Czesław Kłak

Application of the Attorney General for the examination the compliance of Article 267 of the Treaty on the Functioning of the European Union with the Constitution of the Republic of Poland of 2 April 1997

Analysis of the applicant's arguments and the submission of the Minister of Foreign Affairs

By its letter of 4 October 2018 in Case No. PK VIII TK 58.2018, K. 7/18, the Attorney General applied for the declaration of non-compliance of Article 267 of the Treaty on the Functioning on the European Union,[199] to the extent that it allows the court to ask questions referred for preliminary rulings pertaining to the interpretation of the Treaties or validity and interpretation of acts adopted by institutions, bodies or organisational units of the European Union in matters concerning the system, shape and organisation of the judiciary and the proceedings before the judicial authorities of the EU Member State – with Articles 2, 7, 8(1) and 10 read in conjunction with Articles 95(1), 90(1), 173 and 176(2) of the Constitution of the Republic of Poland.[200]

The Attorney General's submission of 4 October 2018 states that the Attorney General can see a potential non-compliance of Article 267 of the Treaty on the Functioning on the European Union to the extent that it allows the court to ask questions referred for preliminary rulings pertaining to the interpretation of Treaties or to the validity and interpretation of acts adopted by institutions, bodies or organisational units of the European Union and the proceedings before the judicial authorities of the EU Member State – with Articles 2, 7, 8(1) and 10 read in conjunction with Article 95(1) of the Polish Constitution, as well as Articles 90(1), 173 and 176(2) of the Constitution of the Republic of Poland.

On 15 October 2018 the Constitutional Court received a position of the Minister of Foreign Affairs (dated 12 October 2018) relating to, among

199 Journal of Laws [Dz.U] of 2004, No. 90, item 864/30 as amended; consolidated text: Journal of Laws [Dz.U.], EU 2016 C 202, p. 13).

200 Journal of Laws [Dz.U.] of 1997, No. 78, item 483 as amended.

others, the application on the declaration of non-compliance of Article 267 TFEU (point 2 of the Attorney General's application) with the Constitution.

I share the view (p. 3 of the statement of reasons to the submission of the Attorney General dated 4 October 2018) that Article 267 of the TFEU is a provision of an international agreement binding on Poland, and therefore, under Article 188(1) of the Constitution of the Republic of Poland, it may be made subject to examination within proceedings before the Constitutional Court. The constitutional provision in question states explicitly that the Court rules on cases in the matter of the constitutionality of acts and international agreements. Since the TFEU is an international agreement, the formal criterion that must be satisfied to examine its constitutionality with the Constitution has been satisfied. At the same time, the constitutional provision in question does not envisage that the examination of the compliance of international agreements with the Constitution is excluded for a specific type of such agreements. The provision in question does not provide for any exclusions, which is why it is possible to examine under the provision the constitutionality of any legal act which satisfies the criterion of being considered a 'statute' and an 'international agreement'. Once this criteria has been met, an application (under Article 191 of the Constitution) or a question of law (under Article 193 of the Constitution) may be submitted with regards to the constitutionality of the international agreement. The same opportunity exists under the procedure of constitutional appeal referred to in Article 79(1) of the Constitution. As the Constitutional Court pointed out in its judgment of 18 December 2007 in Case SK 54/05,[201] a normative act within the meaning of Article 79(1) of the Constitution may be also an international agreement. In that case, the applicant questioned the constitutionality of Protocol No. 4 to the Europe Agreement establishing an association between the Republic of Poland and the European Communities and their Member State, done in Brussels on 16 December 1991.

Taking into account the above comments, it should be assumed that the Attorney General, pursuant to Article 191(1)(1) in conjunction with Article 188(1) of the Constitution, was competent to submit the application for the examination of compliance of Article 267 of the TFEU with the Constitution, as the provision in question is included in an international agreement referred to in Article 188(1) of the Constitution.

201 Publication OTK A 2007, No. 11 item 158.

A view that it is impossible to formally request the assessment and interpretation of legal regulations enacted by national legislative bodies by asking a question referred for a preliminary ruling should be also accepted (p. 5 of the statement of reasons to the Attorney General's application of 4 October 2018). Pursuant to Article 267 of the TFEU, the European Union Court of Justice (EUCJ) issues preliminary rulings on the interpretation of the Treaties or on the validity and interpretation of acts adopted by institutions, bodies or organisational units of the EU, and therefore the EUCJ has no competence to issue preliminary rulings on the compliance of national regulations with the Treaties; indeed, it is not competent to assess their compliance with the constitution of a Member State. The EUCJ neither issues any preliminary ruling on the interpretation of national regulations nor decides on their compliance with EU law, which is clear from Article 267 of the TFEU. There should be no doubt that when interpreting the Treaties or deciding on the validity and interpretation of acts adopted by institutions, bodies and organisational units of the European Union, the EUCJ cannot go beyond its competence conferred upon it by the Treaties, but it also cannot enter the matters which are beyond the competence of the European Union as an international organisation. If a matter is *ultra vires* for the EU, it cannot be the subject of rulings issued by the EUCJ. Any interpretation to the contrary would be contrary to Article 5(1) and (2) and Article 4(1) of the Treaty of the European Union. As a result, the EUCJ cannot impose on a Member State by its preliminary ruling any specific interpretation of the Member State's national regulations and it cannot rule on the applicability of such regulations. It also cannot eliminate them from the national legal order. From the perspective of national law, and from the constitutional point of view in particular, the question should be asked whether it is possible for the court to ask a question referred for a preliminary ruling which would essentially (directly or indirectly) lead to the review by the EUCJ of national law norms or to obtaining from the EUCJ an interpretation of regulations on the matter which, under Article 4(1) of the Treaty on the European Union, is within the jurisdiction of the Member State. This is what the application of the Attorney General in his letter of 4 October 2018 relates to.

The Attorney General's submission of 4 October 2018 does not challenge at any point the right of Polish courts to ask questions referred for preliminary rulings (see in particular page 7 of the statement of reasons to the submission of the Attorney General of 4 October 2018). It may be concluded based on the point III.1 of the statement of reasons to the Attorney General's

submission of 4 October 2018 (p. 11) that the Attorney General found that the interpretation of Article 267 of the TFEU concerning the scope of rights enjoyed by a court of an EU Member State, according to which a national court may ask questions referred for a preliminary ruling pertaining to the interpretation of the Treaties or validity and interpretation of acts adopted by institutions, bodies or organisational units of the European Union in matters concerning the system, shape and organisation of the judiciary, as well as proceedings before the judicial authorities of the EU Member State, raises doubts in terms of its compliance with the basic law, in particular with Articles 2, 7, 8(1) and 10 read in conjunction with Article 95(1) of the Polish Constitution and Articles 90(1), 173 and 176(2) of the Constitution of the Republic of Poland. The Attorney General does not challenge the very essence of a question referred for a preliminary ruling, he does not undermine the court's right to have its own opinion, he does not present the view that national law may deprive the court of such opportunity, but in fact he argues that making a reference for a preliminary ruling by the Member State's court cannot go beyond the constitutional framework of the court's functioning within the national legal order and the matter which, according to the Constitution, belongs to the area of national law, and which has not been delegated to an international organisation or an international body under Article 90(1) of the Constitution cannot be the subject matter of the EUCJ's opinion within the procedure referred to in Article 267 of the EUCJ. Therefore, the Attorney General sees the problem of the substantive scope of the question referred for a preliminary ruling in the context of the EU's competence, the EUCJ's competence and the scope of cases in which Member States, according to the Treaties, retain their discretion for shaping their law, as well as in the context of the legitimacy principle (Article 7 of the Constitution). This is not about the interpretation of Article 267 of the TFEU, because the Polish Constitutional Court is not entitled to provide one, which is clear based on Article 188 of the Constitution, but this is about answering the question whether the matter which is of constitutional nature may be covered by the question referred for a preliminary ruling, namely whether it is possible to decide, in response to a question referred, on matters pertaining to the areas which were not delegated under Article 90(1) of the Constitution to an international organisation or an international body.

The Attorney General correctly indicates in his submission of 4 October 2018 that the supreme nature of the Constitution in the Polish legal order (Article 8(1) of the Constitution) results in, among others, a possible con-

flict between EU law and norms provided for by the Constitution (p. 15 of the statement of reasons to the submission in question). It was reasonably stated, referring to the case-law of the Constitutional Court, that such conflict cannot be resolved by acknowledging the superior character of EU law over the constitutional norm. Expanding on this view, further consequences of such assumption should be pointed out. Having regard to Article 8(1) of the Constitution, it should be stated that it is unacceptable to adopt an interpretation of EU law that would lead to such a conflict. Therefore, the EU law cannot be construed in a manner that would contravene the foundations of the constitutional order of a Member State. This applies, among others, to the competence of the EU and its bodies, institutions or organisational units. Lack of competence of the EU within a given field means that no EU body or institution may interfere in the domestic legal orders of Member States. When issuing a preliminary ruling under Article 267 of the TFEU, the EUCJ cannot go beyond the limits of this provision or interfere in the areas which do not fall within the competence of the EU. This means, looking from the perspective of the national legal order, that the courts of Member States cannot involve the EUCJ in cases where it does not have jurisdiction and which fall within the competence of Member States under the Treaties. When asking a question referred for a preliminary ruling, the Member State cannot create the EUCJ's competence to rule and it cannot formulate a question to which the answer would amount in fact to the assessment of the domestic legal order or which would decide on the competence of specific public authorities in a given country or which would refer to their system, composition or organisation. Adopting such an interpretation would undermine Article 8(1) of the Constitution, as the basic law would cease to be a legal act regulating this significant matter, while the competence to regulate it would be conferred on a body of the international organisation which has not been granted this power under the Treaty. It would be also contrary to the essence of Article 267 of the TFEU as it is not the aim of this provision to allow the EUCJ to assess the domestic legal order, nor to decide on the compliance with specific legal regulations with the Treaties.

The position of the Attorney General presented in his submission of 4 October 2018 (p. 18 of the statement of grounds) to the effect that if the Constitution includes explicit references to further regulations provided by the statute (…), such rights of the legislator cannot be sub-delegated to other bodies, including bodies of international organisation, is also reasonable. Article 90(1) of the Constitution stipulates that the Republic of Poland may

delegate to an international organisation or international institution, by virtue of international agreements, the competence of State authorities in relation to certain matters. Such delegation cannot, however, lead to undermining constitutional solutions relating to the competence of public authorities or to adopting solutions that would be in conflict with constitutional norms. Therefore, it is impossible to adopt a solution which would result in granting an international organisation or an international body the power to interfere with a matter which, according to the Constitution, is related to the system, shape and organisation of a given public authority. Any other interpretation would be contrary to Articles 90(1) and 8(1) of the Constitution

The view presented in the Attorney General's submission of 4 October 2018 (p. 23 of the statement of reasons) to the effect that the delegation of competence 'in relation to certain matters' (as referred to in Article 90(1) of the Constitution) should be understood as a prohibition of delegating the overall competence of a given body and delegating competence in its entirety, and as a prohibition of delegating competence relating to the essence of matters defining the jurisdiction of a specific public authority, should be considered correct. To support this position, the judgments of the Constitutional Court of 24 November 2010 in Case K 32/09 and of 11 May 2005 in Case K 18/04, were referred to. It may be concluded from the above that when delegating competence as referred to in Article 90(1) of the Constitution, there can be no alleged or implied delegation and it is impossible to extend the scope thereof as a result of the functioning of an international organisation or an international body. Firstly, the scope of delegation must be precisely defined, as noted by the Constitutional Court in its judgment of 11 May 2005 in Case K 18/04, and secondly, it cannot be interpreted broadly.

Membership in the European Union does not mean that the Member State loses its right to decide on its internal organisation.[202] This includes the right to specify the system, organisation and characteristics, as well as the detailed regulation of proceedings before specific public authorities, including the judiciary. The provisions of EU primary law do not regulate this matter as it remains beyond the competence of the EU. Thus, such solutions may be assessed from the perspective of their compliance with the Constitution, but it is impossible for the EUCJ to assess the solutions adopted by specific Members States.

202 W. Postulski, *Sądy państw członkowskich jako sądy wspólnotowe [Member States' courts as Community courts]*, [In:] *Stosowanie prawa Unii Europejskiej przez sądy [Application of EU law by courts]*, ed. A. Wróbel, Warsaw 2005, p. 412.

Whether a judicial body was established or not and whether it was placed within the judiciary system in one place or another, or outside it, whether the Member State entrusted the body with one competence and not another, and defined its functioning in one way and not another – these are matters regulated by national law.[203] To this extent, the EUCJ's jurisdiction does not cover the assessment of solutions adopted. Such competence cannot be derived from Article 267 of the TFEU since the EUCJ's competence cannot be presumed on the basis thereof.

The court of a Member State, including a Polish court, cannot ask questions referred for a preliminary ruling under Article 267 of the TFEU in a manner that runs contrary to Articles 8(1) and 90(1) of the Constitution. This is not about contesting the core of Article 267 of the TFUE, but about respecting the division of competences between the Member State and the European Union when asking questions referred for a preliminary ruling, and about respecting the exclusivity of national law in terms of defining the system, shape and organisation of the judiciary and proceedings before judicial authorities. Article 267 of the TFEU does not change such matters and cannot be perceived as providing grounds for defining such matters by the European Union (through the functioning of its body) as, firstly, it would be contrary to its character, and secondly, it would lead to the extension of its competence contrary to the Treaty, thus breaching Article 90(1) of the Constitution.

The Minister of Foreign Affairs, in his position of 12 October 2018 (p. 2 of the statement of reasons), indicated that 'Polish law does not clearly determine the issue of whether the constitutionality review of EU primary law acts, such as the Treaty on the Functioning of the European Union or the Treaty on the European Union in this case, is admissible.

The Minister of Foreign Affairs, in his position, referred to the Constitutional Court's competence to assess the constitutionality of EU secondary law (p. 3 of the statement of reasons), by taking the view that under Article 188 of the Constitution the Constitutional Court has no right to examine the compliance of secondary law with the Constitution. The problem is, however, that the Attorney General's submission of 4 October 2018 does not concern the constitutionality of EU secondary law, but the provision of primary law in the TFEU. Therefore, the comments (considerations) in this regard are ir-

203 C. Mik, *Sądy polskie wobec perspektywy przystąpienia Rzeczypospolitej Polskiej do Unii Europejskiej [Polish courts with the prospect of Poland's accession to the European Union]*, "Przegląd Prawa Europejskiego" [European Law Review] 1997, No. 1, p. 21.

relevant, as the Minister of Foreign Affairs refers to the application of the Attorney General of 23 August 2018 and his submission of 4 October 2018 (as this is the idea behind the presentation of the position by a participant in the proceedings before the Constitutional Court initiated by the application [legal question, constitutional appeal] submitted by an entity entitled to initiate such proceedings under Article 63(1) of the Act on the organisation and mode of proceedings before the Constitutional Court), while the Attorney General has not raised this matter at all. When taking the position in this case, the Minister of Foreign Affairs went beyond the limits of the Attorney General's application and submission without any substantive grounds to do so (arising from the scope of application in this case). Since it was decided to comment on the competence of the Constitutional Court to rule on the compliance of EU secondary law with the Constitution, it should be noted that in its judgment of 16 November 2011 in Case SK 45/09, the Constitutional Court decided that as part of examining a constitutional appeal, it was possible to assess the provisions of EU secondary law (p. 11 of the statement of grounds). The scope of Article 188 of the Constitution differs from that of Article 79 of the Constitution. It cannot be said, however, that the Constitutional Court can never examine the constitutionality of EU secondary law acts, since it was established that when examining a constitutional appeal, it was possible to assess the constitutionality of EU law acts enacted by its bodies.

On page 4 of the statement of reasons to the position of the Minister of Foreign Affairs of 12 October 2018, it was pointed out accurately that Article 188(1) of the Constitution referred to all international agreements without any distinction. The Constitution does not provide for any solution in this regard. That would imply that some international agreements are subject to constitutionality review, while others are not. The above is confirmed by the fact that it was not stated which international agreements were excluded from the possibility of being subject to such constitutionality review. Therefore, the intention of the authors of the Constitution was not to introduce any restrictions; if they had, a provision would have been enacted to this effect. Article 188(1) of the Constitution states that all normative acts which are international agreements may be subject to review by the Constitutional Court. An international agreement as referred to in Article 90 of the Constitution, with its content being taken into account, the legal consequences of signing it and a special procedure for expressing consent to ratification were not excluded from the substantive scope of Article 188(1) of the Constitution. Article 90

of the Constitution is not a provision that excludes the Constitutional Court's review, what it does is limit such review exclusively to a preventive mechanism.

In the case of international agreements as referred to in Article 90 of the Constitution, it is not only a preventive review that has been envisaged. As may be concluded from Article 133(2) of the Constitution, the President of the Republic, before ratifying an international agreement, may refer it to the Constitutional Court asking it to rule on the constitutionality of this agreement. The provision, however, does not eliminate the follow-up review under Article 188(1) of the Constitution, but only provides for a preventive review (exclusively upon a request by the President of the Republic) prior to the ratification of international agreements. Article 133(2) of the Constitution cannot be read as eliminating the possibility of a follow-up review for international agreements, as referred to in Article 90 of the Constitution, since it is not a *lex specialis* in respect of Article 188(1) of the Constitution, but it rather should be seen as a provision which provides for the competence of the President of the Republic to initiate, prior to ratification, a preventive review in respect of any international agreements to be ratified. In essence, the possibility of carrying out a review prior to the ratification of a given international agreement was introduced, without prejudice to any future challenges to the agreement's constitutionality.

In the position of the Minister of Foreign Affairs of 12 October 2018, a view was expressed (p. 4 of the statement of reasons) that primary law has its roots in international agreements entered into by and between Member States (founding treaties), but in the process of historical development the 'corset' of international law was left behind and the primary law achieved the status of an independent and autonomic legal order, by, among others, the development of features distinguishing it from international law and national law.[204] This view, however, has not been linked to the paragraph that preceded it. Secondly, no conclusions were drawn on this basis, but it may be read as a position advocating the lack of possibilities of assessing the compliance of EU primary law with the Constitution (in the context of the previous paragraph on the same page). This opinion is, however, erroneous because the author of the opinion explicitly stated that primary Community law (law of the Treaties) is, formally speaking, undoubtedly the classic case of international

204 See: A. Wróbel, *Źródła prawa Wspólnot Europejskich i prawa Unii Europejskiej [Sources of the law of European Communities and the law of the European Union]*, [In:] *Stosowanie prawa Unii Europejskiej przez sądy [Application of EU law by courts]*, ed. A. Wróbel, Zakamycze 2005, p. 24).

law, as it is the law found in international contracts.[205] Article 188(1) of the Constitution, using the notion of international agreements, also covers the treaties relating to the functioning of an international organisation to which the Republic of Poland is a party. It is evident that international agreements differ from each other in subject matter, content, consequences, etc., but the Constitution fails to provide a link between such differences and constitutionality assessment options and it does not state that some agreements, due to their specific features, are subject to assessment, while others, due to their distinctive features, are not. The very fact that EU law is an autonomic legal order[206] does not mean that the law of the Treaties has ceased to be that of an international agreement. These are international agreements that create this autonomic legal order, but in spite of the autonomy granted, they still are classical examples of international law.

In the submission of the Minister of Foreign Affairs of 12 October 2018, the view was presented (p. 5 of the statement of reasons) that in the judgment of 11 May 2005 in Case K 18/04, the Constitutional Court stated that it was not competent to provide a stand-alone assessment of the compliance of EU primary law with the Constitution, while the same competence was available to it in respect of the accession treaty, as it is a ratified international agreement (point III.1.2 of the statement of reasons). On this basis one cannot, however, conclude that the Constitutional Court does not have the competence to examine the constitutionality of international agreements to which the Republic of Poland is a party and which relate to the functioning of the European Union. The view expressed by the Constitutional Court in the statement of reasons to its judgment of 11 May 2005 in Case K 18/04 concerned the provisions of EU law, namely Treaties, to which the Republic of Poland was not a party. It is evident that such international agreements cannot be assessed in terms of their constitutionality, as they are not a part of the Polish legal order. In fact, the Constitutional Court itself in the aforementioned statement of reasons to its judgment of 11 May 2005 in Case K 18/04 pointed out that the subject matter of constitutionality review carried out within the jurisdiction specified in Article 188(1) of the Constitution (with the consequences specified in 190(1)) may include an international agreement, such as the treaties regulating the relations between the Republic of Poland and the European Communities, and – although only to the extent inherently

205 *Ibidem*, p. 23.
206 *Ibidem*, p. 24.

related to the application of the accession treaty and the Act concerning the conditions of accession that constitutes its integral component – the treaties establishing and modifying the Communities (European Union). The view is entirely legitimate, since these treaties became a part of the Polish legal order through the accession act. It does not follow from the views presented by the Constitutional Court that it is impossible to examine the constitutionality of international agreements, such as the treaties entered into by the Republic of Poland which concern its membership in and functioning within an international organisation: the European Union. On the contrary, these agreements are within the scope defined in Article 188(1) of the Constitution, because the relations between the Republic of Poland and the international organisation (European Communities, currently the European Union) must be regulated by an international agreement and such agreement is covered by the Constitutional Court's jurisdiction under Article 188(1) of the Constitution.

What is entirely incomprehensible is the reference by the Minister of Foreign Affairs in his position of 12 October 2018 to the judgment of the Constitutional Court of 16 November 2018 in Case SK 45/09 (p. 5 of the statement of grounds) in the context of the Constitutional Court's jurisdiction to examine the constitutionality of EU primary law. The judgment in question did not relate to primary law, so no inferences can be made on its basis in respect of examining the compliance of any provisions of EU primary law with the Constitution. Primary law and secondary law are different,[207] and for this reason, views relating to secondary law should not be applied to primary law.

The Minister of Foreign Affairs in his position of 12 October 2018 did not refer to the judgment of the Constitutional Court of 24 November 2018 in Case K 32/09, in which the Court assessed the constitutionality of the Lisbon Treaty amending the Treaty on European Union and the Treaty establishing the European Community, done in Lisbon on 13 December 2007. In the statement of reasons to the judgment in question, the Court unequivocally stated that the jurisdiction enjoyed by the Constitutional Court under Article 188(1) of the Constitution to rule on matters pertaining to the compliance of acts and international agreements with the Constitution did not provide for different rights of the Court depending on the procedure followed for ratification purposes. The Constitutional Court is therefore competent to examine the constitutionality of international agreements ratified based on an earlier consent expressed by statute. The Treaty on the Functioning of the European

207 *Ibidem*, pp. 24-25.

Union is an example of such an agreement, as it was the Treaty of Lisbon that was ratified and the Treaty of Lisbon included the provisions amending the Treaty establishing the European Community, including among others the provisions on the change of the name of the treaty to the Treaty on the Functioning of the European Union (in accordance with Article 2(1) of the Treaty of Lisbon, the Treaty establishing the European Community was amended according to the provisions of this article and the title of the Treaty was replaced by: 'Treaty on the Functioning of the European Union'). As a reminder, it should be noted that on 1 April 2008, the Sejm of the Republic of Poland adopted the Act on the ratification of the Lisbon Treaty amending the Treaty establishing the European Community, done in Lisbon on 13 December 2007[208], which authorised the President of the Republic of Poland to ratify it (Article 1). The act entered into force on 30 April 2008 (as provided for by its Article 2). On this ground, the President of the Republic of Poland ratified the international agreement that included, among others, the provisions of the Treaty on the Functioning of the European Union. Given that the Constitutional Court decided on the matter of admissibility of assessment of the Treaty of Lisbon's compliance with the Constitution, there should be no doubts over the possibility of assessing the constitutionality of the Treaty on the Functioning of the European Union, especially that the solutions included in the latter result from the former.

In the context of the Constitutional Court's judgment of 24 November 2010 in Case K 32/09, it is necessary to refer to considerations raised in the position of the Minister of Foreign Affairs of 12 October 2018 which relate to the fact that a potential constitutionality review of the accession treaty and of the treaties establishing the Union and the Communities could be only of preventive nature (under Article 133(2) of the Constitution) and that such review is at least desirable (p. 4 of the statement of reasons). This view cannot be accepted in the light of the position expressed by the Constitutional Court in its judgment of 24 November 2010, Case K 32/09. The assessment of the compliance of an international agreement with the Constitution, to which the Constitutional Court is entitled under Article 188(1) of the Constitution, has no limitations in terms of subject matter, which means that the Constitutional Court's jurisdiction covers any international agreement and that there are no doubts whatsoever that the international agreement ratified based on the prior consent expressed in the statutory act stays within the scope of such

208 Journal of Laws 2008, No. 62, item 388.

jurisdiction (point III. 1.1.1. of the statement of reasons). There were no reservations to the effect that the aforementioned agreements may be reviewed only as part of prevention and not post-factum. Importantly, in Case K 32/09, the Court performed the post-factum assessment of the Treaty of Lisbon precisely pursuant to Article 188(1) of the Constitution and not pursuant to Article 133(2) of the Constitution, since the President of the Republic ratified the Treaty without using his rights to refer the Treaty to the Constitutional Court for the purpose of verifying its constitutionality prior to its ratification. As it was emphasised by the Constitutional Court in the statement of reasons to the judgment (p. 13): by ratifying the Treaty, the President of the Republic of Poland expressed his belief in its compliance with the Constitution. Failure to request the preventive examination of the compliance of the Treaty of Lisbon with the Constitution did not bar a post-factum review, which indeed took place and resulted in the judgment of the Constitutional Court of 24 November 2010.

The position of the Minister of Foreign Affairs of 12 October 2018 suggests that the Constitutional Court has no competence at all to examine the compliance of EU primary law with the Constitution (p. 5 of the statement of reasons). To support the view, selected theses from the Constitutional Court's judgment of 11 May 2005, Case K 18/04, were quoted, but the careful analysis of the statement of reasons shows that the Court did not express any postulate of this kind, as it related exclusively to the EU primary law acts to which the Republic of Poland was not a party and which, consequently, cannot be regarded as international agreements within the meaning of Article 188(1) of the Constitution. Also, the position of the Minister of Foreign Affairs entirely ignores the view expressed by the Constitutional Court in the statement of reasons to the judgment of 24 November 2010 in Case K 32/09.

The considerations included in the position of the Minister of Foreign Affairs of 12 October 2018 to the effect that the Constitutional Court in its judgment of 11 May 2005 in Case K 18/04, held that the obligation to refer for a preliminary ruling from the Court of Justice in its part imposing such obligation on the national court whose rulings are not subject to appeals under domestic law is non-compliant with Articles (8)(1), 174, 178(1) and 188 read in conjunction with Articles 190(1), 193 and 195(1) of the Constitution, cannot lead to the conclusion that the Constitutional Court is not competent to examine the compliance of Article 267 of the TFEU with the Constitution. Indeed, this provision is the equivalent of Article 234 of the Treaty establishing the European Community, but this has no relevance for

the circumstances related to the Attorney General's application of 23 August 2018 and his submission of 4 October 2018. The Attorney General questioned the compliance of Article 267 of the TFEU with the Constitution to a specific extent and this scope is very different from the scope of allegations and claims examined by the Court in Case K 18/04. Not only was a formally different provision in the same field questioned (reference for a preliminary ruling), but more importantly, the Attorney General's application of 23 August 2018 and his submission of 4 October 2018 concerned other constitutional issues than those analysed in Case K 18/04. The Minister of Foreign Affairs indicates in his position, given the arguments presented on page 6 of the statement of reasons, that he considers the assessment of the compliance of Article 267 of the TFEU with the Constitution impossible in view of how the Court assessed its predecessor, Article 234 of the Treaty establishing the European Community, even though formally and explicitly such a thesis was never formulated (which is surprising because of the unclear message of the position). It should be pointed out that pursuant to Article 59(1)(2) and (3) of 30 November 2016 on the organisation and mode of proceedings before the Constitutional Court,[209] the Court sitting in camera issues an order to discontinue the proceedings if it finds that a ruling is inadmissible (point 2) or unnecessary (point 3). The equivalent of the regulation specified in the Act of 1 August 1997 on the Constitutional Court[210] was Article 39(1)(1) which stated that the Court discontinued the proceedings at the in camera sitting if it would be unnecessary or inadmissible to issue a ruling. The difference is that in the current legal state of affairs, the conditions of a ruling being unnecessary and inadmissible were included in separate points, while in the Act of 1 August 1997 they were included in a single point as alternatives. As it was indicated by the Constitutional Court in its judgment of 27 March 2007 in Case SK 3/05,[211] this status quo (a ruling being inadmissible) appears when the constitutionality of a legal provision at issue has been already examined in another case. Inadmissibility of a ruling is determined by the negative procedural condition in a form of *res judicata*. This view is in line with the position presented by the Constitutional Court in its decision of 21 December 1999, Case K 29/98.[212] As the Constitutional Court pointed out in its judgment of 27 March 2007 in Case SK 3/05, the institution that was created by the

209 Journal of Laws [Dz.U.] of 2016, item 2072
210 Journal of Laws [Dz.U.] of 1997, No. 102, item 643 as amended.
211 Publ. OTK A 2007, No. 3 item 32.
212 Publ. OTK ZU 1997, No. 7, item 172.

case-law of the Constitutional Court and legal theory to ensure the stability of situations existing as a result of the final rulings that are binding is the principle of *ne bis in idem*. According to the Court, this principle is applied when the same provisions have already been challenged based on the same claims. In this case, the Constitutional Court discontinues the proceedings as it is unnecessary to issue a ruling, even though there are examples in the Court's case law in which an earlier examination of constitutionality in respect of a specific provision from the perspective of the same claims did not lead to the discontinuation of proceedings (see, for instance, the Constitutional Court's judgment of 12 September 2006, SK 21/05, OTK A 2006, No. 8, item 103). The case-law of the Constitutional Court indicates that the *ne bis in idem* principle is not applicable if new grounds of review are specified when in the earlier ruling the provision at issue was found to comply with the Constitution (e.g. decision of the Constitutional Court of 28 July 2003, P 26/02 OTK A 2003, No. 6 item 73). When putting this opinion against the backdrop of the Attorney General's submission of 4 October 2018, it should be noted that the grounds of review in Cases K 18/04 and K 7/18 are not identical. In the Attorney General's submission of 4 October 2018, different grounds of review were specified, namely Articles 2, 7 and 10 read in conjunction with Articles 95(1), 90(1), 173 and 176(2) of the Constitution. Article 234 of the Treaty establishing the European Community, the equivalent of Article 267 of the TFEU, was therefore examined in terms of its compliance with the Constitution based on different grounds and this determined a different scope of constitutional review of the provision at issue. To complete the argument, it should be also mentioned that it is not always the case that if the Constitutional Court has decided on a specific provision based on some grounds referred to by the applicant, then it is accepted, following *a majori ad minus* reasoning, that it has also dispersed doubts concerning specific parts or scopes (see, among others, the decision of the Constitutional Court of 14 October 2002, SK 18/02, OTK 2002, No. 5, item 74). In the case of the Attorney General's submission of 4 October 2018, it should be recalled that the Constitutional Court did not examine Article 267 of the TFEU (or its equivalent – Article 234 of the Treaty establishing the European Community) to the extent specified by the applicant (the Attorney General). Therefore, this matter was not decided on by the Constitutional Court. The *res judicata* argument cannot be raised here. The Attorney General challenges another normative content that, in his view, may result from Article 267 of the TFEU than the normative content that was challenged in Case K 18/04. In that case,

the applicant (group of deputies) challenged Article 234 of the Treaty establishing the European Union in the part in which it imposed on the last-instance courts and tribunals the obligation to make references for preliminary rulings on the validity and interpretation of Community law, also when such law is not compliant with the Constitution, and in which it made the Court of Justice's opinion binding on Polish courts and tribunals even if such opinion results in a situation where a ruling required would be unconstitutional. The Attorney General's submission of 4 October 2018 raises the issue of unconstitutionality of Article 267 of the TFEU at an entirely different point. To ensure clarity it should be also noted that the *res judicata* argument cannot be raised in the case analysed here for the reasons of the subject involved as in Case K 18/04 the applicant was not the Attorney General. According to the view expressed by the Constitutional Court in its judgment of 27 March 2007, Case SK 3/05, the doctrine of *res judicata* may be relied on when both substance and subject are identical. As this is not the case here, the negative procedural condition cannot be raised in Case K 7/18.

I share the view expressed by the Minister of Foreign Affairs in his position of 12 October 2018 that it is a different thing to establish the application and meaning of a normative provision of EU law (previously: Community law) and to compare the content of laws and international agreements with the Constitution and to have them examined by the Constitutional Court under Article 188(1) with the consequences as set forth in Article 190(1) of the Constitution. The position also mentions, as already stated in the statement of reasons to the Constitutional Court's judgment of 11 May 2005 in Case K 18/04, that the two approaches mentioned above are not mutually exclusive and there is no conflict between them. Accepting this position means that it cannot be assumed that the Constitutional Court has no competence to assess the compliance of the provisions of the Treaties with the Constitution, including those provisions that refer to the concept of a question referred for a preliminary ruling. Therefore, the Constitutional Court in Case K 7/18 has jurisdiction to examine such compliance.

The Minister of Foreign Affairs, in the statement of reasons to his position (pp. 8-16), makes comments on the procedure of questions referred for preliminary rulings and the Court of Justice's extensive case-law in this regard. Taking into account the Attorney General's submission of 4 October 2018, I am of the opinion that any considerations in this regard are unnecessary, since the Attorney General does not challenge the core of questions referred for preliminary rulings as provided for in Article 267 of the TFEU and he does

not question the courts' right to ask such questions. The Attorney General does not intend to interpret Article 267 of the TFEU, as only the EUCJ is competent to interpret the Treaties and no constitutional court (tribunal) of a Member State has jurisdiction in this regard. The position expressed by the Minister of Foreign Affairs should refer to the scope of claims raised by the Attorney General, including the grounds for review, and this cannot be found in the position in question. The Minister of Foreign Affairs will not analyse constitutional issues, as these are at the core of the Attorney General's position. It should be noted, however, that the Minister of Foreign Affairs raised certain important issues in his substantive position. He correctly emphasised that the subject of the EUCJ's preliminary ruling is exclusively the interpretation of EU law and the Court of Justice has no jurisdiction and does not examine within a preliminary ruling procedure national law with EU law (p. 10 of the statement of reasons). The Minister of Foreign Affairs was also correct in emphasising that the procedure specified in Article 267 of the TFEU is an instrument of cooperation between the Court of Justice and national courts, whereby the Court of Justice provides national courts with the elements of interpretation of EU law which are necessary for them to hear cases pending before them (to support such views, relevant case-law was quoted). In my opinion, however, it was overlooked that the Attorney General's submission of 12 October 2018 expresses the intention of reflecting this position in the decision of the Constitutional Court with references to the Constitution, including Articles 2, 7 and 10 read in conjunction with Article 95(1) of the Constitution. The Attorney General wishes, therefore, to reconstruct – from the Constitution's perspective – systemic framework within which the court may operate when asking a question referred for a preliminary ruling. The Minister of Foreign Affairs should refer to constitutional grounds raised by the Attorney General, and on this basis he should express his position as to whether the analysis of such grounds allows for such conclusions. This is the subject of the Attorney General's submission of 12 October 2018.

It is an oversimplification to say that it is the EUCJ that decides whether questions referred for a preliminary ruling by national courts are admissible (p. 12 of the statement of reasons to the position of the Minister of Foreign Affairs of 12 October 2018). The question to be asked is whether, in each case in which courts find it necessary to ask such a question, they may do so without taking into account the supreme legal act, namely, the Constitution (Article 8(1) of the Constitution). The position of the Minister of Foreign Affairs, even though it is supposed to relate to the Attorney General's sub-

mission of 4 October 2018, fails to refer to this matter at all, although it is precisely this matter that is relevant from the perspective of a decision in Case K 7/18. The Attorney General does not question that, from the perspective of Article 267 of the TFEU, questions referred for preliminary rulings are supposed to be about the interpretation of EU law and that the interpretation itself is necessary for the referring court to issue a decision. His conclusion, however, clearly and unequivocally shows that it is impossible to ask questions referred for preliminary rulings in any matters that are beyond the competence of the European Union and, therefore, outside the jurisdiction of the EUCJ. This is not about the interpretation of EU law, but about outlining the constitutional framework within which the referring court may operate. If it is assumed that there are no points of reference and that the Constitution is not a point of reference either, this would mean that courts would be able to ask questions related to the process of electing members to constitutional bodies (including, for instance, shaping of the Constitutional Court) or related to the functioning of the highest-rank State bodies (that may be parties to various court proceedings) merely by indicating a 'European element' to make it possible to ask questions referred. Whether or not the court may ask a question is determined, from the constitutional perspective, by the scope of matters regulated by EU primary law under an international agreement which delegates certain competences of national bodies in a given field. Thus, this is Article 90(1) of the Constitution that outlines the framework within which questions may be asked, as it was only in these matters that the Republic of Poland delegated competence to the international organisation. It is also only within this framework that a body of the international organisation, such as the EUCJ, may exercise its competence. The Attorney General's submission of 4 October 2018 seeks to clarify this issue without contesting the content of Article 267 of the TFEU. The Attorney General intends to establish, from the constitutional perspective, whether courts may ask questions referred for a preliminary ruling in any case, in relation to any matter related to the system, shape and organisation of the judiciary and proceedings before judicial bodies, or whether, constitutionally speaking, such matters are beyond the remit of the EU, and therefore cannot be decided by the EUCJ. This is a fundamental question, which is in fact a question about the relation between EU competences and the competences of Member States in the light of the supreme legal act, namely the Constitution.

It should be also pointed out that on page 15 of the statement of reasons to the position of the Minister of Foreign Affairs of 12 October 2018, there is

a statement that the principle of the primacy of EU law requires that the national court have discretion to ask the Court of Justice any questions referred for a preliminary ruling that such court deems necessary. It was also noted that the above is justified by the cooperation between the Court of Justice and national courts. These principles do not imply, however, that asking a question referred for a preliminary ruling may be contrary to the basic law of the Member State, as this would mean the acceptance of a position that fails to respect the constitutional order of a specific Member State, which would be against the foundations of the European Union.

Conclusion

1. Adopting a position that the Constitutional Court has no competence to examine the compliance of the provisions of EU primary law with the Constitution would lead to undermining the principle of the supremacy of the Constitution in the Polish legal order, which would be contrary to Article 8(1) of the Constitution.

2. At the same time, adopting such position would mean that the Constitutional Court would not be able to assess the constitutionality of the provisions of an international agreement based on which certain obligations are imposed on the state and on bodies governed by public law other than the State (such as natural persons and legal entities).

3. The Constitutional Court, in its judgment of 16 November 2011 in Case SK 45/09, explicitly stated that the Constitution retained its supremacy and primacy over any legal acts applicable in the Polish constitutional order, including EU law. This position of the Constitutional Court arises from Article 8(1) of the Constitution. In the judgment of 11 May 2005, Case K 18/04, the Court expressed the view that the Constitution remains, due to its special power, the supreme law of the Republic of Poland in relation to any international agreements binding on the Republic of Poland, and this also applies to ratified international agreements on delegating competences 'in relation to certain matters' to an international organisation or an international body. Adopting the position presented by the Minister of Foreign Affairs in his letter of 12 October 2018 could lead to depriving individuals of their constitutional protection in case of discrepancies between EU primary law with constitutional values, if, in the process of applying EU law, a specific provision were to be understood in a manner inconsistent with the provisions of the Constitution.

4. As it was pointed out by the Constitutional Court in its judgment of 24 November 2010 in Case K 32/09, Articles 90(1) and 91(3) of the Constitution cannot constitute a basis for delegating to an international organisation or an international body the right to adopt legal acts or make decisions that would be inconsistent with the Constitution. The Constitutional Court's judgment of 11 May 2005 in Case K 18/04 was referred to in this regard. It was emphasised in the judgment that delegating competences cannot breach the provisions of the Constitution, including the principle of its supremacy among sources of law. It was also correctly pointed out that the provisions of the Treaty of Lisbon state which competences are to be delegated. An international organisation cannot adopt law beyond the delegated scope, while its bodies – in the process of applying the existing law – cannot extend the scope of competence delegated to the international organisation. Any other interpretation would run contrary to Article 90(1) of the Constitution.

5. As the Constitutional Court stated in its judgment of 24 November 2010 in Case K 32/09, the democratic State ruled by law, as referred to in Article 2 of the Constitution, retains its full constitutional identity as a member of the European Union due to the overall homogeneity of the system-shaping role of law in Member States and in the organisation they form. Article 90 of the Constitution, understood from the perspective of the principles and from the values derived from Article 2 of the Constitution, and given that there are no competences that do not arise from an explicit legal provision (as the Constitutional Court did in its resolution of 10 May 1994, W 7/94, OTK w 1994, part 1, item 23), excludes the possibility of delegating competences without respecting the legal basis provided for in it and the democratic process of adopting such basis. Any amendment to the content of the Treaties without respecting the ratification procedure that leads to delegating competences to the European Union requires, due to the application of Article 2 of the Constitution, a proper statutory basis in accordance with the rules envisaged by Article 90 of the Constitution. Adopting the position expressed by the Minister of Foreign Affairs in his letter of 12 October 2018 could lead to a situation where in response to a question referred for a preliminary ruling from the field which, according to the Constitution, is to be regulated by the statute and in respect of which the international organisation does not enjoy the competence to adopt legal regulations, the constitutional legal order could be breached, while rights and obligations could be shaped in breach of legal regulations, which would be detrimental not only to the sovereignty of the State, but also to its security.

6. Adopting the position presented by the Minister of Foreign Affairs in his letter of 12 October 2018 could also lead to accepting that in response to questions referred for a preliminary ruling it would possible to influence (directly or indirectly) the shape of State bodies. Such a position cannot be accepted, as the European Union has no competence whatsoever to enact law in this field, and consequently, the EUCJ has no jurisdiction in this regard and cannot address such matters.