessity to specify, by statute, a proper way of proceeding with the legal acts of the European Union. Pursuant to Article 15(5) of the Act on International Agreements, Article 15(1)-(4) of the said Act shall be applied accordingly to resolutions of the Council of Ministers concerning the submission of an EU legal act referred to in Article 12(2a) of the said Act to the President of the Republic for ratification. This entails that the submission of an EU legal act to the President for ratification occurs after consent mentioned in Article 89(1) or Article 90 of the Constitution is obtained or after the Sejm has been informed about such an intention to submit the act for ratification, as stated in Article 89(2) of the Constitution (see Article 15(3) of the Act on International Agreements).

5.1.2. The Constitution provides for three procedures aimed at ratifying an international agreement. Two of them require granting consent to ratification by statute (Article 89(1) as well as Article 90 of the Constitution). The third procedure concerning international agreements which do not require consent for ratification granted by statute, is limited to imposing an obligation on the Prime Minister to inform the Sejm of any intention to submit, for ratification by the President of the Republic, any international agreements whose ratification does not require consent granted by statute (Article 89(2) of the Constitution).

What determines the choice of one of the above-mentioned procedures to be applied is the content of a given international agreement.

Pursuant to Article 89(1) of the Constitution, ratification of an international agreement by the Republic of Poland, as well as renunciation thereof, shall require prior consent granted by statute - if such an agreement concerns: 1) peace, alliances, political or military treaties; 2) freedoms, rights or obligations of citizens, as specified in the

Constitution; 3) the Republic of Poland's membership in an international organisation, 4) considerable financial responsibilities imposed on the State, 5) matters regulated by statute or those in respect of which the Constitution requires the form of a statute. Thus, undoubtedly, Article 89(1) of the Constitution specifies a procedure for the ratification or renunciation of an international agreement the content of which is of special significance to the state as well as the said provision sets out the catalogue of such agreements. The above-mentioned procedure (referred to as complex ratification, large ratification) consists in granting consent, by statute, to the ratification of an international agreement before it is ratified by the President. This constitutes part of the entire ratification process that takes place at the level of the constitutional law (see K. Działocha, *op. cit.*, comment 2 on Article 89). Due to the lack of special regulations pertaining to a procedure for enacting a statute by means of which consent shall be granted for ratification in accordance with Article 89(1) of the Constitution, it is subject to general requirements outlined in Articles 118-123 of the Constitution. This means that the Sejm shall pass bills by a simple majority vote, in the presence of at least half of the statutory number of Deputies (Article 120, first sentence, of the Constitution, in principle).

An agreement referred to in Article 90(1) of the Constitution, i.e. an international agreement, by virtue of which the Republic of Poland may confer the competence of organs of state authority in relation to certain matters on an international organisation or international institution, needs to be bound by tighter restrictions. The certain "tightening" of the procedure involves raising the level of a majority in the Sejm and the Senate from a simple majority to the level of a two-thirds majority vote both in the Sejm and the Senate. The said majority required in the Sejm and the Senate, as specified in Article 90(2) of the Constitution, in the case of granting consent to the ratification of an international agreement on the conferral of competence is considerably higher than a majority required for the enactment of (ordinary) statutes. It is equivalent to the qualified majority in the Sejm and is higher in the context of the Senate, in comparison with a majority required to adopt a bill to amend the Constitution (Article 235(4) of the Constitution). Thus, in quantitative categories, it should be concluded that the requirements under discussion are at least equivalent – from the point of view of representation and legitimacy – to requirements which are to be met in the case of amendments to the Constitution. The said circumstance is an additional argument for the assessment that the conferral of competence vested in the organs of state authority "in relation to certain matters" takes place with the preservation of high standards of representation and the scale of acceptance of solutions to

be adopted (see the judgment of the Constitutional Tribunal of 11 May 2005, ref. no. K 18/04). It should be stressed that the procedure provided for in Article 90 of the Constitution enhances the position of the Senate in the course of the legislative process. Also, the separate character of that procedure consists in the fact that the two houses of the Polish Parliament have equal rights when it comes to enacting such a bill, as without consent of either of the houses the bill may not be enacted. This means that Article 121 of the Constitution is not applicable; the said Article specifies the competence of the Senate in the course of enacting bills and sets out a procedure for the Sejm to consider the Senate's resolutions concerning bills passed by the Sejm (see the judgment of the Constitutional Tribunal of 27 May 2003, ref. no. K 11/03, OTK ZU No. 5/A/2003, item 43). The said circumstance is an additional argument for the assessment that the conferral of competence vested in the organs of state authority "in relation to certain matters" takes place with the preservation of high standards of representation and the scale of acceptance of solutions to be adopted. In that regard, the Sejm and the Senate function as the organs of the state that represent the Nation – the sovereign, pursuant to the principle expressed in Article 4(2) of the Constitution.

Direct reference to the sovereign decision of the Nation is even clearer in the case of a nation-wide referendum, which – pursuant to Article 90(3)-(4) of the Constitution – may be held to ratify an international agreement conferring the competence of organs of state authority in certain matters.

By providing for the necessity to enact a bill in which consent is granted for ratification in its Article 89 and Article 90, the Constitution, manifests the fact that international agreements – which are of special significance from the point of view of the Constitution – require greater democratic legitimacy granted by the Parliament, or by the Nation.

5.2. Relations between Article 89(1) and Article 90 of the Constitution.

5.2.1. Article 89(1) of the Constitution explicitly sets out certain categories of cases which an international agreement concerns, whereas Article 90(1) of the Constitution indirectly indicates the category of cases by reference to "the competence of organs of state authority". Thus, the subject of an international agreement may comprise matters which fall within the scope of the regulation of Article 89 as well as Article 90 of the Constitution. In practice, this may hinder drawing a distinction as regards the scope of application of the two provisions.

The catalogue of matters mentioned in Article 89(1)(1)-(5) of the Constitution indicates that a majority of ratified international agreements affect (modify) the way of exercising the competence by the organs of state authority. In many cases, the said agreements do not introduce a restriction as to the exercise of the competence by the organs of state authority or impose obligations on those organs which do not arise from national law (e.g. agreements on the enforcement of rulings issued by foreign courts). Moreover, the said catalogue indicates that the subject of those agreements may be of particular constitutional significance. However, with reference to those agreements, such a restrictive procedure is not applied as the one in the case of agreements referred to in Article 90(1) of the Constitution. Therefore, it should be assumed that not every agreement that affects the way of exercising competence vested in the organs of state authority, and restricts or modifies the scope of the said competence by imposing new obligations on the said organs, constitutes the conferral of competence within the meaning of Article 90 of the Constitution. Making a contrary presumption would result in almost complete overlap of the scope ratione materiae of Article 89 and Article 90 of the Constitution. This would be inconsistent with the intention of the rational constitution-maker, as he has assumed that, in the case of constitutionally significant matters which lead to the modification of the scope of competence vested in the organs of state authority, the procedure indicated in Article 89(1) of the Constitution is the proper one, and merely in the event of conferring the competence, the proper procedure is the one set out in Article 90 of the Constitution.

The uniqueness of Article 90 of the Constitution should also be recognised in its role that has been historically assigned thereto. There is no doubt that the present version of Article 90 of the Constitution was understood as a provision that was to make accession to the EU possible, although this does not directly follow from its content (see K Wojtyczek, *Przekazywanie kompetencji państwa organizacjom międzynarodowym*, Kraków 2007, p. 25, see also R. Chruściak, "Procedury przystąpienia Polski do Unii Europejskiej w pracach nad Konstytucją", *Państwo i Prawo* Issue No. 5/2003, p. 53). Regarded as "an integration clause", Article 90 of the Constitution has introduced a special procedure for the ratification of international agreements on the basis of which Poland intends to "delegate to an international organization or international institution the competence of organs of State authority in relation to certain matters". A ratification statute considered in accordance with the procedure set out in Article 90 of the Constitution constitutes a special type of a statute not only due to strict requirements for the enactment thereof, but mainly due to its objective which is to grant consent to the

ratification of agreements that make it possible for Poland to participate in integration processes. The procedure and terms of granting consent to ratification in accordance with Article 90 of the Constitution have been intentionally distinguished by the constitution-maker from the procedure for enacting ordinary bills, including other ratification bills referred to in Article 89 of the Constitution. That distinction is based on agreements concerning participation in integration processes in forms that ultimately affect the practical dimension of the principle of the sovereignty of the state, which is enshrined in chapter I of the Constitution (see Z Kędzia, "Opinia w sprawie wybranych aspektów prawnych ratyfikacji umowy międzynarodowej", *Przegląd Sejmowy* Issue No. 1/2009, p. 184).

5.2.2. Significance assigned to Article 90 of the Constitution by the constitution-maker is reflected in practice. The procedure provided for in the same provision was only applied twice: during the process of ratification of the Treaty of Accession and the Treaty of Lisbon. Thus, what should determine the choice between the ratification procedure set in Article 90 and the one provided for in Article 89 of the Constitution should be the content of a given international agreement. If the agreement is related to the conferral of competence vested in the organs of state authority, it is proper to apply a special procedure.

5.3. The procedure for enacting the Act on the ratification of the European Council Decision 2011/199/EU.

5.3.1. The Act on the ratification of the European Council Decision 2011/199/EU was enacted in accordance with the procedure specified in Article 89(1) of the Constitution. In the explanatory note for the government's bill on the ratification of the European Council Decision 2011/199/EU (the Sejm Paper No. 37/7th term), it has been stated that "the European Council Decision 2011/199/EU fulfils premisses specified in Article 12(2a) of the Act of 14 April 2000 on International Agreements (...), in accordance with which ratification comprises EU legal acts referred to in Article 48(6) of the Treaty on European Union. Since the said Decision fulfils the premisses set out in Article 89(1) of the Constitution of the Republic of Poland, as it concerns Poland's membership in an international organisation (Article 89(1)(3) of the Constitution), the binding of the Republic of Poland by the European Council Decision of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro (2011/199/EU) should take place in accordance with Article 89(1) of the Constitution, i.e. by ratification upon prior

consent granted by statute".

5.3.2. In the applicants' view, the Act on the ratification of the European Council Decision 2011/199/EU should have been enacted in accordance with Article 90(2)-(4) of the Constitution, as this results in the conferral of competences that have legal effects.

It should be noted that, at the stage of legislative work, draft resolution was submitted on the procedure for expressing consent for the ratification of the European Council Decision 2011/199/EU (the Sejm Paper No. 114/7th term). The resolution provided that a statute granting consent to ratification would be enacted in accordance with Article 90(2) of the Constitution. It was pointed out in the explanatory note that the said Decision: "creates a treaty basis for conferring – upon a supranational level - competences vested in the organs of state authority, unless the Government decide to renegotiate the TFEU in that regard before joining the euro area". The draft resolution was dismissed at the 14th sitting of the Sejm on 10 May 2012. The Sejm began to work on the bill in accordance with the procedure provided for in Article 89(1) of the Constitution.

Reservations as to the procedure for enacting the bill were also raised in the course of legislative work on the Government's bill on ratification (see the first reading in the Committee on the European Union and the Committee on Foreign Affairs – the Bulletin No. 125/7th term of the Sejm, as well as the second reading – Verbatim Record from the 14th sitting of the Sejm on 10 May 2012, pp. 168-181). The Deputies made reference, *inter alia*, to an expert opinion prepared by the Bureau of Research of the Chancellery of the Sejm (see "Opinie w sprawie Decyzji Rady Europejskiej z dnia 16-17 grudnia 2010 r. dotyczącej zmiany art. 136 Traktatu o funkcjonowaniu Unii Europejskiej, w szczególności procedury jej stanowienia w UE oraz procedury jej ratyfikacji", *Przegląd Sejmowy*, Issue No. 2/2012, pp. 147-176; the summaries of the opinions as well as other expert opinions were published in *Przeglądzie Sejmowym*, Issue No. 3/2012, pp. 177-215).

Eventually, the bill on the ratification of the European Council Decision 2011/199/EU was enacted in accordance with the procedure provided for in Article 89(1) of the Constitution. As it follows from the course of legislative work, the discrepancy between opinions regarded the issue whether consent to the ratification of the said Decision should be granted by a statute enacted in accordance with the procedure set out in Article 89(1) of the Constitution, or the one provided for in Article 90(2)-(4) of the Constitution. In the view of the Council of Ministers, the submission of the bill on the ratification of the said Decision correlated with the fulfilment of the premiss of "Poland's

membership in an international organisation", and this indicated the adequacy of the procedure set out in Article 89(1) of the Constitution. In the opinion of the applicants, the Act on the ratification of the European Council Decision 2011/199/EU bears the characteristics of an international agreement referred to in Article 90(1) of the Constitution, as it creates the legal and treaty basis for conferring competence vested in the organs of state authority in relation to certain matters on an international organisation – the European Stability Mechanism.

6. Premisses concerning the application of a procedure provided for in Article 90 of the Constitution.

6.1. A special ratification procedure – Article 90 of the Constitution.

6.1.1. From a substantive point of view, the unanimous European Council Decision 2011/199/EU may be regarded as a special kind of an international agreement. This arises, for instance, from the objective of the said Decision which is to amend the TFEU, being an international agreement. Also, it should be assumed that the said Decision concerns – although not directly – Poland's membership in the EU. This may be justified by indicating that the proposed solution creates a new situation as regards the status of two groups of Member States, namely those whose currency is the euro and those that still use their national currencies. Moreover, the proposed amendment to the TFEU implies vital consequences of adopting the common currency i.e. the euro. In that regard, the legitimacy of applying the legal institution of ratification upon prior consent granted by statute (Article 133(1)(1) in conjunction with Article 89(1) of the Constitution) raises no reservations (see P. Czarny, "Opinie w sprawie Decyzji Rady Europejskiej", *op. cit.*, *Przegląd Sejmowy* Issue No. 2/2012, p. 165).

In the applicants' opinion, the amendment introduced by the European Council Decision 2011/199/EU, read in conjunction with the norms introduced by the ESM Treaty as well as analysed in the context of the fiscal compact, leads to conferring - upon an international level - competences that have legal effects, and thus the Act on the ratification of the European Council Decision 2011/199/EU should have been enacted in accordance with the procedure provided for in Article 90 of the Constitution.

6.1.2. It is assumed in the doctrine that Article 90 of the Constitution has been introduced for the purpose of creating a constitutional basis of Poland's accession to the EU (see P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2*

kwietnia 1997 r., Warszawa 2000, p. 115; C. Mik, "Przekazanie kompetencji przez Rzeczpospolitą Polską na rzecz Unii Europejskiej i jego następstwa prawne (uwagi na tle art. 90 ust. 1 Konstytucji)", [in:] *Konstytucja Rzeczypospolitej Polskiej z 1997 roku a członkostwo Polski w Unii Europejskiej*, C. Mik (ed.), Toruń 1999, p. 145). Hence, with regard to Article 90 of the Constitution, the phrases "a European clause" or "an integration clause" have been used, which indicates a narrow interpretation of Article 90 of the Constitution. Such a role assigned to Article 90 of the Constitution has been confirmed by a bill amending the Constitution submitted by the Polish President (the Sejm Paper No. 3598/6th term of the Sejm), where it was proposed to delete Article 90 of the Constitution and to regulate the issue of Poland's membership in the EU in a new chapter entitled "The Membership of the Republic of Poland in the European Union" (see *Zmiany w Konstytucji RP dotyczące członkostwa Polski w Unii Europejskiej. Dokumenty z prac zespołu naukowego powołanego przez Marszałka Sejmu*, P. Radziewicz (ed.), Warszawa 2010, p. 28).

The said provision has not, in practice, been applied to international organisations other than the European Union, although such a possibility was considered with regard to Poland's ratification of the Statute of the International Criminal Court (see "Opinie w sprawie ratyfikacji przez Polskę Rzymskiego Statutu Międzynarodowego Trybunału Karnego", *Przegląd Sejmowy* Issue No. 4/2001, pp. 129-172), as well as in the context of an agreement with the United States of America concerning the missile defence system (see R. Piotrowski, *Instalacja systemu obrony przeciwrakietowej w świetle Konstytucji RP*; J. Kranz, A. Wyrozumska, "Kilka uwag o umowie polsko-amerykańskiej w sprawie tarczy antyrakietowej" [in:] "Dwugłos o aspektach prawnych tarczy antyrakietowej w Polsce", *Państwo i Prawo* Issue No. 7/2009, pp. 20-49).

As mentioned before, the ratification procedure provided for in Article 90 of the Constitution has been applied twice: in the course of ratifying the Treaty of Accession and the Treaty of Lisbon. In the explanatory note for the bill on the ratification of the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007, it has been stressed that the procedure for the ratification of the Treaty of Lisbon in Poland should be based on the provisions of Article 90 of the Constitution. "Carrying out the ratification procedure on the basis of Article 90, and not on the basis of Article 89, of the Constitution follows from the content of the Treaty of Lisbon, which changes the subject of regulation of the previous Treaties establishing the EU to such an extent that this implies further conferral, or

possibly modifications to the conferral, of «the competence of organs of State authority in relation to certain matters» upon a future unitary international organisation – the European Union (the Sejm Paper Issue No. 280/6th term of the Sejm).

Thus, when taking a decision about the choice of a procedure for enacting a statute by means of which consent is to be granted for the ratification of an international agreement (Article 89(1) or Article 90(2)-(4) of the Constitution), the legislator must rely on an analysis of the content of the agreement and the effects thereof. What determines the choice of the procedure is the character of the regulations that are to be introduced. Undoubtedly, Article 90 of the Constitution is applicable in the case of the fulfilment of the premiss that "the competence of organs of State authority in relation to certain matters" is to be conferred upon an international organisation or international institution.

Fundamental controversies arise from the "narrow" or "broad" interpretation of that premiss, which means correlating Article 90 of the Constitution – in the first place – with international agreements, on the basis of which competences are conferred directly (see the Treaty of Accession or the Treaty of Lisbon) and, in the second case, also with agreements that bring about changes within the scope of conferred competences or changes within the scope of exercise of competences conferred earlier.

6.2. The conferral of competences as a premiss determining the application of Article 90 of the Constitution – a doctrinal perspective

Article 90(1) comprises three sequences which contain certain normative content that is closely interrelated: 1) the Republic of Poland may, by virtue of international agreements, 2) delegate to an international organisation or international institution, 3) the competence of organs of state authority in relation to certain matters. "A constitutional norm providing for conferral ("may (...) delegate") of competences of the organs of state authority in relation to certain matters upon an international organisation or international institution means an act as a result of which the Republic of Poland gives up its exclusive right to exercise its authority within a certain scope, by permitting the application of legal acts issued by an international organisation (international institution) in that regard, i.e. to its internal affairs, and in particular permitting the direct application of law enacted by the said organisations. Thus, the said conferral does not even regard particular (legislative, executive or judicial) competences of the organs of the state, but merely competence in relation to certain matters. «Conferral» in this context does not denote the conferral of sovereignty of the Polish state upon an international entity" (K. Działocha, *op. cit.*,

comment 3 on Article 90).

It is emphasised in the doctrine that, on the one hand, conferral of competences involves giving up competences within a certain scope by the state for the sake of a given international organisation and, on the other hand, the said conferral makes it possible for the organisation to enact law that would be directly applicable within a certain scope to the legal order of the state and would take precedence over other norms (including statutory ones) of national law. The conferral of competences takes place if the two requirements are fulfilled. Thus, not every obligation towards an international entity leads to the conferral of competences (see A. Wyrozumska, "Prawo międzynarodowe oraz prawo Unii Europejskiej a konstytucyjny system źródeł prawa" [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, K. Wójtowicz (ed.), Warszawa 2006, p. 78)

According to J. Barcz and J. Kranz, the conferral of competences within the meaning of Article 90 of the Constitution comprises the following elements: 1) opening up the national legal system to exclusive competences that have legal effects and are vested in an international organisation (international institution), that directly shape legal relations (direct application and direct effects) in the realm of its binding law (with regard to subjects, objects, events or situations – primarily within the scope of jurisdiction of its member states); 2) permanently renouncing some of its competences that have legal effects (in particular law-making competences) by the state in relation to certain matters; 3) conferring competences that have legal effects, also within a broader scope than the competences renounced by the state, upon an international organisation (international institution) (see J. Barcz, J. Kranz, "Powierzenie kompetencji na rzecz UE a Traktat o Europejskim Mechanizmie Stabilności i Traktat o unii fiskalnej. Uwagi w świetle orzecznictwa niemieckiego FTK i wyroku TSUE w sprawie C-370/12", *Przegląd Sejmowy* Issue No. 4/2013, p. 23 and the subsequent pages).

An extensive analysis of the term 'conferral of competences' has been carried out by K. Wojtyczek, who summed up the issue in the following way: "Conferral of competences means delegating certain competences that have legal effects on entities or individuals being subject to the authority of the Republic of Poland, in relation to matters that fall within the scope of Poland's jurisdiction, to an international organisation or international institution. As a result, the said international organisation or institution has sole authority over entities or individuals that are subject to the authority of particular states. At the same time, what emerges is a series of complex correlations regarding competences between the international organisation or institution and its member states;

the correlations ensure that the conferred competences are effective. Due to the conferral of competences, the international organisation or institution acquires competences which do not completely correspond to the competences of its member states. The authority of international organisations or institutions goes considerably beyond the sum of corresponding competences of the organs of state authority, and provides a new quality, by making it possible to carry out public tasks that may not be performed single-handedly by particular states or even by traditional means of international cooperation" (K. Wojtyczek, *Przekazywanie kompetencji...*, p. 206).

The interpretation of the term "the competence of organs of State authority" must take account of the objectives of Article 90(1) of the Constitution. On the one hand, the said provision authorises the state to confer competences upon an international organisation or institution; on the other hand, it provides for a special procedure for conferring the competences. The basic law-making objective is to enable the state to effectively act in international relations within the scope of integration. The interpretation may not hinder the state's ability to undertake indispensable actions in international relations, and in particular to join such organisations and enhance integration (*ibidem*, p. 14).

What may be noted from this brief presentation of views held by various representatives of the doctrine is that the understanding of the premiss 'conferral of competences' is not consistent, and thus it leads to different conclusions as regards the legitimacy of applying the procedure set out in Article 90(2) of the Constitution to a given international agreement.

6.3. Article 90 of the Constitution in the jurisprudence of the Constitutional Tribunal.

6.3.1. Although the Constitutional Tribunal has underlined the special character of a statute that grants consent to the ratification of an international agreement, hitherto it has not provided an interpretation of terms used in Article 90 of the Constitution. In its two vital judgments (of 11 May 2005, ref. no. K 18/04, as well as of 24 November 2010, ref. no. K 32/09, OTK ZU No. 9/A/2010, item 108), the Tribunal assumed that the conferral of competences had already taken place and focused on the questions whether the conferral of competences had at all been admissible in the light of the principle of the sovereignty of the Republic of Poland and whether, in the context of a particular international agreement (the Treaty of Accession, the Treaty of Lisbon) "conferral" had

met the criteria set out in Article 90(1) of the Constitution (and in particular, whether competences had been conferred in relation to only "certain matters"). The Constitutional Tribunal held the view that Article 90 of the Constitution manifested the fact that the constitution-maker had, in a sovereign way, opened up to the possible – determined by certain conditions – extension of the catalogue of legal acts that are to be universally applicable in the territory of the Republic of Poland. However, neither Article 90(1) nor Article 91(3) of the Constitution may constitute a basis of conferring, upon an international organisation (or an organ thereof), competence to enact legal acts or take decisions that would be inconsistent with the Constitution.

6.3.2. In the statement of reasons for the judgment of 11 May 2005, ref. no. K 18/04, which concerned the constitutionality of the Treaty of Accession, the Tribunal has stated that the conferral of competences "in relation to certain matters" must be construed as a prohibition against conferring all competences vested in a given organ of state authority, and conferring all competences within a given scope, as well as a prohibition against conferring competences concerning matters that fall within the scope of powers of a given organ of state authority. Therefore, it is necessary to precisely specify areas and the scope of competences that are subject to conferral. At the same time, the Tribunal has made a proviso that Article 90(1) of the Constitution may not constitute a basis of granting an international organisation (or an organ thereof) competence to enact legal acts or make decisions that would be inconsistent with the Constitution, in particular to the extent that the Republic of Poland could not function as a sovereign and democratic state ("core" powers).

6.3.3. -6.4 [...]

6.5. The competence of the organs of state authority

6.5.1. What constitutes a basic prerequisite for applying Article 90 of the Constitution is determination that the subject of an international agreement comprises the competence of the organs of state authority as well as the conferral thereof upon an international organisation or international institution. If the Constitutional Tribunal determines that the subject of a given international agreement does not at all comprise the competence of the organs of state authority, there is no need to consider what the conferral thereof implies.

In the applicants' opinion, the term 'competence' should be construed as "powers

of the supreme authority to enact law and issue orders safeguarded by enforcement. (...) thus, the point is the formal essence of power, i.e. intention and the implementation of the intention".

In the context of such a general definition, it is indispensable to indicate more specific characteristics which describe the term 'competence' in categories that make it possible to construct a certain higher-level norm for the review which may constitute a reference point for evaluating whether there has occurred conferral of competence in a specific situation.

6.5.2. The term 'competence' has not been defined in law, and moreover it is rarely used by the legislator in the binding law. By contrast, the term 'competence' has been used in the legal register for a long time. The way in which 'competence' is specified and defined varies in the science of Polish law, both in the light of the theory of law as well as in the context of particular dogmas (see M. Zieliński, *Wykładnia prawa: Zasady, reguły, wskazówki,* Warszawa 2002, pp. 24-31; M. Matczak, "Z rozważań nad koncepcją normy kompetencyjnej" [in:] *Z zagadnień teorii i filozofii prawa: Konstytucja*, A. Bator (ed.), Wrocław 1999, p. 201 and the subsequent pages; A. Bator, *Kompetencja w prawie i prawoznawstwie*, Prawo CCLXXXVII, Wrocław 2004; W. Jedlecka, "Suwerenność państw członkowskich a kompetencje wyłączne Unii Europejskiej" [in:] *Z zagadnień teorii i filozofii prawa. Kompetencja ze stanowiska teorii i filozofii prawa*, W. Jedlicka (ed.), Wrocław 2004, pp. 85-86).

The complexity of the term 'competence' as used in Article 90 of the Constitution has been pointed out by K. Wojtyczek, who has indicated that the term 'competence' may denote a generally understood right to regulate or determine matters within a given scope that is defined by a certain criterion. Within that meaning, in practice, competence comprises a certain set of powers and is specified by 'competence' construed as authorisation for a given entity or individual to take certain action. Competence within that meaning provides for conferring general competence upon a certain entity or individual within a given scope. In such a case, competence is specified in relation to activity that is specified in more detail (K. Wojtyczek, *op. cit.*, pp. 107-108).

However, despite exiting differences, one may indicate elements that comprise the term 'competence' as adopted by a majority of the representatives of public law as well as used in the jurisprudence of courts. These are: a) the essence of competence, i.e. the capability of action, the possibility of action, authorisation to action; b) the subject of

competence, i.e. above all, the organ of public authority that has the said capability or possibility; c) the object of competence, i.e. an act (action, a set of juridical acts, a series of actions).

In order to specify the content of an act, it is vital what matters the said act is to concern. The act may take on diverse forms and may concern the enactment and application of law. It may consist in taking actions. Authorisation to carry out an act (take action) is related to specifying the terms of the validity of the act. Frequently it is also related to specifying the effects of a legal act.

Specifying competence and determining the content of norms governing competence always entail indicating an individual organ of state authority (e.g. the Council of Ministers) or the type of an organ of state authority (e.g. a court). the specification of the object and the possibility of carrying out an act may be abstract to a greater or lesser extent; however, it always indicates the type of rights and obligations addressed to a given organ of state authority.

The application of the above specification of competence to the interpretation of Article 90 of the Constitution encounters serious difficulties. The character of the said regulation entails that the conferral may concern not only the conferral of individual elements of competence, but also a certain fragment of state authority exercised by various organs of the state. Moreover, competence taken over by an international organisation (an international institution) does not constitute a simple sum of conferred competences – on the part of an international organisation new competences emerge and they are not exactly equivalent to conferred competences. Finally, it is not always possible to precisely indicate conferred competences and specify the terms of exercising the competence in an international agreement that constitutes the basis of the activity of an organisation. In particular, this concerns situations where Poland is to become a member of an organisation that has already been established. The said lack of precision may stem from the particular character of the organisation, the way its objectives have been formulated, the particular character of its bodies or authorities and, also, from the legal language used in international law.

For the above reasons, the term ‘competence’ (norms governing competence) that is used in the theory of law as well as in the context of particular dogmas does not provide sufficient criteria for reviewing of the appropriateness of applying the procedure indicated in Article 90 of the Constitution. Indeed, the said criteria do not reflect the essence and *ratio legis* of Article 90 of the Constitution which primarily imply conferring some of the

competence vested in the organs of state authority upon an international organisation. As a consequence, an international organisation and the bodies or authorities thereof gain the right to exercise powers of the organs of public authority with regard to all Polish citizens and the organs of Polish public authority.

6.5.3. Taking account of views expressed by the representatives of the doctrine and presented in the jurisprudence of the Constitutional Tribunal, it should be stated that "competence" in the light of Article 90(1) of the Constitution entails authorising a given organ of public authority to take certain actions. The said actions, in principle, have legal effects and are related to issuing legally binding acts. The said acts may interfere with the realm of the legally protected personal interests of the individual. In order to determine whether given competence is competence construed in the light of Article 90 of the Constitution, it is required to at least indicate an organ of state authority in which the competence is vested, entities or individuals that are governed by that competence, the content of the rights of the said organ and the obligations of subordinate entities or individuals which correspond to the said rights. Given that Article 90(1) of the Constitution mentions competence "in relation to certain matters", merely specifying the scope of activity carried out by an organ of state authority or a generally formulated right to regulate a given category of matters does not constitute competence within the meaning of the said provision. Also, it may not be the subject of conferral.

To provide an answer to the question whether the European Council Decision 2011/199/EU should have been ratified in accordance with Article 90(1) of the Constitution, it should primarily be determined whether the said Decision regards the competence within the meaning presented above. Only the occurrence of the above elements in the context of the said Decision could indicate that we are dealing with the competence referred to in Article 90(1) of the Constitution.

When establishing necessary findings, one should bear in mind the complex character of the term 'competence' as used in Article 90(1) of the Constitution as well as requirements concerning the formulation of international agreements that provide for conferral of competences. Since the scope of competences that are to be conferred does not have to be reflected in the content of an international agreement in a simple way, one should assume that the above-indicted elements of competence do not have to be explicitly formulated in a provision of the international agreement. Thus, the criterion that verifies the fulfilment of the premiss concerning Article 90(1) of the Constitution is also the

criterion for the effect of an international agreement or an equivalent act, e.g. a decision issued by the European Council under Article 48(6) of the TEU (the bridging clause). If one may conclude from the agreement that the application of the agreement will provide grounds for distinguishing the above-indicated elements, one should opt for the procedure set out in Article 90(1) of the Constitution.

6.5.4. In the view of the Constitutional Tribunal – in the light of analysing the content of the European Council Decision 2011/199/EU from the point of view of elements that must occur if one is to speak of "competence of an organ of state authority" – there are no grounds to state that the challenged Act, which grants consent to the ratification of the European Council Decision amending Article 136(3) of the TFEU, leads to the conferral of "the competence of organs of State authority", within the meaning of Article 90 of the Constitution. It does not follow from Article 136(3) of the TFEU that competence which was previously vested in given organs of state authority would become part of the scope of competence of an international organisation or international institution. The said provision mentions neither an international organisation nor any competence of an organ of state authority which is to be conferred. The amendment to Article 136 of the TFEU has not created a relation of subordination with regard to an international organisation (an international institution). That conclusion eliminates a need to interpret the other terms used in Article 90(1) of the Constitution.

6.6. Amending an agreement on the basis of which competence has been conferred.

6.6.1. A special case that requires evaluation in the light of Article 90 of the Constitution is the case of amending an agreement on the basis of which the competence of organs of state authority has been conferred. Given that agreements which are subject to ratification upon consent granted by statute are not uniform in character, it is justified to make an initial assumption that not every amendment to an agreement on the basis of which competence has been conferred must be ratified in accordance with the same procedure (i.e. the procedure set out in Article 90 of the Constitution).

On the one hand, Article 90(1) of the Constitution clearly states that a special procedure is applied if competence is conferred. On the other hand, however, the said provisions may not be interpreted in a way that limits their application only to such a

situation. It may not be ruled out that, as a result of an amendment to an international agreement, the way of exercising competence will change so considerably that the exercise thereof by an international organisation will mean granting it new competence. Even if the said conferral is not provided for in the agreement, it will arise from the interpretation of the agreement arrived at in accordance with rules adopted by the organisation itself as well as by its member states.

However, if the subject of an international agreement does not explicitly comprise the conferral of competence, then recognition that, nevertheless, such conferral has taken place requires indicating the competence vested in the organs of state authority and the rules of interpretation that justify an assertion about the said conferral. Indeed, what does not follow from Article 90 of the Constitution is a presumption within the meaning of which the introduction of an amendment to an agreement concluded in accordance with the procedure set out in Article 90 of the Constitution always requires the same procedure. This would be inconsistent with the wording of Article 90 of the Constitution as well as with its functional interpretation arrived at on the basis of the above-mentioned fundamental principles of the Constitution, which confirms the fact that Polish law has opened up to international law.

6.6.2. The thesis that a legal act which has been adopted in a certain form should be amended in the same form may not be regarded as a binding principle of law which applies to all legal acts mentioned in the Constitution. Although in the Polish legal order such a regularity may be observed (e.g. in the context of statutes), it is not applicable to the interpretation of Article 90 of the Constitution. The acceptance of the said thesis is admissible if we are dealing with one particular form of a legal act. In such a case, an amendment to the act should be introduced in the same form. As regards international agreements, they are concluded, ratified and renounced in accordance with varied procedures. Moreover, Article 90 of the Constitution introduces a special norm in relation to the above-mentioned thesis. The constitution-maker's intention is that the procedure indicated in Article 90 of the Constitution is to be applied if the subject of an international agreement comprises the conferral of competences. Thus, a linguistic interpretation weighs in favour of applying the said provision only when the premises indicated therein has been fulfilled. The cited provision lacks an additional proviso that the procedure set out in Article 90 of the Constitution also concerns any amendments to that type of an agreement. Relying on *a contrario* reasoning, it should be assumed that if the subject of an amending

agreement does not comprise the conferral of competences, the procedure set out in Article 90 of the Constitution is not applicable. *A contrario* reasoning is supported by constitutional axiology as well as by the purposive interpretation of Article 90 of the Constitution. The bases of constitutional axiology indicate that the essence of the constitution-maker's approach rules out the possibility of applying the procedure set out in Article 90 of the Constitution in the case of any amendments to an international agreement.

A similar approach has been adopted by the legislator. In Article 25(2) of the Act on International Agreements, he has provided that an amendment to the scope of application of an international agreement upon consent referred to in Article 89(1) and Article 90 of the Constitution "shall require prior consent granted by statute". Thus, there is no mention here of "the same procedure". Consequently, one may not rule out that an amendment to an international agreement adopted in accordance with Article 89(1) of the Constitution will be introduced in accordance with Article 90(2) of the Constitution if, on the basis of the agreement, the competence of state authority is to be conferred.

It should be added that the acceptance of the thesis about the necessity to apply Article 90 of the Constitution to an amendment introduced into an agreement concluded in accordance with that procedure would entail assuming that a reverse operation (the return of competence") would also require the application of such a procedure, but this would be contrary to the *ratio legis* of Article 90 of the Constitution.

Also, the applicants' thesis about preserving the same form is not justified in the light of international law.

6.6.3. The stance presented by the Constitutional Tribunal as regards the interpretation of Article 90 of the Constitution is supported by the principle of favourable predisposition of the Republic of Poland towards the process of European integration and the principle of cooperation with all countries. In its judgment of 27 May 2003, ref. no. K 11/03, the Constitutional Tribunal has stated that interpretation of binding legislation should take account of the constitutional principles derived from the Preamble and Article 9 of the Constitution. What is constitutionally correct, and thus preferred, is such an interpretation of law which serves the implementation of the indicated constitutional principle. In its judgment of 11 May 2005, ref. no. K 18/04, the Tribunal has stressed that on no account may an interpretation which favours the EU law lead to "the results which are contrary to the explicit wording of constitutional norms and are impossible to reconcile with the minimum of the guarantee functions fulfilled by the Constitution". In this context,

it should be recalled what stance the Constitutional Tribunal has presented in the statement of reasons for the judgment of 12 January 2005, ref. no. K 24/04 (OTK ZU No. 1/A/2005, item 3). The Constitutional Tribunal has held that: "In numerous cases the development of the European Union requires taking a new approach to legal issues and institutions which have been established over the period of many years (and sometimes many centuries), as well as have been enriched with jurisprudence and the doctrine, and which also have been well-known to several generations of lawyers. The necessity to redefine certain – as it may seem, inviolable – institutions and terms arises from the fact that, in a new legal situation stemming from European integration, there may sometimes be conflicts between the well-established understanding of constitutional provisions and new needs for taking action at the forum of the EU that would still be consistent with constitutional principles".

6.6.4. To sum up, even if we assume that in the case of amending an agreement the subject of which has been the conferral of competence vested in the organs of state authority, there exists a certain presumption that, also on the basis of that amendment, the conferral of competence will take place, then this presumption is relative and may not be accepted in the present case. One may not devise a general rule that consent to an amendment introduced to an agreement ratified in accordance with Article 90 of the Constitution must be granted in accordance with the same procedure. The adoption of an interpretation within the meaning of which any amendment to an agreement conferring competence is to be introduced in accordance with the same procedure, i.e. in accordance with Article 90 of the Constitution, as it has already been indicated, is justified neither by the wording of the said provision nor by the functional interpretation thereof. Also, the above-mentioned constitutional principles that specify relations between international law and national law do not require that Article 90 of the Constitution be applied in the case of any amendment to an agreement conferring competence.

7. An analysis of the allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with the Constitution.

7.1. The allegation and the higher-level norm for the review

In the applicants' opinion, the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 90 in conjunction with Article 120, first sentence, of the Constitution, as regards a procedure in accordance with which the said Act has been enacted, due to creating legal and treaty bases for conferring the competence of

organs of state authority in relation to certain matters upon an international organisation – the ESM; "the matters included the terms of Poland's participation in the monetary union, the conferral of competence - on the organs of the ESM - that has legal effects as regards determining the terms of Poland's participation in the monetary union, and the extension of the scope of jurisdiction of the European Court of Justice and the European Court of Auditors with regard to Poland".

First of all, it should be stated that the indication of Article 120, first sentence, of the Constitution as a higher-level norm that is to be read in conjunction with another provision, without any additional explanation, leads to a conclusion that the applicants' arguments for the infringement of Article 90 of the Constitution also refer to Article 120, first sentence, of the Constitution.

In this context, it should be noted that two norms may be derived from Article 120, first sentence, of the Constitution. The first one determines the issues of a majority and the minimal number of Deputies present during a vote; the regulation only refers to the Sejm (it follows from Article 124 of the Constitution that Article 120 of the Constitution is applied accordingly to proceedings in the Senate). The second norm which may be derived from Article 120, first sentence *in fine*, of the Constitution is the following: bills are not passed by a simple majority vote, where the Constitution provides for a different majority or a different minimal number of Deputies present during the vote. Thus, the first norm constitutes a basic rule which is applied unless another provision of the Constitution provides for a different majority. Such an exception is Article 90(2) of the Constitution. As the Sejm has aptly argued, the joined reconstruction (reading provisions together) of the higher-level norm in the context of the allegation raised by the applicants (the legitimacy of the applying the procedure set out in Article 90 of the Constitution) is therefore possible solely on the basis of Article 90 and Article 120, first sentence *in fine*, of the Constitution. Consequently, the higher-level norm for the review comprises Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution.

7.2. A formal aspect – the bridging clause

The European Council Decision 2011/199/EU has been adopted in accordance with the simplified revision procedure, provided for in Article 48(6) of the TEU, which allows the European Council, acting by unanimity after consulting the European Parliament and the Commission, and in some cases - the European Central Bank, to adopt a decision amending all or part of the provisions of Part Three of the Treaty on the

Functioning of the European Union. Such a decision may not increase the competences conferred on the Union in the Treaties, and the entry into force of such a decision depends on the adoption thereof by the Member States in accordance with their respective constitutional requirements. Increasing or reducing the competences conferred on the Union may take place in accordance of the ordinary revision procedure of the Treaties that constitute the basis of the Union (Article 48(2)-(5) of the TEU).

The Republic of Poland consented to such a revision procedure of the TFEU, by ratifying the Treaties that constitute the basis of the functioning of the EU, and in particular the Treaty of Lisbon. In its judgment of 24 November 2010, ref. no. K 32/09, the Constitutional Tribunal has stressed that the simplified revision procedure, provided for in Article 48(6) of the TEU, corresponds with the requirements set out in Article 90(1) of the Constitution, as it allows for an amendment on the basis of a decision of the European Council only in the cases where this does not lead to an increase in the competences conferred on the Union in the Treaties. Possible conferral of competences of organs of state authority in relation to certain matters as a result of that amendment would be possible only by adhering to the requirements set out in Article 90 of the Constitution, which concern the conferral of competences on the basis of an international agreement. "However, any conferral of competences in that regard is not possible, since Article 48(6), third subparagraph, of the Treaty on European Union stipulates that the said decision shall not increase the competences conferred on the Union in the Treaties. Therefore, there will be no conferral of «competence of organs of State authority in relation to certain matters». Thus, the point is not the conferral of competences". The European Council Decision 2011/199/EU, in its recital 6, emphasises that: "The amendment concerns a provision contained in Part Three of the TFEU and it does not increase the competences conferred on the Union in the Treaties".

For obvious reasons, this formal aspect of the regulation may not determine the assessment of constitutionality as regards the Act on the ratification of the European Council Decision 2011/199/EU. However, it is related to the assessment carried out by the Court of Justice in its judgment of 27 November 2012 in the case *Thomas Pringle v Government of Ireland*, which, *inter alia*, concerned the legitimacy of applying the simplified revision procedure (Article 48(6) of the TEU) to the amendment to Article 136 of the TFEU (see point 7.4 in part III of this statement of reasons for the Tribunal's judgment).

7.3. [...]

7.4. Questions referred for a preliminary ruling to the CJEU in the case *Pringle*

7.4.1. The stance of the Constitutional Tribunal corresponds to the stance presented by the Court of Justice of the European Union in its judgment of 27 November 2012 in the case *Pringle.* It should be emphasised that, when assessing the constitutionality of the Act on the ratification of the European Council Decision 2011/199/EU, the Constitutional Tribunal recognised that the CJEU's statements were binding as regards the fact that the addition of paragraph 3 to Article 136 of the TFEU did not confer any new competences on the Union (paragraph 73 of the CJEU's judgment), as well as the validity and interpretation of the European Council Decision 2011/199/EU.

Addressing the doubts raised by the Irish Supreme Court, the CJEU concluded that there were no circumstances that would undermine the validity of the European Council Decision 2011/199/EU, and also stated that the provisions of the Treaties (i.e. Article 4(3) and Article 13 of the TEU as well as Article 2(3), Article 3(1)(c) and Article 3(2), Articles 119-123 and Articles 125-127 of the TFEU) and the general principle of effective judicial protection did not prevent the Member States whose currency was the euro from concluding an agreement such as the ESM Treaty, done at Brussels on 2 February 2012, or from ratifying the said Treaty. The right of a Member State to conclude and ratify the said Treaty was not contingent upon the entry into force of the European Council Decision 2011/199/EU.

7.4.2. The CJEU stated, first of all, that the provisions of the TEU and TFEU did not confer any specific competence on the Union to establish a stability mechanism of the kind envisaged by the European Council Decision 2011/199/EU. Admittedly, Article 122(2) of the TFEU conferred on the Union the power to grant *ad hoc* financial assistance to a Member State which was in difficulties or was seriously threatened with severe difficulties caused by natural disasters or exceptional occurrences beyond its control. However, as emphasised by the European Council in recital 4 of the preamble to its Decision 2011/199, Article 122(2) of the TFEU did not constitute an appropriate legal basis for the establishment of a stability mechanism of the kind envisaged by that Decision. The fact that the mechanism envisaged was to be permanent and that its objectives were to safeguard the financial stability of the euro area as a whole meant that such action could not be taken by the Union on the basis of that provision of the TFEU. Even if

Article 143(2) of the TFEU also enabled the Union, subject to certain conditions, to grant mutual assistance to Member States, that provision covered only Member States whose currency was not the euro. As regards the question whether the Union could establish a stability mechanism comparable to that envisaged by the Decision 2011/199 on the basis of Article 352 of the TFEU, the CJEU held that the Union had not used its powers under that article and that, in any event, that provision did not impose on the Union any obligation to act.

7.4.3. With regard to the issue of increasing the scope competences conferred on the Union in the Treaties, by virtue of adding the paragraph by the European Council Decision 2011/199/EU, the CJEU stated that Article 136(3) of the TFEU confirmed that the Member States had the power to establish a stability mechanism and was further intended to ensure, by providing that the granting of any financial assistance under that mechanism would be made subject to strict conditionality, that the mechanism would operate in a way that would comply with European Union law. That amendment did not confer any new competence on the Union, as it created no legal basis for the Union to be able to undertake any action which had not been possible before the entry into force of the amendment to the TFEU. The CJEU pointed out that even though the ESM Treaty made use of the Union's institutions, in particular the Commission and the ECB, that fact was not, in any event, capable of affecting the validity of the Decision 2011/199, which in itself provided only for the establishment of a stability mechanism by the Member States and was silent on any possible role for the Union's institutions in that connection.

The CJEU stressed that since neither Article 122(2) of the TFEU nor any other provision of the TEU and TFEU conferred a specific power on the Union to establish a permanent stability mechanism such as the ESM, the Member States were entitled, in the light of Article 4(1) and Article 5(2) of the TEU, to act in this area. The amendment to Article 136 of the TFEU by Article 1 of the Decision 2011/199 confirmed the existence of competence possessed by the Member States. Accordingly, that decision did not confer any new competence on the Member States. Thus, concluding a treaty such as the ESM Treaty was admissible and was not subject to the entry into force of the Decision 2011/199. At the same time, the CJEU drew attention to the fact that the establishment of the ESM did not affect the power of the Union to grant, on the basis of Article 122(2) of the TFEU, *ad hoc* financial assistance to a Member State when it was found that the Member State was in difficulties or was seriously threatened with severe difficulties caused by natural disasters

or exceptional occurrences beyond its control.

7.4.4. The CJEU also made reference to a relation between the ESM and Article 125 of the TFEU, in accordance with which neither was the Union nor a Member State to 'be liable for (…) the commitments' of another Member State or 'assume [those commitments]'. In the view of the CJEU, that norm was not intended to prohibit either the Union or the Member States from granting any form of financial assistance whatever to another Member State. The said provision prohibited the Union and the Member States from granting financial assistance as a result of which the incentive of the recipient Member State to conduct a sound budgetary policy was diminished. However, Article 125 of the TFEU did not prohibit the granting of financial assistance by one or more Member States to a Member State which remained responsible for its commitments to its creditors provided that the conditions attached to such assistance were such as to prompt that Member State to implement a sound budgetary policy. The activation of financial assistance by means of a stability mechanism such as the ESM was not compatible with Article 125 of the TFEU unless it was indispensable for the safeguarding of the financial stability of the euro area as a whole and was subject to strict conditionality. The instruments for stability support of which the ESM might make use under Articles 14 to 18 of the ESM Treaty demonstrated that the ESM would not act as guarantor of the debts of the recipient Member State. The latter would remain responsible to its creditors for its financial commitments.

7.4.5. To sum up, the CJEU clearly stated that the EU law did not rule out the possibility of concluding an international agreement such as the ESM Treaty by a number of Member States (it also held that this was consistent with the principle of loyalty of the Member States towards the Union). Additionally, the CJEU confirmed that the involvement of the EU institutions (the European Commission, the ECB and the CJEU itself) was consistent with the EU law, did not entail conferring – on the Union – any competences that had legal effects and matched the competences vested in those institutions on the basis of the TEU and the TFEU. Consequently, the establishment of the ESM did not result in granting the ESM any competences that had legal effects.

7.5. The judgment of the Federal Constitutional Court of Germany.

In the context of the application under examination, attention should be drawn to the judgment of 12 September 2012, ref. no. 2 BvR 1390/12, issued by the Federal

Constitutional Court of Germany, as the present case is similar (though not identical) to the the situation of that Member State, and the scope of issues examined by the Federal Constitutional Court is also similar.

The Federal Constitutional Court examined the constitutionality of a statute which granted consent to the adoption of the European Council Decision 2011/199/EU. The Federal Government proposed that the said statute should be enacted in accordance with an ordinary procedure (Article 23(1) in conjunction with Article 59(1) of the Basic Law for the Federal Republic of Germany), emphasing in the statement of reasons for its judgment that no sovereign rights were transferred. "Article 136 (3) TFEU does not itself put a stability mechanism into effect, but merely gives the Member States the possibility of establishing such mechanisms on the basis of an international agreement. In this way, at all events, no competencies are transferred to the bodies of the European Union; on the contrary, the competencies of Member States are to be taken up and their relationship to the rules and regulations on European Union currency law is to be laid down. At the same time, by way of a stability mechanism in treaty law, it will be guaranteed that the only Member States liable are those which participate in it. Regarded in this light, Article 136 (3) TFEU confirms the sovereignty of the Member States in that it entrusts to them the decision as to whether and in what way a stability mechanism is established" (paragraph 236)

Declaring the said statute to be constitutional, the Federal Constitutional Court drew analogical conclusions to those presented by the CJEU. First of all, the Federal Constitutional Court underlined that paragraph 3 added to Article 136 of the TFEU introduced a legal basis only for establishing a stability mechanism which might be activated if indispensable to safeguard the stability of the euro area as a whole, and any financial assistance granted under the mechanism would be made subject to "strict conditionality". The Federal Constitutional Court formulated the main conclusion, stating that the provisions of Article 136(3) of the TFEU did not entail any transfer of sovereign rights by the Federal Republic of Germany, and thus one might not, in principle, refer to evaluation criteria arising from to the principle of democracy, expressed in the Basic Law: "The enactment if a statute concerning Article 136(3) of the TFEU does not entail that the *Bundestag* grants other actors any political and budgetary competences. (...) Article 136(3) of the TFEU itself does not establish a stability mechanism, but merely opens up the possibility of establishing such a mechanism for Member States on the basis of international law. Consequently, on no account are competences conferred on the

institutions of the European Union" (see J. Barcz, J. Kranz, *Powierzenie kompetencji*…, p. 23 and the subsequent pages).

A similar stance was taken by the Constitutional Court of Austria in its judgment of 16 March 2013, ref. no. SV-2/12-18.

7.6. Conclusions.

7.6.1. Although the ESM Treaty has been concluded by the Members States whose currency is the euro, outside the legal framework provided for in the Treaties that constitute the basis of the functioning of the European Union, and the normative significance of paragraph 3 added to Article 136 of the TFEU consists in recognising and confirming the admissibility of concluding such international agreements by the EU Member States, the Constitutional Tribunal has noted that the establishment of the ESM has actually changed the architecture of the Economic and Monetary Union. The establishment of that institution has strengthened links between the Member States that are signatories to the ESM Treaty. There is no doubt that the existence of a permanent rescue mechanism for the Member States that have encountered serious financial difficulties will have impact on the ways of solving problems with their solvency. In the case where a Member State affected by the difficulties files an application for financial assistance under the ESM, it will be subject to strict conditions concerning the use of such financial aid, which will also be supervised by certain EU institutions. The Member States that are signatories to the ESM Treaty accept an obligation, at the moment of signing the ESM Treaty, to cover their share of capital in that institution, as well as to provide – upon fulfilment of further premisses – funds to cover the subscribed capital, or even to cover the shares of any insolvent signatories to the Treaty. This implies a substantial burden for the budgets of the Member States involved.

By contrast, the provisions of the ESM Treaty do not concern the Member States that have not joined the Economic and Monetary Union, i.e. those with a derogation. The establishment of the ESM has not changed the rules for adopting the common currency; as the Tribunal has noted earlier on, the treaty provisions concerning the revocation of the derogation have not changed. However, it should be noted that as part of the decision-making process concerning the adoption of the euro, the Member States with a derogation, which in the future may possibly include Poland, will be obliged to consider the necessity to join the ESM. The issue of ratification of the ESM Treaty will become one of the vital elements of a future political decision concerning the adoption of the euro, provided that

the said Treaty will still be binding at that time. Due to the dynamic character of changes that have been taking place in the European Union, it is however difficult to evaluate today whether, until the moment of the introduction of the euro by Poland, the ESM Treaty will remain an international agreement that will be binding (on a voluntary basis) for only the Member States whose currency is the euro, or whether attempts will be made to incorporate the Treaty into the EU legal system.

Still, paragraph 3 added to Article 136 of the TFEU has not primarily changed the fact that joining the euro area depends – apart from the necessity to fulfil the criteria of economic convergence – also on the fulfilment of the criteria of legal convergence. In the case of Poland, this will require the introduction of amendments to many normative acts. Statutes aimed at adjusting Polish law to the requirements of the euro area, as well as a possible statute grating consent to the ratification of the ESM Treaty, will be potential subjects of constitutional reviews to be carried out by the Constitutional Tribunal (Article 188(1) of the Constitution).

7.6.2. The Constitutional Tribunal has deemed that the challenged Act on the ratification of the European Council Decision 2011/199/EU does not result in the conferral of competences vested in the organs of state authority, within the meaning of Article 90(1) of the Constitution. Article 136(3) of the TFEU (included in "The Provisions Specific to Member States Whose Currency is the Euro") does not entail conferring the competences of the organs of state authority upon an international organisation (international institution). The said provision dispels doubts as to whether, in the light of the Treaties, the Members States whose currency is the euro may provide each other assistance. The Member States have accepted that confirmed possibility, by becoming the signatories to the ESM Treaty, which has been concluded outside the EU legal framework, which additionally rules out the thesis about increasing the scope of competences conferred on the EU. This has been confirmed by the CJEU with regard to the EU law, and by the Federal Constitutional Court in the context of national law. There are no grounds to claim that the European Council Decision 2011/199/EU creates legal and treaty bases for conferring the competences of organs of state authority in relation to certain matters on an international organisation – the ESM. There is no chronological correlation between the amendment to the TFEU and the ESM Treaty. Poland is not a signatory to the ESM Treaty, as well as the ESM Treaty does not imposes any obligations on Poland and does

not cause any changes in the way the organs of state authority in Poland implement a financial policy. The amendment to Article 136, introduced by the European Council Decision 2011/199/EU, does not also introduce any changes that would be significant from the point of view of the EU systemic structure.

Deeming that the challenged Act is not related to the competence of organs of state authority, the Constitutional Tribunal assumes that the appropriate procedure for the enactment of the said Act is the procedure set out in Article 89 of the Constitution. The statement leads to the conclusion that the higher-level norm indicated by the applicants is inadequate; the application of Article 90 of the Constitution would not have been the appropriate procedure for granting consent to the ratification. Therefore, the Constitutional Tribunal rules that the Act on the ratification of the European Council Decision 2011/199/EU is not inconsistent with Article 90 in conjunction with Article 120, first sentence *in fine*, of the Constitution.

7.7. The other higher-level norms for the review

The applicants have also alleged that, due to "creating legal bases for restricting the powers of the Sejm to implement a budgetary policy as well as the power of the Council of Ministers to implement an economic policy, by way of granting the European Commission the competence to specify the terms of a mechanism correcting the financial economy of the state", the Act on the ratification of the European Council Decision 2011/199/EU additionally infringes Articles 219 and 146 of the Constitution.

The applicants have raised the allegation about the non-conformity of the said Act to Article 219 as well as Article 146 of the Constitution, as if aside from the main allegation. But they have indicated entire Article 219 as well as Article 146 of the Constitution, without justifying their thesis about the non-conformity of the said Act to those higher-level norms.

Pursuant to Article 32(1)(3)-(4) of the Constitutional Tribunal Act, an application submitted to the Constitutional Tribunal must include the formulation of a claim alleging the non-conformity of a given normative act to the Constitution as well as reasons for the claim with the indication of supporting evidence. The Constitutional Tribunal states that the proper formulation and justification of an allegation are of relevance for assessing whether there are no negative procedural premisses, for delineating the scope ratione materiae of a given application, and thus – in accordance

with Article 66 of the Constitutional Tribunal Act – for determining the scope of the Tribunal's jurisdiction; and also they are relevant due to the presumption of the constitutionality of law (see Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, pp. 114-115 and the jurisprudence indicated therein).

The lack of justification for the allegation constitutes a negative procedural premiss which rules out the substantive examination of the application and thus results in the necessity to discontinue the review proceedings (see the judgments of the Constitutional Tribunal of: 3 June 2002, ref. no. K 26/01, OTK ZU No. 4/A/2002, item 40; and 15 July 2009, ref. no. K 64/07, OTK ZU No. 7/A/2009, item 110). Pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the Constitutional Tribunal has decided to discontinue its proceedings within the scope of examining the conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 219 and Article 146 of the Constitution.

8. The allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 88 of the Constitution as well as with Article 48(6) of the TEU.

8.1. According to the applicants, the European Council Decision 2011/199/EU has been issued without a legal basis (as it goes beyond the scope of Article 48(6) of the TEU), and consequently the ratification of that decision by Poland leads not only to the adoption thereof in a way that is inconsistent with Article 90 of the Constitution, it but also results in a situation where provisions introduced illegally into the TFEU will become part of the Polish legal order. For this reason, the provisions may not constitute a source of universally binding law in the Republic of Poland, which additionally infringes Article 88 of the Constitution.

The applicants have assumed that the negative evaluation of the choice of the procedure for adopting the European Council Decision 2011/199/EU would weigh in favour of the non-conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 48(6) of the TEU.

It should be noted at the beginning that the applicants' allegation has been constructed at two levels. Formally, the applicants directly question the conformity of a national statute to a ratified international agreement the ratification of which required prior

consent granted by statute, which falls within the scope of the jurisdiction of the Constitutional Tribunal (Article 188(2) of the Constitution). A statute concerning ratification may be subject to review by the Constitutional Tribunal as to its conformity to a legal act that is higher in the hierarchy of acts. At the same time, one may not rule out a review of the statute in respect of its compliance with the elements of the statutory procedure provided for in the Polish law and regulated in EU legal acts (see the judgment of the Constitutional Tribunal of 16 July 2009, ref. no. Kp 4/08, OTK ZU No. 7/A/2009, item 112).

However, in the context of the present case, the applicants expect the Tribunal to determine whether Article 48(6) of the TEU constituted the right basis for adopting the European Council Decision 2011/199/EU, but this aspect of the allegation would require juxtaposing the European Council Decision 2011/199/EU, amending Article 136 of the TFEU, with Article 48(6) of the TEU, which goes beyond the scope of jurisdiction of the Constitutional Tribunal.

What reveals the applicants' intention is their justification of the allegation. Making reference to the judgment of 11 May 2005, issued by the Constitutional Tribunal in the case K 18/04, the applicants argue that: "The EU Member States maintain their right to assess whether Community (EU) law-making bodies, when issuing certain provisions of law, acted within the scope of conferred competences and whether they exercised those competences in accordance with the principles of subsidiarity and proportionality". However, the applicants have overlooked the context of that statement (see point 10.2. in part III of the statement of reasons for the judgment in the case K 18/04). Further on, the Tribunal stated that: "Going beyond that framework results in a situation where legal acts (provisions) issued outside it are not subject to the principle of the primacy of Community law".

The quoted passage from the analysis of the Constitutional Tribunal refers to the allegation of the unconstitutionality of Article 234 of the Rome Treaty (at present Article 267 of the TFEU) – in the part concerning questions referred for a preliminary ruling. The Constitutional Tribunal stressed that the Court of Justice was the main but not exclusive holder of powers within the scope of the application of the Treaties in the legal system of the Communities and the European Union. The Court of Justice had exclusive competence (together with the Court of First Instance – in cases that fell within the jurisdiction of that court) to adjudicate on the validity and interpretation of Community law. In the conclusion, the Constitutional Tribunal stated that: "by ratifying the Treaty of

Accession as well as the statute on the terms of accession, the Republic of Poland approved of the division of functions within the system of Community and EU bodies. An element of that division is that the Court of Justice of European Communities is to provide the interpretation of Community law and to ensure that the interpretation is observed consistently in all Member States" (point 10.3 in part III of the statement of reasons for the judgment in the case K 18/04). The above view was maintained in the decision of the Constitutional Tribunal of 19 December 2006, ref. no. P 37/05 (OTK ZU No. 11/A/2006, item 177). The Tribunal stressed therein that the division of competence between the courts of the EU Member States and the ECJ, as regards the interpretation and application of Community law, was the following: the ECJ provided interpretation, and the application of law – construed as the application of the norms of Community law to facts established by a court – fell within the jurisdiction of a given court of the EU Member States, which in a given case was bound by the said interpretation (see point 4.1. in part III of the statement of reasons for the decision in the case P 37/05).

8.2. Therefore, it should be stated that the Constitutional Tribunal has no jurisdiction to adjudicate on the validity of EU acts. In accordance with the Treaties, it is the Court of Justice of the European Union that determines whether the EU or a relevant EU institution, has competence to issue an act; the said Court reviews *inter alia* the validity of EU acts (Article 263 of the TFEU) as well as has jurisdiction to give preliminary rulings concerning the validity of such acts (Article 267 of the TFEU). A reason for ruling that an act is invalid may, *inter alia*, be the lack of competence to issue such an act" (K. Wójtowicz, "Kontrola konstytucyjności aktów Unii Europejskiej podjętych ultra vires – między pryncypiami a lojalną współpracą", [in:] *W służbie dobru wspólnemu,* R. Balicki, M. Masternak-Kubiak (eds.), Warszawa 2012, p. 518).

In the judgment of 16 November 2011, ref. no. SK 45/09 (OTK ZU No. 9/A/2011, item 97), the Constitutional Tribunal has stated: "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)".

Within the scope of its competence provided for in Article 267 of the TFEU, the Court of Justice of the European Union examined the questions referred by the Supreme Court in Ireland for a preliminary ruling, the application of 3 August 2012 (Case C-370/12). As it has already been mentioned above (see point 7.4 in part III of this statement of reasons), in the case *Pringle*, the CJEU stated – taking a stance with regard to the allegation of the lack of competence, as one question concerned the validity of a provision of the EU primary law – that it fell to the Court, as the institution which, under the first subparagraph of Article 19(1) of the TEU, was to ensure that the law was observed in the interpretation and application of the Treaties, to examine the validity of a decision of the European Council based on Article 48(6) of the TEU. At the same time, the Court held that the amendment to Article 136 of the TFEU did not confer any new competences on the Union, and thus it could be introduced in accordance with a simplified revision procedure under Article 48(6) of the TEU.

8.3. Making reference to the allegation of the nonconformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 48(6) of the TEU, it should be stated that the indicated higher-level norm for the review is inadequate. The review of a procedure for the enactment of a statute consists in examining the conformity of the procedure for the enactment of the statute (challenged provisions) to requirements arising from provisions regulating legislative proceedings as well as to constitutional provisions that concern those issues. Thus, it should be deemed that there is no relation of adequacy between the challenged Act (the Act on the ratification of the European Council Decision 2011/199/EU) and the indicated higher-level norm for the review (Article 48(6) of the TEU). The content of the European Council Decision 2011/199/EU has been analysed in the present case as the substantive content of authorisation expressed in the Act on the ratification of the European Council Decision 2011/199/EU. Evaluation whether – in the light of Article 48(6) of the TEU – the amendment introduced by the European Council Decision 2011/199/EU increases the scope of competences conferred on the EU and whether it has been adopted in accordance with an appropriate procedure does not fall within the limits of this analysis. Article 48(6) of the TEU may constitute a higher-level norm for the review in the context of assessing the procedure for the adoption of the

European Council Decision 2011/199/EU itself (this was the case in the proceedings before the CJEU). The evaluation of the legality of the said Decision was carried out in the case *Pringle*. The CJEU stated then: "Examination of the first question referred has disclosed nothing capable of affecting the validity of European Council Decision 2011/199/EU of 25 March 2011 amending Article 136 of the Treaty on the Functioning of the European Union with regard to a stability mechanism for Member States whose currency is the euro".

Taking into account that it proved impossible to derive a common platform for comparing the challenged regulation with the indicated higher-level norm for the review from the context of the application and the justification thereof, the Tribunal has deemed that the Act on the ratification of the European Council Decision 2011/199/EU is not inconsistent with Article 48(6) of the TEU.

8.4. The applicants have also raised the allegation that the Act on the ratification of the European Council Decision 2011/199/EU is inconsistent with Article 88 of the Constitution. Pursuant to that provision, the condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof (para. 1); the principles of and procedures for promulgation of normative acts shall be specified by statute (para. 2); international agreements ratified with prior consent granted by statute shall be promulgated in accordance with the procedures required for statutes. The principles of promulgation of other international agreements shall be specified by statute (para. 3).

The applicants have not indicated in what way the challenged Act has infringed Article 88 of the Constitution. The lack of justification for the allegation constitutes a negative procedural premiss which rules out the substantive examination of the application and thus results in the necessity to discontinue the review proceedings. Consequently, pursuant to Article 39(1)(1) of the Constitutional Tribunal Act, the Constitutional Tribunal has decided to discontinue its proceedings within the scope of examining the conformity of the Act on the ratification of the European Council Decision 2011/199/EU to Article 88 of the Constitution, on the grounds that issuing a judgment in that regard is inadmissible.

9. An application for “an interpretation”.

In the final part of their application, the applicants have requested the Tribunal to “provide an interpretation as to the form in which the Republic of Poland binds itself by decisions of an international institution such as the European Council as well as an interpretation concerning a procedure binding for the organs of state authority in Poland as regards the adoption and negotiation of such decisions”. The application for “an interpretation”, formulated this way, should be regarded as inadmissible. The Constitutional Tribunal has no jurisdiction to determine the universal interpretation of statutes, understood as an abstract reply – issued in a separate procedure – with regard to the meaning and legal content of a given statutory provision. The determination of the universal interpretation of statutes used to fall within the scope of the jurisdiction of the Constitutional Tribunal in the years 1989-1997.

It may be assumed that the applicants are aware of that fact, and thus allege that the Act on International Agreements lacks a certain regulation. However, the applicants do not indicate an appropriate higher-level norm for the review, and the mere application for “providing an interpretation” has not been included in the *petitum* of the letter, but in the final fragment of the reasoning. Thus, it is impossible to treat a claim formulated this way as the subject of the allegation (e.g. Article 2 of the Act on International Agreements, insofar as it does not provide for...). Even if the issue formulated this way was to be examined, the lack of the said regulation would have to be regarded as legislative omission. However, it seems that the reconstruction of the subject of the allegation on the basis of the principle *falsa demonstratio non nocet* is groundless in the present case (cf. the judgment of 24 November 2010, ref. no. K 32/09, point 1.2 in part III of the statement of reasons – the Constitutional Tribunal classified that legislative omission was the lack of a detailed regulation of the mechanism for cooperation between the Council of Ministers and the Sejm and the Senate in matters pertaining to Poland’s membership in the EU).

The proceedings within the scope of the application for “providing an interpretation by the Constitutional Tribunal (...) are subject to discontinuation on the basis of Article 39(1)(1) of the Constitutional Tribunal Act.

Taking the above into consideration, the Constitutional Tribunal has adjudicated as in the operative part of the judgment.