Warsaw, 29 March 2021

PRIME MINISTER
BPRM.5091.5.2021

CONSTITUTIONAL TRIBUNAL

APPLICATION

Pursuant to Article 191(1)(1) in conjunction with Article 188(1) of the Constitution of the Republic of Poland of 2 April 1997,[1] I move for constitutional review of:

1) the first and second paragraph of Article 1 in conjunction with Article 4(3) of the Treaty on the European Union of 7 February 1992[2] ("**TEU**") understood in such a way that it authorises or obligates an organ which applies the law to disapply the Constitution of the Republic of Poland or requires the application of legal provisions in contravention of the Constitution of the Republic of Poland
– under Article 2; Article 7; Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) and under Article 178(1) of the Constitution of the Republic of Poland;

2) the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU understood in such a way that in order to ensure effective legal protection, an organ which applies the law is authorised or obligated to apply legislative provisions in contravention of the Constitution, among others to apply a provision which has become null and void as incompatible with the Constitution under a ruling of the Constitutional Tribunal

[1] *Dziennik Ustaw* No. 78, item 483, as amended.
[2] *Dziennik Ustaw* of 2004, No. 90, item 864/30, as amended; EU Official Journal C 202/1 of 07.06.2016, p. 1.

– under Article 2; Article 7; Article 8(1) in conjunction with Article 8(2) and Article 91(2); Article 90(1); Article 178(1) and Article 190(1) of the Constitution of the Republic of Poland;

3) the second paragraph of Article 19(1) in conjunction with Article 2 TEU understood in such a way that it authorises the court to review the independence of judges appointed by the President of the Republic of Poland and to review a resolution of the National Council of the Judiciary concerning the submission of a request to the President of the Republic of Poland to appoint a judge
– under Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2); Article 144(3)(17) and Article 186(1) of the Constitution of the Republic of Poland.

GROUNDS

I. Legitimacy of the Constitutional Tribunal

The legitimacy of the Constitutional Tribunal to review the constitutionality of primary law of the European Union ("**European Union**" or "**EU**") derives directly from the wording of the provisions of the Constitution of the Republic of Poland, as corroborated by the case-law of the Constitutional Tribunal as well as legal theory.

Firstly, it should be noted that the substantive basis for rulings is provided by Article 188(1) of the Constitution of the Republic of Poland: "*The Constitutional Tribunal shall adjudicate regarding the conformity of statutes and international agreements to the Constitution.*" As this application concerns provisions of the TEU, specifically, norms defined in interpretations of the TEU, which is an international agreement, there is no doubt that the contested provisions fall under the jurisdiction of the Constitutional Tribunal. Legal theory broadly supports this conclusion: "*[i]t [the exclusive jurisdiction of the Court of Justice to interpret the Treaties] does not preclude the Constitutional Tribunal's constitutional review of primary Union law (ratified international agreements)*";[3] and further, according to Marek Safjan: "*[i]n the context of the applicable constitutional regulations, there can be no doubt that the Constitutional*

[3] A. Mączyński, J. Podkowik, comments on Article 188, [in:] *Konstytucja RP. Tom II. Komentarz do art. 87-243,*
L. Bosek, M. Safjan (eds.), Warsaw 2016, No. 32.

Tribunal has jurisdiction to review the compatibility of the Accession Treaty (and other norms of primary law which are public international law) with the provisions of the Constitution of the Republic of Poland."[4] Other publications dedicated to the issue corroborate this opinion,[5] including most recent ones: "*It seems that there should be no major doubt as to the admissibility of the constitutional review of primary Union law as it is in fact comprised of international treaties and, as such, may be reviewed according to the procedures established for such normative acts, which mainly derives directly from Article 188(1) of the Constitution as concerns ex-post review of international agreements…*"[6]

It should be noted that the Constitutional Tribunal has given two rulings concerning the compatibility of the Treaties which constitute primary law of the European Union with the Constitution of the Republic of Poland.[7] According to one of the rulings concerning the Treaty of Accession of the Republic of Poland (among others) to the European Union signed at Athens on 16 April 2003[8] ("**Accession Treaty**"), "*the Constitutional Tribunal has no jurisdiction to conduct autonomous constitutional review of primary law of the European Union. However, it does have such jurisdiction in relation to the Accession Treaty as a ratified international agreement (Article 188(1) of the Constitution.*"[9] However, the Tribunal modified its position in its further argumentation, taking the opposite view that "*…the system of the European Union is dynamic. It allows for amendments of laws after accession. It also allows for evolution of the principles and the scope of the functioning of the Union. Thus, there can be no absolute certainty at the time of accession exactly how the system will evolve. However, competences conferred by the Member States ensure that the Member States can influence actions and decisions of the system as a whole. That is an important guarantee of the regularity and acceptability of the system. Any decision that the Union should cover a new area in order to attain one of the objectives of the Community requires unanimity of the Member States with respect to such matter (Article 308 TEC). This guarantees that no such change is effected if any*

[4] M. Safjan, "Konstytucja a członkostwo Polski w Unii Europejskiej", *Państwo i Prawo* 2001, No. 3, p. 9; cf. K. Wójtowicz, *Sądy konstytucyjne wobec Unii Europejskiej,* Warsaw 2012, p. 67.
[5] A. Śledzińska-Simon, "Lojalność konstytucyjna czy lojalność unijna? – znaczenie zasady pierwszeństwa prawa Unii Europejskiej dla sądów krajowych", [in]: *Zasada pierwszeństwa prawa Unii Europejskiej w praktyce działania organów władzy publicznej RP,* M. Jabłoński, Sylwia Jarosz-Żukowska (eds.), Wrocław 2015, p. 207 (footnote 41).
[6] W. Jóźwicki, *Ochrona wyższego niż unijny konstytucyjnego standardu prawa jednostki i tożsamości konstytucyjnej RP*, Poznań 2019, p. 251.
[7] Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005 No. 5, item 49 and judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.
[8] *Dziennik Ustaw* of 2004, No. 90, item 864.
[9] Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005 No. 5, item 49

Member States objects to it."[10] Legal commentators have criticised the conclusions of the Constitutional Tribunal: "*[s]uch wording is ambiguous. What exactly does it mean that review of the founding Treaties is 'autonomous' or not? What are the practical limitations of the scope of review of the Treaties? … In any case, the Constitutional Tribunal in its judgment did not refuse to review primary law of the EU because it would lie beyond the permissible remit.*"[11]

The other judgment of the Constitutional Tribunal concerning constitutional review of the Treaty amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon on 13 December 2007[12] ("**Lisbon Treaty**") continued the case-law originating with the judgment concerning the Accession Treaty: "*both the accession to the Union itself and any subsequent amendments to Union legislative procedures (mechanisms) cause the Member States to react by initiating constitutional review. The relations between Union law and national law constitute a mechanism by means of which the organs of the Member States on the one hand take part (in different forms and at different stages) in the drafting of future Union law and in decisions which institutionalise such law. Thus, competences, mechanisms and procedures emerge at European level on the one hand and within national systems on the other hand, which ensures participation in Union law-making while safeguarding the equitable balance. Thus, any modification of Union mechanisms requires that the related system of mechanisms and guarantees within national law must be reviewed. Such is the purpose of constitutional review as corroborated by the practice of European constitutional tribunals and courts … It should be noted that the constitutionality of the very accession to the European Union and the conferral of competences under Article 90 of the Constitution has been reviewed in case K 18/04. Thus, the only issue in the case at hand is the 'normative novelty' of the Lisbon Treaty to the extent contested by the applicants.*"[13]

The norms subject to this constitutional review have evolved as a result of the law-making activity of the Court of Justice of the European Union ("**CJEU**") and have not been reviewed by the Constitutional Tribunal either in its review of the Accession Treaty or the Lisbon Treaty (thus, *res iudicata* does not apply). As the norms subject to this application derive from case-law, the participation of the Republic of Poland in their development was negligible and the Republic of Poland could not object to their creation, which calls for their hierarchical review

[10] *Ibidem*.
[11] S. Biernat, "Glosy do wyroku Trybunału Konstytucyjnego z 11.5.2005 r. (zgodność Traktatu akcesyjnego z Konstytucją RP) K 18/04, Glosa nr 2", *Kwartalnik Prawa Publicznego* 2005, No. 4, p. 189.
[12] *Dziennik Ustaw* of 2009, No. 203, item 1569.
[13] Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.

by the Constitutional Tribunal in order to confirm whether or not they are compatible with the Constitution of the Republic of Poland, which is the superior source of law in the Polish legal system of which Union law is an integral part. There are serious doubts to that effect, as argued below.

As concerns the legitimacy of the Constitutional Tribunal to adjudicate on the matter subject to this application, it should further be noted that legal theory broadly accepts the admissibility of review of the compatibility of the CJEU's activity with the Constitution: "*The Court of Justice of the European Union is also bound by the principle of conferral and may also be considered to act outside of its competences, for instance by interpreting Union norms in contravention of the Treaties which give the basis for the Union. Such claims raised against the European Court could not be assessed within the Union judicial system in the absence of applicable procedures and as a result of the principle* nemo iudex in causa sua. *If one accepts, as constitutional courts tend to do, that competences are conferred under the constitution, then any exercise of such competences in contravention of the constitution would have to rely on a constitutional basis … It follows, as established by the Polish Constitutional Tribunal, that the Union is not authorised by Poland to enact laws or make decisions in contravention of the Constitution of the Republic of Poland … competences to create competences cannot be conferred; any addition to the list of conferred competences must be based on an international agreement and the approval referred to in Article 90(1) of the Constitution.*"[14] The review subject to this application concerns such circumstances involving, to a certain degree, law-making interpretation and application of primary Union law *ultra vires* by the CJEU, which in the opinion of the Prime Minister is in contravention of the Constitution of the Republic of Poland; such review falls under the jurisdiction of the Constitutional Tribunal.[15] Legal theory and the case-law of constitutional courts of other Member States have developed methods of reviewing the activity of the CJEU concerning its adjudicating practice which operates on principles specific to Union law that are established, developed, and applied by the CJEU together with provisions of the Treaties, based on the notion of *ultra vires*.[16] This conclusion is also apparent in the judgment of the Constitutional Tribunal concerning the Lisbon Treaty which refutes the

[14] K. Wójtowicz, *Sądy konstytucyjne...,* pp. 98-99.
[15] W. Jóźwicki, *Ochrona...*, p. 253.
[16] A. Kustra, *Kelsenowski model kontroli konstytucyjności prawa a integracja europejska. Studium wpływu,* Toruń 2015, pp. 249, 303, cf. P Craig, "The ECJ and Ultra Vires action: a Conceptual Analysis", *Common Market Law Review* 2011, No. 29, pp. 395 *et seq*. For an in-depth analysis of the case law of constitutional courts, cf. A. Kustra, *Kelsenowski...*, pp. 204-235 and 245-279 and K. Wójtowicz, *Sądy konstytucyjne...*, pp. 95-103.

jurisdiction of the Constitutional Tribunal in cases where the CJEU goes outside of its competences merely hypothetically while reaffirming such jurisdiction in cases where such actions "*materialise in specific regulations subject to review by the Constitutional Tribunal under Article 188 of the Constitution,*"[17] as in the case at hand.

Considering the foregoing, there is no doubt that this application falls under the jurisdiction of the Constitutional Tribunal laid down in Article 191(1)(1) in conjunction with Article 188(1) of the Constitution of the Republic of Poland.

II. Subject matter of the review

1. The first and second paragraph of Article 1 in conjunction with Article 4(3) TEU

The subject matter of the review presented in point 1 above concerns core provisions of the TEU which lay the foundation of the system established by the Treaty and form the basis necessary to derive from the general principles the obligations of the Member States of the European Union to ensure absolute effectiveness of Union law, among others by giving precedence both to Union norms and objectives derived from such norms over provisions of national law including constitutional provisions.

The subject matter of the review concerns the first and second paragraph of Article 1 TEU which establishes the European Union and provides: "*…the HIGH CONTRACTING PARTIES establish among themselves a EUROPEAN UNION, hereinafter called 'the Union', on which the Member States confer competences to attain objectives they have in common. This Treaty marks a new stage in the process of creating an ever closer union among the peoples of Europe, in which decisions are taken as openly as possible and as closely as possible to the citizen.*" According to commentators, given the position of those provisions at the beginning of the first part "Principles", they open up the legal system of the European Union to the notion of principles,[18] i.e., legal norms understood not as yes-or-no rules but rather as optimising choices which set the direction of decisions that could materialise to a greater or lesser extent.[19] Therefore, the first and second paragraph of Article 1 TEU, which establishes the European Union as a union of law and refers to the common objectives to be pursued by conferring

[17] Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.
[18] A. Wróbel, commentary on Article 1, [in:] *Traktat ustanawiający Wspólnotę Europejską. Komentarz. Tom I (art. 1-60),* A. Wróbel (ed.), Kraków-Warszawa 2008, LEX Omega.
[19] R. Dworkin, *Biorąc prawa poważnie,* Warsaw 1998, pp. 56-68.

competences on the European Union, becomes the key normative anchor upon which rest all principles of Union law.

Such argumentation is evident in the case-law of the Court of Justice of the European Communities ("**Court of Justice**") and the existing CJEU (since 1 December 2009), which has derived a number of general principles from the "spirit of the Treaty" or the "nature of the Union system." According to the CJEU, "*EU law is characterised by the fact that it stems from an independent source of law, namely the Treaties, by its primacy over the laws of the Member States, and by the direct effect of a whole series of provisions that are applicable to their nationals and to the Member States themselves. Those characteristics have given rise to a structured network of principles, rules and mutually interdependent legal relations binding the European Union and its Member States reciprocally as well as binding its Member States to each other.*"[20] This justification based on the autonomy of the Treaties and the characteristics of Union law applies to principles derived from the nature of the Union system and the necessary objectives, referred to in the first and second paragraph of Article 1 TEU. The principle of primacy of the European Union is one of the first and fundamental principles of such kind derived by the Court of Justice and creatively developed by the CJEU. It establishes the primacy of Union law (originally, Community law) over laws of the Member States, which has led the CJEU to conclude in its early case-law that: "*It follows from all these observations that the law stemming from the Treaty, an independent source of law, could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis of the Community itself being called into question*."[21] According to later case-law, the validity of Union law or its effect in the national legal system cannot be overridden by national law, including constitutional provisions.[22] Thus, in the opinion of the CJEU, Union law, including both primary and secondary law, takes precedence over any national norm irrespective of its position in the hierarchy of national sources of law. Recent case-law reiterates this position.[23] Therefore, national courts were bound to apply Union norms in lieu of national norms. However, the incorporation of Article 4(3) TEU into the process of interpretation changed that.

[20] Opinion 1/17 of the European Court (CETA between Canada and the EU) of 30 April 2019, ECLI:EU:C:2019:341, paragraph 109.
[21] Judgment of the Court of Justice of 15 July 1964, C-6/64, Costa, ECLI:EU:C:1964:66.
[22] Judgment of the Court of Justice of 17 December 1970, C-11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, paragraph 3.
[23] Judgment of the CJEU of 26 February 2013, C-617/10, Fransonn, ECLI:EU:C:2013:105, paragraph 45 and the case-law cited therein.

The principle of primacy is linked to the principle of sincere cooperation referred to in Article 4(3) TEU. According to legal theory, "*The provisions establishing the principle of sincere cooperation may be instrumental in laying the foundation for the principle of primacy. The idea is nothing new. The relationship between the principle of primacy and the principle of sincere cooperation has been evident for a long time, in fact starting with the Costa judgment.*"[24] According to that judgment, "*the executive force of Community law cannot vary from one State to another in deference to subsequent domestic laws, without jeopardising the attainment of the objectives of the Treaty set out in Article 5(2).*"[25] That approach has prevailed to date and has been deployed to further develop the principle of primacy. The Court of Justice has directly referred to the principle of sincere cooperation as the foundation for national courts to ensure the effectiveness of Union law: "*It is also settled case-law that any national court, hearing a case within its jurisdiction, has, as an organ of a Member State, the obligation pursuant to the principle of cooperation set out in Article 10 EC, fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the rule of law of the Union,*"[26] leading to the conclusion that "*any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set aside national legislative provisions which might prevent directly applicable Union rules from having full force and effect are incompatible with the requirements which are the very essence of Union law.*"[27] Thus, national organs are obligated to apply Union law and set aside national norms and they are authorised to "do everything necessary" for such purpose. According to later CJEU case-law: "*That principle therefore requires all Member State bodies to give full*

[24] S. Biernat, "Zasada pierwszeństwa prawa unijnego po Traktacie z Lizbony", *Gdańskie Studia Prawnicze* 2011, Vol. XXV, p. 58.
[25] Judgment of the Court of Justice of 15 July 1964, C-6/64, Costa, ECLI:EU:C:1964:66.
[26] Judgment of the CJEU of 8 September 2010, C-409/06, Winner Wetten, ECLI:EU:C:2010:503, paragraph 55 and the case-law cited therein.
[27] Judgment of the CJEU of 8 September 2010, C-409/06, Winner Wetten, ECLI:EU:C:2010, paragraph 56; judgment of the Court of Justice of 19 June 1990, C-213/89, Factortame, ECLI:EU:C:1990:257, paragraph 20; judgment of the Court of Justice of 9 March 1978, 106/77, Simmenthal, ECLl:EU:C:1978:49, paragraph 16, 21.

effect to the various EU provisions, and the law of the Member States may not undermine the effect accorded to those various provisions in the territory of those States."[28]

As a result, the principle of primacy within the meaning defined by the CJEU (it is confirmed in the documents annexed to the Final Act of the Intergovernmental Conference which adopted the Treaty of Lisbon, signed on 13 December 2007, i.e., Declaration 17 concerning primacy and the Opinion of the Council Legal Service on primacy,[29] which however have [no] binding effect, *a contrario* Article 51 TEU which provides that "*[t]he Protocols and Annexes to the Treaties shall form an integral part thereof*"; hence, declarations are not an integral part thereof") together with the principle of sincere cooperation obligate organs of the Member States of the European Union to set aside any national provisions, including constitutional provisions, which would undermine the effect of Union law. Thus, from the perspective of the national legal system, they might act both *praeter* and *contra legem*, without any legal basis, going outside of their powers, in breach of substantive law, procedural law, and even constitutional provisions. As an example of such application of the principle of primacy, the court is obligated to act in contravention of a final judgment of the Constitutional Tribunal by setting aside a national provision which the Constitutional Tribunal has found to be unconstitutional while deferring the date of coming into force of the judgment and deciding that the provision should continue to be applied for a certain period of time (the operative part of the judgment expressly requires that Union law be applied "*irrespective of the judgment of the national constitutional court*");[30] to decide that the court has jurisdiction irrespective of a judgment of the Constitutional Tribunal and irrespective of the fact that the court has no such jurisdiction under national provisions;[31] and to disapply provisions concerning jurisdiction and decide that the court has jurisdiction to refer the case to a court which meets the criteria of independence in the opinion of the referring court.[32]

In this light, the norm derived from the first and second paragraph of Article 1 TEU in conjunction with Article 4(3) TEU, which authorises or obligates an organ which applies the law to disapply the Constitution of the Republic of Poland or requires the application of legal

[28] Judgment of the CJEU of 24 June 2019, C-573/17, Popławski, ECLI:EU:C:2019:530, paragraph 54 and the case-law cited therein; cf. judgment of the Court of Justice of 19 November 2009, C-314/08, Filipiak, ECLI:EU:C:2009:719, paragraph 82.
[29] OJ C 202, 7.6.2016, p. 344.
[30] *Ibidem*, paragraph 84-85. *[C-314/08, Filipiak – translator's note]*
[31] Judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 148, 167.
[32] Judgment of the CJEU of 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and others, ECLI:EU:C:2019:982, paragraph 171.

provisions in contravention of the Constitution of the Republic of Poland, raises far-reaching reasonable constitutional doubts and it is not endorsed by the wording of the Treaties which the Constitutional Tribunal has reviewed.

2. The second paragraph of Article 19(1) in conjunction with Article 4(3) TEU

According to the second paragraph of Article 19(1) TEU, "*Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law.*" The provision addressed to the Member States of the European Union obligates them to establish appropriate norms in the national legal systems to ensure that persons subject to Union law can exercise rights derived from Union law.

The CJEU's case-law interprets that provision in conjunction with the principle of sincere cooperation under Article 4(3) TEU and the principle of effective legal protection, which, according to the CJEU, is a general principle of Union law stemming from the constitutional traditions common to the Member States, enshrined in the second paragraph of Article 19(1) and in Article 47 of the Charter of Fundamental Rights of the European Union[33] ("**Charter of Fundamental Rights**" or "**Charter**").[34] In the context of the subject matter of this review, it should be noted that the CJEU has ruled that persons subject to Union law should be able to enjoy effective legal protection of rights conferred by Union law and it is for the Member States to establish a system of legal remedies and procedures which ensure respect for the right to effective legal protection. Furthermore, in accordance with the principle of sincere cooperation laid down in Article 4(3) TEU, national courts are required to interpret and apply national procedural rules governing the exercise of rights of action in a way that enables natural and legal persons to challenge before the courts the legality of any decision or other national measure relative to the application to them of Union law.[35] Therefore, it is for the domestic legal system of each Member State to designate the courts and tribunals having jurisdiction and to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive directly from Union law.[36] However, in the opinion of the CJEU, where no

[33] OJ C 202/2 of 07.06.2016, p. 389.
[34] Judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paragraph 35 and the case-law cited therein.
[35] Judgment of the Court of Justice of 25 July 2002, C-50/00 P, Unión de Pequeños Agricultores, ECLI:EU:C:2002:462, paragraph 41–42.
[36] Cf. judgment of the Court of Justice of 20 September 2001, C-453/99, Courage and Crehan,Rec., ECLI:EU:C:2001:465, paragraph 29 and judgment of the Court of Justice of 11 September 2003, C-13/01, Safalero, ECLI:EU:C:2003:447, paragraph 49.

legal remedy exists which makes it possible to ensure respect for an individual's rights under Union law, it is for the national courts to create new procedural measures providing such protection, even in contradiction to existing national law.[37] The CJEU has ruled that to conclude otherwise would go against the requirements derived from the very nature of Union law as any provision of a national legal system and any legislative, administrative or judicial practice which might withhold from the national court having jurisdiction to apply such law the power to "do everything necessary" to set aside national legislative provisions which might prevent, even temporarily European Union rules from having full force and effect are incompatible with those requirements which are the very essence of EU law, would impair the effectiveness of EU law.[38] Notably, the CJEU's ruling that national provisions must be disapplied includes constitutional provisions and binds constitutional courts, as well.[39] For example, the CJEU has applied that norm by obligating a national court to grant interim relief under Union law even in contravention of a rule of national law;[40] and to decide that the court has jurisdiction in the case of elimination of national legislative provisions as a result of a final judgment of the Constitutional Tribunal which deprive the national court of such jurisdiction[41] and thus, in fact, to act without a legal basis, which would judicially "revive" the revoked legislative provisions.

Considering the foregoing, the interpretation provided in the CJEU's case-law creates a norm derived from the second paragraph of Article 19(1) TEU in conjunction with Article 4(3) TEU such that in order to ensure effective legal protection, an organ which applies the law is

[37] "*This principle implies not only the right to a fair trial and the right to effective remedy but also, under certain circumstances, the very obligation to create new procedural measures. This is the case when an analysis of the national legal system reveals that there is no remedy that would protect, be it incidentally, the rights of an individual derived from Union law. Furthermore, national courts are obliged to ensure legal protection of the rights of individuals derived from Union law.*" (M. Taborowski, "Mechanizmy stosowania prawa unijnego w krajowych porządkach prawnych", [in:] *Mechanizmy ochrony praworządności państw członkowskich w prawie Unii Europejskiej. Studium przebudzenia systemu ponadnarodowego,* Warsaw 2019, LEX Omega, point 1.2.1.2.; cf. W. Czapliński, commentary on Article 10, [in:] *Traktat ustanawiający Wspólnotę Europejską. Komentarz. Tom I (art. 1-60)*, A. Wróbel (ed.), Kraków-Warsaw 2008, LEX Omega; cf. judgment of the Court of Justice 13 March 2007, C-432/05, Unibet, paragraph 41; judgment of the Court of Justice of 16 December 1976, 33/76, Rewe, ECLI:EU:C:1976:188, paragraph 5; judgment of the Court of Justice of 16 December 1976, 45-76, Comet, ECLI:EU:C:1976:191, paragraph 16.

[38] Judgments of the CJEU of 22 June 2010, C-188/10 and C-189/10, Melki and Abdeli. ECLI:EU:C:2010:363, paragraph 44.

[39] Judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 148; judgment of the CJEU of 15 January 2013, C-416/10, Krifan and others, ECLI:EU:C:2013:8, paragraph 70, judgment of the Court of Justice of 17 December 1970, 11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114, paragraph 3; judgment of the CJEU of 8 September 2010, C-409/06 Winner Wetten, ECLI:EU:C:2010:503, paragraph 61.

[40] Judgment of the Court of Justice of 19 June 1990, C-213/89, Factortame, ECLI:EU:C:1990:257, paragraph 19–23.

[41] Judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 81, 149–150.

authorised or obligated to apply legislative provisions in contravention of the Constitution, among others to apply a provision which has become null and void under a ruling of the Constitutional Tribunal. Such obligation to act without a legal basis or in contravention of applicable constitutional provisions, a legal norm so understood, raises serious reasonable constitutional doubts in the opinion of the Prime Minister.

3. The second paragraph of Article 19(1) in conjunction with Article 2 TEU

The second paragraph of Article 19(1) TEU, which obligates the Member States of the European Union to ensure effective legal protection, has been deployed to derive a norm authorising national courts to review the appointment and independence of judges of courts of the Member States.

Such interpretation of the second paragraph of Article 19(1) TEU (legal norm) has been coined by the CJEU, which derives its interpretation of that provision of the Treaty mainly from Article 2 TEU on the assumption that the second paragraph of Article 19(1) TEU gives concrete expression to Article 2 TEU, which provides that rule of law is a principle endorsed by all of the EU Member States. In this connection, the second paragraph of Article 19 TEU entrusts the responsibility for ensuring judicial review in the EU legal order not only to the CJEU but also to national courts and tribunals which, in collaboration with the CJEU, fulfil a duty entrusted to them jointly of ensuring that in the interpretation and application of the Treaties the law is observed.[42] According to the CJEU's case-law, the very existence of effective judicial review designed to ensure compliance with provisions of EU law is of the essence of the rule of law;[43] it follows that every Member State must ensure that the courts which come within the system of remedies in the fields covered by Union law meet the requirements of effective judicial protection,[44] including the requirements of independence.[45] In the opinion of the CJEU, the requirement that courts be independent forms part of the essence of the right to effective judicial protection and the fundamental right to a fair trial, which is of cardinal importance as a guarantee that all the rights which individuals derive from EU law will be protected and that

[42] Judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLl:EU:C:2018:117, paragraph 32-33 and judgment of the CJEU of 3 October 2013, Inuit Tapiriit Kanatami and others/Parliament and Council, C-583/11 P, ECLI:EU:C:2013:625, paragraph 99.
[43] Judgment of the CJEU of 28 March 2017, C-72/15, Rosneft, ECLI:EU:C:2017:236, paragraph 73 and the case-law cited therein.
[44] Judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paragraph 37.
[45] Judgment of the CJEU of 28 March 2017, C-72/15, Rosneft, EU:C:2017:236, paragraph 73.

the values common to the Member States set out in Article 2 TEU, in particular the value of the rule of law, will be safeguarded.[46]

Consequently, on the basis of Article 2 TEU, the CJEU has extended the substantive scope of application of the second paragraph of Article 19(1) TEU to cover all cases concerning the judicial systems of the Member States. The CJEU thus dismissed its previous case-law based on the application of Article 47 in conjunction with Article 51 of the Charter of Fundamental Rights. Article 47 of the Charter of Fundamental Rights confers a right on individuals: "*Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article. Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law.*" The substantive scope of that right is defined in Article 51 of the Charter which provides that the "*provisions of this Charter are addressed to the institutions, bodies, offices and agencies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law.*" Therefore, to apply any requirements of independence for national courts, the case had to have a Union connection for the standards established in the Charter of Fundamental Rights to apply.[47] However, instead of the Charter of Fundamental Rights whose application hinges on implementation of Union law, more recent case-law of the CJEU relies on the second paragraph of Article 19(1) TEU in conjunction with Article 2 TEU, which is not linked with the "implementation of Union law" but refers to "the fields covered by Union law"; thus, "*…as regards the material scope of the second subparagraph of Article 19(1) TEU, that provision relates to 'the fields covered by Union law', irrespective of whether the Member States are implementing Union law, within the meaning of Article 51(1) of the Charter.*"[48] Consequently, as declared by the President of the CJEU, "*it follows in principle that while Article 51(1) of the Charter and Article 19(1) TEU differ in the scope of* rationae materiae*, both regulations aim to define the operating framework of the system of protection of fundamental rights in the EU: Article 51(1) of the Charter aims to divide responsibilities between the EU and the Member States for effective protection of fundamental rights while Article 19(1) TEU*

[46] Judgment of the CJEU of 24 June 2019, C-619/18, Commission/Poland, ECLI:EU:C:2019:531, paragraph 58.
[47] Judgment of the CJEU of 16 May 2017, C-682/15, Berlioz Investment Fund S.A, ECLI:EU:C:2017:373, paragraph 44; judgment of the CJEU of 14 June 2017, C-685/15, Online Games, ECLI:EU:C:2017:452, paragraph 54.
[48] Judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paragraph 29.

aims to protect the architecture of the judiciary upon which rests the Union legal system."[49] In principle, the second paragraph of Article 19(1) TUE in the broad interpretation from the perspective of Article 2 TEU applies, in the way discussed above, in each case examined by a national court which adjudicates within the system of Union law. Consequently, while the organisation of the judicial system in the Member States falls within their exclusive competences, the Member States are required to exercise such competences in accordance with the aforementioned interpretation of the second paragraph of Article 19(1) TEU in conjunction with Article 2 TEU.[50]

Furthermore, that norm so understood results in the creation of competences of national courts which refer questions for a preliminary ruling to the CJEU concerning review of the independence of judges or courts as organs of public authority in the Member State under the criteria defined by the CJEU in the absence of a legal norm in the national legal system that would authorise a court to conduct such review where the legal system of the Member State in fact includes constitutional provisions which bar such review as such review or the prerogative of appointing judges are reserved for another constitutional organ of public authority or which provide that a legal act confirming appointment is final[.] The CJEU has reiterated that "*it is important to ensure that the substantive conditions and detailed procedural rules governing the adoption of such decisions are such that they cannot give rise to reasonable doubts, in the minds of individuals, as to the imperviousness of the judges concerned to external factors and as to their neutrality with respect to the interests before them.*"[51] This concerns in particular review of the independence of judges appointed by the President of the Republic of Poland and review of final resolutions of the National Council of the Judiciary concerning a request to the President

[49] K. Lenaerts, "Aby Karta praw podstawowych Unii Europejskiej była rzeczywistością dla wszystkich: 10 lat, odkąd Karta jest prawnie wiążąca, *Europejski Przegląd Sądowy 2020*, No. 2, p. 5.
[50] Judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paragraph 40; judgment of the CJEU of 24 June 2019, Commission/Poland, C-619/18, ECLI: EU:C:2019:531, paragraph 52; judgment of the CJEU of 5 November 2019, C-192/18, Commission/Poland, ECLI:EU:C:2019:924, paragraph 102; judgments of the CJEU of 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and others, ECLI:EU:C:2019:982, paragraph 75 and judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 68.
[51] Judgment of the CJEU of 24 June 2019, C-619/18, Commission/Poland, ECLI: EU:C:2019:531, paragraph 111; judgment of the CJEU of 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and others, ECLI:EU:C:2019:982, paragraph 134 and judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 123.

of the Republic of Poland for the appointment of a judge, which the Polish courts referring questions to the CJEU were expressly obligated to undertake.[52]

In conclusion, the norm derived from the second paragraph of Article 19(1) TEU in conjunction with Article 2 TEU, which expands the material scope of application of those provisions and authorises a court to review the independence of judges appointed by the President of the Republic of Poland and to review a resolution of the National Council of the Judiciary concerning a request to the President of the Republic of Poland for the appointment of a judge, raises serious constitutional doubts.

III. Comparative legal analysis of the case-law of Member States

The relations between European Union (formerly European Communities) law and national law of the Member States, in particular their constitutions, and the scope and limits of competences conferred on the Union (formerly the European Communities) and the position of the CJEU have been frequently considered by courts of the Member States (including constitutional courts as well as common and administrative courts of last instance). Consequently, it seems that the doctrine (concept) prevalent in case-law is that ultimate review and interpretation of European Union law us reserved for rulings of the Court of Justice of the European Union.[53] Ultimate review of Union law by courts of the Member States with jurisdiction would directly restrict the application of the principle of primacy of Union law. Consequently, in the words of

[52] Judgments of the CJEU of 19 November 2019, C-585/18, C-624/18 and C-625/18, A.K. and others, ECLI:EU:C:2019:982, paragraph 153 and judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 149 and 166.

[53] "*An individual might argue before a national court that action is beyond the EU's competence because the ECJ has accorded an interpretation to certain articles of the Lisbon Treaty that they cannot properly bear. An individual might in a similar vein contend that the EU legislature has enacted acts that go beyond those that could be based on the particular Treaty article in question"* P. Craig, "The ECJ and Ultra Vires Action", *Common Market Law Review* 2011, No. 2, p. 396. Polish legal commentators also find that review of the CJEU's rulings is admissible: "*As regards review of primary law of the European Union, it should first be noted that in practice only the Treaties are subject to constitutional review. National legal systems have no instruments necessary to review constitutional objections raised directly against the general principles of Union law. Furthermore, given their nature, those are largely identical to the principles underlying the legal systems of the Member States. However, certain objections have been raised against principles specific to Union law. In that case, based on settled case-law of constitutional courts, ECJ judgments which establish, develop or apply in practice a certain principle could hypothetically be subject to review. The adequate basis of such review would be either* ultra vires *or contravention of the constitutional identity of a Member State.*" (A. Kustra, *Kelsenowski...*, pp. 302-303).

Professor Krzysztof Wójtowicz, there has for long been a "*turn away from the concept of absolute primacy of Community law.*"[54]

For several decades now, leading foreign legal commentators specialising in Union law and legal theory have reiterated that the principle of primacy does not imply absolute superiority of Union law or resulting hierarchical subordination of constitutional norms but rather involves primacy of application in specific instances, i.e., within the competences conferred on the Union.[55] **Thus, primacy of application is fragmentary, it concerns Union competences, and it is conditional as it does not affect the hierarchy of the sources of law and, as such, it is subordinated to constitutional norms which are the final criterion of validation of any norms applied in a given Member State.** Primacy of Union law so understood finds its expression in constitutional review of Union law and acts of Union institutions exercised by many courts of highest instance of the Member States, in particular constitutional courts.

Legal theory describes in many different ways how constitutional review of Union law may be exercised. One perspective focuses on the formal legal basis (legitimacy) of review of Union law and its interpretation with reference to the principles of primacy of the constitution and the prohibition of *ultra vires* acts of Union institutions,[56] and on the substantive legal basis of such review (benchmarks of review) with reference to sovereignty, protection of fundamental rights and the constitutional identity of the Member State.[57] Another perspective based on evolution of the case-law of courts of the Member States which review Union law and its interpretation takes a broader view on the formal basis as "intra-systemic legitimacy" of constitutional review of Union law which includes the "*supreme legal effect of the constitution, the constitutional basis of the admissibility of the conferral of competences on the Union and the resulting needs of protection of the constitutionally limited scope of the conferral, the sovereignty of the Member States and their resulting status as High contracting Parties, and the requirement of ensuring standards of protection of fundamental rights guaranteed by the constitution.*"[58] This model defines review of primary law narrowly, as review of *ultra vires* acts of Union institutions and protection of the constitutional identity of the Member State.[59] **Irrespective of the model and the characteristics of the formal or substantive basis of review, there is no**

[54] Cf. statement by Krzysztof Wójtowicz in: Z. Maciąg (ed.), *Stosowanie Konstytucji RP z 1997 roku doświadczenia i perspektywy. Międzynarodowa konferencja naukowa. Zapis dyskusji*, Kraków 2006, p. 145.
[55] N. MacCormick, "Beyond the Sovereign State", *Modern Law Review* 1993, No. 1, pp. 9 *et seq*.
[56] K. Wójtowicz, *Sądy...,* pp. 89-102.
[57] *Ibidem*, pp. 103-118.
[58] A. Kustra, *Kelsenowski...,* p. 237.
[59] *Ibidem*, pp. 244-301.

doubt that Union law and its interpretation is subject to constitutional review from the perspective of *ultra vires* acts, protection of fundamental rights and the constitutional identity, as corroborated in recent legal theory.[60]

This theoretical perspective stems from long-time case-law of courts of the Member States of the European Union. The section below describes the key judgments which have established consistent and stable case-law in this regard. According to legal scholars, such case-law is a source of inspiration for national courts, in particular courts of the Member States which joined the European Union after 2004: "*Analysis of the case-law of constitutional courts concerning the intra-systemic legitimacy of constitutional review of Union law confirms that certain constitutional ideas have migrated. This is linked to recurrent (but not identical) arguments raised at different stages of development of the case-law as well as explicit references to the case-law of other constitutional courts used as a source of inspiration …. other courts refer to and borrow such arguments mainly in those Member States which joined the European Union in the 2004 accession.*"[61] **The constitutional courts of the Member States typically consider that their position authorises and legitimises them as "guardians of the constitution" wielding the ultimate power to decide about the legality and binding force of norms in the country, which is the role to which they were appointed by the founders of the contemporary constitutional judiciary.[62] It follows that potential disapplication of a CJEU judgment which is incompatible with the supreme law of a Member State is not at all a judicial infringement but rather an element and a result of the long-time constitutional heritage of the Member States,[63] indeed, a constitutional tradition.**

Further to the foregoing, the Prime Minister invokes the case-law of courts of the Member States presented below and submits that the position underlying this application concerning the jurisdiction of constitutional courts and the identification of constitutional problems, subject to manifest differences in the provisions of the constitutions, evidently corresponds with the judicial practice of certain European countries.

[60] Cf. M. Gniadzik, "Trzy wzorce kontroli aktów instytucji Unii Europejskiej w orzecznictwie niemieckiego Federalnego Trybunału Konstytucyjnego", *Przegląd Sejmowy* 2012, No. 4, pp. 269 *et. seq.*; W. Jóźwicki, *Ochrona...*, pp. 251-253 and 370-390 and literature cited therein.
[61] A. Kustra, *Kelsenowski...*, p. 241.
[62] Cf. H. Kelsen, *Istota i rozwój sądownictwa konstytucyjnego,* Warsaw 2009, pp. 63 *et seq*.
[63] A. Wyrozumska, "Wyrok FTK z 5.05.2020 r. w świetle podobnych orzeczeń sądów innych państw członkowskich Unii Europejskiej", *Państwo i Prawo* 2020, No. 9, p. 47.

1. Germany

The case-law of the Federal Constitutional Court ("**FCC**"), the constitutional court of the Federal Republic of Germany, has been instrumental in constitutional review of Union law and its relations with the constitutional rules of the Member States. The case-law of the FCC and that of the Italian *Corte Constituzionale* have defined the fundamental doctrines (rules) of constitutional review of primary law and its interpretation by the CJEU.

A key judgment in this regard was the judgment of 29 May 1974 in case *Internationale Handelsgesellschaft,*[64] also known as Solange I. The judgment was given in proceedings under administrative law concerning a deposit forfeited after the expiry of an export licence for maize, granted to a company in expert licences issued under two then applicable Community Regulations. The company appealed against the forfeit, and the administrative court referred questions concerning the binding force and interpretation of secondary Community law for a preliminary ruling. In its preliminary ruling,[65] the Court of Justice not only declared that the contested regulations do not contravene primary Community (now Union) law but also emphasised the primacy of Community law over national law, including constitutional norms.[66] However, the administrative court referred a legal question to the FCC, alleging that the deposit and its forfeit contravene the German Basic Law ("**BL**"), in particular Article 2(1) and Article 12 BL; according to legal theory, guarantees of economic freedom are derived from those two provisions of the German constitution.[67] The FCC declared the contested provisions to be compatible with the BL; however, what is particularly relevant in the context of this application is that the FCC put forth three fundamental principles concerning the relationship between constitutional law and Community (now Union) law.[68]

Firstly, the FCC found that Article 24 BL (a counterpart to Article 90 of the Constitution of the Republic of Poland) which deals with the transfer of sovereign rights to inter-state institutions must be construed in the overall context of the whole Basic Law. Consequently, the FCC concluded that **it does not open the way to amending the basic constitutional structure of**

[64] Judgment of the Second Senate of the FCC of 29 May 1974, BvL 52/71.
[65] Judgment of the Court of Justice of 17 December 1970, C-11/70, Internationale Handelsgesellschaft, ECLI:EU:C:1970:114.
[66] *Ibidem*, paragraph 3.
[67] *Relacje między prawem konstytucyjnym a prawem wspólnotowym w orzecznictwie sądów konstytucyjnych państw Unii Europejskiej,* B. Banaszkiewicz, P. Bogdanowicz (eds.), Warsaw 2006, p. 70.
[68] Translation of the grounds [into Polish – translator's note] after: *Relacje...*, p. 68.

the Federal Republic of Germany, which forms the basis of its identity, through the legislation of the inter-state institution without an amendment to the Basic Law.

Secondly, the Court of Justice cannot authoritatively decide whether a provision of Community law conforms to the BL and the FCC has exclusive jurisdiction in that regard in the Federal Republic of Germany. The FCC has jurisdiction to determine the inapplicability of a rule of Community (now Union) law by the administrative authorities or courts of the Federal Republic of Germany in so far as it conflicts with the BL.

Thirdly, the FCC declared that the principle of primacy of Community (now Union) law is conditional and found that as long as the integration process has not progressed so far that Community law also receives a catalogue of fundamental rights decided on by a parliament and of settled validity, which is adequate in comparison with the catalogue of fundamental rights contained in the BL, **review by the FCC of Community (Union) law including its interpretation given by the Court of Justice is admissible and necessary**.

The Solange I judgment in fact concluded that the principle of primacy of Union law is not absolute and conditional but subject to *a casu ad casum* review by the FCC which may determine that a rule conflicts with the BL and declare its inapplicability by the administrative authorities or courts. The FCC defined general and abstract limits of competences which may be conferred on Union institutions: it follows from that judgment that acts of Union institutions must not contravene the basic constitutional structure of the Federal Republic of Germany.

The FCC revisited that notion in its judgment of 22 October 1986, also known as *Solange II.*[69] The case concerned a constitutional complaint lodged by an importer of preserved mushrooms from outside the European Economic Community ("**EEC**") whose application for an import licence required under then applicable European regulations was refused by the German authority. In administrative proceedings, the administrative court of last instance referred a question for a preliminary ruling to the Court of Justice concerning the validity of the EEC Regulations under which the German authority issued its refusal to the applicant. The judgment of the Court of Justice of 6 May 1982 found the Regulations to be valid.[70] The Federal Administrative Court dismissed the company's appeal and its subsequent appeal contesting the judgment of the Court of Justice. When the Federal Administrative Court dismissed its

[69] Judgment of the Second Senate of the FCC of 22 October 1986, 2 BvR 197/83.
[70] Judgment of the Court of Justice of 6 May 1982, C-126/81, *Wünsche*, ECLI:EU:C:1982:144.

application once again, the company lodged a constitutional complaint. The complaint did not contest Community law directly but it contested the refusal of the Federal Administrative Court to re-examine the case, which the appellant considered to be in violation of the constitutional right to freedom of economic activity and the right to a fair trial (according to legal theory, the German BL defines the right to a fair trial as a guarantee of a "judge appointed by law" and the "right to a legal hearing").[71] In its review of the complaint, the FCC considered once again the relations between national law and Community law and the relevant existing case-law. In the grounds of its judgment of 22 October 1986, the FCC defined two fundamental principles concerning the relations between constitutional law and Union law:[72]

- under the German Basic Law, the power to cede sovereign rights to international institutions must not undermine the constitutional order of the Federal Republic of Germany by breaking into its basic framework, that is, into its very structure. That applies in particular to the legal principles underlying fundamental rights. In so far as an international institution is in a position to encroach on the essential content of the fundamental rights recognised by the BL, it is necessary, if that entails the removal of legal protection existing under the terms of the BL, there should be a guarantee of the application of fundamental rights which in substance and effectiveness is essentially similar to the protection required by the BL;

- so long as the European Communities (now the European Union), in particular Court of Justice case-law, generally ensure effective protection of fundamental rights which is to be regarded as substantially similar to the protection of fundamental rights required unconditionally by the BL, and in so far as they generally safeguard the essential content of fundamental rights, the FCC will no longer exercise its jurisdiction to decide on the applicability of secondary Community legislation cited as the legal basis for any acts of German courts or authorities within the sovereign jurisdiction of the Federal Republic of Germany, and it will no longer review such legislation by the standard of the fundamental rights contained in the BL.

Thus, although the FCC "reversed" the Solange I model concerning primacy of Union law, it reaffirmed the conditional applicability of the principle of primacy whose ultimate measure is the constitutional level of protection guaranteed by the BL. According to

[71] *Relacje...*, p. 76.
[72] Translation of the grounds [into Polish – translator's note] after: *Relacje...*, p. 73-74.

commentators, the FCC set conditions under which it shall not exercise its jurisdiction with the reservation that it will exercise that jurisdiction if the standards of protection are undermined.[73] Furthermore, *Solange II* confirmed the limits of competences which may be conferred under the German BL, already delineated in *Solange I.* According to legal theory, *Solange I* and *II* introduced the principle of "functional substitution" which "*principally aims to protect the essential structural principles of fundamental rights: rule of law and social state. Such safeguards must be maintained under either legal system: German law or Community law.*"[74] Any act of international institutions, including Union institutions, which encroaches on those principles must be considered to go outside of conferred competences and, as such, to conflict with the BL.

The next step in the development of the theory of the FCC's constitutional review of Union law came with the judgment of 12 December 1993 concerning the Maastricht Treaty.[75] The judgment concerned several constitutional complaints against the German Act approving the ratification of the Maastricht Treaty and the Act amending the German BL in connection with the establishment of the European Union. The complaints lodged by an individual and by four Members of the Bundestag (each acting on his or her behalf) contested the compatibility of those Acts with a number of constitutional rights of the individual including the right to dignity, personal freedom, freedom of association, position of Members of the Bundestag. The complaint lodged by the individual was the only one not to be dismissed and to be examined on its merits, albeit to a very narrow extent, and it was eventually declared to be unfounded. In spite of the narrow scope of the examination, the FCC in its judgment put forth principles of fundamental relevance to the relations between constitutional law and Union law.[76] Firstly, the FCC found that the European Union is a federation of states and not a new federal state; it follows that the authority of the Union is derived from the Member States and has binding effect in German sovereign territory only by virtue of the German command to apply the law. **According to the FCC, the Member States are "High Contracting Parties" which have given as the reason for their commitment to the TEU their desire to be members of the European Union for a lengthy period; such membership may, however, be terminated by means of an appropriate act being passed. Each Member States is therefore maintaining**

[73] A. Kustra, *Kelsenowski...*, p. 214.
[74] R. Arnold, "Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego a proces integracji europejskiej", *Studia Europejskie* 1999, No. 1, p. 100.
[75] Judgment of the Second Senate of the FCC of 12 December 1993, 2 BvR 2134, 2159/92.
[76] Translation of the grounds [into Polish – translator's note] after: *Relacje...*, pp. 79-81.

its status as a sovereign State in its own right as well as the status of sovereign equality with other States. Since the Member States are the "High Contracting Parties", they autonomously determine the extent of their obligations to international institutions such as the Union as an international organisation must not go outside the competences conferred upon it in the treaty which establishes its power. The foregoing also applies to the European Union. The FCC concluded that the TEU relies on the principle of limited individual competences of Union institutions and bodies.

Thus, the FCC introduced what legal theory refers to as the *Kompetenz-Kompetenz* rule, which provides that the Union, which is not a sovereign state, has no competence to define its own competences. It follows that Union bodies must not act outside their competences, i.e., *ultra vires*. According to paragraph 7 of the operative part of the FCC judgment, "*[p]ursuant to the principle of limited individual powers, it is indeed possible for an individual provision which accords functions or powers to be interpreted in the context of the objectives of the Treaty; however, this objective does not by itself constitute sufficient grounds for the establishment or extension of functions or powers. When standards of competence are being interpreted by institutions and governmental entities of the Communities, the fact that TEU draws a basic distinction between the exercise of limited sovereign powers and amendment of the Treaty must be taken into consideration. Thus, interpretation of such standards may not have an effect equivalent to an extension of the Treaty; if standards of competence were interpreted in this way, such interpretation would not have any binding effect on Germany.*"[77]

According to that judgment, the consent of the German legislator for the ratification of the TEU is not a blanket consent: it does not cover any subsequent substantial amendments to the programme of integration or to its authorisations to act under the Treaty. In paragraph 10 of the operative part of the judgment, the FCC expressly defined the *ultra vires* doctrine which requires that the EU and its organs giving an act must remain within the limits of the conferred competences: "***[i]f, for example, European institutions or governmental entities were to implement or to develop the Maastricht Treaty in a manner no longer covered by the Treaty in the form of it*** *upon which the German Act of Consent is based, any legal instrument arising from such activity would not be binding within German territory. German State institutions would be prevented by reasons of constitutional law from applying such legal instruments in Germany.* ***Accordingly, the German Federal Constitutional Court***

[77] *Ibidem*, pp. 80-81.

must examine the question of whether or not legal instruments of European institutions and governmental entities may be considered to remain within the limits of the sovereign rights accorded to them, or whether they may be considered to exceed those limits."[78]

It follows from that judgment that the FCC reaffirmed its legitimacy regarding constitutional review of Union law, reiterated that State sovereignty defines the limits of conferred competences, and authorised review of Union acts from the perspective of competences conferred on the Union. Thus, the constitutional court is the guardian of legality from the perspective of general compliance with the standards by Union institutions while incidental (case-by-case) review of secondary law remains dormant[79] until an applicant demonstrates that the Union system fails to ensure protection of fundamental rights, which would then reactivate such competences for review[80] according to the rule set in Solange II.

The FCC reaffirmed its jurisdiction of constitutional review of acts of Union institutions and bodies from the perspective of the *ultra vires* doctrine in its later case-law,[81] in particular concerning the ratification of the Lisbon Treaty[82] and in reaction to the European Court's Mangold judgement.[83]

In the first case, as in the case of the Maastricht Treaty, the FCC examined constitutional complaints contesting the Act approving the Treaty of Lisbon and the Act implementing it. The central focus of the complaints was electoral law.[84] According to German legal theorists: "*[w]hereas the European treaties obviously do not interfere with national voting rights as such, they transfer powers heretofore wielded by national parliaments to the EU, making these elected bodies less relevant and thereby allegedly devaluating the national voting rights. Therefore, the applicants in the Lisbon Case could argue that the new treaty eroded the powers of the German federal parliament and the Federal Constitutional Court again used its self-authorization from the Maastricht judgment to deal with this issue in some detail.*"[85] Thus,

[78] *Ibidem*, pp. 81-82.
[79] T.C. Hartley, *The Foundations of European Union Law,* Oxford 2010, p. 240, cf. A. Kustra, *Kelsenowski...*, p. 217.
[80] Cf. Judgment of the Second Senate of the FCC of 7 June 2000, 2 BvL 1/97210.
[81] Judgment of the Second Senate of the FCC of 17 February 2000, 2 BvR 1210/98.
[82] Judgment of the Second Senate of the FCC of 30 June 2009, 2 BvE 2/08.
[83] Cf. Judgment of the Second Senate of the FCC of 6 June 2010, 2 BvR 2661/06; judgment of the Court of Justice of 22 November 2005, C-144/04, Mangold, ECLI:EU:C:2005:709.
[84] Cf. Judgment of the Second Senate of the FCC of 30 June 2009, 2 BvE 2/08, margin note 213 *et seq*.
[85] T. Giegerich, "Ostatnie słowo Niemiec w sprawie zjednoczonej Europy – wyrok Federalnego Trybunału Konstytucyjnego w sprawie Traktatu z Libony", *Europejski Przegląd Sądowy* 2011, No. 3, p. 5 *[English version: "The Federal Constitutional Court's Judgment on the Treaty of Lisbon – The Last Word (German) Wisdom Ever Has to Say on a United Europe?", German Yearbook of International Law 2009/52, pp. 9-43 – translator's note].*

when examining the alleged infringements of voting rights of individuals, the FCC considered fundamental principles: sovereignty of the Federal Republic of Germany and the relations between Union law and the federal constitution. That the complaint was admitted itself suggests that Union regulations may be contested in a constitutional complaint if they are found to infringe on the rights of German citizens, such as by eroding the powers of the State which safeguards fundamental rights of individuals enshrined in the BL. With that in mind, the FCC considered three key issues:

- *"whether the Treaty transferred too many powers from the German parliament to the EU;*
- *whether it failed to provide the EU with sufficient democratic legitimacy; and*
- *whether it diminished German sovereignty to the extent that it reduced Germany and the other member States to mere cantons of a European federal State."*[86]

The FCC answered none of those questions in a way that would prevent the ratification of the Lisbon Treaty but it did clearly delineate the limits of potential integration and reaffirmed its jurisdiction of review of *ultra vires* acts and the constitutionality of Union law. The FCC reiterated the conclusions of the Maastricht judgment: as an association of states, the Union acts only on the basis and within the limits of the principle of conferral. The FCC elaborated on the doctrine of sovereignty: the constitutional identity of the Federal Republic of Germany must be protected irrespective of the exercise and potential development of Union competences.[87] The FCC referred directly to the doctrine of *ultra vires* review where the FCC examines whether legal instruments of the EU institutions and bodies keep within the boundaries of the sovereign powers accorded to them by way of conferral whilst adhering to the principle of subsidiarity. If such review is negative, such instrument cannot apply in Germany.[88] The FCC's arguments focused on the risk of infringement of the principle of conferral of powers: so long as the Member States as the "High Contracting Parties" are responsible for European integration and determine the scope of powers conferred on the Union, the European Court cannot "*unrestrictedly, i.e. without external control, decide how the treaties were interpreted.*"[89]

[86] *Ibidem*, p. 6.
[87] Judgment of the Second Senate of the FCC of 30 June 2009, 2 BvE 2/08, margin note 233.
[88] *Ibidem,* margin note 242.
[89] T. Giegerich, *Ostatnie słowo...,* p. 10.

However, such control must be *ultima ratio* and only in respect of "obvious transgressions" of the boundaries which the treaties draw on EU competences.

As regards constitutional identity review,[90] the FCC performs in the constitutional structure of the Federal Republic of Germany the role of the ultimate guardian of the identity of the German constitution protected under Article 79(3) BL which provides: "*Amendments to this Basic Law affecting the division of the Federation into Länder, their participation in principle in the legislative process, or the principles laid down in Articles 1* [human dignity, fundamental rights, division of powers] *and 20* [the Federal Republic of Germany as a democratic and social federal state, the people as the sovereign, the right to resist] *shall be inadmissible.*"[91] According to legal theory, "***The Court can therefore review the compatibility of any European Treaty with the BL's inviolable structural elements.*** *If this is done prior to German ratification, as was the case in the proceedings concerning the ratification of the Treaty of Lisbon, no problem arises under EU law. But the Court claims the power henceforth to review even those treaty provisions which are already in force as well as each and every act of secondary EU law under the standards of Article 79 (3) BL and,* ***should the Court make a finding that any of them are incompatible, declare them inapplicable in Germany, thereby disregarding the primacy of EU law over national law.***"[92]

In consequence, the FCC reaffirmed the conditional applicability of the principle of primacy of Union law, both from the perspective of *ultra vires* and protection of constitutional identity, and declared its ultimate jurisdiction to decide about interpretations of principles enshrined in the Treaties. The judgment originated further case-law endorsing constitutional identity review of Union law, leading among others to the conclusion that constitutional identity includes among others safeguards of the secrecy of telecommunications[93] and relative discretion of the legislator to make decisions on public revenue and expenditure.[94] **Importantly, those FCC**

[90] This notion refers to the text of the Judgment of the Second Senate of the FCC of 30 June 2009, 2 BvE 2/08, margin note 240-241.
[91] *Konstytucja Niemiec*, B. Banaszak, A. Malicka (transl.), Warsaw 2008, http://libr.sejm.gov.pl/tek01/txt/konst/niemcy.html [accessed on 18 March 2021] *[English version of the Basic Law of the Federal Republic of Germany: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0414 – translator's note]*.
[92] T. Giegerich, *Ostatnie...*, p. 9.
[93] Judgment of the First Senate of the FCC of 2 March 2010, 1 BvR 256/08, margin note 218. More about the facts of the case and the grounds: cf. A. Kustra, *Kelsenowski...*, p. 284.
[94] Judgment of the First Senate of the FCC of 12 September 2012, 2 BvR 1390/12, margin note 230. More about the facts of the case and the judgment: J. Barcz, "Stabilizacja sytuacji finansowej w strefie euro a uprawnienia parlamentów narodowych – wyrok niemieckiego Federalnego Trybunału Konstytucyjnego z 12.09.2012 r.", *Europejski Przegląd Sądowy* 2012, No. 11, pp. 4 *et seq.*

judgments clearly turned away from *Solange II* which had linked constitutional review to the level of protection of fundamental rights in the Union, a criterion that applicants would need to demonstrate was not fulfilled.

The other case, *Honeywell*, was initiated by a constitutional complaint lodged by an automotive company in connection with a judgment of the Federal Labour Court of 26 April 2006. In its judgment, the Federal Labour Court applied a general principle of Union law, the principle of non-discrimination, in accordance with the guidance of the Court of Justice *Mangold* judgment, which concluded that it is the responsibility of the national court to guarantee the full effectiveness of the general principle of non-discrimination in respect of age, setting aside any provision of national law which may conflict with Community law, even where the period prescribed for transposition of that directive has not yet expired.[95] The Federal Labour Court applied that principle in contravention of German law which allowed for the conclusion of fixed-term employment contracts with employees over the age of 52 years, even though the period allowed for the implementation of the directive prohibiting discrimination of employees on grounds of age had not elapsed when the appeal was lodged and the dispute was a horizontal one between individuals (a company and its employee).[96] It should be noted that the *Mangold* judgment followed a preliminary ruling of the Court of Justice concerning questions referred by the Federal Labour Court in a different case. The complainant was complaining of a violation of constitutional rights by the judgment of the Federal Labour Court, including contractual freedom, the right to a lawful judge (as the Federal Labour Court failed to refer questions to the Court of Justice), and the principle of legal certainty, among others by relying on a judgment of the Court of Justice which did not concern directly the case pending before the Federal Labour Court. The complainant also submitted that the *Mangold* judgment was issued in manifest transgression of competences by reviewing domestic legislation with regard to the legal relationship between private individuals and by postulating a directly applicable general principle not covered by the Treaties such as the general prohibition of discrimination based on age and direct and third-party effect of directives before the end of the period allowed for implementation.[97]

[95] Judgment of the Court of Justice of 22 November 2005, C-144/04, Mangold, ECLI:EU:C:2005:709, paragraph 74-78.
[96] On the facts of the case, cf. M. Bainczyk, "Pomiędzy otwartością a kontrolą ultra vires – orzeczenie niemieckiego Bundesverfassungsgericht dotyczące skutków wyroku TS w sprawie Mangold II", *Europejski Przegląd Sądowy* 2013, No. 5, pp. 34-35.
[97] Judgment of the Second Senate of the FCC of 6 June 2010, 2 BvR 2661/06, margin note 39-42.

The FCC declared the complaint to be admissible but unfounded. Given the complainant's pleas, the FCC judgment focuses on the relationship between the German Federal Constitutional Court and the CJEU. The FCC judgment reaffirmed and clarified the principle of review of acts of Union institutions and focused on CJEU case-law.[98] Arguably, under this understanding of the *ultra vires* doctrine, the FCC did not preclude further development of Union principles through case-law but did preclude any abuse of such powers in a way which would lead the court to legislate, in particular in political cases which should be resolved by the legislature: "*...the development of legislation is not law-making, which occurs in a space of unconstrained political decisions; such development takes place within a framework defined by statutes and treaties which constitute its basis and set its limits. Judicial development of legislation aims in particular to fill programs and loopholes, resolve conflicts of values, and accommodate specific circumstances in individual cases.* ***Development of legislation goes beyond such boundaries if it modifies manifest and even unambiguously documented decisions established in treaties or statutes or creates new regulation which is not closely linked to statements of the legislature. It is particularly inadmissible for judicial bodies to go beyond the circumstances of an individual case and take fundamental decisions of political nature or to develop legislation resulting in structural shifts in the system of constitutional checks and balances.***"[99] Such review should be undertaken in the event of manifest violation of competences, after referring questions for a preliminary ruling to the CJEU in order to obtain a binding interpretation of the Treaties, and in a manner friendly to Union law.[100] According to legal theory, the referring court should review the methodology followed by the CJEU and decide whether the interpretation proposed by the CJEU is acceptable to the FCC.[101] As such, it is a "clear warning" given to the CJEU.[102] In consequence, the FCC once again reaffirmed that the constitutional court of a Member State is the final instance as regards law applicable in the Federal Republic of Germany in the case of any transgression of the competences of Union bodies, in particular the CJEU when it interprets the Treaties in a preliminary ruling on questions referred by a national court.

Importantly, even if a Union institution is not found in the final analysis to be *ultra vires*, the FCC in its later case-law declared its jurisdiction to contest excessively broad interpretations of

[98] *Ibidem*, margin note 56 *et seq*.
[99] M. Bainczyk, *Pomiędzy...,* p. 36.
[100] Judgment of the Second Senate of the FCC of 6 June 2010, 2 BvR 2661/06, margin note 60-62.
[101] M. Gniadzik, *Trzy wzorce...*, p. 275.
[102] A. Kustra, *Kelsenowski...*, p. 258.

the Treaties, reducing the standards of review set in *Honeywell*,[103] which found its expression in the judgment of 24 April 2013.[104] The judgment was given following the examination of a constitutional complaint contesting the constitutionality of an Act setting up a counter-terrorism database. The Act did not implement Union law; however, in the grounds of the judgment, the FCC referred to the scope of application of the Charter of Fundamental Rights of the European Union and the resulting obligation to refer questions for a preliminary ruling to the CJEU. The FCC challenged the CJEU's interpretation proposed in two judgments concerning the interpretation of Article 51 and Article 53 of the Charter in the light of the principle of primacy which leads to a broad application of the Charter and the obligation to ensure effectiveness of such rights in all cases concerning rights guaranteed by the Charter irrespective of the division of competences between the Member States and the Union.[105] In its judgment of 24 April 2013, **the FCC ruled expressly that the Charter does not apply "*to national measures whose objectives refer to the internal order, even if such objectives are identical to those defined in Union law.*"[106]**

The FCC judgment of 14 January 2014[107] concerning the OMT (Outright Monetary Transactions) program of the European Central Bank ("**ECB**"), where the FCC referred the first question for a preliminary ruling to the CJEU,[108] concluded in its grounds that the question is referred for the purpose of *ultra vires* review and protection of constitutional identity and that the FCC will ultimately decide about compatibility with the German BL,[109] which was noted and criticised by the Advocate General of the Court of Justice.[110] Importantly, the FCC judgment refers to the case-law of constitutional courts or supreme courts of ten Member States (Denmark, Estonia, France, Ireland, Italy, Latvia, Poland, Sweden, Spain, Czech Republic) to demonstrate that the FCC's approach to constitutional review of Union law from the perspective of transgression of competences by Union bodies and protection of constitutional identity was

[103] *Ibidem*, p. 262.
[104] Judgment of the First Senate of the FCC of 24 April 2013, 1 BvR 1215/07.
[105] Judgment of the CJEU of 26 February 2013, C-617/10, *Fransonn*, ECLI:EU:C:2013:105, paragraph 19-23, 44-46 and judgment of 26 February 2013, C-399/11, *Melloni*, ECLI:EU:C:2013:107, paragraph 58-64. CJEU applied a similar mechanism to the first and second paragraph of Article 19(1) TEU in the case of the "Portuguese judges", cf. judgment of the CJEU of 27 February 2018, C-64/16, Associação Sindical dos Juízes Portugueses, ECLI:EU:C:2018:117, paragraph 29.
[106] Judgment of the First Senate of the FCC of 24 April 2013, 1 BvR 1215/07, margin note 88-91 [translation [into Polish – translator's note] after A. Kustra, *Kelsenowski...*, p. 261].
[107] Judgment of the Second Senate of the FCC of 14 January 2014, 2 BvR 2728/13.
[108] Judgment of the CJEU of 16 June 2015, C-62/14, *Gauweiler*, C-62/14, ECLI:EU:C:2015:400.
[109] Judgment of the Second Senate of the FCC of 14 January 2014, 2 BvR 2728/13, margin note 23 *et seq*. regarding *ultra vires* and 102-103 regarding constitutional identity.
[110] Opinion of Advocate General Pedro Cruz Villalón delivered on 14 January 2015, C-62/14, paragraph 17-18 and 36-62.

prevalent among courts of other Member States.[111] According to German commentators discussing the case-law cited by the FCC, the FCC's perspective on Union law is close to the doctrine of primacy of the constitution, protection of constitutional identity and conferral of competences developed in the case-law of the Polish Constitutional Tribunal and the Czech *Ústavní Soud* ("**Czech Constitutional Court**", "**Czech CC**").[112] Eventually, in view of the answer given by the CJEU, the FCC did not find any violation of competences; however, **the judgment expressly declared that the OMT was subject to review by German institutions; if the OMT is found to conflict with the prerequisites determined in the CJEU judgment, the FCC might determine that ECB transgressed its competences.**[113] This is because **the constitutional organs of the Federal Republic of Germany must counter acts that violate the constitutional identity or constitute an *ultra vires* act.**[114]

The most recent iteration of that doctrine, also relating to ECB's competences, is the FCC judgment of 5 May 2020[115] which reviewed the ECB's purchase programme of private sector assets on the secondary market and expressly refused to apply a CJEU judgment.[116] The FCC judgment concerned constitutional complaints lodged against Decision (EU) 2015/774 of the European Central Bank of 4 March 2015 on a secondary markets public sector asset purchase programme (ECB/2015/10), as amended by Decision (EU) 2017/100 of the European Central Bank of 11 January 2017 ("**Decision**") concerning the Public Sector Purchase Programme (PSPP). The constitutional complaints argued among others that ECB transgressed the competences conferred on the Union (institutions) and violated the principle of democracy, the principle of the sovereignty of the people, and German constitutional identity. The FCC referred questions to the CJEU.[117] The CJEU's preliminary ruling found the Decision to confirm to the Treaties and confirmed its applicability.[118] In consequence, the FCC judgment of 5 May 2020, given following the CJEU's answer, rejected the arguments raised by the complainants in most part while accepting the plea of an *ultra vires* act. According to the FCC, the CJEU failed to

[111] Judgment of the Second Senate of the FCC of 14 January 2014, 2 BvR 2728/13, margin note 30.
[112] M. Claes, J.-H. Reestman, "The Protection of National Constitutional Identity and the Limits of European Integration at the Occasion of the Gauweiler Case", *German Law Journal* 2015, No. 4, p. 931.
[113] Judgment of the Second Senate of the FCC of 21 June 2016, 2 BvR2728/13, paragraph 4 of the operative part.
[114] *Ibidem*, paragraph 43 of the operative part.
[115] Judgment of the Second Senate of the FCC of 5 May 2020, 2 BvR 859/15.
[116] Judgment of the CJEU of 11 December 2018, C-493/17, Heinrich Weiss and others, ECLI:EU:C:2018:1000.
[117] Judgment of the Second Senate of the FCC of 18 July 2017, 2 BvR 859/15.
[118] Judgment of the CJEU of 11 December 2018, C-493/17, Heinrich Weiss and others, ECLI:EU:C:2018:1000, paragraph 45-70.

duly apply the general principle of proportionality and to balance conflicting interests; given that the principle of proportionality is a general principle of the Union, its infringement is systemic in nature.[119] Consequently, such infringement is manifest and results in abuse of the CJEU's mandate in connection with the second sentence of Article 19(1) TEU because such interpretation contravenes legal interpretations derived both from the principles of the Union and the constitutional traditions of the Member States, which are not binding on but must be respected by the CJEU.[120] As a consequence, the competences conferred on the Union institutions under the Treaties are transgressed.[121] According to the FCC, the combination of the limited standard of review applied by the CJEU together with the broad discretion afforded the ECB paves the way for an erosion of Member State competences.[122] **As a result, the FCC concluded that the CJEU judgment may be circumvented and that German organs may not apply the Decision at least until such time that Union institutions present a proportionality assessment including a financial assessment.[123]** That is, to date, the most far-reaching FCC judgment (refusing to apply a CJEU judgment) regarding the primacy of Union law and the most extreme application of the principle that conferred competences must not be transgressed, which challenges the binding force of CJEU judgments and the principle of primacy of Union law in respect of an *ultra vires* act.

To summarise the case-law of the German constitutional court in this regard, the FCC has since the 1970s consistently opposed an understanding of the principle of primacy of the European Union as absolute and unconditional, including the subordination of national constitutional norms to Union law. The FCC has established three fundamental criteria for its review of acts and instruments of Union bodies: protection of fundamental rights; protection of the constitutional identity; and prohibition of *ultra vires* acts. In this framework, the FCC has endorsed review of the case-law of the CJEU and disapplication of CJEU judgments, which clearly delineates the principle of primacy of Union law.

[119] Judgment of the Second Senate of the FCC of 5 May 2020, 2 BvR 859/15, margin note 113, 116, 118, 165.
[120] *Ibidem*, margin note 112.
[121] *Ibidem*, margin note 126-157, 165.
[122] *Ibidem*, paragraph 4 of the operative part and margin note 156.
[123] *Ibidem*, paragraph 9 and 10 of the operative part and margin note 232 and 234.

2. Italy

Another constitutional court to develop case-law regarding the relations between constitutional law and Union law, in particular the principle of primacy of the latter, similar to the FCC, was the Italian *Corte Costituzionale* ("**Italian CC**" or "**Italian Constitutional Court**). Since the 1970s, its case-law has reserved the Italian CC's powers of constitutional review of Community law and potential derogation from the principle of primacy. Legal theory refers to that concept as *controlimiti*[124] (counterlimits) which restricts the limitation of sovereignty under Article 11 of the Italian constitution. As a consequence, the Italian CC has refused to apply two CJEU judgments and derogated from the principle of primacy on grounds of incompatibility with the Italian constitution.

The development of the case-law of the Italian CC reached a milestone with the judgment of 18 December 1973, *Frontini*.[125] The Constitutional Court considered legal questions referred by two Italian courts which requested review of Article 2 of the Italian Act approving the ratification and implementing the Treaty establishing the European Economic Community signed on 25 March 1957 under Article 23 of the Italian constitution which provides: "*No obligation of a personal or financial nature may be imposed on any person except by law.*"[126] The questions arose in connection with import duties imposed on farmers under a Community Regulation and what the courts considered to be an unacceptable amount of such duties. The Italian Constitutional Court ruled that the constitution was not violated because Article 11 of the Italian constitution which provides: "*Italy rejects war as an instrument of aggression against the freedom of other peoples and as a means for the settlement of international disputes. Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations. Italy promotes and encourages international organisations furthering such ends*," forms the basis for the conferral of competences on the European Communities (now the European Union) and fulfils the requirement of "law" referred to in Article 23 of the Italian constitution. In this context, the Constitutional Court drew fundamental conclusions as to the applicability of Community law in Italy. First, it reaffirmed that the competences conferred on the European

[124] G. Piccirili, "The '*Taricco Saga'*: the Italian Constitutional Court continues its European journey", *European Constitutional Law Review* 2018, No. 4, p. 3.
[125] Judgment of the Constitutional Court, 183/1973.
[126] *Konstytucja Włoch,* Z. Witkowski (transl.), Warsaw 2004, http://libr.sejm.gov.pl/tek01/txt/konst/wlochy.html [accessed on 17 March 2021]. All quotes from the Italian constitution after that translation [into Polish – translator's note].

Communities include the issuance of normative regulations with the same status as statutes, which need not be implemented in national law, however within the scope of competences precisely defined in the Treaties.[127] Consequently, it ruled out constitutional review of secondary law while admitting that "***given any attempt at aberrant interpretations of Article 189 TEU, the Constitutional Court might review the Treaty itself against the principles and fundamental rights enshrined in the Constitution.***"[128] In the opinion of the Italian CC, violations of the supreme values of the Italian legal order, such as inalienable rights of individuals, could constitute such aberrant interpretation.[129] Thus, the Italian Constitutional Court endorsed constitutional review of primary law, in particular its interpretations, which might be incompatible with the Italian constitutional order. Italian legal theory refers to this as the doctrine of *controlimiti*[130] (counterlimits) restricting the limitation of sovereignty under Article 11 of the Italian constitution. Furthermore, the application of Community law by national judges was restricted. The Italian CC ruled that in the case of a conflict of Community law and Italian law, judges may not autonomously decide to disapply a national provision as such provisions should first be declared to be unconstitutional by the Italian Constitutional Court.[131]

That case-law continued to develop (with minor corrections) in later years, including the judgment of 5 June 1984, *Granital*.[132] The case was initiated by a legal question referred by the Genoa court in the context of incompatibility of Community Regulations according to the CJEU's interpretation and national provisions concerning border duties, which would violate the aforementioned Article 11 of the Italian constitution. The Italian Constitutional Court ruled, in contradistinction to *Frontini*, that it is for the referring court to resolve the conflict between national law and Community law. Directly applicable Community law takes precedence over national statutes and primary law enjoys the general presumption of compatibility with the Italian constitution.[133] According to commentators, the Italian Constitutional Court reaffirmed the jurisdiction of courts to apply Community law only if there is a concrete and directly effective norm of Community law which may apply as a matter of precedence over national law; if national law conflicts only with general principles of the Treaties, the matter should be

[127] *Relacje...*, p. 114.
[128] *Ibidem*, p. 115.
[129] Judgment of the Constitutional Court, 183/1973, § 9.
[130] Cf. G. Piccirili, "The 'Taricco *Saga*'…", p. 3 and the bibliography cited therein.
[131] H. Dovhań, "Tożsamość konstytucyjna w acquis constitutionnel Sądu Konstytucyjnego Republiki Włoskiej: sprawa Taricco", *Europejski Przegląd Sądowy* 2018, No. 7, p. 13.
[132] Judgment of the Constitutional Court of 5 June 1984, 170/1984.
[133] *Relacje...*, p. 117.

referred to the Constitutional Court.[134] **The Italian Constitutional Court retains its exclusive jurisdiction of constitutional review of the Treaties and acts which ratify the Treaties, in particular against fundamental principles of the constitutional system and rights of individuals, if an interpretation of the Treaties authorises acts of Union institutions which violate such principles.[135]** Importantly, the Italian Constitutional Court declared its exclusive jurisdiction to make final decisions about the division of competences between the EC (EU) and Italy.[136] The Italian CC passed a similar ruling on 13 April 1989.[137] The judgment concerned invalidated Community regulations imposing levies on companies trading with third countries depending on turnover with such countries. In a case concerning the reimbursement of amounts paid under the invalidated Community regulations, an Italian court referred a question for a preliminary ruling to the Court of Justice which in its judgment of 22 May 1985[138] upheld the invalidity of the regulations and clarified the temporal effect of the judgment. The Venice court then referred a legal question to the Italian CC concerning incompatibility of the judgment of the Court of Justice with Article 23 (levies may only be imposed by law), Article 24 (right to a fair trial), and Article 41 (economic freedom) of the Italian constitution.[139] The Italian Constitutional Court ruled that the question of the court is inadmissible because the matter examined by the referring court is not the same as the matter examined by the Court of Justice. **However, the Constitutional Court declared that, were those matters identical, the question would have to be examined, and thus reaffirmed its jurisdiction in matters concerning the Court of Justice and interpretation of the Treaties.**

The Italian Constitutional Court also featured in the most infamous judicial saga and dialogue between the CJEU and a national court, as a result of which the European Court itself withdrew from the principle of primacy while the Italian Constitutional Court refused to apply a CJEU judgment: the Taricco saga. It opened with the CJEU judgment of 8 September 2015 in the case of Ivo Taricco,[140] relating to domestic criminal proceedings targeting a "VAT carousel" involving VAT fraud in sales of champagne among shell companies, fraudulent invoicing, and deducing VAT on artificial transactions.[141] The Cueno court considered the limitation period,

[134] Cf. A. Kustra, *Kelsenowski...*, p. 215 and the bibliography cited therein.
[135] *Relacje...*, p. 117.
[136] P. Craig, "The ECJ, National Courts and the supremacy of Community Law", in: R. Miccu; I. Pemice (eds.), *The European constitution in the making*, Baden-Baden 2004, p. 39.
[137] Judgment of the Constitutional Court of 13 April 1989, 232/1989.
[138] Judgment of the Court of Justice of 22 May 1985, 33/84, Fragd, ECLI: ECLI:EU:C:1985:221.
[139] *Relacje...*, pp. 120-121.
[140] Judgment of the CJEU of 8 September 2015, C-105/14, Taricco, ECLI:EU:C:2015:555.
[141] *Ibidem*, paragraph 18-19.

which under Italian law is a matter of substantive law determining the severity of punishment rather than a procedural regulation. The limitation period in the criminal case was about to expire even if extended on grounds of financial crime.[142] Consequently, the Italian court referred questions for a preliminary ruling to the CJEU, asking among others whether the short limitation periods which led to impunity of financial criminals in Italy were in fact a VAT exemption (similar to exemptions available for duty-free shops) not included in the list of exemptions in Article 158 of Council Directive 2006/112/EC of 28 November 2006 on the common system of value added tax[143] and, as such, whether they led to breach of the obligation of the Member States to ensure sound public finances laid down by Article 119(3) of the Treaty on the Functioning of the European Union[144] ("**TFEU**"). The CJEU[145] found potential incompatibility of the Italian limitation period regulations albeit with another provision of the TFEU: Article 325(1) and (2) which obligates the Member States to counter fraud and any other illegal activities affecting the financial interests of the Union through measures which shall act as a deterrent and to take the same measures to counter fraud affecting the financial interests of the Union as they take to counter fraud affecting their own financial interests, and with the principle of sincere cooperation enshrined in Article 4(3) TEU. According to the CJEU, if a national rule prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union, or provides for longer limitation periods in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union, that could potentially violate Article 325 TFEU.[146] The national court must verify whether that is the case and, if so, give full effect to Article 325 TFEU, if need be by disapplying the provisions of national law on limitation periods according to the principle of primacy of Union law,[147] without having to request or await the prior repeal of those articles by way of legislation or any other constitutional procedure.[148] In the opinion of the CJEU, the foregoing does not conflict with Article 49 of the Charter, which enshrines the principle of *nullum crimen sine lege* and the principles of legality and proportionality at Union level,

[142] That is the broader problem of Italian financial crime: due to its complexity, it requires lengthy proceedings, leading to expiration of the limitation period in many cases, which causes a wide-spread sense of impunity cf. *ibidem*, paragraph 22-23; por. A. Kustra-Rogatka, "Wewnątrzwspólnotowe zwalczanie przestępstw związanych z VAT a konstytucyjne standardy odpowiedzialności karnej (uwagi na tle spraw Taricco i Taricco II)", *Państwo i Prawo* 2020, No. 4, p. 44.
[143] OJ L 347 of 11.12.2006, p. 1.
[144] *Dziennik Ustaw* of 2004, No. 90, item 864/2, as amended; OJ C 202/1 of 07.06.2016, p. 47.
[145] Judgment of the CJEU of 8 September 2015, C-105/14, Taricco, ECLI:EU:C:2015:555, paragraph 27.
[146] *Ibidem*, paragraph 46-48.
[147] *Ibidem*, paragraph 49-58.
[148] *Ibidem*, paragraph 49.

because such act did constitute a criminal offence at the time when it was committed while the provision did not concern general limitation periods but rather circumstances of their extension for financial crime.[149]

Thus, the CJEU ruled that accused VAT criminals should be tried even after the expiration of the limitation period under the national law subject to the following two criteria:

- if such limitation period prevents the imposition of effective and dissuasive penalties in a significant number of cases of serious fraud affecting the financial interests of the European Union;

- if longer limitation periods apply in respect of cases of fraud affecting the financial interests of the Member State concerned than in respect of those affecting the financial interests of the European Union.[150]

The CJEU judgment not only stirred much controversy among legal theorists from the perspective of protection of fundamental rights (not least because proceedings stayed due to the expiry of a limitation periods would need to be potentially reopened in the light of the CJEU judgment[151]) but also caused much legal uncertainty. According to commentators, "*For instance, the Third Chamber of the Cassation Court (*Corte Supreme di Cassazione*) applied the Taricco I rule in the Pennacchini case on 17 September 2015. On the very next day, the Appeal Court of Milan (*Corte d'Appello di Milano*) did the opposite and raised the issue of* controlimiti."[152] The very test established in Taricco was so ambiguous that its applications varied.[153] Eventually, the Appeal Court of Milan and the Cassation Court referred legal questions[154] to the Italian Constitutional Court, suggesting the intention of applying the *controlimiti* procedure in order to confirm that national courts could disapply the CJEU judgment.[155] They argued that the application of the CJEU judgment would be in conflict with Article 25 of the Italian constitution which provides: "*No punishment may be inflicted*

[149] *Ibidem,* paragraph 55-56.
[150] H. Dovhań, *Tożsamość...,* p. 14; cf. A. Kustra-Rogatka, *Wewnątrzwspólnotowe...,* p. 45.
[151] E.D. Sanniento, *An Instruction Manual to Stop a Judicial Rebellion (before it is too late, of course),* https://verfassungsblog.de/an-instruction-manual-to-stop-a-judicial-rebellion-before-it-is-too-late-of-course/ [accessed on 20 March 2021].
[152] *Ibidem,* p. 15.
[153] A. Kustra-Rogatka, *Wewnątrzwspólnotowe...,* p. 47.
[154] Judgment of the Appeal Court of Milan of 18 September 2015, No. 339 in the 2015 judgment register; judgment of the Cassation Court III Criminal Section of 7 July 2016, No. 212 in the 2016 judgment register, published in: G.U. Prima Serie Speciale of 2016, No. 2 and 41.
[155] H. Dovhań, *Tożsamość..., p.* 15.

except by virtue of a law in force at the time the offence was committed," and raised the potential effect of the judgment in the context of pending criminal proceedings, which would in fact alter the punishability of an act *ex-post* by imposing modified limitation periods in the case of pending criminal proceedings.[156]

The Italian Constitutional Court decided to request a preliminary ruling of the CJEU,[157] asking about three issues relating to the interpretation of Article 325(1) and (2) TFEU and the Taricco judgment: whether national courts should in fact disregard national legislation concerning limitation periods even if:

- there is not a sufficiently precise legal basis for setting aside such legislation;
- limitation is part of the substantive criminal law in the Member State's legal system and is subject to the principle of legality;
- setting aside such legislation would contrast with the supreme principles of the constitutional order of the Member State or with the inalienable human rights recognised under the Constitution of the Member State.

According to commentators, the decision of the Italian Constitutional Court clearly suggested that the Italian CC was determined to defend the principles derived from the Italian constitution and its own status as a guardian of the constitution:[158] "*There is no doubt that the principle of legality in criminal matters is an expression of a supreme principle of the legal order, which has been posited in order to safeguard the inviolable rights of the individual insofar as it requires that criminal rules must be precise and must not have retroactive effect.*"[159] The Italian CC also considered Union law:

- the principle of loyalty under Article 4(3) TEU, which according to the Italian CC is mutual, which means that both courts are "*united in diversity and must respect uniformity*

[156] A. Kustra-Rogatka, *Wewnątrzwspólnotowe...,* p. 47.
[157] Judgment of the Italian Constitutional Court of 23 November 2016, 24/2017.
[158] K. Doktór-Bindas, *Odesłanie prejudycjalne włoskiego Sądu Konstytucyjnego w sprawie przeciwko MA.S. i MB. (tzw. Taricco bis). Glosa do wyroku Trybunału Sprawiedliwości z 5.12.2017 r., C-42/17,* „Państwo i Prawo" 2019, No. 7, p. 151.
[159] Judgment of the Italian Constitutional Court of 23 November 2016, 24/2017, paragraph 2.2 [translation [into Polish – translator's note] after: K. Doktór-Bindas, *Odesłanie...,* p. 151].

of action derived from Union values and the specificity of each Member State derived from its national values";[160]

- Article 6 TEU under which Union law and CJEU judgments which interpret such law cannot require Member States to reject their constitutional tradition including highest values;[161] and

- Article 49 of the Charter and Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms signed at Rome on 4 November 1950[162] ("**ECHR**"); according to the Italian CC, even though the CJEU judgment excluded limitation from the scope of Article 49 of the Charter, it did not assert that the Member States must disregard any of their own constitutional rules and traditions that prove to be more beneficial compared to Article 49 of the Charter and Article 7 ECHR.[163]

Thus, the Italian Constitutional Court invoked both protection of fundamental rights and the constitutional identity of Italy. In reply to the question referred by the Italian Constitutional Court, the CJEU passed its judgment of 5 December 2017, known as Taricco II.[164] **The CJEU judgment took an unprecedented turn away from the absolute applicability of the principle of primacy of Union law by recognising that the Italian rules concerning limitation periods form part of substantive law and are thereby subject to the principle of legality and *nullum crimen*,**[165] which are an integral part of the Italian constitutional tradition. The CJEU ruled that the obligation to ensure the effective collection of the Union's resources cannot run counter to the principle of legality,[166] and that it is for the national court to decide whether the application of Article 325 TFEU is in conflict with the constitutional identity of the Member State.[167] Consequently, the CJEU ruled that Italian courts should, in principle, disapply national provisions on limitation "*unless that disapplication entails a breach of the principle that offences and penalties must be defined by law because of the lack of precision of the applicable law or because of the retroactive application of*

[160] Judgment of the Italian Constitutional Court of 23 November 2016, 24/2017 paragraph 6.3 [translation [into Polish – translator's note] after: K. Doktór-Bindas, *Odesłanie...,* p. 151].
[161] Judgment of the Italian Constitutional Court of 23 November 2016, 24/2017 paragraph 6.6 [translation [into Polish – translator's note] after: K. Doktór-Bindas, *Odesłanie...,* p. 151].
[162] *Dziennik Ustaw* of 1993, No. 61, item 284.
[163] A. Kustra-Rogatka, *Wewnątrzwspólnotowe...,* p. 48.
[164] Judgment of the CJEU of 5 December 2017, C-42/17, M.A.S. and M.B, ECLI: ECLI:EU:C:2017:936.
[165] *Ibidem,* paragraph 45.
[166] *Ibidem,* paragraph 52.
[167] *Ibidem,* paragraph 59

legislation imposing conditions of criminal liability stricter than those in force at the time the infringement was committed."[168] Moreover, the Taricco test should not apply retroactively to criminal offences committed before the date of the Taricco judgment.[169]

Following that judgment, the Italian Constitutional Court stayed proceedings concerning the questions referred by the Italian courts because the acts subject to such proceedings were committed before the Taricco judgment and so limitation periods could not be disapplied.[170] **Crucially, the Italian Constitutional Court went further and rejected completely the application of the Taricco test (thus rejecting in fact both CJEU judgments) in order to disapply the rules concerning limitation periods as "*it is in conflict with the principle that criminal regulations must be precise under Article 25(2) of the Italian constitution.*** *The Constitutional Court emphasised that in civil law countries, such as Italy, the principle that criminal regulations must be precise obligates the legislature to enact laws in such a way that individuals are in a position to anticipate the consequences of their behaviour.* ***Rules of individual criminal liability must be established directly in law while Article 325 TFEU, on which the CJEU's Taricco test is based, does not meet the criterion of precise criminal regulations***."[171] The judgment is binding on all Italian national courts. Thus, the Italian Constitutional Court ruled that CJEU judgments must be disapplied, which according to commentators gave rise to a new doctrine after *controlimiti*: that of *riserva di legge*.[172]

In summary, the aforementioned case-law of the Italian Constitutional Court clearly suggests that, similar to the FCC, the Italian CC reserves the systemic position of a guardian of the constitution and protector of the integrity of the national legal system, in particular from the perspective of protection of fundamental rights and the constitutional identity of Italy. That has given rise to a doctrine that the principle of primacy of Union law is not absolute and CJEU judgments may be reviewed and rejected by the Italian Constitutional Court if the CJEU's interpretation of the Treaties cannot be reconciled with the norms and the constitutional tradition of Italy and, consequently, with Article 6(3) TEU.

[168] *Ibidem,* paragraph 62.
[169] *Ibidem,* paragraph 60.
[170] Judgment of the Constitutional Court of 31 May 2018, 115/2018, paragraph 11.
[171] A. Kustra-Rogatka, *Wewnątrzwspólnotowe...,* p. 54; cf. judgment of the Constitutional Court of 31 May 2018, 115/2018, paragraph 12.
[172] G. Piccirili, "The 'Taricco Saga'"..., pp. 15-16.

3. Czech Republic

The doctrine of constitutional review of Union law and acts of Union institutions has been developed not only by the constitutional courts of "old Europe" but also by courts of the Member States which joined the Union later, such as the Czech Republic. The Czech *Ústavní Soud* ("**Czech Constitutional Court**", "**Czech CC**") has since its very first judgments underlined the primacy of the Czech constitution and the necessity of systemic "safety valves" protecting against excessively expansive Union law.

That case-law originated with the judgment of the Czech CC of 8 March 2006,[173] its first judgment to consider matters of Union law, specifically, sugar quotas. The Czech Constitutional Court examined a petition of a group of MPs requesting abstract constitutional review of Government Regulation No. 364/2004 Laying Down certain Conditions for the Implementation of Measures of the Common Organisation of the Markets in the Sugar Sector. The Czech CC found it to be manifestly unconstitutional as competences in the sugar sector were conferred on the Union under the Treaties; thus, the government was found to have issued the regulation *ultra vires*.[174] The judgment discussed at length the conferral of competences upon the Union and the relationships between Union law and Czech law. **It acknowledged the primacy of Union law but concluded that it was "*a conditional conferral, as the original bearer of sovereignty, as well as the powers flowing therefrom, still remains the Czech Republic, whose sovereignty is still founded upon Art. 1 par. 1 of the Constitution of the Czech Republic.* *In the Constitutional Court's view, the conditional nature of the delegation of these powers is manifested on two planes: the formal and the substantive plane. The first of these planes concerns the power attributes of state sovereignty itself, the second plane concerns the substantive component of the exercise of state power.* ***In other words, the delegation of a part of the powers of national organs may persist only so long as these powers are exercised in a manner that is compatible with the preservation of the foundations of state sovereignty of the Czech Republic, and in a manner which does not threaten the very essence of the substantive law-based state.*** *Should one of these conditions for the transfer of powers cease to be fulfilled, that is, should developments in the EC, or the EU, threaten the very essence of state sovereignty of the Czech Republic or the essential attributes of a democratic state governed by the rule of law, it will be necessary to insist that these powers be once again taken up by the Czech*

[173] Judgment of the Constitutional Court of 8 March 2006, Pl. ÚS 50/0453.
[174] *Ibidem,* VI(b).

Republic's state bodies; ***in such determination the Constitutional Court is called upon to protect constitutionalism***."[175] Thus, the Czech Constitutional Court recognised that the conferral of competences on the Union is only conditional and not absolute, and invoked the practice of other courts.[176] According to commentators, the judgment clearly confirmed that "*the case-law of the Czech CC does not unconditionally accept the most far-reaching consequences of membership of the European Communities if the fundamental conditions enumerated by the Court are no longer met,*"[177] and that the judgment "*sets limits which must not be crossed, which are also limits of primacy of Community law in the Czech legal system.*"[178] Arguably, notwithstanding the accession of the Czech Republic to the European Union, the Czech CC does not wish to resign its systemic position as a guardian of the constitution responsible for protecting the State and its sovereignty against potential threats of Union law.[179] It has also been noted that the doctrine is consistent with the FCC's Maastricht judgment.[180]

The Czech case-law developed further in this area with two judgments of the Czech Constitutional Court concerning the Lisbon Treaty: the judgment of 26 November 2008,[181] passed before the act of ratification was signed, and the judgment of 3 November 2009,[182] given after the act of ratification was signed. In the first case, the Czech CC examined a petition of the Czech Senate for constitutional review of the Lisbon Treaty. According to the Senate, "*certain provisions of the Treaty of Lisbon are directly related to norms of the constitutional system of the Czech Republic as the Treaty brings fundamental changes that affect substantive elements of the statehood, which necessitates a review of the Treaty in the light of constitutional characteristics of the Czech Republic as a sovereign, unitary and democratic state governed by the rule of law (Art. 1 par. 1 of the Constitution), and whether the changes do not interfere with essential requirements of a democratic state governed by the rule of law, which, under Art. 9*

[175] *Ibidem* [translation [into Polish – translator's note] after: *Relacje* ..., p. 33].
[176] *Ibidem,* VI(a).
[177] K. Witkowska-Chrzczonowicz, "Konstytucyjnoprawne aspekty członkostwa Republiki Czeskiej w Unii Europejskiej w świetle orzecznictwa czeskiego Sądu Konstytucyjnego", *Przegląd Sejmowy* 2008, No. 5, p. 119.
[178] *Ibidem,* p. 120.
[179] W. Sadurski, "'Solange, Chapter 3': Constitutional Courts in Central Europe- Democracy- European Union",
European Law Journal 2008, No. 14, p. 3.
[180] A. Kustra, *Kelsenowski...,* p. 232.
[181] Judgment of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08.
[182] Judgment of the Constitutional Court of 3 November 2009, Pl. ÚS 29/09.

par. 2 of the Constitution, may not be changed."[183] Thus, the Czech CC was forced to take a position on primacy of primary Union law. Its considerations are divided into general and specific considerations. The general considerations define three fundamental rules of the relationship between the constitutional order of a Member State and Union law:

- *"The Constitutional Court generally recognizes the functionality of the EU institutional framework for ensuring review of the scope of the exercise of conferred competences; however, its position may change in the future if it appears that this framework is demonstrably non-functional.*

- *In terms of the constitutional order of the Czech Republic – and within it especially in view of the material core of the Constitution –* ***what is important is not only the actual text and content of the Treaty of Lisbon, but also its future concrete application.***

- ***The Constitutional Court of the Czech Republic will (may) also – although in view of the foregoing principles – function as an* ultima ratio *and may review whether any act of Union bodies exceeded the powers that the Czech Republic transferred to the European Union under Art. 10a of the Constitution.*** *However, the Constitutional Court assumes that such a situation can occur only in quite exceptional cases; these could be, in particular, abandoning the identity of values and, as already cited, exceeding the scope of conferred competences."*[184]

It follows clearly from the foregoing that the perspective of the Czech CC, similar to that of the FCC, is that it can verify whether Union law falls within the limits of conferred competences (*ultra vires* doctrine) and set the limits of primacy of Union law in connection with protection of constitutional identity. The Czech Constitutional Court in its further specific considerations recognised the presumption of competences of the Member States: "*As regards the sphere of shared competences, … the Treaty on EU does not contain shared competences on the basis of Art. 4 par. 2 of the Treaty on the Functioning of the EU, but on the basis of individual special treaty provisions. If some competence is not expressly identified as a Union competence,*

[183] K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego z dnia 26 listopada 2008 r. w prawie zgodności z porządkiem konstytucyjnym Republiki Czeskiej Traktatu z Lizbony, sygn. akt Pl. ÚS 19/08", *Przegląd Sejmowy* 2009, No. 2, pp. 271-272.
[184] Judgment of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08, XI (120) [translation [into Polish – translator's note] after: K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego...", p. 278].

whether exclusive or shared, it remains fully within the power of the member state,"[185] and **rejected the primacy of the CJEU over national constitutional courts: "*after the Treaty of Lisbon enters into force, the relationship between the European Court of Justice and the constitutional courts of member states will not be placed in a hierarchy in any way; it should continue to be a dialog of equal partners, who will respect and supplement each other's activities, not compete with each other.*"[186]** Finally, the Czech CC reaffirmed the primacy of the constitution of a Member State over Union law and reserved its jurisdiction to review acts of Union institutions, in particular as concerns the transgression of competences confirmed on Union bodies: "***In terms of our constitutional law, the Constitution (and the Czech constitutional order generally) remains the fundamental law of the state****; as regards the Czech legal order and European law, they are relatively independent and autonomous systems.* ***The Constitutional Court remains the supreme protector of Czech constitutionality, including against possible excesses by Union bodies or European law****, which also clearly answers the contested issue of the sovereignty of the Czech Republic; if the Constitutional Court is the supreme interpreter of the constitutional regulations of the Czech Republic, which have the highest legal force on Czech territory, it is obvious that Art. 1 par. 1 of the Constitution cannot be violated. if European bodies interpreted or developed EU law in a manner that would jeopardize the foundations of materially understood constitutionality and the essential requirements of a democratic, law-based state that are, under the Constitution of the Czech Republic, seen as inviolable (Art. 9 par. 2 of the Constitution), such legal acts could not be binding in the Czech Republic.*"[187]

Similarly, in the 2009 judgment passed in a case lodged by a group of Senators requesting constitutional review of the TEU "as a whole" and its individual challenged provisions as well as certain provisions of the TFEU in the wording of the Lisbon Treaty,[188] the Czech Constitutional Court ruled that the treaties are compatible with the Czech constitutional order while reiterating and invoking the 2008 judgment with reference once again to the constitutional

[185] Judgment of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08, XII(134) [translation [into Polish – translator's note] after: K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego...", p. 282].
[186] Judgment of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08, XVII(197) [translation [into Polish – translator's note] after: K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego...", p. 288].
[187] Judgment of the Constitutional Court of 26 November 2008, Pl. ÚS 19/08, XX(216) [translation [into Polish – translator's note] after: K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego...", p. 289].
[188] K. Witkowska-Chrzczonowicz, "Wyrok Sądu Konstytucyjnego z dnia 3 listopada 2009 r. w sprawie zgodności z konstytucją Traktatu z Lizbony zmieniającego Traktat o Unii Europejskiej oraz Traktat ustanawiający Wspólnotę Europejską", *Przegląd Sejmowy* 2011, No. 1, pp. 209 *et seq*.

identity and the principle of conferred competences as a limit of primacy of Union law and the basis for review of Union law by the Czech CC.[189]

In the wake of that case-law, the Czech Constitutional Court disapplied a CJEU judgment and contested the principle of primacy of Union law four years later in its judgment of 31 January 2012.[190] The case concerned inconsistency of the case-law of the Czech CC and the Czech Supreme Administrative Court ("**SAC**") regarding Slovak pensions. Following the dissolution of Czechoslovakia, the new States (the Czech Republic and the Slovak Republic) needed to decide which one of them would pay pensions to citizens of the dissolved State. Under a mutual agreement, each State agreed to pay pensions to those citizens whose employer had a registered office in the respective country as at or directly before the date of the dissolution. Consequently, pensions were paid to Czech citizens either by the Czech Republic of by the Slovak Republic depending on the country of registered office of the employer. The amount of such pensions differed significantly due to the much weaker economic condition of Slovakia, which resulted in significant differences of benefits paid to Czech citizens. The Czech CC found that state of affairs to be unconstitutional and obligated the Czech government to pay a supplementary benefit to Czech citizens whose pensions were paid by the Slovak Republic.[191]

The SAC considered such interpretation to be inadmissible, contested it in several judgments and, in time, after the accession of the Czech Republic to the European Union, declared it to be in contravention of Union law. The SAC decided that the Czech CC's judgment resulted in dual determination of insurance periods and that the very distinction between Czech citizens eligible to receive supplementary benefits and Slovak citizens deprived of such benefits was based on the discriminatory condition of nationality, which the SAC considered to violate Regulation (EEC) No. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons, to self-employed persons and to members of their families moving within the Community[192] as well as the Treaties. The SAC referred questions to the CJEU or a preliminary ruling. The CJEU in its judgment of 22 June 2011[193] ruled that "*the combined provisions of Articles 3(1) and 10 of Regulation No 1408/71 preclude a national rule, such as that at issue in the main proceedings, which allows payment of a supplement to old age benefit solely to Czech nationals residing in the territory of the Czech Republic, but it does not*

[189] *Ibidem,* pp. 217 *et seq*.
[190] Judgment of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12.
[191] Judgment of the Constitutional Court of 3 June 2002, II. ÚS 405/02.
[192] OJ L 28 of 16.01.1997, p. 197.
[193] Judgment of the CJEU of 22 June 2011, C-399/09, *Landtova,* ECLI:EU:C:2011:415.

necessarily follow, under EU law, that an individual who satisfies those two requirements should be deprived of such a payment."[194] Thus, the CJEU concluded that the Czech CC's judgment resulted in discrimination unlawful under Union law: direct discrimination based on nationality and indirect discrimination based on residence.[195] As a consequence, based on the CJEU judgment, the SAC decided that it was not bound by the judgment of the Czech Constitutional Court.[196]

In a similar case, Holubec, the Czech CC upheld its earlier case-law and concluded that there was in fact no foreign connection required to apply Union law because the period of work in Czechoslovakia cannot be retrospectively considered employment abroad. Hence, there was no Union connection in the case, necessary to apply Union law and to legitimise CJEU jurisdiction. In the opinion of the Czech Constitutional Court, the CJEU was *ultra vires*: "*Failure to distinguish the legal relationships arising from the dissolution of a state with a uniform social security system from the legal relationships arising for social security from the free movement of persons in the European Communities, or the European Union, is a failure to respect European history, it is comparing things that are not comparable.* ***Due to the foregoing, European law, i.e. Regulation (EEC) No 1408/71 … cannot be applied to entitlements of citizens of the Czech Republic arising from social security.***"[197] The Czech CC invoked its earlier case-law in which it had stressed its role as a guardian of the Czech constitutional system and the status of the constitution as the supreme law of the Czech Republic. The Czech CC also referred to the FCC's case-law including Solange I, Solange II and Maastricht as "a certain parallel."[198] **Finally, it found that the CJEU exceeded the scope of the transferred competences and was *ultra vires*.**[199] What is significant is how the Czech CC formally arrived at that conclusion: instead of relying on a benchmark identified by the applicant, it merely invoked its own case-law and that of the FCC to conduct *ultra vires* review. According to commentators, the Czech CC's judgment was welcomed by the then FCC President Andreas Vosskuhle.[200] The judicial conflict concerning Slovak pensions was eventually resolved by a legislative intervention which revoked the supplementary pension benefits.

[194] *Ibidem,* paragraph 54.
[195] *Ibidem,* paragraph 49.
[196] Judgment of the [Czech] SAC of 25 August 2011, 3 Ads 130/2008-204.
[197] Judgment of the Constitutional Court of 31 January 2012 , Pl. ÚS 5/12, VII(2) [translation [into Polish – translator's note] after: A. Kustra, *Kelsenowska...,* p. 274].
[198] Judgment of the Constitutional Court of 31 January 2012, Pl. ÚS 5/12, VII(2).
[199] *Ibidem.*
[200] A. Kustra, *Kelsenowska...,* pp. 274-275.

Considering the aforementioned case-law, it seems evident that the German and Italian doctrines of constitutional review of Union law have not only been accepted but also directly applied.

4. Denmark

CJEU interpretations have also been contested in Denmark in the case-law of the Danish Supreme Court which has analysed in detail and set the limits of the CJEU's norm-making activity, resulting in disapplication of judgments of the Luxembourg Court.

The first case in which the Supreme Court set clear limits of Union law was *Carlsen* closed with the judgment of 6 April 1998.[201] It was initiated by a constitutional complaint concerning amendment of the 1972 law of accession of Denmark to the European Communities following the ratification of the Maastricht Treaty. The benchmark of the review was Section 20 of the Constitution which provides: "*1. Powers vested in the authorities of the Realm under this Constitution Act may, to such extent as shall be provided by Statute, be delegated to international authorities set up by mutual agreement with other states for the promotion of international rules of law and co-operation. 2. For the passing of a Bill dealing with the above a majority of five-sixths of the Members of the Folketing shall be required. If this majority is not obtained, whereas the majority required for the passing of ordinary Bills is obtained, and if the Government maintains it, the Bill shall be submitted to the Electorate for approval or rejection in accordance with the rules for Referenda laid down in section 42.*"[202] The complaint focused mainly on provisions of the Treaty which defined the competences of the CJEU and could authorise its law-making activity, which would violate the constitutional condition of delegating sovereign competences within the limits provided by statute. Although the Supreme Court eventually confirmed constitutionality of the contested law, it took a clear position on the relations between the constitution and Union law.

The grounds of the judgment referred to and resolved fundamental issues arising in the relationship between the constitution of a Member State and Union law. Firstly, they invoked the doctrine recognised in the case-law of other countries: the doctrine of conferred competences and *Kompetenz-Kompetenz* (established in the FCC case-law), which provide that

[201] Judgment of the Supreme Court of 6 April 1998, I 361/1997.
[202] [Polish translation:] M. Grzybowski, *Konstytucja Królestwa Danii,* http://libr.sejm.gov.pl/tek01/txt/konst/dania.html [accessed on 19 March 2021].

the Union acts on the basis and within the limits of competences conferred by the Member States and that there is a limit of competences which may be conferred. However, the Supreme Court went further and ruled that the division of competences must be clear and cannot result in the presumption of competences or creation of new competences, and that any act of a Union institution in conflict with the Danish constitution does not fall within the constitutional scope of conferral: "***Section 20 of the Constitution does not authorise Denmark to delegate to an international organisation any competences to legislate or decide in conflict with the Constitution***. *In particular, the Constitution prohibits any delegation of competences to an extent which would imply that Denmark is not considered a sovereign and democratic State … The constitutional limit of the delegation of competences 'to such extent as shall be provided by Statute' (Section 20.1 of the Constitution) sets a limit both of the areas of delegated competences and of the scope of such delegation. That wording imposes a requirement of positive delimitation of delegated competences both with respect to the areas of such delegation and the essence of delegated competences. Areas in which competences are delegated may be defined generally. It is not necessary that the definition of the extent of delegated competences is sufficiently precise to rule out any differences in interpretation. Delegated competences may also be defined with reference to the TEC. However, it is inadmissible in the light of Section 20 of the Constitution that an international organisation should define its own competences."*[203]

Secondly, the Supreme Court explicitly ruled out, with reference to the *Kompetenz-Kompetenz* rule, a broad interpretation of Union competences required to attain objectives of Union law, prevalent in the then CJEU case-law: "***The circumstance that actions of the Community are necessary to attain one of the objectives of the Community is not an autonomous or sufficient basis to apply Article 308 TEC.***[204] *Its application is further conditional on the intended action being part of the 'functioning of the common market.' In conjunction with Article 2 which provides that the objectives of the Community are pursued 'by establishing a common market and an economic and monetary union and by implementing common policies or activities referred to in Articles 3 and 3a [4] TEC,'*[205] *that provision should be understood in such a way*

[203] *Relacje...*, p. 40.
[204] Now Article 358 TFEU [in fact, Article 352 TFEU – translator's note]: "*If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures. Where the measures in question are adopted by the Council in accordance with a special legislative procedure, it shall also act unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament.*"
[205] Now Article 119 TFEU: "*For the purposes set out in Article 3 of the Treaty on European Union, the activities of the Member States and the Union shall include, as provided in the Treaties, the adoption of an*

that an intended action must fall under the functioning of the common market as defined in other provisions of the Treaty. Decisions under Article 308 TEC must be unanimous. Thus, the Danish government may prevent the application of that provision in a way which would go beyond the scope of the delegation of competences by Denmark to the Community."[206] Therefore, the Danish Supreme Court anticipated and ruled out as incompatible with the Danish constitution any act of the CJEU which would involve a "spill-over" of competences in connection with general objectives of the Union.

Thirdly, the Supreme Court reserved its jurisdiction to review of the CJEU's *ultra vires* acts as well as the jurisdiction of any national court: "*Although Denmark did delegate to the ECJ powers to review the validity of Community legal acts,* ***Danish courts may exceptionally disapply a Community legal act if such act, although upheld by the ECJ, goes outside of the scope of sovereign competences delegated to the Community under a Danish statute***."[207] This approach goes even further than that of other courts of the Member States which have reserved such jurisdiction only for the constitutional court.

That doctrine was fleshed out in the judgment of 6 December 2016[208] where the Supreme Court examined a case of industrial relations. An employee claimed a severance allowance even though a dismissed employee was not entitled to receive a severance pay under Danish law if the employee was entitled to an old-age pension from the employer and joined a pension scheme before reaching the age of 50.[209] The Supreme Court held[210] that the CJEU in *Region Syddanmark*[211] had found that the Danish regulations were discriminatory in the light of a Union Directive; however, in that case, the dispute was vertical: the employee's employer was a State company and as such, according to the CJEU case-law, "emanation of the State", and so Directives could without a doubt apply directly; in the case at hand, however, the dispute was horizontal as it involved private individuals. Consequently, the Supreme Court referred a question for a preliminary ruling to the CJEU, asking about direct application of Union law and

economic policy which is based on the close coordination of Member States' economic policies, on the internal market and on the definition of common objectives, and conducted in accordance with the principle of an open market economy with free competition."

[206] *Relacje...,* pp. 40-41.

[207] *Ibidem,* p. 41.

[208] Judgment of the Danish Supreme Court of 6 December 2016, 15/2014, https://domstol.dk/media/2udgvvvb/judgment-15-2014.pdf [accessed on 21 March 2021].

[209] *Ibidem,* paragraph 6.1 and 6.5, pp. 2 and 3.

[210] *Ibidem,* paragraph 6.2 and 6.3, pp. 2 and 3.

[211] Judgment of the CJEU of 12 October 2010, C-499/08, *Ingeniørforeningen i Danmark v. Region Syddanmark,*
ECLI:EU:C:2010:600.

whether the principle of legal certainty and the principle of the protection of legitimate expectations must take precedence with regard to a private individual such as the employer in the case at hand.[212]

In its ruling of 19 April 2016,[213] the CJEU held that the principle of non-discrimination on grounds of age is a general principle of Union law also found in constitutional traditions of the Member States; consequently, national law must be interpreted in accordance with that principle or otherwise disapplied, even in horizontal relations.[214]

The judgment of the Supreme Court completely rejected the CJEU judgment. According to the Supreme Court, by applying the general principle of non-discrimination as expected by the CJEU, it would be acting outside the scope of its competences.[215] The Supreme Court held that its role is different than that of the CJEU: the CJEU interprets Union law while the Supreme Court ultimately decides whether to apply Union law according to the CJEU's interpretation. Consequently, the Supreme Court has by definition the jurisdiction to review the CJEU's juridical activity both in the context of conferred competences and the discretion of national courts bound by the CJEU's interpretations.[216] In the case at hand, to apply the CJEU judgment would be to go outside the scope of competences of the Supreme Court and outside the competences conferred on the Union: as pointed out by the Supreme Court, direct effect of a norm derived from a Directive in a dispute between individuals is foreseen neither in the Treaties nor in the Danish law on accession. Similarly, in the opinion of the Supreme Court, the general principles referred to in Article 6(3) TEU are not directly applicable, either, as they are not sufficiently concrete.[217] Finally, such application of the principle of non-discrimination disregards other values recognised in Danish law, including the principles of legal certainty and the protection of legitimate expectations.[218] Consequently, the Supreme Court disapplied the CJEU judgment in the case under examination because "***the Law on accession does not provide the legal basis to allow the unwritten principle prohibiting discrimination on grounds of age to take precedence over Paragraph 2a(3) of the Law on salaried employees in so far as the***

[212] Cf. judgment of the Danish Supreme Court of 6 December 2016... , "Reference for a preliminary ruling", p. 1.
[213] Judgment of the CJEU of 19 April 2016, C-441/14, *Dansk Industri,* ECLI:EU:C:2016:278.
[214] *Ibidem,* paragraph 22-25 and 29-41.
[215] Judgment of the Danish Supreme Court of 6 December 2016..., pp. 44-45 and 48.
[216] *Ibidem,* p. 45.
[217] *Ibidem,* pp. 45 and 47.
[218] *Ibidem,* pp. 47-48.

provision is contrary to the prohibition. The Supreme Court would be acting outside the scope of its powers as a judicial authority if it were to disapply the provision in this situation."[219]

To summarise, the Danish Supreme Court established its own original version of the doctrine of review of ultra *vires acts* based on a restrictive and literal interpretation of the Treaties regarding competences of the Union; the key to the interpretation of the division of competences is the Danish constitution and the law on EU accession. Consequently, for national courts to do as expected by the CJEU, i.e., to give effect to unwritten principles of Union law which are derived merely from the case-law and not underpinned by explicit and directly applicable norms of the Treaties would be to go outside the competences of the CJEU and of national courts. Thus, it is for national courts to verify at each time whether the applicability of an interpretation of Union law is consistent with national law, in this case with the constitution.

The foregoing overview of case-law suggests, firstly, that CJEU judgments or, rather, norms of Union law developed therein are subject to review by competent courts of the Member States and, secondly, that constitutional provisions applied as a benchmark of such review reaffirm the supreme position of constitutional norms in the legal systems of the Member States, also in relation to Union law. According to the invoked case-law, the constitutional courts of certain Member States review the normative effect of CJEU case-law by checking its compatibility with the fundamental systemic rules, acts falling within the scope of competences conferred on the Union, and the constitutionally guaranteed level of protection of fundamental rights. **In the extreme, where the CJEU drastically transgresses competences conferred under the Treaties, the courts disapply such judgments, including preliminary rulings which are formally binding on the referring national court.**

Further to the foregoing, there is no doubt that the serious constitutional doubts raised in this application as to the norms derived from the CJEU's interpretations of the TEU and the CJEU's application of general principles established by the CJEU merely by virtue of case-law are nothing new in the European legal space. Constitutional provisions of the Member States may differ, even considerably, but **the Constitutional Tribunal's ruling in the case initiated by this application will indubitably fit well into the international context of judicial activity of other constitutional courts of the Member States which, together with the Constitutional Tribunal of the Republic of Poland, develop the common constitutional**

[219] *Ibidem,* p. 48.

tradition of the Member States and act as ultimate guardians of national constitutional systems and the directly related principle of sovereignty of the Member States.

IV. Benchmarks of review

1. Article 2 of the Constitution of the Republic of Poland

According to Article 2 of the Constitution, the Republic of Poland is a democratic state ruled by law and implementing the principles of social justice. That provision is a literal copy of Article 1 of the Constitution of the Republic of Poland of 22 July 1952 in the wording amended on 29 December 1989.[220] Article 1 was upheld until the date of coming into force of the Constitution of the Republic of Poland of 2 April 1997 under Article 77 of the Constitutional Act of 17 October 1992 on mutual relations between the legislature and the executive of the Republic of Poland and on local government.[221] As the Constitutional Tribunal has held, the identical wording is coupled by axiological proximity: the set of values underlying the December 1989 amendment was reaffirmed and elaborated upon in the Constitution of 2 April 1997.[222]

The provision concerning a democratic state ruled by law ensures axiological and praxeological coherence of the entire legal system in Poland[223] and provides guidance for interpretations of the provisions of the Constitution.[224] It is one of those fundamental constitutional provisions which define the underlying systemic characteristics of the Republic of Poland subject to special protection, and it serves as a key directive for organs of public authority in the enactment and application of the law in accordance with the standards of a democratic state ruled by law.[225] In Article 2 of the Constitution, the constitutional legislator has expressed three separate constitutional principles: that of a democratic state, a state ruled by law, and social justice. Those three principles are closely linked both in function and in content, in particular because the content of those principles is not wholly separable. In the light of Article 2 of the Constitution of the Republic of Poland, it is a necessary condition of a state ruled by law that

[220] Act of 29 December 1989 amending the Constitution of the People's Republic of Poland (*Dziennik Ustaw* No. 75, item 444).
[221] *Dziennik Ustaw* No. 84, item 426, as amended.
[222] Cf. judgment of the Constitutional Tribunal of 25 November 1997, K 26/97, OTK 1997 No. 5-6, item 64.
[223] W. Sokolewicz, commentary on Article 2, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* L. Garlicki (ed.), Warsaw 2007, p. 8.
[224] Judgment of the Constitutional Tribunal of 9 June 1998, K 28/97, OTK 1998 No. 4, item 50.
[225] Decision of the Constitutional Tribunal of 9 May 2005, Ts 216/04, OTK-B 2006 No. 2, item 87.

the state be democratic and that it implement the principles of social justice. Furthermore, the principle of a state ruled by law comprises multiple specific principles which influence the understanding of the principle of a democratic state and social justice.[226]

In the context of the case at hand, of all the elements of the provision concerning a democratic state ruled by law enshrined in Article 2 of the Constitution of the Republic of Poland, the Prime Minister refers to the principle of legal certainty (loyalty of the State to its citizens) as the basis of this review.

The principle of legal certainty is one of the key elements of the normative content of the provision concerning a state ruled by law, and it is a foundation of a state ruled by law. As noted by the Constitutional Tribunal, one of the key principles which define the relations between citizens and the state in a democratic state ruled by law is the principle of protection of the citizens' trust in the state and its law. That is an uncontested characteristic of a democratic state ruled by law. According to the case-law of the Constitutional Tribunal, the principle of citizens' trust in the state has, ever since the 29 December 1989 amendment of the Constitution, been consistently and coherently derived from and linked to the principle of a democratic state ruled by law. The principle of citizens' trust in the state and its law relies on legal certainty, that is, a set of characteristics of law which ensure legal safety of an individual and allow him or her to decide about his or her behaviour on the basis of a complete understanding of the criteria of actions of state organs and legal consequences of his or her actions. Individuals should be in a position to anticipate the consequences of their behaviours and of events according to the legal conditions prevailing at a given time and to expect that the legislature will not change them arbitrarily. Thus, legal safety linked to legal certainty enables individuals to predict actions of state organs and anticipate their own actions, which substantiates individual freedom as individuals carry on their business according to their preferences and take responsibility for their decisions, as well as individual dignity owing to respect that the legal system has for individuals as autonomous rational beings. What is at stake is not the aspect of legal certainty which concerns relative stability of the legal system (relating to the principle of legality) but rather legal certainty understood as certainty that individuals can rely on applicable law when carrying on their affairs.[227] The principle of legal certainty also implies the prohibition for the

[226] P. Tuleja, commentary on Article 2, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86,* M. Safjan, L. Bosek (eds.), Warsaw 2016, Legalis, margin note 1.
[227] Judgment of the Constitutional Tribunal of 14 June 2000, P 3/00, OTK 2000 No. 5, item 138.

legislature to establish such normative constructs which are infeasible, create a legal illusion, and consequently only have the appearance of protection.[228]

It should further be noted that the case-law of the Constitutional Tribunal recognises Article 2 of the Constitution of the Republic of Poland as a stand-alone benchmark of constitutional review wherever elements of a state ruled by law relevant to a given case are not enshrined in other provisions of the Constitution of the Republic of Poland. Whenever there is no specific constitutional norm or existing norms need to be harmonised, the provision concerning a democratic state ruled by law may provide a benchmark of constitutional review.[229] As the Constitutional Tribunal had held, Article 2 of the Constitution gives expression to the intention of acknowledging the pre-existing form and understanding of the provision concerning a democratic state ruled by law which emerged in the constitutional practice and case-law in 1990-1997. That provision should continually be understood as a collective expression of a number of rules and principles which may not be included expressly in the wording of the Constitution and yet immanently stems from the axiology and the essence of a democratic state ruled by law. Many rules and principles "discovered" at one time by the Constitutional Tribunal in the provision concerning a democratic state ruled by law have now been explicitly written into the new Constitution. In that case, there is no need any more to refer to the general wording of Article 2 of the Constitution while constitutional review may rely on specific constitutional provisions (such as Article 38, Article 45, or Article 51). However, many of the substantial elements of a democratic state ruled by law have not been expressed in dedicated specific provisions of the Constitution. As such, those elements still may and need to be derived from Article 2 of the Constitution. Whenever there is no specific constitutional norm or where any existing norms need to be harmonised, the provision concerning a democratic state ruled by law may provide a benchmark of constitutional review. This includes for instance the principle of protection of citizens' trust in the state and its law. The Constitutional Tribunal has long considered that principle to be a manifest characteristic of a democratic state ruled by law; there is no reason why that conclusion should be refuted in the light of the new Constitution.[230]

[228] Judgment of the Constitutional Tribunal of 19 December 2002, K 33/02, OTK-A 2002 No. 7, item 97.
[229] Judgment of the Constitutional Tribunal of 13 April 1999, K 36/98, OTK 1999 No. 3, item 40.
[230] *Ibidem.*

2. Article 7 of the Constitution of the Republic of Poland

According to Article 7 of the Constitution, "*[t]he organs of public authority shall function on the basis of, and within the limits of, the law.*" That provision establishes a systemic principle: the principle of legality. To put in as concisely as possible, the principle of legality implies that state organs act on the basis and within the limits of the law while the law defines their responsibilities, competences, and course of conduct; such course of conduct leads to determinations being made in the form required by law, on the applicable legal basis, and in compliance with substantive provisions binding on the organ.[231] Consequently, it is desirable that "*every action of an organ of public authority is based on statutory authorisation: (1) to take action in a given matter; (2) to handle the matter in a given form; and (3) to make determination in a given legal guise.*"[232] It is addressed to organs of public authority, that is, according to the case-law of the Constitutional Tribunal, "*all authorities in the constitutional meaning: the legislature, the executive, and the judiciary*"[233] and their actions "*include individual determinations such as decisions, judgments, and orders.*"[234] According to legal theory, the principle of legality understood as the directive to act on the basis and within the limits of the law is a rule to which there can be no exception.[235]

Considering the nature of the constitutional system of sources of law and the privileged central position of statutes as the basic act of generally applicable law which precisely defines the basis of actions of organs of public authority, it follows that the principle of legality implies the principle of exclusive force of statutes. The case-law of the Tribunal emphasises the role of statutes as a source of law and obligations of organs: "*it is an obligation of organs of public authority to comply with all regulations, irrespective of their position in the system of sources of law, which define its powers or obligations. Thus, organs must in the first place be familiar with the regulations which govern their competences and observe the resulting directives and prohibitions. It follows from the constitutional principle of legality that organs must not act without a legal basis or avoid exercising their powers if binding legal norms impose upon them relevant obligations.*"[236] In this context, another principle derived from Article 7 of the

[231] So rightly in: judgment of the Regional Administrative Court of Gliwice of 16 January 2020, III SAB/Gl 279/19, LEX no. 2775250.
[232] M. Zubik, W. Sokolewicz, commentary on Article 7, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I*, L. Garlicki, M. Zubik (eds.), Warsaw 2016, Lex Omega, comment 5.
[233] Judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, OTK 2001 No. 8, item 256.
[234] *Ibidem.*
[235] P. Tuleja, commentary on Article 7, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86,* M. Safjan, L. Bosek (eds.), Warsaw 2016, Legalis, margin note 15.
[236] Decision of the Constitutional Tribunal of 4 October 2011, P 9/11, OTK-A 2011 No. 8, item 86.

Constitution of the Republic of Poland is the interpretative principle of primacy of literal interpretation and general interpretative restraint exercised by organs of public authority. According to the case-law of the Supreme Administrative Court, in the light of Article 7 of the Constitution of the Republic of Poland, interpretations "*must not result in the attribution of a meaning which goes outside of conclusions arising from the application of irrefutable and methodologically sound interpretative directives. Even more so, they must not involve generalisations or simplifications which would ignore the linguistic and logical aspect of a norm.*"[237] According to legal theory, the principle of legality emphasises and reaffirms the obligation of courts to adjudicate in accordance with the Constitution since "*the assumption that acting on the basis of the law implies the requirement to act on the basis of the Constitution has become the foundation of a contemporary democratic state ruled by law.*"[238] According to commentators,[239] determination of a violation of Article 7 of the Constitution may provide grounds for the award of compensation referred to in Article 77 of the Constitution. In this context, the Constitutional Tribunal has noted and stressed the importance of interpretation in the determination of the unlawfulness of an action: "*In the opinion of the Tribunal, the discretionary powers of a judge, within the limits set by the Constitution and by statutes, is a legitimate, genuinely necessary instrument of dispute resolution subject to protection (Article 178 of the Constitution). Thus, although the liability of the Treasury for damage caused when exercising public power is considered in the light of Article 77(1) of the Constitution to constitute non-personal liability aiming to compensate harm done in connection with the functioning of a structure … yet regarding liability for damage caused when exercising judicial power, one cannot disregard the specific circumstances of persons performing the functions of judicial authority, determined in the dedicated special catalogue of rights and obligations … While the criteria for complaints alleging that a final judgment is unlawful, which are an extraordinary procedural remedy, may and should be subject to a narrow interpretation … the Constitutional Tribunal holds that the notion of unlawfulness of a final judgment, as developed in the case-law of the Supreme Court does not introduce a special type of unlawfulness. It is 'qualified' unlawfulness only in that it involves a violation of norms addressed to judicial authorities which govern the adjudicating process. In that case, a violation of legal provisions governing a legal relationship (known as objective unlawfulness) is a consequence and a*

[237] Resolution of seven judges of the Supreme Administrative Court of 22 April 2002, FPS 5/02, ONSA 2002, No. 4, item 137.
[238] P. Tuleja, commentary on Article 7..., margin note 1.
[239] *Ibidem*, margin note 16.

function of the primary violation (judicial unlawfulness). It is in such cases that a judgment closing a procedure is indefensible. Qualified, manifest, evident unlawfulness of a judgment occurs where the discretionary powers of courts are abused, the limits of arbitrary decision-making are transgressed or the fundamental interpretative methods are violated; yet it remains the 'unlawfulness' referred to in Article 77(1) of the Constitution."[240] Thus, it would go against Article 7 of the Constitution to make interpretations contesting the existing legal system. According to commentators summarising the position of the Constitutional Tribunal, "*Article 7 would also be violated by an interpretation of the law which leads to implicit limitation of the applicability of a provision even if, as the Constitutional Tribunal has concluded, it aims to extend the application of such provision to a new group of beneficiaries (in the case at hand, veterans) (cf. SK 4/02 of 15 April 2003).*"[241]

A key element of the principle of legality from the perspective of this application is the prohibition of presuming the existence of competences of organs of public authority. According to commentators, Article 7 of the Constitution implies "*the requirement that competences to act must be defined in acts of generally applicable law, no such competences must be presumed to exist, and they must not be exercised arbitrarily.*"[242] According to the case-law of the Constitutional Tribunal, a broad interpretation of existing competences is not admissible, either.[243] In the event of any doubt, the competences of an organ must be interpreted narrowly so as not to go outside unambiguous and explicit legal provisions which confer certain powers on such organ: "*the competences of organs of public authority should be defined unambiguously and precisely in legal provisions, all actions of such organs should find a legal basis in such provisions and, in the event of any interpretative doubts, no competences of organs of public authority may be presumed to exist.*"[244] Commentators point out that in the light of the principle of legality, no two organs may have the competence to act at the same time in the same matter, and no competence may be freely "swapped" for another which is not to be exercised under the circumstances. Likewise, no organ of public authority may freely transfer its powers to another organ without a clear legal basis, and the legislature must not freely attribute powers to individual organs but should do so with a view to the role and systemic position of such

[240] Judgment of the Constitutional Tribunal of 27 September 2012, SK 4/11, OTK-A 2012 No. 8, item 97.
[241] M. Zubik, W. Sokolewicz, commentary on Article 7..., comment 8.
[242] P. Tuleja, commentary on Article 7... , margin note 14.
[243] M. Florczak-Wątor, commentary on Article 7, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* P. Tuleja (ed.), Warszawa 2019, Lex Omega, comment 5.
[244] Judgment of the Constitutional Tribunal of 14 June 2006, K 53/05, OTK-A 2006 No. 6, item 660.

organ.[245] Finally, it is forbidden not only to act *contra legem* but also *praeter legem* or *in fraudem legis* by circumventing the law.[246]

3. Article 8(1) in conjunction with Article 8(2) and Article 91(2) of the Constitution of the Republic of Poland

According to Article 8(1) of the Constitution of the Republic of Poland, the Constitution shall be the supreme law of the Republic of Poland. The principle of primacy of the Constitution of the Republic of Poland enshrined in that provision defines the position of the Constitution in the Polish system of sources of law, as well as its functions and the relationship between the Constitution of the Republic of Poland and international law including Union law. The primacy of the Constitution of the Republic of Poland concerns both the applicability and the making of law. In the context of the pleas presented in this application, both those aspects seem equally important. The principle of primacy determines the apex position of the Constitution in the hierarchy of the sources of law (its supreme legal effect). As rightly noted by commentators, "*the principle of primacy of the Constitution of the Republic of Poland is also addressed to organs which apply the law, in particular the courts. In its most general sense, it includes two directives. First, the court which reconstructs a legal norm on which its ruling is to be based should also refer to the provisions of the Constitution of the Republic of Poland. Giving a ruling while circumventing the provisions of the Constitution of the Republic of Poland is an infringement of the law. As the provisions of the Constitution of the Republic of Poland are general, they do not in principle provide an autonomous basis for a ruling.*"[247] Thus, for the application of the law, the primacy of the Constitution of the Republic of Poland rules out any disapplication of autonomous constitutional norms as well as any application of norms which are no longer in force and effect because they have been found to be unconstitutional in a judgment of the Constitutional Tribunal. The principle of primacy in combination with the principle of direct application also expresses the directive of pro-constitutional interpretation of legal provisions.

In the context of the pleas raised in this application, it is particularly relevant how the principle of primacy of the Constitution of the Republic of Poland relates to European Union law.

[245] M. Zubik, W. Sokolewicz, commentary on Article 7...; cf. judgment of the Constitutional Tribunal of 23 March 2006, K 4/06, OTK-A 2006 No. 3, item 32.
[246] W. Brzozowski, "Obejście konstytucji", *Państwo i Prawo* 2014, No. 9, p. 8.
[247] P. Tuleja, commentary on Article 8, [in:] *Konstytucja RP. Tom I. Komentarz do art. 1-86,* M. Safjan, L. Bosek (eds.), Warsaw 2016, Legalis, margin note 8.

According to commentators, the relationship between the Constitution of the Republic of Poland and Union law is related to the case-law of the CJEU which has established the principle of primacy of Union law over national constitutions.[248] However, the Constitutional Tribunal in its case-law has consistently held that the Constitution of the Republic of Poland is the supreme law in Poland while emphasising the objective of harmonisation of Polish law with Union law.[249] While stressing the primacy of the Constitution of the Republic of Poland over Union law, the Constitutional Tribunal has referred to the division of competences between national constitutional courts and the CJEU: "*The CJEU ultimately decides about compatibility of European regulations and directives with the Treaties while the Constitutional Tribunal decides about their compatibility with the Constitution as, not least in the light of Article 8(1) of the Constitution, the Constitutional Tribunal is bound by such an understanding of its position that it retains the position of the 'court of last instance' in relation to the Polish Constitution in fundamental matters of systemic nature.*"[250]

Commentators have discussed the principle of primacy of the Constitution of the Republic of Poland over Union law by invoking the requirement of protecting the primacy of the Constitution of the Republic of Poland as the fundamental act which defines constitutional identity. According to P. Bała, "*even under the rule of so-called friendly interpretation, in the case of conflict, constitutional provisions must always take precedence, unless the sovereign enshrined in Article 4(1) of the Constitution of the Republic of Poland changes the constitutional system according to the norms laid down in Chapter XII of the Polish Constitution.*"[251] In conclusion, to protect the primacy of the Constitution in the context of European integration is to protect the sovereignty of the State; the accession of Poland to the European Union has changed the perspective on the supreme legal effect (primacy) of the Constitution but does not undermine it.

It should further be noted that the rule enshrined in Article 91(2) of the Constitution of the Republic of Poland corresponds with and gives substance to the principle of primacy of the Constitution of the Republic of Poland: an international agreement ratified by prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes. Notably, Article 91(2) of the Constitution of the Republic

[248] *Ibidem.*
[249] Judgment of the Constitutional Tribunal of 22 June 2005, K 18/04, OTK-A 2005 No. 5, item 49.
[250] Judgment of the Constitutional Tribunal of 20 April 2020, U 2/20, OTK-A 2020, item 61.
[251] P. Bała, "'Państwo suwerenne'. O polskiej próbie konstytucjonalizacji tez orzeczenia Federalnego Trybunału Sprawiedliwości z 30 czerwca 2009 roku", *Przegląd Prawa Publicznego* 2011, No. 3, pp. 6-16.

of Poland applies to, and defines the position in the national legal system of, only those international agreements which are ratified according to Article 89(1) of the Constitution of the Republic of Poland (qualified procedure), i.e. by prior consent granted by statute or, in the case of agreements under which the Republic of Poland delegates to an international organisation or international institution the competences of organs of State authority in relation to certain matters, or alternatively in a national referendum (Article 90 of the Constitution of the Republic of Poland). International agreements whose ratification requires no such consent are not covered by the principle of primacy over statutes; as such, their position in the hierarchy of sources of law is inferior to that of statutes and, consequently, they must be consistent with statutes.[252]

According to commentators, the principle of primacy enshrined in Article 91(2) of the Constitution of the Republic of Poland is a constitutional principle with direct application. An aforementioned international agreement takes precedence over statutes only if "such an agreement cannot be reconciled with the provisions of such statutes", that is, in the case of a conflict of the provisions of the agreement and the statutes.[253] Thus, the provisions of Article 91(2) of the Constitution of the Republic of Poland enshrine a rule of a conflict of laws which applies mainly in the application of law. However, the application of that rule does not invalidate the statute which is in conflict with the agreement. In turn, it requires that the statute should be disapplied and that autonomously applicable provisions of the international agreement should apply in their place.[254] The principle of primacy enshrined in Article 91(2) of the Constitution of the Republic of Poland applies to the Treaties which are the primary law of the European Union as they fall into the special category of international agreements ratified by prior consent granted by statute or in a national referendum according to Article 90(1) of the Constitution of the Republic of Poland.

The primacy of that category of international agreements, including the primary law of the European Union, only relates to statutes. However, the principle of primacy of international agreements does not apply in the case of their conflicts with the Constitution. This is confirmed by Article 91(2) of the Constitution of the Republic of Poland which addresses the principle of primacy of international agreements only to statutes; an exception to the principle of primacy

[252] P. Radziewicz, commentary on Article 91, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, P. Tuleja (ed.), Warszawa 2019, LEX Omega, comment 3.
[253] K. Działocha, commentary on Article 91, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Vol. II, L. Garlicki (ed.), Warsaw 1999, comment 5.
[254] Cf. P. Radziewicz, commentary on Article 91..., comment 3.

of the Constitution in favour of a category of international agreements would have to be enshrined expressly in the Constitution. Furthermore, Article 188(1) of the Constitution of the Republic of Poland also speaks against the application of the principle of primacy of international agreements in the case of their conflicts with the Constitution of the Republic of Poland as it provides that the Constitutional Tribunal has jurisdiction in matters of the conformity of statutes and international agreements to the Constitution.[255]

In connection with the pleas raised in this application, the principle of primacy of the Constitution should be understood in the context of Article 8(2) of the Constitution, which provides that the provisions of the Constitution shall apply directly, unless the Constitution provides otherwise. That principle reflects the normative effect of the provisions of the Constitution[256] and defines the functional relationship between the Constitution and inferior normative acts.

Two methods of direct application of the Constitution have been recognised: simultaneous application and sole application.[257] The Constitutional Tribunal in its judgment of 28 November 2001 described them as follows: "*The simultaneous application of the Constitution and statute would, therefore, either mean that the constitutional provision, which is sufficiently concrete and precise, becomes – together with the statutory provision – the grounds for construing the legal norm constituting the basis of the ruling; or that the organ applying the law determines the meaning of the statutory provision, which conforms to the Constitution (as well as to general constitutional principles). Conversely, it is only permissible to use a constitutional provision as the sole grounds for judicial rulings where the relevant issue is not regulated by statute (which occurs only exceptionally within our legal system) and, furthermore, only where the relevant constitutional provision is characterised by a sufficient degree of specificity and precision.*"[258] Although the Constitutional Tribunal clarified Article 8(2) of the Constitution with reference to the relationship between the Constitution and statutes, the principle of direct application of the

[255] Cf. K. Działocha, commentary on Article 91..., comment 5.
[256] Cf. judgment of the Constitutional Tribunal of 16 September 2002, K 38/01, OTK-A 2002 No. 5, item 59.
[257] Some commentators also refer to conflicting application of a statute and the Constitution where a given matter is governed by a constitutional provision and by an inferior provision which cannot apply simultaneously in view of a conflict which cannot be resolved in an interpretation (M. Florczak-Wątor, commentary on Article 8, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* P. Tuleja (ed.), Warsaw 2019, LEX Omega, comment 5).
[258] Judgment of the Constitutional Tribunal of 28 November 2001, K 36/01, OTK 2001 No. 8, item 55.

Constitution also holds in relation to other acts of generally applicable law including those enacted by the European Union.

Considering that the prevalent standard is to simultaneously apply the Constitution and other normative acts, the principle of direct application of the Constitution mainly holds in the assessment and interpretation of applicable law, which should be consistent with the Constitution.[259] This directive binds all bodies which apply the law, including the courts. Thus, Article 8(2) of the Constitution invoked as a simultaneous benchmark of review implies that legal provisions, including Union law, should be interpreted, subject to the primacy of the Constitution, in a manner friendly to the Constitution (pro-constitutional interpretation), that is, taking into account the general principles enshrined in the Constitution, aiming to attain the other norms of the Constitution and never going against them.

4. Article 90(1) of the Constitution of the Republic of Poland

Article 90(1) of the Constitution of the Republic of Poland provides that the competences of organs of State authority may be delegated to an international organisation or international institution by virtue of international agreements. That provision is unprecedented in the history of Polish constitutionalism. An analysis of the proceedings of the Constitutional Committee of the National Assembly suggests that the provisions was from the very outset meant to enable the Republic of Poland's membership of the European Union.[260]

Notably, the Constitutional Tribunal in its case-law has considered the relationship between the Constitution of the Republic of Poland and primary law of the European Union in the context of Article 90(1). In its judgment in K 32/09, the Tribunal considered the scope of the potential conferral of competences: "*In Article 90, the Constitution provides for conferring the competences of state organs only [in] relation to certain matters, which – in the light of the Polish constitutional jurisprudence – means a prohibition to: confer all the competences of a given organ of the state, confer competences in relation to all matters in a given field and confer the competences in relation to the essence of the matters determining the remit of a given state organ; a possible change of the manner and object of conferral requires observance of the requirements for amending the Constitution.*" Thus, no competences may be conferred on the

[259] Cf. judgment of the Constitutional Tribunal of 16 September 2002, K 38/01, OTK-A 2002 No. 5, item 59.
[260] M. Szpunar, commentary on Article 90, [in]: *Konstytucja RP. Tom II. Komentarz do art. 87-243,* M. Safjan, L. Bosek (eds.), Warsaw 2016, Legalis, margin note 13.

Union such that would interfere with the essence of constitutional organs. Such interpretation also follows from the sovereignty of the people because *"[t]he EU Member States retain their sovereignty due to the fact that their constitutions, being manifestation of the state's sovereignty, retain their significance … The provisions of Articles 4 and 5 of the Constitution in conjunction with the Preamble set the fundamental relation between sovereignty and the guarantee of the constitutional status of the individual, and at the same time exclude the possibility of surrendering sovereignty, the regaining of which the Constitution regards as the premiss of the Nation's independence to determine its own fate.*"[261]

One should therefore stress constitutional identity, which is particularly relevant in the case of a conflict of Polish law and Union law. Considering such conflict from the perspective of Article 90(1) of the Constitution, that is, the permissible scope of the conferral of competences of Polish state public on the European Union, the Tribunal has endorsed the following understanding of constitutional identity: "***Therefore, constitutional identity is a concept which determines the scope of 'excluding – from the competence to confer competences – the matters which constitute (...) «the heart of the matter», i.e. are fundamental to the basis of the political system of a given state' …, the conferral of which would not be possible pursuant to Article 90 of the Constitution.*** *Regardless of the difficulties related to setting a detailed catalogue of inalienable competences, the following should be included among the matters under the complete prohibition of conferral: decisions specifying the fundamental principles of the Constitution and … the principle of statehood, the principle of democratic governance, the principle of a state ruled by law, the principle of social justice, the principle of subsidiarity,* ***as well as the requirement of ensuring better implementation of constitutional values and the prohibition to confer the power to amend the Constitution and the competence to determine competences****.*"[262]

According to the case-law of the Constitutional Tribunal, the conferral of competences may occur not only once, upon the approval of the accession treaties, but also when the treaties are amended.[263] In either case, it is necessary to protect the constitutional identity and to review the scope of changes to conferred competences. The constitutional identity is inextricably linked to the sovereignty of the people and their right of self-determination. In this context, the Constitutional Tribunal has also held that "*[t]he accession to the European Union and the*

[261] Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.
[262] *Ibidem*.
[263] *Ibidem.*

relevant conferral of competences do [not] entail surrendering sovereignty to the European Union. The limit of conferral of competences is determined in the Preamble of the Constitution by recognising the state's sovereignty as a national value; and the application of the Constitution – inter alia with regard to the realm of European integration – should correspond to the meaning which the introduction to the Constitution assigns to regaining sovereignty understood as a possibility of determining the fate of Poland."[264]

The Tribunal went further and derived a principle of key importance to this application from the Constitution of the Republic of Poland: "*The Preamble determines the manner of interpretation of the provisions of the Constitution of the Republic of Poland concerning the independence and sovereignty of the state and the Nation (Article 4, Article 5 and Article 8, as well as Article 104(1), Article 126(2) and Article 130 of the Constitution), and also the provisions applicable to the membership in the European Union (Article 9, 90 and 91 of the Constitution), which allows the Constitutional Tribunal, adjudicating in this case, to derive from the provisions of the Constitution –* ***the principle of protection of the state's sovereignty in the process of European integration***."[265] The Tribunal has defined it as follows: "*The principle of protection of the state's sovereignty in the process of European integration requires respecting, during that process, the constitutional limits of conferral of competences set by limiting the said conferral only to certain matters, and thus striking proper balance between the conferred competences and the retained ones; the balance entails that, in the case of competences constituting the essence of sovereignty* ***(including, in particular, the enactment [of] constitutional rules and the control of observance thereof, the judiciary, the power over the state's own territory, armed forces and the forces guaranteeing security and public order)****, the deciding powers are vested in the relevant authorities of the Republic of Poland.*"[266] That principle also applies to the way that Poland confers competences on the Union. The Tribunal has explicitly held that "*[t]he said principle excludes the statement that the subject, upon which the competences have been conferred, may independently extend the scope of the competences … Also, it is not possible to understand the conferral of competences in such a way that would entail allowing a possibility of determining any competences that may be presumed to be conferred.*"[267]

[264] *Ibidem.*
[265] *Ibidem.*
[266] *Ibidem.*
[267] *Ibidem.*

Thus, the Constitutional Tribunal has on many occasions stressed the primacy of the Constitution of the Republic of Poland which is an emanation of sovereignty of the Nation. Article 90(1) which governs the transfer of competences of Polish state organs to an international institution of international organisation was never intended to confer on such subjects of international public law the power to infringe on the essence of the fundamental functions of the Polish State. As noted by the Constitutional Tribunal, "*[t]he essence of Article 90 of the Constitution is the safeguarding character of the restrictions contained therein, as regards the sovereignty of the Nation and the state.*"[268]

5. Article 144(3)(17) of the Constitution of the Republic of Poland

Article 144(3) of the Constitution contains a catalogue of prerogative and is a key provision establishing the systemic position of the President of the Republic of Poland. It sets out the scope of powers of the President which lie beyond the political scrutiny of the Sejm.[269] In the light of established case-law of the Constitutional Tribunal, there is no doubt that official acts given within the prerogatives of the head of State are (or may be) sovereign and **cannot be reviewed under an act of law inferior to the constitution**.[270] As rightly noted by commentators, the broad catalogue of prerogatives enables "*the President to perform functions of an executive organ and take in relation to certain matters a position different from that of the government and the parliamentary majority and to pursue an independent policy (for instance, appoint to key public positions persons from outside the political constellation of the parliamentary majority). That definitely strengthens the President's systemic position.*"[271]

The prerogatives of the Head of State were first written into the April 1935 constitution. The constitutional legislator decided to define a catalogue of presidential powers which require no countersignature among others due to the transition of the parliamentary system referred to as "rationalisation of Parliament's functioning."[272] Those were even at that time considered "personal powers of the Head of State" lying beyond parliamentary scrutiny.[273] While Article 47 of the Small Constitution of 1992 (*Dziennik Ustaw*, item 426) also contained a catalogue of

[268] *Ibidem.*
[269] Judgment of the Constitutional Tribunal of 11 September 2017, K 10/17, OTK-A 2017, item 64.
[270] *Ibidem.*
[271] B. Banaszak, commentary on Article 144, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2012, Legalis.
[272] W. Skrzydło, commentary on Article 144, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2013, Lex Omega.
[273] *Ibidem.*

prerogatives, it was definitely less extensive than the current one set out in Article 144(3) of the Constitution of the Republic of Poland. The constitutional legislator clearly wanted to extend the autonomous powers of the President of the Republic of Poland and thus **strengthen the President's systemic position**.

According to the principle of no political accountability,[274] the President of the Republic of Poland is subject to no scrutiny in exercising the prerogatives granted to the President. While the President may be subject to "*political assessment by society which is the stock of the Nation, the only available sanction is to lend no support to the President when he or she decides to stand for re-election.*"[275] That only sanction (lack of support of the public) no longer applies in the President's second term in office: according to the constitution, the President cannot be re-elected more than once.

Under Article 144(3)(17) of the Constitution, the President of the Republic of Poland has the exclusive competence to appoint judges. It should be emphasised that the act of appointment to the office of a judge is an **autonomous systemic and constitutional act**.[276] As such, that act cannot be seen as purely symbolic. The foregoing is broadly endorsed by case-law. As the Constitutional Tribunal has held, "*the role of the President in the appointment procedure is more than that of a 'notary' who certifies decisions taken elsewhere … the President makes an independent assessment of presented candidates and may consequently refuse to accept a motion of the National Council of the Judiciary. The President has the power to refuse motions should they, in the President's opinion, contravene the values of which the President is a guardian under the Constitution.*" [277] That position is shared by the Supreme Administrative Court which in its judgment of 7 December 2018 has held that "*the appointment of a judge is an act of constitutional law which determines the individual composition of the judiciary.* ***It is the President's discretionary determination within the President's personal prerogatives.***"[278]

In view of the foregoing, i.e., the systemic position of the President of the Republic of Poland and the structure and nature of the President's official acts within the President's personal prerogatives, it follows, as held by the Constitutional Tribunal, that "***there can be no political accountability, not even indirect, for such acts. Such acts are not subject to scrutiny by organs***

[274] *Ibidem.*
[275] P. Sarnecki, *Prezydent Rzeczypospolitej Polskiej. Komentarz,* Zakamycze 2000, p. 111.
[276] Resolution of the Supreme Court of 10 April 2019, II DSI 54/18, LEX No. 2642153.
[277] Judgment of the Constitutional Tribunal of 5 June 2012, K 18/09, OTK-A 2012 No. 6, item 63.
[278] Judgment of the Supreme Administrative Court of 7 December 2017, I OSK 857/17, LEX No. 2335069.

of public authority. Such scrutiny would only be admissible only if enshrined in the Constitution."[279] As the Supreme Court has held, "*it should be emphasised that in the context of settled case-law of the Supreme Administrative Court, the Constitutional Tribunal and the Supreme Court concerning the rank of an act of judicial appointment by the President of the Republic of Poland, any reservations regarding the procedure preceding such act of appointment or errors and omissions in proceedings before the National Council of the Judiciary are legally irrelevant.*"[280] **Acts of appointment to the office of a judge by the President of the Republic of Poland which lie within the President's prerogatives are final and not subject to scrutiny, even indirectly.[281]**

6. Article 178(1) of the Constitution of the Republic of Poland

Under Article 178(1) of the Constitution of the Republic of Poland, judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes. That is closely linked to the principle of legality enshrined in Article 7 of the Constitution of the Republic of Poland: judges are bound by generally applicable law established by statute which has not been found to be unconstitutional by the Constitutional Tribunal acting as the competent organ of public authority. The principle of being subject to statutes excludes any *contra legem* interpretation contravening applicable legal provisions, which would grant law-making powers to judges. According to commentators, Article 178(1) of the Constitution of the Republic of Poland implies that judges are subject only to law and its directives rather than any non-legal directives.[282]

That provision has been interpreted accordingly by the Supreme Court and the Constitutional Tribunal. According to the case-law of the Supreme Court, "*judges within the exercise of their office are not independent of statutes; on the contrary, statutes determine their actions in an absolute way; in fact, judges are subordinated in principle to the entire system of sources of applicable law. The subordination of judges to statutes should be understood as a directive of legality of decisions rather than a directive for courts to participate in law-making. The Polish legal system is based on a separation of law-making (legislative activity) from the interpretation and application of the law. That principle relies on an understanding of the constitutional*

[279] Judgment of the Constitutional Tribunal of 24 October 2017, K 3/17, OTK-A 2017, item 68.
[280] Resolution of the Supreme Court of 10 April 2019, II DSI 54/18, LEX No. 2642153.
[281] Judgment of the Constitutional Tribunal of 24 October 2017, K 3/17, OTK-A 2017, item 68.
[282] M. Masternak-Kubiak, commentary on Article 178, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* M. Baczkowska (ed.), Warsaw 2014, LEX Omega.

distinction between the legislature and the judiciary. Interpretation is evidently a normative act; however, the function of interpretation must not turn into the function of legislation. Furthermore, an act of interpretation of law performed by a judge must not only be made in accordance with the judge's conscience. The power of creative interpretation indubitably does not authorise a judge to arbitrarily shape the content of interpreted provisions. Judges are empowered and obligated to identify the content of provisions taking into account both the fundamental legal principles and the known methods of interpretation, and must not transgress their limits. Article 7 of the Constitution enshrines the principle of legality, which provides that organs of the State must act on a legal basis and within the limits of law. That norm is addressed to the courts, as well. The defendant's invoking the principle of legality derived from Article 7 of the Constitution in order to disapply an applicable statute directly violates that constitutional principle."[283] The case-law of the Constitutional Tribunal broadly endorses the inadmissibility of distributed constitutional review which would allow for review of statutory regulations against the Constitution of the Republic of Poland and their disapplication: "*[i]n view of the prominence of that principle in the existing legal system, the Constitutional Tribunal holds that there is existing settled case-law (judgments P. 12/98, P. 8/99, U. 4/97, SK 19.99) which finds its fullest expression in the judgment of the full formation of 31 January 2001, P. 4/99: 'The principle of direct application of the Constitution (Article 8(2) of the Constitution) may in no case give grounds for the court to disapply statutory provisions.' That position is shared by a majority of commentators (cf. among others A. Mączyński, Bezpośrednie stosowanie Konstytucji przez sądy, PiP 2000, z. 5; A. Wasilewski, Przedstawianie pytań prawnych Trybunałowi Konstytucyjnemu przez sądy (art. 193 Konstytucji RP), PiP 2000, z. 5; St. Rudnicki, Glosa do wyroku SN z 7 kwietnia 1998 r., I PKN 90/98, MP 2001, No. 11). Direct application of the Constitution does not give the courts and other bodies authorised to apply the law the powers of constitutional review of applicable legislation. The process of such review is expressly and unambiguously defined in the Constitution. Article 188 of the Constitution reserves such exclusive jurisdiction for the Constitutional Tribunal. The presumption of constitutionality of statutes may only be refuted in a judgment of the Constitutional Tribunal; judges are bound by statutes under Article 178(1) of the Constitution as long as the statutes remain in force and effect (cf. judgment of the Supreme Court of 25 August 1995, I PRN 53/94,*

[283] Judgment of the Supreme Court of 13 April 2015, SNO 13/15, LEX No. 1745803.

OSNPiUS 1994, z 11, item 179, judgment of the Supreme Administrative Court of 27 November 2000, II SA/Kr 609/98)."[284]

The principle of being bound by the Constitution and by statutes obligates judges who have any doubt as to the formal or substantive constitutionality of statutory provisions to refer a legal question to the Constitutional Tribunal which has exclusive jurisdiction under Article 188 and Article 190 of the Constitution of the Republic of Poland, as reaffirmed in many judgments of courts of last instance including the Supreme Court: "*According to settled case-law of the Constitutional Tribunal and the Supreme Court, the courts and other organs which apply the law have no jurisdiction to rule on unconstitutionality of and disapply statutory provisions. The presumption of constitutionality of statutes may only be refuted in a judgment of the Constitutional Tribunal; judges are bound by statutes under Article 178(1) of the Constitution as long as the statutes remain in force and effect. If the court is certain that a provision is unconstitutional or has any doubts, it should refer a legal question to the Constitutional Tribunal according to Article 193 of the Constitution. In the absence of a provision of the Constitution which would empower the courts and other organs authorised to apply the law to undertake constitutional review of statutory acts, such competence must not be presumed to exist, in view of the principle enshrined in Article 7 of the Constitution that organs of public authority are required to act on the basis and within the limits of the law.*"[285]

In the light of the invoked case-law, the principle of being bound by statutes prohibits judges from disapplying statutes on the grounds of their internal conviction about a formal or substantive defect of a provision applicable in the case in which they adjudicate. The presumption of the constitutionality of statutes obligates judges to apply statutory provisions until the Constitutional Tribunal finds them to be unconstitutional; in the event of any doubt, the proper procedure is to refer a legal question according to Article 193 of the Constitution of the Republic of Poland. Article 178(1) of the Constitution of the Republic of Poland is closely linked to the principle of legality which rules out the presumption of any competences of the courts other than those expressly conferred by the Constitution and constitutional acts of

[284] Judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, OTK 2001 No. 8, item 256.
[285] Judgment of the Supreme Court of 24 November 2015, II CSK 517/14, LEX No. 1940564. Cf. other case-law: judgment of the Constitutional Tribunal of 31 January 2001, P 4/99, OTK 2001 No. 1, item 5 and judgment of the Constitutional Tribunal of 4 December 2001, SK 18/00, OTK 2001 No. 8, item 256, judgment of the Supreme Court of 30 October 2002, V CKN 1456/00, unpublished, judgment of the Supreme Court of 27 March 2003, V CKN 1811/00, unpublished, judgment of the Supreme Court of 6 November 2003, II CK 184/02, unpublished, judgment of the Supreme Court of 16 April 2004, I CK 291/03, OSNC 2005 No. 4, item 71, judgment of the Supreme Court of 24 June 2004, III CK 536/02, unpublished, and judgment of the Supreme Court of 3 December 2008, V CSK 310/08, unpublished.

applicable law, and it obligates the courts to interpret and apply the law so as to avoid any *praeter* or *contra legem* interpretation.

7. Article 186(1) of the Constitution of the Republic of Poland

The National Council of the Judiciary is a constitutional organ established as a guardian of the independence of judges and, thus, to exercise special oversight over the judiciary. The National Council of the Judiciary not only decides about the professional promotion of judges but also protects the proper organisation of work of the entire judiciary. However, its key function is to enforce the professional code of ethics.[286]

According to legal commentary and the case-law, given its structural position "in between" the different segments of State authority, the National Council of the Judiciary is an "*instrument implementing the constitutional principle of the balance of the three branches of power and a forum of co-operation and mutual balancing of powers.*"[287] Thus, the National Council of the Judiciary cannot be explicitly considered an organ of State administration or an organ of judicial self-governance.[288] B. Banaszak has endorsed that position: "*The existing constitutional regulation which locates regulations concerning the National Council of the Judiciary in the chapter dedicated to the judiciary* ***clearly reflects the constitutional legislator's intention to classify the National Council of the Judiciary as an independent, non-adjudicating organ of the judiciary functionally linked to it****. Therefore, it cannot be considered an organ of State review and protection of the law.*"[289] As a forum of communication among the branches of power in the Republic, the National Council of the Judiciary has been equipped with specific competences which make it a constitutional organ of the State.[290]

Thus, the systemic position of the National Council of the Judiciary stems from the functions and powers expressly enshrined in the Constitution of the Republic of Poland: "*the constitution refers to two specific competences of the National Council of the Judiciary which are closely linked to the scope of functions attributed to the Council: the right to lodge applications with*

[286] M. Masternak-Kubiak, commentary on Article 178, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* M. Baczkowska (ed.), Warsaw 2014, LEX Omega.
[287] Judgment of the Constitutional Tribunal of 5 March 2019, K 12/18, OTK-A 2019, item 17; cf. also judgment of the Constitutional Tribunal of 20 June 2017, K 5/17, OTK-A 2017, item 48.
[288] W. Brzozowski, *Niezależność konstytucyjnego organu państwa i jej ochrona,* Warsaw 2016, p. 63.
[289] B. Banaszak, commentary on Article 186, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Warsaw 2012.
[290] *Ibidem.*

the Constitutional Tribunal (Article 186(2)) and to present candidates for the position of a judge to the President (Article 179) … Thus, the provisions of Article 186(1) of the Constitution set the limits of discretion of the legislator in determining the scope of functions of the National Council of the Judiciary in accordance with the provisions of Article 187(4)."[291] In consideration of its functions, the National Council of the Judiciary has been additionally strengthened by being granted full separation from and independence of other organs of State. According to commentators, the key attributes of the independence of the Council include the election of its Chairperson from among and by members of the Council; the Council's power to determine its procedures in its internal regulations; and decision-making by the Council in the form of resolutions passed at meetings.[292] Importantly, **there is no procedure for review of the independence of the National Council of the Judiciary as a whole or of any of its members under the Constitution of the Republic of Poland**.

It should further be noted that the proceedings of the Constitutional Committee of the National Assembly raised no need for judicial review of resolutions passed by the National Council of the Judiciary in the performance of its constitutional functions. The same holds for resolutions concerning the presentation of candidates for appointment to the office of a judge to the President of the Republic of Poland.[293] As the Supreme Court has held, "*[n]o doubts were raised as to the* ***exclusive*** *systemic powers of the National Council of the Judiciary* ***beyond any judicial review*** *to present candidates for the position of a judge to the Head of State, even though the Council has performed its systemic function in the judiciary since 1990, hence the practice of proceedings before the Council was well recognised in the constitutional system and known to participants of the legislative process of drafting the Constitution.*"[294]

According to commentators, "*[s]ince Article 186(1) of the Constitution of the Republic of Poland provides that the National Council of the Judiciary shall safeguard the independence of courts and judges, then it follows, considering Article 179 of the Constitution of the Republic of Poland, that the purpose of the participation of the National Council of the Judiciary in the procedure of judicial appointments is to verify whether candidates presented to the Council raise no objections from the perspective of their respect for the principle of judicial*

[291] B. Naleziński, commentary on Article 186, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* P. Tuleja (ed.), Warsaw 2019; cf. also judgment of the Constitutional Tribunal of 16 April 2008, K 40/07, OTK-A 2008 No. 3, item 44.
[292] K. Szczucki, commentary on Article 186, [in:] *Konstytucja RP. Tom II. Komentarz do art. 87-243,* M. Safjan, L. Bosek (eds.), Warsaw 2016.
[293] Judgment of the Supreme Court of 6 September 2019, I NO 98/19, LEX No. 3012332.
[294] *Ibidem.*

independence in the prospective performance of the function of a judge."[295] **Thus, the National Council of the Judiciary is the only organ competent to undertake an *ex-ante* review of the independence and impartiality of candidates for vacant positions of judges in the appointment procedure.**

8. Article 190(1) of the Constitution of the Republic of Poland

According to Article 190(1) of the Constitution of the Republic of Poland, judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. That provision, although laconic, precisely expresses the constitutional legislator's intent as to the nature and legal effect of judgments of the Constitutional Tribunal. It should be noted that the subjective scope of that provision does not differentiate between judgments depending on the matters adjudicated within the jurisdiction of the Constitutional Tribunal: it applies alike to judgments given in the exercise of powers under Article 188 and Article 189, under Article 122(3) and (4) (*ex-ant*e review of statutes), Article 131(1) (determination of inability of the President of the Republic of Poland to hold office and delegation of temporary powers to hold the office of the President of the Republic of Poland), and Article 133(2) of the Constitution of the Republic of Poland (*ex-ant*e review of international agreements).[296] It seems a much more complex matter, and apparently one not ultimately resolved by the Tribunal and legal theory, to what extent the principles enshrined in Article 190(1) Constitution of the Republic of Poland apply to different kinds of judgments. The notion of "judgment" covers determinations on the merits in cases referred to the Tribunal (substantive judgments) as well as determinations on procedural matters in the course of proceedings and determinations which close proceedings with no pronouncement on the merits (formal judgments). For the purposes of this application, it should be noted that judgments of the Constitutional Tribunal on the merits of the case which close proceedings indubitably have the attributes of universally binding application and finality.[297]

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[295] *Ibidem.*

[296] Cf. L. Garlicki, commentary on Article 190, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* tVol. V, L. Garlicki (ed.), Warsaw 2007, comment 2.

[297] Cf. for instance: L. Garlicki, commentary on Article 190..., comments 4 and 5. In this context, it should be noted that the provisions of subsequent statutes governing the specific terms and conditions of proceedings before the Constitutional Tribunal provide for the option of lodging complaints against decisions refusing to recognise an application initiating proceedings or a constitutional complaint. Such derogation from the principle of finality of judgments of the Constitutional Tribunal is also provided for in Article 61(5) of the Act of 30 November 2016 on the Organisation and Rules of Proceedings before the Constitutional Tribunal (*Dziennik Ustaw* of 2019, item 2393). However, the Tribunal has held that such exceptions "*...concern the*

The benchmark of review reconstructed under Article 190(1) of the Constitution of the Republic of Poland reflects two principles (attributes) of judgments of the Constitutional Tribunal and their effect: first, their universally binding application; and second, their finality. The universally binding application of judgments of the Tribunal should be considered on two planes.[298] They may have a lasting effect in the system of generally applicable law. A judgment declaring a legal provision to be hierarchically incompatible leads to irreversible removal of such provision from the legal system in its entirety, in part, or within a certain meaning developed through interpretation. By interfering directly with the normative system, such judgments have an *erga omnes* effect which goes beyond determinations in individual cases. Hence, the other aspect of the universally binding application of judgments of the Constitutional Tribunal is that the operative part of its judgments is binding not only on the participants of specific proceedings pending before the Tribunal but also on all potential addresses of the judgment including all organs of the State.[299] Universally binding application implies the obligation to respect such judgments. That obligation has been found to include primarily the "*...prohibition for anyone to undertake any act or action contravening a judgment of the Constitutional Tribunal.*"[300]

Turning now to the principle of finality of judgments, it should be noted that the Constitutional Tribunal has clarified its essence among others in the decision of the full formation of 17 July 2003. According to the grounds of the judgment, "*The legal effect of the principle (attribute) of finality of judgments of the Constitutional Tribunal established by the constitutional legislator expressly, categorically and unconditionally is that, given that clear normative stance of the constitutional legislator, judgments of the Constitutional Tribunal should be considered irrefutable, both in proceedings before the Tribunal and in any other proceedings governed by statute. As legal acts whose legal effect is inferior to that of the Constitution, statutes, including the Act on the Constitutional Tribunal, cannot disapply in whole or in part or autonomously limit the constitutional principle (attribute) of finality of judgments (rulings) of the Constitutional Tribunal or some of its legal consequences derived from the wording of Article*

preliminary stage of proceedings which determines whether an application or complaint meet the formal requirements defined in the Constitution and the Act on the Constitutional Tribunal. They do not undermine the principle of finality of judgments of the Tribunal enshrined in Article 190(1) of the Constitution concerning determinations in matters pending before the Tribunal initiated by an application or a constitutional complaint (or a legal question)" (judgment of the Constitutional Tribunal of 30 November 2006, SK 9/06, OTK-A 2006 No. 10, item 165).

[298] L. Garlicki, commentary on Article 190…, comment 5.

[299] Cf. K. Gonera, E. Łętowska, "Artykuł 190 Konstytucji i jego konsekwencje w praktyce sądowej", *Państwo i Prawo* 2003, No. 9, p. 21.

[300] L. Garlicki, commentary on Article 190..., comment 5.

190(1) of the Constitution of the Republic of Poland but under an explicit ('positive') constitutional provision, one that is not enshrined in the Constitution of 2 April 1997."[301] Thus, the finality of judgments of the Tribunal implies that its judgments are irrefutable, which commentators have described as follows: "***…it would be unconstitutional to grant anyone the competences to annul or alter judgments of the Constitutional Tribunal***"[302] or the power (obligation) to ignore them. From the formal (procedural) perspective, the finality of judgments of the Constitutional Tribunal implies that they cannot be appealed. Thus, any provisions allowing for judgments of the Tribunal to be appealed and allowing for their formal and substantive review, even by the Tribunal itself, would go against the benchmark of review under consideration.

V. Grounds for the pleas

1. Pleas concerning the first and second paragraph of Article 1 in conjunction with Article 4(3) TEU understood in such a way that it authorises or obligates an organ which applies the law to disapply the Constitution of the Republic of Poland or requires the application of legal provisions in contravention of the Constitution of the Republic of Poland

The first plea presented in above in the application raises in essence the question whether the principle of primacy of Union law and the principle of sincere cooperation of the Union and the Member States, understood in such a way that they allow for disapplication of the provisions of the Constitution or require the application of legal provisions in contravention of the Constitution, are compatible with the Constitution of the Republic of Poland.

1.1. Incompatibility with Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) of the Constitution of the Republic of Poland – violation of the principle of primacy of the constitution

The principle of primacy of European Union law and the principle of sincere cooperation have not yet been subject to constitutional review. However, the Tribunal has referred to them in its case-law.

[301] Decision of the Constitutional Tribunal of 17 July 2003, K 13/02, OTK-A 2003 No. 6, item 72.
[302] L. Garlicki, commentary on Article 190..., comment 4.

In its judgment of 11 May 2005, K 18/04, the Tribunal has held that the accession of Poland to the European Union took place by authority granted in the Constitution of the Republic of Poland with the awareness of the fact that the principle of primacy is enshrined in the essence of the system of European integration and was adopted with the consent of the Nation given in a referendum. Thus, compliance of the Republic of Poland with binding international law is a constitutional directive under Article 9 of the Constitution of the Republic of Poland. Since the Republic of Poland acting pursuant to Article 90(1) of the Constitution of the Republic of Poland has transferred the competences of State organs in relation to certain matters under the Accession Treaty, it has thereby limited the scope of its own sovereign competences, opening space for the application of law originating from other sources and accepting out of its own sovereign accord the principles of Community (European Union) law, including the principle of its primacy. In the same judgment, the Constitutional Tribunal has held that the principle of primacy of Community (European Union) law over national law is prominent in the case-law of the Luxembourg Court of Justice on the grounds of the objectives of European integration and the imperative of creating a common European legal space. That principle clearly expresses the aspiration of ensuring consistent application and enforcement of European law. However, the Constitutional Tribunal has ruled that the principle of primacy is not the sole determinant of final decisions of sovereign Member States in the case of a potential conflict between the Community (Union) legal system and constitutional regulations. In the Polish legal system, such decisions should at each time be made taking into account Article 8(1) of the Constitution. The judgment of the Constitutional Tribunal also referred to a potential conflict between Union law and the Constitution. The Tribunal emphasised that **such conflict may in no case be resolved in the Polish legal system by acknowledging the primacy of Community law over the Constitution**. Such potential conflict must not invalidate applicable constitutional provisions, replace them with provisions of Community (Union) law, or limit their scope of application to the areas not covered by Community (Union) law. The Tribunal stressed that in that case, the Polish legislator would need to amend the Constitution, work towards an amendment of Community regulations or, in the extreme, leave the European Union. Such decisions are incumbent on the sovereign, that is the Polish Nation, or an organ of State authority which may represent the Nation in accordance with the Constitution. **The judgment emphasised that the constitutional provisions concerning individual rights and freedoms set a minimum absolute benchmark which cannot be lowered or challenged as a result of Community regulations.** The Constitution safeguards the rights and freedoms expressly enshrined therein in relation to everyone falling within its scope of application. **Interpretation**

"friendly to European law" has its limits. In no case may it lead to outcomes inconsistent with the directives of constitutional provisions which cannot be reconciled with the minimum guarantees enshrined in the Constitution. Thus, the Constitutional Tribunal does not recognise the admissibility of contesting the applicability of a constitutional provision merely due to a contrary Community (Union) regulation being introduced into the legal system.

In its judgment of 24 November 2010, K 32/09, the Constitutional Tribunal upheld the grounds of the judgment of 11 May 2005, K 18/04. It reiterated that, in view of its special force, the Constitution remains the "supreme law of the Republic of Poland" in relation to all international agreements binding the Republic of Poland, including ratified international agreements transferring "competences in relation to certain matters." Given its supreme legal force derived from Article 8(1) of the Constitution, its application and binding force take precedence in the Republic of Poland. The Constitutional Tribunal has held that Article 90(1) and Article 91(3) give no grounds for the transfer to an international organisation (or an international institution) of the power to enact legal acts or make decisions contravening the Constitution of the Republic of Poland.

In its judgment of 16 November 2011, SK 45/09, the Constitutional Tribunal held that the primacy of the Constitution as the supreme law of the Republic allows for constitutional review of Union regulations (secondary law). The Tribunal found that the risk of different standards of protection of fundamental rights arising under Union law and the Constitution is low. However, this does not mean that the legal solutions in the two legal orders are identical. It would be hard to assume that the EU law will contain norms which will fully concur with the norms of the Polish law. This arises from differences related to the way of enactment of EU law, with the participation of all the Member States, as well as from the different character of the two comparable legal orders (on the one hand – the law of the state, on the other hand – the law of the international organisation). Allowing the possibility of examining the conformity of the acts of EU secondary legislation to the Constitution, what should be emphasised is the need to maintain due caution and restraint in that regard. As the Constitutional Tribunal has held, the EU law binds all Member States. One of the systemic principles of EU law is the principle of sincere cooperation. Pursuant to Article 4(3) of the TEU, the Union and the Member States shall, in full mutual respect, assist each other in carrying out tasks which flow from the Treaties. The Member States shall take any appropriate measure, general or particular, to ensure fulfilment of the obligations arising out of the Treaties or resulting from the acts of the institutions of the Union. The Member States shall facilitate the achievement of the Union's

tasks and refrain from any measure which could jeopardise the attainment of the Union's objectives. What would be difficult to reconcile with that principle, in the opinion of the Constitutional Tribunal, is granting powers to particular Member States which would allow them to declare the norms of EU law to be no longer legally binding. Any contradictions should be eliminated by applying interpretation that respects the relative autonomy of EU law and national law. Moreover, the said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. The said assumption gives rise to an obligation, on the part of the Court of Justice, to be favourably inclined towards national legal systems, whereas on the part of the Member States – the obligation to approach the EU norms with the utmost respect.

In the opinion of the Prime Minister, given the present legal circumstances resulting mainly from the judicial activity of the Court of Justice of the European Union, the case-law of the Constitutional Tribunal invoked above is no longer sufficient to ensure effective primacy of the Constitution over Union law.

In the opinion of the Prime Minister, the aforementioned judgments of the Constitutional Tribunal concerned circumstances which were unambiguous from the perspective of resolving a conflict between two legal systems. An organ which applies the law, faced with a choice between two conflicting norms which could not be reconciled according to the rules of interpretation, was obliged at each time to respect the primacy of constitutional provisions. As the Constitutional Tribunal has rightly held, thanks to the axiological proximity of national law and Union law and in preparation of Polish law for integration of Union regulations, such conflicts were rare. Thus, in practice, organs which apply the law have not been obliged to disapply any regulations in connection with a conflict of constitutional provisions and Union law. However, if a conflict between those two systems was identified, organs of authority acting on behalf of the sovereign or, in special cases, the sovereign as such would be obliged to eliminate such conflict. An organ which applies the law acquired no law-making powers by invoking Union law. That, on the one hand, allowed the Republic of Poland to meet its national obligations and, on the other hand, ensured that the values protected by the Constitution were respected, in particular the principle of primacy of the Constitution, legal certainty, trust of citizens in the State, and legal certainty.

Meanwhile, recent CJEU case-law suggests that the principle of primacy of Union law and the principle of sincere co-operation have been filled with new normative content. It includes the

power conferred on the courts, as well as other organs which apply the law, to disapply the Constitution, even where such determination is in conflict with the Constitution; such power is alien to Polish law.

For instance, in the judgment of 2 March 2021, C-824/18, the CJEU held that it will be for the national court to make a final assessment on the basis of the guidance provided by this judgment and any other relevant circumstances of which it may become aware, taking account, where appropriate, of the reasons and specific objectives alleged before it in order to justify the measures concerned, whether national provisions may give rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of judges to external factors and, in particular, to the direct or indirect influence of the Polish legislature and executive and as to their neutrality with respect to the interests before them, and to lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law. If the referring court has such doubts, it is obliged to apply the principle of primacy of Union law and the principle of sincere cooperation interpreted as requiring the referring court to disapply the provisions of the national legal system, whether they are of a legislative or constitutional origin, and to apply instead the national provisions previously in force. Such normative implications (understanding) of the principle of primacy of Union law and the principle of sincere cooperation of the European Union and the Member States raise reasonable constitutional doubts.

The norm contested by the Prime Minister, whereby competent organs of a Member State are authorised or obliged to disapply the Constitution of the Republic of Poland or to apply legal provisions in contravention of the Constitution of the Republic of Poland, deprives the Constitution of its attribute of the supreme law of the Republic of Poland. The principles of primacy and sincere cooperation so understood according to the CJEU case-law imply recognition of norms within the Polish legal system which enjoy, as a minimum, precedence over the Constitution (or even binding force, which would indubitably position them above the Constitution in the hierarchy of sources of law). In this interpretation of the principle of primacy and the principle of sincere cooperation, constitutional norms are reduced to an object of review against another norm applied as the benchmark; if the two are found to be in conflict, the constitutional norm would in practice be invalidated. Such interpretation of provisions of international agreements, including the Treaties which constitute primary law of the European Union, is in conflict with Article 8(1) of the Constitution.

These arguments are endorsed by the principle of direct application of the Constitution enshrined in Article 8(2) of the Constitution. In essence, it allows organs which apply the law to invoke the provisions of the Constitution of the Republic of Poland bypassing statutes and other acts of generally applicable law whose status is inferior to that of the Constitution. Interpretation of statutes in accordance with the Constitution of the Republic of Poland is an instantiation of direct application of the Constitution. In its extensive version, such interpretation requires that any outcome of interpreting a statute which is in conflict with the Constitution of the Republic of Poland must be dismissed. In its intensive version, it implies that an outcome of interpreting a statute which is best aligned with the Constitution must prevail.[303] In the context of Article 8(1), Article 91(2) and Article 90(1) of the Constitution, it seems reasonable that those implications of the principle of direct application of the Constitution should also extend to Union law. Article 91(2) of the Constitution sets clear limits of application of the principle of primacy of primary Union law (the Treaties), which is limited only to those instances where Union law is in conflict with statutes. International agreements ratified by prior consent given by statute remain normative acts whose status is inferior to that of the Constitution. According to the case-law of the Constitutional Tribunal, under Article 90(1) of the Constitution, certain competences cannot be transferred to an international organisation or an international institution. No provision of the Constitution gives grounds to transfer to an international organisation the power to enact normative acts or make decisions which would contravene the Constitution of the Republic of Poland.[304] Constitutional identity understood as the values underlying the Constitution and its fundamental principles sets the limits of the transfer of competences under Article 90(1) of the Constitution.[305] According to the constitutional standard, there can be no exception from the principle of primacy of the Constitution, even if such exception stems from international law.

On the aforementioned grounds, a norm granting primacy to Union law where it is in conflict with constitutional provisions is in conflict with Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) of the Constitution of the Republic of Poland.

[303] P. Tuleja, commentary on Article 8..., margin note 35.
[304] Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005 No. 5, item 49.
[305] P. Tuleja, commentary on Article 8..., margin note 35.

1.2. Incompatibility with Article 2 of the Constitution – violation of the principle of legal certainty

A broad interpretation of Article 4(3) TEU in conjunction with the first and second paragraph of Article 1 TEU, understood in such a way that organs of the Member State are authorised or obliged to disapply the Constitution of the Republic of Poland or to apply legal provisions in contravention of the Constitution of the Republic of Poland, would in fact imply a model of distributed constitutional review of Union law. That would, in essence, empower organs which apply the law, including every court, to autonomously decide whether and to what extent the provisions of the Constitution apply and may be considered when making a determination in a given case. As a result, the actual content of the provisions of the Constitution would substantiate only when applied and could, depending on the person making the determination, take on a different wording. Similarly, different decisions could be made in very similar factual circumstances. Considering the special function of the provisions of the Constitution, their fundamental importance to safeguarding individual rights and freedoms, that would be in conflict with Article 2 of the Constitution of the Republic of Poland and in particular with the principle of citizens' trust in the State (the principle of the State's loyalty to citizens).

For guarantees of legal certainty to materialise, it is necessary first and foremost to ensure stability of the legal system understood as all of its interacting elements. That is not possible if a normative act at the apex of the hierarchy, which is not only the benchmark of review but also the determinant of interpretation and the foundation of the axiology of the system as one that is internally consistent, is not effectively protected from arbitrary modification and its applicability depends on variable and unpredictable criteria.

It should be stressed that the principle of citizens' trust in the State is considered the foundation of a State ruled by law and a key principle derived from the principle of a democratic State ruled by law. According to extensive case-law of the Constitutional Tribunal, for the principle of citizens' trust in the State to materialise, it is imperative to ensure legal safety and legal certainty to the extent necessary for actions of the State in relation to individuals to be predictable. That principle which refers to the legal system as a whole takes on particular relevance in relation to the Constitution which, as the superior legal act, is the foundation of the system and a guarantee of the protection of rights and freedoms. It should be emphasised that legal certainty is an autonomous value, a set of characteristics of the law irrespective of its particular content. In other words, legal certainty should be protected even if the content of the

law may raise doubts sufficient to undertake its amendment (for instance, because the law is in conflict with Union law). The Constitutional Tribunal has held that when the Tribunal examines the constitutionality of normative acts, it must consider whether the invalidation of a normative act once it is ruled unconstitutional would not undermine legal safety and legal certainty to the extent that the resulting burden for subjects of law would outweigh the benefits of eliminating the unconstitutional normative act from the legal system.[306] Legal certainty provides a guarantee for individuals, protecting them from arbitrary decisions of organs of authority and allowing them to plan their own actions and make decisions free from the risk that applicable law may prove to be apparent, unattainable or unenforceable. Thus, if the legislator accepts that law may be unpredictable in areas and matters sufficiently significant to be enshrined in the Constitution, that violates Article 2 of the Constitution of the Republic of Poland irrespective of the intended purpose. Such far-reaching interference in individual rights and freedoms could not be justified even by the requirement of fulfilling international obligations of the Republic of Poland.

1.3. Incompatibility with Article 7 of the Constitution – violation of the principle of legality

A broad interpretation of the principle of primacy of Union law and sincere cooperation of the Union and the Member States raises doubts also in the absence of clear limits of the competences of organs which apply the law to decide about interpretations of constitutional provisions. According to Article 7 of the Constitution, organs of public authority shall act on the basis and within the limits of the law. The principle of legality enshrined in Article 7 of the Constitution obliges the legislator to define competences in acts of generally applicable law, not to presume the existence of such competences or to exercise them in a discretionary, arbitrary manner. Legality of actions of organs of public authority implies that once established by law, organs of public authority act on the basis and within the limits of the law while the law defines their responsibilities and competences as well as course of conduct; such course of conduct leads to determinations being made in the form required by law, on the applicable legal basis, and in compliance with substantive provisions binding on the organ.[307]

[306] Decision of the Constitutional Tribunal of 6 November 2008, 5/07, OTK-A 2008 No. 9, item 163.
[307] W. Sokolewicz, commentary on Article 7, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* Vol. V, L. Garlicki (ed.), Warsaw 2007, comment 5.

In the light of the foregoing, it would be inadmissible to create competences in an act other than a statutory act of general application or to confer imprecisely defined competences on organs. Similarly, to allow competent authorities to act in an excessively discretionary and arbitrary manner would also violate the principle of legality. The degree of concreteness of norms which define competences may differ depending on the matter to be governed by such norm; however, in the case of conflicts of constitutional provisions and Union law, such norms should be the most concrete. Therefore, such matters of utmost importance to the legal system must not be left for the discretion of organs which apply the law.

However, a broad understanding of the principle of primacy and the principle of sincere cooperation, as discussed above, would confer competences to decide about the binding force of constitutional norms in a manner alien to the Constitution: such competences would in fact derive from CJEU case-law. In the opinion of the Prime Minister, it would then be impossible to acknowledge that an organ of public authority acts on the basis of the law within the meaning of Article 7 of the Constitution.

It should further be stressed that, in the broad interpretation of the principle of primacy and the principle of sincere cooperation, an organ which applies the law would make determinations according to the criterion of "giving full effect to Union provisions." Furthermore, the limits of such competences would be unclear and imprecise. According to such broad interpretation of the principle of primacy and the principle of sincere cooperation, an organ would be obliged "to do everything necessary" to disapply national statutory provisions which could undermine the full effect of directly applicable provisions of Union law. The way that the norm which confers such competences is worded, in particular by reference to an ambiguous notion of "full effect" and in the absence of limits of such competences, implies that actions of an organ which applies the law would be most arbitrary and discretionary. Thus, the legal basis of the fundamental competence to decide about constitutional norms is generic and construed with imprecise notions which can have no single national definition.

Considering the foregoing, in the opinion of the Prime Minister, a broad interpretation of the principle of primacy and the principle of sincere cooperation does not fulfil the requirement that organs of public authority shall act within the limits of the law.

1.4. Incompatibility with Article 178(1) of the Constitution – violation of the principle that judges are bound only by the Constitution and by statutes

The broad interpretation of the principle of primacy and the principle of sincere cooperation established in the CJEU's case-law has a special effect for judges who decide about conflicts of norms of the Polish legal system and those of the Union legal system. In principle, a certain degree of discretionary judicial power is a legitimate and genuinely necessary tool of resolving disputes, subject to protection.[308] However, Article 178(1) of the Constitution of the Republic of Poland sets clear limits of such discretion: judges, within the exercise of their office, shall be subject only to the Constitution and statutes. This principle rules out the power of judges to review the compatibility of statutory provisions with the Constitution of the Republic of Poland, both *in genere* and *in concreto*. According to prevailing theory of constitutional law, judges have no competence to disapply statutory provisions even if they are in conflict with the Constitution of the Republic of Poland in the opinion of the judge.[309] In that case, the judge is obliged to follow the legal procedure and refer a legal question to the Constitutional Tribunal (Article 193 of the Constitution of the Republic of Poland). It should be stressed that, since the constitutional legislator does not allow judges to contest statutory provisions, such competences are in particular ruled out in relation to constitutional provisions. The opposite interpretation would paradoxically imply that judges are bound by statutory provisions more than they are bound by the provisions of the Constitution of the Republic of Poland. Such interpretation would be in conflict with the foundations of the system of hierarchy of sources of law in the Republic of Poland.

The foregoing is corroborated by the provisions of the Constitution which establish an exception from the principle that judges are bound by statutes: Article 91(2) and (3) of the Constitution expressly safeguard the primacy of international treaties ratified by consent given by statute and laws established by an international organisation, if so provided by the agreement establishing such organisation, ratified by the Republic of Poland, where such law is in conflict with a statute. Those provisions allow for the application of the principle of primacy of Union law and the principle of sincere cooperation of the European Union and the Member States and provide the constitutional basis for their application by organs which apply the law in the

[308] Judgment of the Constitutional Tribunal of 27 September 2012, SK 4/11, OTK-A 2012 No. 8, item 97.
[309] P. Wiliński, L. Karlik, commentary on Article 178, [in:] *Konstytucja RP. Tom II Komentarz do art. 87-243*, M.
Safjan, L. Bosek (eds.), Warsaw 2016, margin note 60.

Republic of Poland. However, the Constitution sets a clear limit of the exception from the principle enshrined in Article 178(1) of the Constitution, and the wording of Article 91(2) and (3) of the Constitution certainly does not allow for its broad interpretation. Evidently, there can be no doubt that the constitutional legislator wished to expressly rule out the binding force of primacy of Union law, including primary law, over constitutional provisions.

For those reasons, granting the courts the power (obligation) to disapply the Constitution violates Article 178(1) of the Constitution.

2. Pleas concerning the second paragraph of Article 19(1) TEU in conjunction with Article 4(3) TEU understood in such a way that in order to ensure effective legal protection, an organ which applies the law is authorised or obligated to apply legislative provisions in contravention of the Constitution, among others to apply a provision which has become null and void as incompatible with the Constitution under a ruling of the Constitutional Tribunal

The second plea presented above concerns the CJEU's interpretation of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU understood in such a way that the requirement for the Member States to ensure effective legal (judicial) protection under the second paragraph of Article 19(1) authorises or obligates competent organs to apply the law in contravention of the Constitution. As a special case of application of the law in contravention of the Constitution, the plea expressly refers to the application of legal provisions which have become null and void as incompatible with the Constitution under a ruling of the Constitutional Tribunal. A norm which authorises or obligates organs to apply the law in contravention of the Constitution undermines the principle of supreme legal effect (primacy) of the Constitution and is in conflict with the constitutional standard of transfer of competences to international organisations and with the principle of legality, the principle that the courts are only subject to the Constitution of the Republic of Poland and statutes, and the principle of legal certainty. The directive to disapply judgments of the Constitutional Tribunal, derived from the contested norm, undermines the universal application of such judgments enshrined expressly in the Constitution. In essence, this plea contests an interpretation of the aforementioned provisions which, due to the objective of ensuring effective legal (judicial) protection presumed to be superior to other constitutional values, allows for violations of the Constitution when applying the law. In the opinion of the Prime Minister, the constitutional problem raised in this plea centres on the

constitutionality of such an interpretation of the principle of effective legal (judicia) protection derived from Union law which would allow competent organs, including the courts, to apply legal provisions in contravention of the Constitution of the Republic of Poland, thus depreciating the position of the Constitution in the legal system. In an abstract sense, the problem concerns the power to disapply provisions of the Constitution of the Republic of Poland in order to give effect to the principle of effective legal (judicial) protection enshrined in the Treaties; it further concerns the constitutionality of the conferral of such competences on competent organs under Union law.

2.1. Incompatibility of Article 8(1) in conjunction with Article 8(2) and Article 91 of the Constitution of the Republic of Poland – violation of the principle of primacy of the Constitution of the Republic of Poland

The legal norm established in the CJEU's case-law under the second paragraph of Article 19(1) in conjunction with Articles 4(3) TEU, contested by the Prime Minister, obligates competent organs of the Member States to apply legal provisions in contravention of the Constitution. That directive materialises where an organ finds that the Member State does not fulfil the obligation of providing remedies sufficient to ensure effective legal protection in the fields covered by Union law under the second paragraph of Article 19(1) TEU. According to the contested norm, to give effect to the principle of effective legal (judicial) protection established in the Treaties, organs of the Member States are obliged to apply national legal provisions in such a way that the objective of that principle takes precedence over rules of the national legal system enshrined in the Constitution. In practice, in the light of the norm of Union law established by the CJEU, effective legal (judicial) protection must be ensured even in violation of constitutional norms of the Member State. In other words, according to the contested norm, the principles and the system established by the constitutional norms of the Member State set no formal or substantive limits of actions to be taken in order to ensure effective legal protection in the fields covered by Union law.

As mentioned above, the contested norm requires that legal provisions be applied in contravention of the Constitution of the Republic of Poland, thus empowering or obligating competent organs to decode legal norms based on legal provisions or classifications of factual circumstances according to such norms in violation of provisions of the Constitution of the Republic of Poland. That notion applies to a range of actions of organs which apply the law

which are in conflict with the principles and systemic solutions enshrined in the Constitution of the Republic of Poland. For instance, that would occur if an organ were to establish its jurisdiction, administer proceedings, or make a determination in a case on the basis of provisions which do not apply to such case or do so without any legal basis, which would violate the principle of legality enshrined in Article 7 of the Constitution of the Republic of Poland. The CJEU's case-law which has established the contested norm clearly implies that organs of State authority may apply a provision which has become null and void as incompatible with the Constitution under a ruling of the Constitutional Tribunal, and disapply existing statutory provisions and apply instead provisions revoked by the legislator, or take actions, without a clear legal basis in national legal provisions, which are in conflict with directly applicable provisions of the Constitution of the Republic of Poland.

The directive of the contested legal norm, in essence, undermines the primacy of the Constitution and its apex position in the hierarchy of sources of law. According to the CJEU's interpretation of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, the objective of giving effect to the principle of effective legal (judicial) protection enshrined in the Treaties may and should be attained even in violation of constitutional provisions. The principle of effective legal (judicial) protection so understood reflects the principle of primacy of Union law over national law, including constitutional provisions, established by the CJEU. That principle is "distorted" in that it results in interference with the constitutional order which is more far-reaching than in the original understanding of the principle of primacy. That problem is discussed in the section of the grounds which outlines the plea of violation of the first and second paragraph of Article 1 TEU in conjunction with Article 4(3) TEU. It should be noted at this point that where a national provision is found to be in conflict with Union law, the modified principle of primacy requires the application not of provisions of primary or secondary Union law but rather directives concerning the application of national law, established in the CJEU's law-making case-law, which are in conflict with the constitutional system of the Member State. The incompatibility of the principle of primacy of Union law so understood with Article 8(1) of the Constitution of the Republic of Poland is discussed in detail in the preceding point of the grounds for the pleas.

The directive that organs of authority should ensure effective legal (judicial) protection in violation of the Constitution, derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, is, in the opinion of the Prime Minister, manifestly in conflict with the principle enshrined in Article 8(1) of the Constitution of the Republic of

Poland. As follows from the aforementioned case-law of the Constitutional Tribunal, it has been established that "*Due to the primacy of the binding force of the Constitution, which arises from its Article 8(1), the Constitution enjoys precedence as to the binding force and application in the territory of the Republic of Poland. The Constitutional Tribunal holds that neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or adopt decisions which would be inconsistent with the Constitution of the Republic of Poland upon an international organisation or international institution.*"[310] **Norms of Union law, including those created by CJEU case-law (provided that the case-law does not transgress the limit of "law-making" activity), must not allow for disapplication or violation of provisions of the Constitution of the Republic of Poland.** Otherwise, the Constitution would be deprived of its immanent attribute of the supreme law in the Polish legal system. That would undermine the norm concerning conflicts of law, enshrined in Article 91(2) of the Constitution of the Republic of Poland, which provides that an international agreement ratified by prior consent given by statute shall take precedence over a statute if such statute cannot be reconciled with the agreement. Precedence over statutes does not imply and, in the light of Article 8(1) of the Constitution of the Republic of Poland, cannot imply that an international agreement takes precedence over the Constitution of the Republic of Poland. That rule also holds for the Treaties establishing and governing the functioning of the European Union (due to their legal nature and the procedure in which the Republic of Poland became bound by them), as well as legal norms derived from them in the CJEU's interpretations. In the context of the aforementioned provisions of the Constitution, a norm of Union law which authorises or requires the application of the law in contravention of the Constitution, undermines the constitutional principles of the established legal system. As mentioned above, such is the effect of the contested norm derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU.

As concerns the principle of primacy of the Constitution in the context of the principle of direct application of the Constitution, it should further be noted that **the principle of effective legal (judicial) protection under the second paragraph of Article 19(1) TEU should be applied taking into consideration the constitutional norms of the legal system of the Republic of Poland**. It must be stressed that the Constitution provides a number of guarantees of legal protection of the rights of individuals and their entities. The fundamental principles of the

[310] Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005 No. 5, item 49 and judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.

system of legal protection in the Republic of Poland, although not the only ones, are enshrined in Article 45(1) if the Constitution of the Republic of Poland, which establishes the right to a fair trial; Article 78 of the Constitution, which establishes the right to appeal judgments and decisions given in first instance; and Article 176(1), which provides that judicial proceedings shall have at least two instances. Therefore, the subjective scope of the contested norm covers matters pertinent to the Constitution. The requirement of simultaneous application of constitutional provisions and the contested norm, derived from Article 8(2) of the Constitution, implies that the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU must be interpreted with due respect for constitutional norms, that is, in a pro-constitutional interpretation. The principle of direct application of the Constitution cannot be deemed to be met if a legal norm directly requires the application of the law in contravention of the Constitution of the Republic of Poland, as in the case at hand.

Considering the foregoing, in the opinion of the Prime Minister, the contested norm of Union law which provides for the application of legal provisions by national organs in violation of the Constitution of the Republic of Poland is in conflict with Article 8(1) in conjunction with Article 8(2) and Article 91(2) of the Constitution of the Republic of Poland,

2.2. Incompatibility with Article 90(1) of the Constitution of the Republic of Poland – violation of the principle of conferral of competences on an international organisation

The Prime Minister submits that the CJEU's law-making interpretation of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU violates the principles of the conferral of competences of organs of State authority on an international organisation, including a supranational organisation such as the European Union, in relation to certain matters, derived from Article 90(1) of the Constitution. The CJEU is *ultra vires* and goes outside the scope of competences conferred by the Republic of Poland on the European Union under Article 90(1) of the Constitution, and establishes new competences of certain organs of State authority, in particular the courts, which are in conflict with the fundamental constitutional norms which enshrine the sovereignty of the nation and the State. **This plea relates to the formal aspect of the CJEU's competences to create the contested legal norm and the substantive aspect of the normative content derived in an interpretation from the aforementioned provisions of the TEU.**

By acceding to the European Union, the Republic of Poland conferred certain competences of organs of State authority on the Union. As the Constitutional Tribunal has held, "*The conferral of competences is the key consequence of the process of European integration based on constitutional provisions and express will of the Nation.*"[311] Such conferral of certain competences of sovereign authority of the Member States on the European Union is reflected in the principle of conferral enshrined in Article 5(2) TEU, which provides that the Union shall act only within the limits of the competences conferred upon it by the Member States in the Treaties to attain the objectives set out therein. Competences not conferred upon the Union in the Treaties remain with the Member States. By becoming bound by the Treaties which are the primary law of the European Union, the Republic accepted the scope of competences of the European Union, defined as exclusive or shared competences, as well as the Union's institutional framework, including the objective jurisdiction of its institutions. Competences of organs of State authority were conferred upon the European Union in relation to certain matters and were later modified, as required under Article 90(1) of the Constitution of the Republic of Poland, with the ratification of the Accession Treaty and the Lisbon Treaty by prior consent for the ratification given, respectively, in a national referendum (Article 90(3) of the Constitution of the Republic of Poland) and in a statute adopted by a qualified majority (Article 90(2) of the Constitution of the Republic of Poland). The scope of the conferral of competences is defined, on the one hand, by the Treaties and, on the other hand, by the constitutional benchmark which sets the limits of the transfer of certain competences of organs of authority upon an international organisation. The principles of the conferral of competences upon an international organisation were discussed above in relation to Article 90(1) of the Constitution as the benchmark of review of the contested legal norms. It should be noted at this point that the Constitutional Tribunal has expressly held that **the principle of retaining sovereignty in the process of European integration "*rules out the notion that the entity upon which competences have been conferred may independently extend their scope.*"[312]** The foregoing is of fundamental importance to the argumentation presented below to the effect that the limits of the conferral of competences have been transgressed.

According to the first paragraph of Article 19(1) TEU, the core competence of the CJEU is to ensure that in the interpretation and application of the Treaties the law is observed. The Treaty on the Functioning of the European Union enumerates the following specific responsibilities of

[311] Judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9, item 108.
[312] *Ibidem.*

the CJEU: to adjudicate on the Member States' infringements of obligations under the Treaties (Article 258-260 TFEU); to impose lump sums or penalty payments on the Member States (Article 260(2) and (3) TFEU); to review the legality of legislative acts of Union institutions (Article 263 TFEU); to adjudicate on failures of the Union institutions to act (Article 365 TFEU); and to give preliminary rulings (Article 267 TFEU). The CJEU's competences with regard to primary law and secondary law of the Union are different. Its competences with regard to primary law are to interpret the Treaties; its competences with regard to secondary law include also deciding about the applicability of acts of secondary law.[313]

An analysis of the scope of the CJEU's competences under the Treaties (TEU and TFEU) in the context of Article 90(1) of the Constitution and the principle of retention of sovereignty in the process of European integration suggests that such competences do not include "law-making competences" with regard both to Union law and the law of the Member States, understood as the competence to interpret the Treaties in such a way that would extend the scope of competences conferred upon the Union by the Member States and modify constitutionally established competences of organs of the Member States. There is no legal basis for the CJEU's law-making interpretations which in fact create new legal norms undermining the foundation of the constitutional system of a Member State, in particular by limiting its sovereignty. That occurs if a norm developed by the CJEU obligates organs of State authority to apply legal provisions in contravention of the Constitution, among others by ignoring the effect of judgments of the constitutional court, or to disapply the principle of pro-constitutional interpretation. According to legal theory, the CJEU is not competent to decide about the applicability of normative acts of the Member States. The CJEU may, at most, decide that a legal act is in conflict with Union law, which however does not remove that act from the legal system.[314] With no legitimacy to invalidate provisions established by competent organs of the Member States, the CJEU is not competent, in the opinion of the Prime Minister, to interpret the Treaties in such a way that obligates national organs to disapply the Constitution of the Republic of Poland because, by doing so, it would in fact assume the function of the constitutional legislator.

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[313] Cf. D. Kabat-Rudnicka, *Konstytucjonalizacja Unii Europejskiej a sądownictwo konstytucyjne. Wielopoziomowa współpraca czy rywalizacja?,* Warsaw 2016, p. 61.

[314] G.A. Bermann, "Marbury v. Madison and European Union 'Constitutional' Review", *The George Washington International Law Review* 2004, No. 36, p. 560; https://scholarship.law.columbia.edu/cgi/viewcontent.cgi?article=1899&context=faculty_scholarship [accessed on 11 March 2021].

The interpretation of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, given by the CJEU and contested by the Prime Minister, is evidently an act of "law-making competences," within the meaning discussed in the preceding paragraph, which has not been conferred on the CJEU. In its interpretation of the aforementioned provisions, rather than construing a norm established in the Treaty, the CJEU systematically develops and supplements it, going well outside the wording of the interpreted provision, conferring new competences upon itself, and interfering with the principle of respect for sovereignty of the State in the process of European integration. In the opinion of the Prime Minister, the literal wording of the second paragraph of Article 19(1) TEU leaves no doubt that that provision is addressed to the Member States. The subjective scope of that regulation is defined with reference to a group of subjects of international law, known as Member States by virtue of their accession to the Union. That provision obligates the Member States to provide remedies sufficient to ensure effective legal protection in the fields covered by Union law. It should be understood as a directive to establish a national institutional framework, both substantive and procedural, necessary to safeguard the protection of individuals' rights established in the Union legal system before national courts. The Member States alone have the competences and the resulting discretion to provide remedies, which protects the internal coherence of normative solutions established in their legal systems. It follows that the second paragraph of Article 19(1) TEU does not create a norm of substantive law which would define a specific standard of legal protection. That provision does not enjoy the attribute of direct application.[315] It is not a source of competences of the Union, either. In particular, its literal wording does not empower the CJEU to define remedies in the Member States either directly or indirectly (by delegating competences to organs which apply the law). The literal interpretation of the second paragraph of Article 19(1) TEU does not empower the CJEU to interfere with the form and scope of the constitutional competences of organs of authority of the Member States. Given that the Union is bound by the principle of conferral of competences and the resulting directive to attain the objectives of the Treaties only within the limits of the conferred competences (Article 5(2) TEU), in the opinion of the Prime Minister, a systemic and functional interpretation of the second paragraph of Article 19(1) TEU and provisions of the Treaties gives no grounds to extend the CJEU's

[315] Cf. B. Wegener, commentary on Article 19, [in:] *EUV-AEUV mit Europäischer Grundrechtecharta mit Kommentar*, C. Callies, M. Ruffert (eds.), Munchen 2016, pp. 308-330, cited after: M. Muszyński, dissenting opinion from the judgment of the Constitutional Tribunal of 21 April 2020, Kpt 1/20, OTK-A 2020 item 60.

competences to include the creation of norms which in essence violate certain systemic principles of the Republic of Poland.

In the opinion of the Prime Minister, the CJEU has appropriated (created for its own sake) the "competence to create competences" empowering it to confer upon organs of the Member States such competences which they have not and which violate the constitutional system, including the competence of constitutional review of the law. In the light of the contested norm, the CJEU has become the "dispenser" of competences which violate constitutional provisions, as discussed in detail in the other sections of the grounds for this plea. **A law-making interpretation which extends the scope of competences conferred on the Union, in this case specifically the competences of the CJEU, is in conflict with Article 90(1) of the Constitution of the Republic of Poland which provides solely for the conferral of clearly defined competences in relation to certain matters and in a way which does not violate the constitutional guarantees of sovereignty of the State, and which prohibits any extension of the scope of conferred competences outside the procedure provided for in the Constitution.** The conferral of certain competences of State authorities upon an international organisation should be considered from the perspective of interference with the principle of sovereignty of the State as it takes away a portion of State sovereignty and confers it upon an international organisation with all the consequences such as, for instance, the obligation to submit to sovereign acts taken by such organisation within the limits of the conferred competences. With a view to the principle of State sovereignty and primacy of the Constitution, even if one accepts, in contravention of the wording of Treaty provisions, the law-making interpretation of the Treaties established in the CJEU's case-law which extends the Union's competences, such practice accepted at Union level still would not automatically confer new competences on the Union or extend the scope of its existing competences because the conferral of competences in that case must follow the procedure enshrined in Article 90(1) of the Constitution of the Republic of Poland. A violation of this constitutional standard implies that the Union "appropriates" (usurps) competences of organs of State authority.

In the opinion of the Prime Minister, the CJEU's case-law invoked in the section of this application concerning the subject matter of the review, which has established the contested norm, is *ultra vires*. **The Republic of Poland has conferred no competences on the European Union such that the CJEU would be empowered to confer on national organs the power to disapply certain provisions of the Constitution, among others by acting in contravention of the Constitution. From the formal (procedural) perspective, the**

contested legal norm has been established outside of the limits of the conferral of competences on an international organisation under Article 90(1) of the Constitution of the Republic of Poland.

The legal norm under review is in conflict with Article 90(1) of the Constitutional of the Republic of Poland from the substantive perspective, as well, that is, with respect to the very content of the norm. It gives organs of the Member States the directive to apply the law in contravention of constitutional provision. To give effect to the principle of effective legal (judicial) protection, organs of State authority are obliged in particular to apply a provision which is no longer in force and effect because it is found to be unconstitutional in a judgment of the Constitutional Tribunal, and to disapply existing statutory provisions and to apply provisions revoked by the legislator, or to act without a clear legal basis established by law, which violates the principle of legality. That directive is conditional: such actions may only be taken if the organ identifies a violation of the second paragraph of Article 19(1) TEU. Thus, such action depends on the organ's assessment of the factual and legal circumstances of the case. Consequently, this mechanism should be deemed conferral of competences on organs of State authority. It should be stressed that organs may never have such competences because they are in conflict with the constitutional system of the Republic of Poland. Importantly, **the conferral of such competences upon organs of State authority which have no such competences under the Constitution by virtue of the contested legal norm is an inadmissible interference with an area of special manifestation of State sovereignty.** Such competences directly relate to the establishment of constitutional rules and review of their enforcement. Firstly, they directly undermine the principle of primacy of the Constitution and the principles of rule of law, which are the fundamental systemic principles of the Republic of Poland. In this case, the constitutional principles are undermined by introducing new norms whose effect is in fact stronger than that of constitutional provisions and which allow, where necessary to ensure effective legal protection, for violations of constitutional norms, that is, norms of the legal act which gives expression and embodies the sovereignty of the Nation and the Polish State, whose enforcement is a guarantee of their sovereignty. Secondly, such competences also undermine effective constitutional review of the law and thus undermine systemic solutions designed to ensure primacy of the applicability of the Constitution in law-making. In this context, one should invoke once again the position of the Constitutional Tribunal, expressed in an identical wording in the grounds of the judgments in K 18/04 and K

32/09, that "*neither Article 90(1) nor Article 91(3) may constitute the basis for conferring the competence to enact legal acts or adopt decisions which would be inconsistent with the Constitution of the Republic of Poland upon an international organisation or international institution. In particular,* ***the provisions indicated here may not be used to confer competences within the scope which would prevent the Republic of Poland from functioning as a sovereign and democratic state***."[316]

According to the principles derived by the Constitutional Tribunal from Article 90(1) of the Constitution, the fundamental competences in matters of State sovereignty may not be effectively conferred on an international organisation. Having no competences other than those conferred by the Member States, the Union may not dispose of any competences it has not. Similarly, the Union has no legitimacy to dispose of competences which it may not have due to the "safety valves of sovereignty" enshrined in Article 90(1) of the Constitution. To conclude, **the contested norm confers on organs of State authority of the Republic of Poland, in particular the courts, competences which the European Union has no competence to dispose of because they are outside the scope of effective conferral according to Article 90(1) of the Constitution of the Republic of Poland**. Consequently, the content of that norm is in conflict with the benchmark of review reconstructed under Article 90(1) of the Constitution of the Republic of Poland.

2.3. Incompatibility with Article 190(1) of the Constitution of the Republic of Poland – undermining the universal application of judgments of the Constitutional Tribunal

The legal norm contested in the second plea, established in the CJEU's case-law on the basis of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, provides that in order to give effect to the principle of effective legal (judicial) protection, competent organs, including the courts, should disapply legal amendments enacted by force of judgments of the constitutional court. This interpretation is exemplified by the CJEU's judgment of 2 March 2021, C-824/18, in a case initiated by questions referred for a preliminary ruling by the Supreme Administrative Court, which establishes the legal norm under review in the Polish legal system. Paragraph 1 of the operative part of the CJEU's judgment includes the following wording: "*to disapply the amendments* [of national provisions] *at issue, whether they are of a legislative or*

[316] Judgment of the Constitutional Tribunal of 11 May 2005, K 18/04, OTK-A 2005 No. 5, item 49 and judgment of the Constitutional Tribunal of 24 November 2010, K 32/09, OTK-A 2010 No. 9 item 108.

constitutional origin."[317] The grounds of the judgment leave no doubt that the notion of amendments of constitutional origin includes provisions which are no longer in force and effect because they are found to be unconstitutional by the Constitutional Tribunal. In the grounds of the judgment, the CJEU expressly ruled that the effect of the judgment of 25 March 2019, K 12/18, where the Constitutional Tribunal held among others that Article 44(1a) of the *Act of 12 May 2011 on the National Council of the Judiciary*[318] ("**Act on the National Council of the Judiciary**") is in conflict with Article 184 of the Constitution, should be disapplied. Among the matters then examined by the Constitutional Tribunal was the jurisdiction of the Supreme Administrative Court to examine appeals against resolutions of the National Council of the Judiciary in individual cases concerning appointment for the office of a judge of the Supreme Court. Such jurisdiction was derived from the contested Article 44(1a) of the Act on the National Council of the Judiciary. The Constitutional Tribunal held that neither the procedure for the examination of such appeals not the systemic characteristics of the Supreme Administrative Court predisposes the Court to examine cases concerning resolutions of the National Council of the Judiciary. According to the grounds of the judgment, "*…it is impossible to assume that the legislator presumes that the 'type' or 'nature' of a resolution of the National Council of the Judiciary referred to in Article 44(1) of the Act on the National Council of the Judiciary leaves it within the substantive jurisdiction of administrative courts if, in principle, such review is with the Supreme Court while the Supreme Administrative Court could examine appeals only in the case of the* lex specialis *under Article 44(1a) of the Act on the National Council of the Judiciary. As recalled above by the Tribunal, the very procedure for appealing against resolutions of the National Council of the Judiciary in individual cases has been established in implementation of the judgment of the Constitutional Tribunal, SK 57/06; however, it should not be implemented as a procedure within the jurisdiction of very different courts. It is a kind of hybrid procedure where it is not courts of different instances but courts of very different kinds that examine the same cases on the basis of the same provisions in relation to different individuals. If the legislator has left such cases in the jurisdiction of common courts, it follows that they do not concern review of the public administration which is the jurisdiction of administrative courts under the Constitution.*"[319] The Tribunal has found Article 44(1a) of the Act on the National Council of the Judiciary to be unconstitutional and expressly held that

[317] Judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 148.
[318] *Dziennik Ustaw* of 2021, item 269.
[319] Judgment of the Constitutional Tribunal of 25 March 2019, K 12/18, OTK-A 2019, item 17.

the effect of this determination is that the provision "*is no longer part of the existing legal system.*" The Tribunal also ruled that "*The revocation of Article 44(1a) of the Act on the National Council of the Judiciary in combination with the principle of the supreme legal effect of the Constitution (Article 8(1) of the Constitution) shall close all judicial proceedings pending under the provision which is no longer in force and effect.*"[320]

Declared by the Constitutional Tribunal to be unconstitutional, Article 44(1a) of the Act on the National Council of the Judiciary was revoked on the publication of the operative part of the judgment in *Dziennik Ustaw* on 1 April 2019. However, the CJEU in the aforementioned judgment of 2 March 2021 recognised the applicability of a legal norm whereby the Supreme Administrative Court should, after finding an infringement of the second paragraph of Article 19(1) TEU and acting in contravention of a judgment of the Constitutional Tribunal, reaffirm its earlier jurisdiction to examine appeals lodged before the legal amendments resulting from the judgment of the Constitutional Tribunal. This implies in practice that the effect of the judgment of the Constitutional Tribunal which found a hierarchical incompatibility of Article 44(1a) of the Act on the National Council of the Judiciary with the constitutional benchmark, which provides the legal basis of the jurisdiction of the Supreme Administrative Court to examine appeals against resolutions of the National Council of the Judiciary, should be ignored.

As follows from Article 190(3) of the Constitution, the effect of a judgment of the Constitutional Tribunal which finds incompatibility of a provision with a benchmark of review which has a higher position in the hierarchy of the system of law is that such provision is no longer in force and effect and must be removed. Such provision is revoked as of the date of coming into force of the judgment of the Constitutional Tribunal, that is, in principle, the date of publication of the judgment in the same official journal in which the provision subject to the Tribunal's judgment was published. The Tribunal may set a different date of such revocation in the operative part of its judgment according to Article 190(3) of the Constitution

The revocation of an unconstitutional provision implies that it shall no longer apply; hence, it would be unacceptable to apply such provision as the basis of determinations or other actions of organs of authority. In the aforementioned example of Article 44(1a) of the Act on the National Council of the Judiciary, its revocation under a judgment of the Constitutional Tribunal implies that the Supreme Administrative Court no longer has jurisdiction to examine

[320] *Ibidem.*

appeals against resolutions of the National Council of the Judiciary and, as such, it shall administer no proceedings in such cases or give rulings on the merits. However, according to the norm derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, the Supreme Administrative Court should apply a provision which is no longer in force and effect in the legal system following a judgment of the Constitutional Tribunal and enjoys no presumption of constitutionality and its unconstitutionality raises no doubt. The norm which so directs ignores the effect and universal application of judgments of the Constitutional Tribunal enshrined in the Constitution. **The special force of judgments of the Constitutional Tribunal guaranteed in the Constitution has effect for all organs of authority, including the Courts**. According to Z. Czeszejko-Sochacki, "*the universal application of judgments of the Constitutional Tribunal implies that* ***all other organs of public authority, including organs of the judiciary, are obliged to respect and apply such judgments.*****"**[321] **The legal norm established by the CJEU on the basis of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU which exempts organs which apply the law from the obligation to respect the universal application of judgments of the Constitutional Tribunal is in manifest conflict with Article 190(1) of the Constitution**.

2.4. Incompatibility with Article 7 of the Constitution of the Republic of Poland – violation of the principle of legality

The CJEU's interpretation of the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, which obligates organs of State authority to apply provisions which are no longer in force and effect due to a judgment of the Constitutional Tribunal, manifestly violates the principle of legality enshrined in Article 7 of the Constitution of the Republic of Poland. That norm in the CJEU's interpretation, which obligates national organs to act (adjudicate) by applying provisions which are no longer part of the Polish legal system, forces national organs to act without any applicable legal basis. As the Constitutional Tribunal has rightly held, "*Thus, organs must in the first place be familiar with the regulations which govern their powers and observe the resulting directives and prohibitions. It follows from the constitutional principle of legality that organs must not act without a legal basis or avoid exercising their powers if*

[321] Z. Czeszejko-Sochacki, "Orzeczenie Trybunału Konstytucyjnego: pojęcie, klasyfikacja, skutki prawne", *Państwo i Prawo* 2000, No. 12, p. 28.

binding legal norms impose upon them relevant obligations."[322] In the light of the Constitution, it would be unacceptable to consider the CJEU's judgment a binding legal norm (source of law) giving the appropriate legal basis for the court to adjudicate.

That interpretation confers upon the courts powers which are alien to the Polish constitution: the competence to examine the independence of the National Council of the Judiciary. According to the case-law of the Constitutional Tribunal, "*the competences of organs of public authority should be defined unambiguously and precisely in legal provisions, all actions of such organs should find a legal basis in such provisions and in the event of any interpretative doubts, no competences of organs of public authority may be presumed to exist.*"[323] An interpretation of provisions of primary law of the European Union given by the Court of Justice of the European Union cannot be considered an appropriate source of competences of Polish courts: the principle of legality enshrined in the Constitution of the Republic of Poland requires unambiguous and precise provisions of generally applicable law.

In its judgment of 2 March 2021, C-824/18, the CJEU obliged the Supreme Administrative Court to administer proceedings on the basis of provisions of the Act on the National Council of the Judiciary previously revoked by the Constitutional Tribunal, The CJEU in fact conferred upon the Supreme Administrative Court the competence to administer proceedings which would examine the independence of the National Council of the Judiciary. Both decisions concerning the jurisdiction of the Supreme Administrative Court directly violate the principle of legality enshrined in Article 7 of the Constitution of the Republic of Poland. As rightly noted by commentators, "*from Article 7 of the Constitution of the Republic of Poland follows the requirement that competences to act must be defined in acts of generally applicable law, no such competences must be presumed to exist, and they must not be exercised arbitrarily.*"[324] It should be noted that the competences conferred by the CJEU without a legal basis in the legislation also obligate the Supreme Administrative Court to arbitrarily assess the independence of another constitutional organ, that is, the National Council of the Judiciary.

[322] Judgment of the Constitutional Tribunal of 21 February 2001, P 12/00, OTK 2001 No. 3, item 47.
[323] Judgment of the Constitutional Tribunal of 14 June 2006, K 53/05, OTK-A 2006 No. 6, item 66.
[324] P. Tuleja, commentary on Article 7..., margin note 14.

2.5. Incompatibility with Article 178(1) of the Constitution of the Republic of Poland – violation of the principle that judges are subject only to the Constitution of the Republic of Poland and statutes

To the extent that it applies to national courts and authorises or obligates them to apply legal provisions in contravention of the Constitution of the Republic of Poland, he contested norm should also be considered in the context of the benchmark of review reconstructed under Article 178(1) of the Constitution of the Republic of Poland. Being bound by the Constitution of the Republic of Poland implies the obligation to apply constitutional provisions. No norm of Union law can waive that obligation. A detailed argumentation on this point is presented in the grounds for the plea concerning the incompatibility of the first and second paragraph of Article 1 in conjunction with Article 4(3) TEU with Article 178(1) of the Constitution of the Republic of Poland and it also holds in relation to the norm reconstructed under the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU which contains an element typical of the principle of primacy of Union law and provides that in order to give effect to the principle of effective legal protection, the courts are authorised or obligated to apply the law in contravention of the Constitution of the Republic of Poland.

2.6. Incompatibility with Article 2 of the Constitution of the Republic of Poland – violation of the principle of legal certainty

In the opinion of the Prime Minister, the contested norm must be confronted with the principle of legal certainty derived from the principle of a democratic State ruled by law (Article 2 of the Constitution of the Republic of Poland). That principle should be considered a key factor creating and consolidating trust of individuals in the State and the law. In essence, it gives legal safety to individuals, which implies that notwithstanding regular amendments of the law by the legislator, the content of enacted regulations enables individuals to predict actions of the State and plan their own actions accordingly. The Constitutional Tribunal has held that "*This substantiates individual freedom as individuals carry on their business according to their preferences and take responsibility for their decisions, as well as individual dignity owing to respect that the legal system has for individuals as autonomous, rational beings.*"[325]

[325] Judgment of the Constitutional Tribunal of 14 June 2000, P 3/00, OTK 2000 No. 5, item 138; so also in the judgment of the Constitutional Tribunal of 6 July 2004, P 14/03, OTK-A 2004 No. 7, item 6; judgment of the Constitutional Tribunal of 25 April 2001, K 13/01, OTK 2001 No. 4, item 81 and judgment of the Constitutional Tribunal of 12 May 2015, P 46/13, OTK-A 2015 No. 5, item 62.

In the opinion of the Prime Minister, the hierarchical system of generally applicable law based on the principle of primacy of the Constitution is one of the guarantees of legal safety for individuals. On the one hand, it opens up space for the application of the norm of conflict of law *lex superior derogat legi inferiori*, taking into account the role of the Constitutional Tribunal; on the other hand, it ensures respect for the rights and freedoms enshrined in the Constitution. However, the contested norm of Union law usurps primacy of application (and, consequently, primacy of binding force) over constitutional provisions, destabilises (upsets) the hierarchy of sources of law, and directly undermines legal safety and the principle of legal certainty. It creates uncertainty in minds of individuals as to the binding force of certain provisions (norms) and the terms of their application by competent organs. **In the opinion of the Prime Minister, there can be no legal certainty and no legal safety where a provision of a rank inferior to the Constitution modifies the principles of application and binding force of the law derived from the Constitution without the appropriate constitutional bases derived, in the case of Union law, from the conferral of competences under Article 90(1) of the Constitution of the Republic of Poland.**

In this context, it should be noted that participants of the legal system have the legitimate right to expect that a provision found to be unconstitutional and revoked in a judgment of the Constitutional Tribunal is no longer in force and effect and, as such, provides no basis for determinations of organs which apply the law. The legal norm contested in this application deprives participants of the legal system of that certainty by allowing organs which apply the law to continue applying an unconstitutional provision revoked in a judgment of the Constitutional Tribunal depending on their own assessment of factual and legal circumstances. Legal uncertainty arises also because, under the contested norm of Union law, the objective of ensuring effective legal (judicial) protection requires disapplication of pro-constitutional interpretation of legal provisions and prevents autonomous application of constitutional provisions which should so apply. This opens the door, for instance, for organs which apply the law to challenge the systemic position and competences of constitutional organs of the State, contest the effective appointment of individuals to an office under autonomously applicable constitutional provisions, and challenge the legal status of individuals so appointed. The latter case clearly exemplifies legal uncertainty caused by the contested norm derived from the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU. Individuals who are considering a professional career involving a specific office will, when making important personal decisions, have no legal certainty that their appointment, which fulfils the requirements

of the Constitution and statutes, will not be contested under the CJEU's law-making interpretation of Union law. However, in the case at hand, legal uncertainty is more far-reaching and affects individuals whose situation will be decided by individuals appointed to an office in the aforementioned circumstances.

In the case of the norm derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 4(3) TEU, the principle of legal certainty is violated not only by the systemic effect of its application, as referred to above, but also by the imprecision and ambiguity of the norm. It should be noted that, under the CJEU's interpretation, the power or obligation to apply legal provisions in contravention with the Constitution is linked to the requirement of ensuring effective legal (judicial) protection. However, provisions of Union law define no specific, concrete remedies to be provided for legal protection to be considered effective: as mentioned above, such competences and the related regulatory discretion are with the Member States. In this context, it should be noted that, in practice, remedies to be provided to ensure legal protection are defined in the CJEU's case-law. By interpreting the Treaties, the CJEU has identified cases where the level of legal (judicial) protection is insufficient, thus, in fact, providing the contested norm. However, the contested legal norm so defined is not sufficiently precise or unambiguous. For instance, in the aforementioned judgment of the CJEU of 2 March 2021, C-824/18, the Court of Justice described circumstances which require the application of legal provisions in contravention of the Constitution in imprecise wording, opening the door for national organs to make arbitrary decisions. According to the legal norm established by the CJEU, such circumstances include among others legal amendments which "*…are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.*" That wording is generic and imprecise: among other things, it does not clarify who are the subjects of the law in whose minds legitimate doubts may arise as to judges, and it deploys the notion of "external factors" which has a very broad meaning and undefined boundaries. In the case under consideration, due to the lack of precision of the norm, different formations of the Supreme Administrative Courts (and different formations of other courts) which apply that norm may reach completely different factual and

legal conclusions in similar cases and, consequently, reaffirm or refuse to reaffirm their jurisdiction to examine appeals against resolutions of the National Council of the Judiciary. As a result, individuals will be unable to carry on their affairs free of risk under the contested legal norm. For the aforementioned reasons, the CJEU's interpretation of the second paragraph of Article 19(1) in conjunction with Article 2 TEU is in conflict with the principle of legal certainty enshrined in Article 2 of the Constitution of the Republic of Poland.

3. Pleas concerning the second paragraph of Article 19(1) in conjunction with Article 2 TEU understood as authorising the court to review the independence of judges appointed by the President of the Republic of Poland and review resolutions of the National Council of the Judiciary concerning a motion to the President of the Republic of Poland for the appointment of a judge

An interpretation of the second paragraph of Article 19(1) in conjunction with Article 2 TEU which reconstructs (decodes) a norm authorising the court to review the independence of judges appointed by the President of the Republic of Poland and review resolutions of the National Council of the Judiciary concerning a motion to the President of the Republic of Poland for the appointment of a judge raises a constitutional problem under Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) and under Article 144(3)(17) and Article 186(1) of the Constitution of the Republic of Poland by conferring upon the court, by way of the CJEU's case-law, a power alien to the Constitution which interferes with the competences of the National Council of the Judiciary and the President of the Republic of Poland. The Constitution expressly names the organs which participate in the creation (personal appointment) of the judiciary and provides for no additional review or assessment of the independence of judges appointed by the President of the Republic of Poland on motion of the National Council of the Judiciary.

3.1. Incompatibility with Article 144(3)(17) of the Constitution of the Republic of Poland

As rightly noted by commentators, Union law makes no reference whatsoever to the formal procedure for official acts given by the President of the Republic of Poland. That competence is an internal aspect of the system of supreme organs of State authority of Poland as a European Union Member State. The Union has no competence in this area in accordance with the

principle of respect for the national identity of the Member States and the related fundamental political and constitutional structures under Article 4(2) TEU.[326]

It should be noted that according both to commentators and case-law, the only limits of the exercise of the prerogatives of the President of the Republic of Poland are set in the Constitution.[327] The only limit for official acts given by the President enshrined in the Constitution is countersignature of the Prime Minister under Article 144(2) of the Constitution of the Republic of Poland.[328] However, the interpretation of the second paragraph of Article 19(1) in conjunction with Article 2 TEU confers on every court of the Republic of Poland a competence alien to the Polish Constitution: **the power of indirect review and determination of the effect of official acts of the President of the Republic of Poland** under Article 144(3) of the Constitution of the Republic of Poland. According to the operative part of the CJEU's judgment of 2 March 2021, C-824/18, the Supreme Administrative Court is obliged to determine whether "*those provisions* [of the Act on the National Council of the Judiciary] *are capable of giving rise to legitimate doubts, in the minds of subjects of the law, as to the imperviousness of the judges thus appointed, by the President of the Republic, on the basis of the decisions of the KRS, to external factors, in particular, to the direct or indirect influence of the legislature and the executive, and as to their neutrality with respect to the interests before them and, thus, may lead to those judges not being seen to be independent or impartial with the consequence of prejudicing the trust which justice in a democratic society governed by the rule of law must inspire in subjects of the law.*" Thus, one of the courts (in fact, every court) may, if it has reasonable doubts as to appointed judges, **indirectly contest one of the fundamental official acts of the President, the act of appointment of judges, by assessing the independence and impartiality of judges so appointed**. Such competence interferes with the discretionary competences of the President of the Republic of Poland established by the constitutional legislator. The Constitutional Tribunal has held: "*if according the Constitution and the case-law of the Tribunal* ***the competence of the President to appoint judges may not be limited by statutes, it must not be limited by acts of application of the law, either***."[329] The Supreme Court shares this opinion: "*In the light of applicable provisions, the competence of the President of the Republic of Poland to appoint judges leaves no doubt that* ***it is the only organ***

[326] K. Kozłowski, commentary on Article 144, [in:] *Konstytucja RP. Tom Ii. Komentarz do art. 87-243,* M. Safjan, L. Bosek (eds.), Warsaw 2016, Legalis, margin note 7.
[327] Judgment of the Constitutional Tribunal of 24 October 2017, K 3/17, OTK-A 2017, item 68.
[328] P. Czamy, commentary on Article 144, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz,* P. Tuleja (ed.), Warsaw 2019, LEX Omega.
[329] Judgment of the Constitutional Tribunal of 4 March 2020, P 22/19, OTK-A 2020, item 31.

empowered to appoint those who administer justice in Poland*. That competence of the President derives directly from the Constitution and the won presidential election as an emanation of the will of the nation expressed directly, under Article 4(2) of the Constitution.* ***It would be inadmissible for the court and judges to interfere with this competence. Every organ acts within the powers/competences conferred upon it****.*"[330]

It should be stressed that the absence of any limits on official acts given by the President of the Republic of Poland, other than countersignature, is one of the fundamental determinants of the systemic position of the Head of State in the system of government in Poland. Any interference, for instance opening up additional space for review of the exercise of the prerogatives by the President of the Republic of Poland, would be in conflict with the Constitution and undermine the model of the system of government established by the constitutional legislator where the President of the Republic of Poland is elected in a direct and universal election, which legitimises the President's democratic mandate and systemic position. The Constitutional Tribunal definitively resolved the matter in its judgment U 2/20: "*According to Article 144(3)(17) of the Constitution, the appointment of judges is a prerogative of the President. Article 179 and Article 144(3)(17) govern the competences and the fundamental procedures for the appointment of judges in the Republic of Poland. They* ***give the President the exclusive competence to decide about judicial appointments free from review by any organ of the State*** *...* ***excluding the participation of other organs in judicial appointments and pre-appointment procedures in the interim between the adoption of a resolution by the National Council of the Judiciary and the official act given by the President. As a result of the constitutional prohibition, the Polish legislation provides no procedures for contesting or reviewing acts given by the President in the exercise of the President's prerogatives. The Constitution not only provides no such procedure but also allows for no such procedure to be established by statute or any act inferior in the hierarchy of the constitutional system of sources of law.*"[331]

It should further be noted that the existing prerogatives of the President of the Republic of Poland were intentionally designed by the constitutional legislator. In view of the extension of the catalogue of official acts which require no countersignature compared with the Small Constitution of 1992,[332] **it follows that the constitutional legislator wished to strengthen the position of the President of the Republic of Poland** by expanding the prerogatives; however,

[330] Resolution of the Supreme Court of 4 February 2020, II DO 1/20, LEX No. 2788504.
[331] Judgment of the Constitutional Tribunal of 20 April 2020, U 2/20, OTK-A 2020, item 61.
[332] W. Skrzydło, commentary on Article 144…

the interpretation of the second paragraph of Article 19(1) in conjunction with Article 2 TUE has the opposite effect. Any non-constitutional review of the exercise of presidential prerogatives raises serious doubts from the perspective of procedures for such review. The President of the Republic of Poland exercises his constitutional powers and gives official acts enumerated in Article 144(3) of the Constitution without having to give any grounds for his decisions. It seems that any substantive review of such acts which would not be arbitrary would be impossible in practice.

3.2. Incompatibility with Article 186(1) of the Constitution of the Republic of Poland

Article 186(1) of the Constitution defines the fundamental responsibilities and mission of the National Council of the Judiciary: to safeguard the independence of courts and judges. The National Council of the Judiciary is the only specialised organ empowered under the Constitution of the Republic of Poland to monitor the Polish legal system so as to ensure the appropriate legal standards safeguarding the proper functioning of the Polish judiciary. The key role of the National Council of the Judiciary in protecting the independence of courts and judges is reflected by the competence conferred on that organ by the constitutional legislator in Article 186(2) of the Constitution, that is, the competence to present motions to the Constitutional Tribunal requesting constitutional review of normative acts to the extent that they concern the independence of courts and judges.

An interpretation of the second paragraph of Article 19(1) in conjunction with Article 2 TEU which authorises the courts to review the independence not only of other judges but also members of the National Council of the Judiciary undermines the systemic position of the National Council of the Judiciary enshrined in Article 186(1) of the Constitution of the Republic of Poland. The power conferred on the Supreme Administrative Court (and the other courts) to review the independence of other judges under a norm (normative provision) established in an interpretation of primary law of the European Union in fact transfers the constitutional competences of the National Council of the Judiciary to another court. **In the opinion of the Prime Minister, the transfer of such review outside of the National Council of the Judiciary is in conflict with the constitutional systemic position of the National Council of the Judiciary and establishes an additional mechanism (centre) of review of judges alien to the Constitution of the Republic of Poland.** As the Constitutional Tribunal has held, "*if the Constitution does not provide for such additional review,* ***it is not possible to derive from the***

Constitution, by any means of interpretation known to the Tribunal, that judges may be reviewed in the process of application of the law, that is, in individual specific acts. One can imagine no criminal, civil or administrative procedure for the court, a specific judicial formation, to review the appointment of other judges. Neither the Constitution nor statutes confer such powers."[333]

It should further be noted that in order to ensure that the National Council of the Judiciary duly performs its functions, it must be independent.[334] Although the Constitution of the Republic of Poland does not expressly provide for independence of the National Council of the Judiciary, that status can be derived from the protection afforded to the members of the National Council of the Judiciary.[335] The Supreme Court has held that "*Such systemic position of the National Council of the Judiciary in the judicial appointment procedure* ***(the power of the Council to present motions to the President of the Republic of Poland requesting appointment to the office of a judge is a direct one in that the Council's decisions are not subject to review by other organs)*** *was, from the very beginning, a clear intention of the constitutional legislator, corroborated by an analysis of the legislative process drafting the Constitution from 1997*."[336] **Any review of the independence of judges sitting on a constitutional organ of the State by a common, administrative or military court would be in conflict with the constitutional provisions enshrining the systemic position of the National Council of the Judiciary.**

The Supreme Court has rightly ruled in the resolution of the full formation of the Disciplinary Chamber of 10 April 2019, II DSI 54/18, as regards the appointment of judges of the Supreme Court and the standards of the right to a fair trial in the appointment procedure. According to the facts of the case considered in the resolution, when examining a cassation complaint lodged by a legal counsel, an adjudicating formation of the Supreme Court had doubts concerning the legitimacy of some of the members of the formation, who could be considered unauthorised to adjudicate within the meaning of Article 439(1)(2) of the Act of 6 June 1997 – Code of Criminal Proceedings.[337] **The Supreme Court in a resolution adopted by the full formation of the Disciplinary Chamber ruled that the judicial appointment procedure laid down in the Act on the National Council of the Judiciary fulfils all constitutional standards and meets the requirements of the right to a fair trial.** The Supreme Court held that the provisions meet the

[333] Judgment of the Constitutional Tribunal of 4 March 2020, P 22/19, OTK-A 2020, item 31.
[334] W. Brzozowski, *Niezależność…*, p. 65.
[335] *Ibidem.*
[336] Judgment of the Supreme Court of 6 September 2019, I NO 98/19, LEX No. 3012332.
[337] *Dziennik Ustaw* of 2020, item 30.

international standard under Article 6(1) ECHR from which the right to have one's case examined by an independent and impartial court is derived.

The Supreme Court rightly held that if a competent organ (i.e., the Constitutional Tribunal) has definitively determined the status of the National Council of the Judiciary and its legitimacy as constitutional, any opinions of commentators and media reports are, at most, a commentary or a gloss **but cannot interfere in any way with the status of a final and binding judgment of the Constitutional Tribunal**. As the Supreme Court rightly found, the case-law and activity of constitutional organs may be subject to criticism of researchers and the media but that "*does not imply that such judgment can be deprecated or invalidated to any extent.*"[338] **Similarly, such criticism and media reports provide no autonomous basis for review of the independence of judges sitting on the National Council of the Judiciary as a constitutional organ.**

In its judgment of 25 March 2019, K 12/18, the Constitutional Tribunal held that the appointment procedure of members of the National Council of the Judiciary **meets the constitutional requirements and that the membership of the National Council of the Judiciary whose vast majority are representatives of judges ensures independence and efficient and effective functioning of that organ**. As the Tribunal held, "*the fact of being a representative of the legal profession derives not from the appointment procedure of members of the National Council of the Judiciary but rather from the fact that the vast majority of members appointed to the National Council of the Judiciary are judges, as guaranteed by the Constitution.*" Consequently, **both the appointment procedure of members of the National Council of the Judiciary and its status have been definitively declared to conform to the Constitution of the Republic of Poland by the competent constitutional body, the Constitutional Tribunal**.

3.3. Incompatibility with Article 8(1) in conjunction with Article 8(2), Article 90(1) and Article 91(2) of the Constitution of the Republic of Poland

In the opinion of the Prime Minister, the legal norm derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 2 TEU, contested in the third plea, is in conflict with the principle of primacy of the Constitution, considered here in the context of the

[338] Resolution of the Supreme Court of 10 April 2019, II DSI 54/18, LEX No. 2642153.

constitutional principles of direct application of the Constitution, the conferral of competences of organs of State authority on an international organisation or international institution in relation to certain matters, and primacy of certain international agreements over statutes.

As was discussed in detail in the section concerning the plea of incompatibility of the contested norm with Article 144(3)(17) of the Constitution of the Republic of Poland, the Constitution provides no procedure for common, administrative or military courts to undertake formal or substantive review of the exercise of the prerogative of the President of the Republic of Poland to appoint judges and, more generally, any other prerogatives. The foregoing follows from the constitutional essence of prerogatives as an instance of the powers of the President of the Republic of Poland as the supreme representative of the State. The Constitutional Tribunal has considered the constitutional problem of the prerogative of the President of the Republic of Poland to appoint judges and held that "***The procedure for the exercise of competences of the President of the Republic of Poland may be specified by statute, however, subject to the principle of primacy of the Constitution enshrined in Article 8(1) of the Constitution*** *(cf. judgment of the Constitutional Tribunal of 5 June 2012, K 18/09, OTK ZU No. 6/A/2012, item 63).* ***However, such competences must not be modified and their review must not be established in any act inferior to the Constitution***."[339] An act of a rank inferior to the Constitution which provides for the competence of courts to review specific aspects of the exercise of presidential prerogatives, including fulfilment of substantive requirements for a specific official act (such as, for instance, integrity of character of a person appointed to the position of a judge according to Article 61(1)(2) of the Act of 27 July 2001 – Law on the Common Court System[340]), not only has no basis in the Constitution but also is in direct conflict with constitutional provisions. It follows from the instantiation of this general rule in relation to the official act of judicial appointment that judicial review of the independence of judges appointed by the President of the Republic of Poland would indirectly limit the scope of presidential powers defined by the prerogatives conferred on the Head of State in violation of Article 144(3)(17) of the Constitution of the Republic of Poland.

The contested legal norm authorises the court to review resolutions of the National Council of the Judiciary concerning a motion to the President of the Republic of Poland for the appointment of a judge. According to the foregoing argumentation, such norm is, in the opinion

[339] Judgment of the Constitutional Tribunal of 26 June 2019, K 8/17, OTK-A 2019, item 34.
[340] *Dziennik Ustaw* of 2021, item 2072.

of the Prime Minister, in conflict with Article 186(1) of the Constitution of the Republic of Poland. Provisions of Union law, which modify the principles of judicial appointment enshrined in the Constitution by authorising the courts to undertake substantive review of determinations contained in resolutions of the National Council of the Judiciary concerning the appointment of individuals to the office of a judge interfere with the constitutional competences of the National Council of the Judiciary. Without reiterating what was raised in the section of the grounds for this application regarding the incompatibility of the contested norm with Article 186(1) of the Constitution, one should invoke the characterisation of the position of the National Council of the Judiciary in the judicial appointment procedure provided in the judgment of the Supreme Court of 6 September 2019, I NO 98/19: "*…as regards the exclusive competence to present candidates for judges to the Head of State, the position of the National Council of the Judiciary is unique in that* ***the constitutional legislator established no 'intermediary links' between the President of the Republic of Poland and the National Council of the Judiciary*** *in that motions concerning judicial appointments are presented without any additional normative 'filter' provided in the Constitution.*"[341]

A legal norm which modifies the essence of constitutional competences of the President of the Republic of Poland and limits the constitutional competences of the National Council of the Judiciary is not only in conflict with the aforementioned constitutional benchmarks but also presumes the admissibility of such modifications of the constitutional mechanism and instruments on grounds of precedence of Union law over the constitutions of the Member States and on grounds of the requirement of ensuring effective legal (judicial) protection. That presumption clearly and directly violates the principle of primacy of the Constitution. It undermines the supreme legal effect of the Constitution over all acts of generally applicable law which constitute a legal system comprised of multiple elements (as a consequence of accession to the European Union). The principle of primacy of the Constitution also holds in relation to that pillar of the legal system which includes primary and secondary law of the European Union. Thus, the Constitution retains its supreme legal effect also in relation to the TEU as an act of primary law of the European Union, which from the perspective of the national legal system should be considered primarily an international agreement. There can be no doubt that according to the rules of conflict of law enshrined in Article 91(2) of the Constitution of the Republic of Poland, in the case of any conflict, an international agreement ratified by

[341] Judgment of the Supreme Court of 6 September 2019, I NO 98/19, LEX No. 3012332.

consent given by statute (or in a national referendum) takes precedence over statutes but not over the Constitution.

In no case may normative principles derived from an international agreement, in particular principles established in an interpretation given by an international institution acting *ultra vires* or interpreted in such a way that their effect is contrary to the actual provisions of the Treaties, contravene constitutional provisions. Any interference of an international organisation or international institution with the competences of State organs in relation to certain matters, including constitutional matters, may be constitutionally admissible but, as raised many times above, do not concern all matters. Article 90(1) of the Constitution of the Republic of Poland which sets the limits of the conferral of competences of State organs on the European Union in relation to certain matters gives no grounds for the CJEU to create, by means of law-making interpretation of the Treaties, any legal norms which would modify systemic solutions concerning the judiciary enshrined in the Constitution of the Republic of Poland. It should be stressed that even if such conferral of competences were hypothetically allowed by the constitutional legislator, still no international agreement ratified by the Republic of Poland provides for such conferral of competences. The organisation of justice and the status of judges and the judicial appointment procedure are not competences conferred on the European Union under the Treaties. The CJEU has confirmed that to a certain extent while making a reservation which allows the Court to give a broad, and thus inadmissible, interpretation of the scope of competences conferred on the European Union, as reflected among others in the following wording of the grounds of the judgment of 2 March 2021: "*…although the organisation of justice in the Member States falls within the competence of those Member States, the fact remains that, when exercising that competence, the Member States are required to comply with their obligations deriving from EU law (judgments of 24 June 2019, Commission v Poland (Independence of the Supreme Court), C-619/18, EU:C:2019:531, paragraph 52 and the case-law cited, and of 26 March 2020, Miasto Łowicz and Prokurator Generalny, C-558/18 and C-563/18, EU:C:2020:234, paragraph 36 and the case-law cited).*"[342]

The norm contested in the third plea of this application consequently also violates and undermines the principle of direct application of the Constitution whose normative content, which defines the competences and mutual relations between the President and the National

[342] Judgment of the CJEU of 2 March 2021, C-824/18, A.B. and others, ECLI:EU:C:2021:153, paragraph 148.

Council of the Judiciary in the judicial appointment procedure, falls within the scope of application of that principle (the Constitution does not expressly provide for such exemption, hence, Article 8(2) *in fine* of the Constitution does not apply). Interference with the constitutionally defined judicial appointment procedure, which is the essence of the contested norm, would thus reduce (limit) the scope of application of the principle of direct application of the Constitution to the extent not provided for in the Constitution.

In conclusion, the legal norm derived by the CJEU from the second paragraph of Article 19(1) in conjunction with Article 2 TEU, which is in conflict with constitutional provisions and presumes primacy of its application or binding force over the Constitution of the Republic of Poland, violates the principle of primacy of the Constitution enshrined in Article 8(1) of the Constitution of the Republic of Poland considered in the context of the aforementioned constitutional provisions which define the mutual relations between national law and Union law. *Per analogiam*, the detailed argumentation presented in the grounds for the first and second plea in this application as concerns violation of the principle of primacy of the Constitution, the principle of direct application of the Constitution, and the principle of the conferral of competences of organs of State authority on the European Union in relation to certain matters and primacy of international agreements ratified by consent given by statute over statutes, holds and will not be reiterated here due to the lengthiness of this application.

Further to the foregoing, I move for the pleas presented in this application to be granted.

PRIME MINISTER

MATEUSZ MORAWIECKI