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IMPLEMENTATION OF PRIMACY AND DIRECT EFFECT PRINCIPLES OF THE COMMUNITY LAW IN THE POLISH CONSTITUTIONAL SYSTEM

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The accession of Poland to the European Union will be preceded by negotiations and a conclusion of the accession agreement, which Poland is likely to conclude with its Member States. Due to a significant development of the formal and substantial standardisation of the accession agreements, it may be said that also our agreement will contain general principles, according to which, in particular: (1) Community law will be binding *ab initio* and *in toto,* unless the provisions on temporary derogation stipulate otherwise; (2) this law will use the primacy and direct effect principles, in the understanding of *acquis communautaire;* it will also be subject to procedures ensuring its uniform application (especially Article 177); (3) Community law will apply to the Accession Agreement, which will be subject to the control of the Court of Justice.[1]

The obligation of an approval of the discussed principles of the Community law must cause changes in the Polish constitutional system. Therefore, there arises the question what sort of legal and organizational changes should be introduced to make effective primacy and direct effect, and what form should they take? Amendments to Polish law should be linked to the necessity of enabling the national organs to fulfil tasks resulting from the presented implications of the primacy and direct effect principles (determined as necessary or preferable, depending whether they involve the responsibility of the state or not). Reflections concerning such changes may be ordered mainly according to the subjective criterion: 1) general remarks, 2) Parliament and Government, 3) Courts, 4) Constitutional Tribunal, 5) form of amendment.

1. General Remarks

Before explaining implications with respect to the Polish state organs, it should be clarified what type of a legal situation to adopt the primacy and direct effect principles is given by the new Constitution of 2 April 1997. When doing so, we should emphasise that the accession of Poland to the EU means being bound by treaties establishing the [*1]

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[1] Cf. Accession treaties [in:] A.G. T o t h, *The Oxford Encyclopedia of European Community Law,* vol. I, Institutional Law, Oxford 1990, p. 4-5.

European Communities and the European Union, which should be seen as international agreements in the full sense of the term. Therefore, information on the legal situation should be sought in general provisions and rules concerning the legal sources in a scope relating to international law, and in particular to international agreements (similarly to the majority of the Constitutions of the EU Member States, the Constitution makes no clear reference to the European Union and the Communities).

First, special attention should be drawn to Article 9 of the Constitution. This provision is a general principle, and states that the Republic of Poland observes the international law binding upon it. The detailed obligations stemming from this provision include, first of all, creating Polish law in compliance to international law as a whole and interpretations subject to this law.[2] Article 87 item 1 renders precise Article 9, which makes ratified international agreements one of the sources of the common binding law of the Republic of Poland. Article 91 item 1 develops the above mentioned constitutional principle and stipulates that international agreements, after their publication in *Dziennik Ustaw* [Journal of Laws], form part of the Polish legal system.[3] This provision also contains the supposition that an international agreement is ready for direct application if its implementation does not depend upon the act's publication (however, it is not quite clear what this is supposed to mean: e.g. may there exist detailed and unconditional provisions requiring to be statutory implemented? If so, this provision of the Constitution would be a regression in relation to a judgment of the Constitutional Tribunal, according to which each international rule, being sufficiently precise and unconditional, involves self-implementation[4]). Article 91 item 2 also states that an agreement ratified upon previous approval expressed in the act, colliding with other acts, prevails.

The Constitution allows for the delegation to the international organisation of the competence of state organs in some issues, and sets out a specific procedure in this respect (Article 90). Thus, it allows to enter into an integrational organisation (EC) and adopt the law it created. This is also confirmed in Article 91 item 3, which allows to give special importance to the law established by an organisation, of direct applicability by virtue of the agreement establishing this organisation. The special importance of such a law consists in ensuring its priority over acts which collide with it.

Constitutional provisions require comments in the light of their importance for the primacy and direct effect principles. Two provisions are of key importance in this con-

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[2] Cf. comments by K. W ó j t o w i c z to Article 9 [in:] *Constitutions of the Republic of Poland and Comments to the Constitution of the Republic of Poland of1997,* ed. by J. B o c, Wrocław 1998 (further as: KK), p. 3. However, this list may not be considered comprehensive.

[3] It seems that it expresses the incorporation and not the transformation of international law. See discussion in: R. S z a f a r z: "Skuteczność norm prawa międzynarodowego w prawie wewnętrznym w świetle nowej Konstytucji" [Effectiveness of the Rules of International Law in Domestic Law in the Light of the New Constitution], *Państwo i Prawo* 1998, no. 1, p. 5; polemics by A. W y r o z u m s k a: "Effectiveness of the Rules of International Law in Domestic Law in the Light of the New Constitution", *Państwo i Prawo* 1998, no. 4, p. 79-85; comments by A. W a s i 1 k o w s k i, "Transformacja czy inkorporacja" [Transformation or Incorporation], *Państwo i Prawo* 1998, no. 4, p. 85—87; the answer to the polemics by R. S z a f a r z: *Państwo i Prawo* 1998, no. 5, p. 93-94.

[4] See J. O n i s z c z u k: *Orzecznictwo Trybunału Konstytucyjnego w latach 1986-1993* [Jurisdiction of the Constitutional Tribunal in 1986-1993], Warszawa 1993, p. 174.

text: Article 90 and Article 91. The first permits to be bound by agreements which form the grounds of the EC and the EU, and, in fact, to accept the discussed principles.[5] However, this is not formulated correctly. In particular, some doubts arise as regards the nature of what is delegated and its scope. In the first case, Article 90 stipulates that the competence of the state authority organs will be delegated in favour of an international organisation or an international organ. Pertinent literature points out that delegation may refer exclusively to the execution of competence, and not to itself, since sovereignty is indivisible. It is emphasised that the application of the term "international organ" is illegal, as is the concept of "state authority", owing to the lack of a uniform terminology of the Constitution. It is also proved to be incorrect to use the inexact expression "in relation to certain matters" in the case of a competence provision with no correlation with a negative material clause.[6]

Irrespective of the correctness of the presented opinion, it should be pointed out that Article 90 gives rise to doubts with respect to the observance of the primacy principle. It allows the organ applying the Constitution to assume that cession of the execution of sovereignty powers takes place "in relation to certain matters", but it does not explain which ones, nor does it identify the legal effects. It seems that the Polish organ (especially the Constitutional Tribunal) should be of the opinion that delegation has to be effected, or has been effected (depending upon whether the decision is made upon a preventive or repressive term), in a scope which results from the treaties to which one intends to accede or to which one has acceded. However, what will happen if such an organ, making a decision under the repressive control term, states that delegation was effected upon the violation of the material scope of the Constitution (the Constitution does not introduce an obligation of preventive control of the agreements of Article 90 before their ratification)? Nevertheless, the concept "in relation to certain matters" is so comprehensive that it offers a broad area of legal interpretation. Refusal to apply Community law would be a significant violation of the membership obligations, and would create serious legal and political problems.

Article 91 also produces problems. This provision includes ratified and promulgated agreement as part of Polish law, orders its direct application and gives priority in cases of a collision with the acts (under the condition that an approval of ratification was expressed in the act Parliament's). It also stipulates that if this results from an agreement establishing an international organisation, the law it created is of direct application and prevails when colliding with the acts.

Doubts concern the observance of both the primacy and direct effect principles. Article 91 guarantees the priority of the Community rules only in a case of a collision

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[5] It was pointed out correctly that this provision was mainly adopted with the aim to an accession to the EU. Cf. comments by K. W ó j t o w i c z to Article 90 of the Constitution, KK, p. 159.

[6] As in: J. G a 1 s t e r: "Konstytucjonalnoprawne aspekty przystąpienia Polski do Unii Europejskiej" [Constitutional and Legal Aspects of the Accession of Poland to the European Union] [in:] *Wejście w życie nowej Konstytucji Rzeczypospolitej Polskiej* [The Implementation of the New Constitution of the Republic of Poland], ed. by Z. W i t k o w s k i, Toruń 1998, p. 71 and 74-75. In the last case, cf. K. W ó j t o w i c z, comments on Article 90...., *op. cit.*, p. 160.

with the rules of the acts and *a maiori ad minus* of the fundamental acts of domestic law (compare Article 87). The primacy principle assumes, however, the priority of each Community rule over each national rule, also constitutional ones.[7] A further defect of the constitutional provision, which ensures priority to international rules (Community), is also the lack of an identification of sanctions in the case of contradiction.[8]

The concept of "direct application", which will concern both the establishing treaties and the law established by the organisation (items 1 and 3 of Article 91), is also unclear. At first glance, this term may be related to direct applicability, known in the Community law. However, the additional assertion in item 1 denies this by stating that if the application of the agreement depends upon issuing the act, it is not of direct application. At the same time, it leads to the conclusion that, in fact,we are dealing with a question of the direct effect of the rules of the agreement (and not the agreement itself; it is rare that the effectiveness of all agreements depends upon issuing an act). Such an understanding of direct application seems to result also from Article 8 of the Constitution, which stipulates a direct application of the provisions of the Constitution. On the other hand, item 3 Article 91 seems to confirm that a direct application, in the meaning proposed by the Polish Constitution, is tantamount to the direct applicability of the regulations of the Community law. However, Article 91 does not refer this concept to the regulations, but to overall law established by the organisation. The directives do not use direct applicability, although with difficulty and under some conditions their rules may be of direct effect. In other words, there is some confusion concerning a concept, which may affect the functioning of the discussed principles in the Polish constitutional system.

In this context, there arises the question how to solve the described problems. Of course, one may rely on a reasonable interpretation of the organs implementing the law, especially the Constitutional Tribunal. It seems, however, that except for flexibility, such conduct has no merits. Therefore, there is the need (wherever possible) for a statutory explication of doubts. Such an act should introduce an obligation of a previous control of agreements, according to which the execution of the sovereignty power is ceded in favour of the international organizations (it should be recalled that the delegation of competence in the case of integration organizations does not occur once, but is reiterated). The act should also state the effects of judgments on the contradiction of Polish law with the Community rules. It seems that this may involve both invalidity (of the judgment of the Constitutional Tribunal *in abstracto)* and ineffectiveness (of the judgment of the Constitutional Tribunal and the Courts *in concreto).* The act would also contain provisions explaining, pursuant to the Community law, the status and ef-

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[7] A sound remark by K. W ó j t o w i c z: "Skutki przystąpienia Polski do Unii Europejskiej dla sądów i Trybunału Konstytucyjnego RP" [The Effects of the Accession of Poland to the European Union for Courts and the Constitutional Tribunal of the Republic of Poland] [in:] *Wejście w życie ..... op. cit.,* p. 87 and 88. For another but mistaken view: J. G a 1 s t e r: *Constitutional and Legal Aspects..., op. cit.,* p. 67. The fact that the Community law does not stipulate how to solve, at the national level, the conflict between Community rule and Constitutional rule, does not mean it does not require a recognition of the absolute primacy of the Community rule.

[8] Correctly emphasised by J. G a 1 s t e r: *Konstytucyjnoprawne aspekty..., op. cit.,* p. 76.

fectiveness of the specific sources of the Community law in Polish law, which would undoubtedly facilitate judgments (preferable amendments).

2. Specific Problems of the Amendment of the Polish Legal System

Formal accession to the EU does not result in changes concerning the structure of state power. Freedom is safeguarded by the principle of the procedural and organizational autonomy of the Member States.[9] However, this does not mean that in practice the Member States do not establish different organizational units, especially administrative ones, to enable a fluent fulfilment of the membership obligations. On the other hand, accession is of key importance for the national organs to execute their competence. Here, there also arise problems with respect to ensuring the observance of the primacy and direct effect of the Community law.

a) The Sejm, the Senate and the Government of the Republic of Poland

Problems concerning the implementation of the primacy and direct effect principles in our constitutional system first refer to establishing the law. This task involves especially the cooperation of the Government, the Sejm and the Senate of the Republic of Poland. Thus, it seems reasonable to adopt a position with respect to potential overall changes towards those organs.

Let us state that, first of all, the Government and the national Parliament will be responsible for an appropriate execution of the Community law and for not undertaking actions contrary to that law. The task of the Sejm and the Senate will be, therefore, in particular, a transposition of directives by means of laws (currently, the adaptation of Polish law to the Community law). In our legal system, laws seem to be the most appropriate form for executing directives. The consistency of the transposition process should signify that initiatives are taken by the Government. In Poland, however, legislative initiative is dispersed. Apart from the Government, also the deputies, Sejm commissions, the Senate as a whole, and even citizens (Article 118 of the Constitution, Article 29 of the Sejm Rules[10]) are entitled to it. More, analysis shows that the legislative initiative is used intensely, especially by the deputies.[11] Moreover, the deputies are

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[9] Cf. C. M i k: "Polskie organy państwowe wobec perspektywy przystąpienia RP do Unii Europejskiej" [Polish State Organs with View to the Accession of the Republic of Poland to the European Union] [in:] *Polska w Unii Europejskiej. Perspektywy, warunki, szanse i zagrożenia* [Poland in the European Union. Prospects, Conditions, Opportunities and Threats], ed. by C. M i k, Toruń 1997, p. 243-245.

[10] A uniform text of the Rules with further amendments (10 April 1998) [in:] *Rules of the Sejm of the Republic of Poland*, Warszawa 1998.

[11] If we consider only the second term of the Sejm (1993-1997) then it becomes apparent that among the overall number of 819 drafts tabled to motion, the Council of Ministers was the author of only 344 acts. The deputies presented 428 drafts (359 - groups of deputies, 69 - the Sejm commissions), the Senate was the author of 20 drafts, and the President - of 27. As many as 58% of draft acts were not from the Government. What more, a significant part of the drafts not presented by the Government were passed, and are currently part of the Polish legal system. During the second term, 244 deputy drafts were passed (187 - groups of deputies, 57 - Sejm commissions), 7 drafts of the Senate and 12 Presidential drafts. The data come from an excellent comprehensive

particularly active in amending the government drafts. It does not seem that this situation will change radically in the future. Due to the above, there arises the problem of ensuring a proper execution of the Community law (transposition of directives) and preventing a passage of laws contrary to the Community law.

The situation is rather clear in the case of governmental drafts. With reference to an adaptation of law understood as drafting acts implementing the Community law, also in the future, specific ministers will deal with the implementation of the Community law. As should be expected, control of the compliance of the governmental drafts to the Community law will be entrusted to the European Integration Committee (EIC), established pursuant to Act of 2 August 1996[12] Such control, in the case of domestic regulations, is final and unquestionable.

For a long time, the situation concerning draft acts, which the European Integration Committee had evaluated only initially, remained unfavourable. The government lost control over the contents of a draft act the moment it was submitted to the Sejm. At present, this state of things changed to a certain degree due to an amendment of the Sejm Rules, to be discussed later on.

A much more serious problem involved draft acts submitted by subjects other than the government, and in particular by groups of Deputies and parliamentary committees. Such drafts were totally not subject to control as regards their compliance to Community law. Attempts were made to alter this situation by means of an amendment to the Sejm Rules (14 September 1997). As a consequence, § 2a was introduced into Article 31, according to which drafts filed by Sejm committees, the Senate or the President would have to be accompanied by a statement pertaining to the compliance, or the degree and reasons for the non-conformity of the draft to European Union law. In practice, this change did not bring about an improvement, and the provision remained a dead letter. The reasons should by sought in the fact that § 2 Article 31 did not determine clearly who has to perform control, and did not foresee an appropriate procedure nor sanctions for the non-fulfilment of the obligation defined by the Rules.

The retention and even the intensification of this unsatisfactory state of things led to a second change in the Sejm Rules, this time much more effective and serious. An amendment to the Rules (19 March 1999) decided to eject the recently added § 2 Article 31. In its place, the newly introduced § 7 asserts that the grounds of all draft acts submitted to the President of the Sejm must contain a declaration about the compliance of the draft to European Union law or the degree and reasons for non-conformity to that law, or a statement that the matter of the planned provision is not encompassed by Union law. Such a modification is by no means merely superficial, since, in contrast to

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study by D. Chrzanowski, W. Odrowąż-Sypniewski: *Analysis of Draft Acts Presented to Sejm of the Second Term, Sejm Chancellery. Office of Studies and Expertise. Department of Legal Opinions*, Report no. 129, March 1998, p. 6-8, 41-43. During the third term, this tendency continues to prevail.

[12] *Dz. U.* [Journal of Laws] no. 106, item 494. See also Ordinance of the President of the Council of Ministers of 2 October 1996 on giving statute to the office of the European Integration Committee *(Dz.U.* 1996, no. 116, item 555), and a presentation and scrutiny of the act on the EIC - C. Mik: "Polskie organy państwowe...", *op. cit.*, p. 249-252.

the heretofore situation, it makes it possible for the President of the Sejm to return the draft to the applicant, as in the case of other shortcomings, mentioned in § 2 and 3 Article 31 (§ 5 Article 31). In this manner, the procedure of sanctioning projects without "European grounds" was rendered more effective.

These were not all the changes introduced in 1999. The amendment defined a procedure for the verification of all drafts (governmental and non-governmental) from the moment of their submission to the completion of the parliamentary procedure. As regards governmental drafts, a base was created for guarding the compliance to European Union law of all eventual corrections and motions concerning such drafts. In this way, Article 39 of the Sejm Rules (on work conducted in Sejm committees after the first reading) found itself in § 3 a, which stipulated that it is obligatory to seek the opinion of the European Integration Committee concerning the compliance of the drafts to EU law. Consequently, the Committee defines the term of a presentation of its opinion, which is then enclosed in a report on the work performed by a parliamentary committee, and subsequently presented at a plenary session as part of the second reading. A similar situation takes place as regards motions filed by parliamentary minorities, also accompanied by a European Integration Committee opinion (§1 and 3 Article 40 of the Rules). The same procedure is applied in the case of a proposal of corrections or motions, made in the course of the second reading (§ 1 Article 43), and the submission of corrections by the Senate (§ 1 Article 50). The work carried out by the Committee is facilitated by the duty of informing the Committee about sessions held by Sejm commissions (§ 4 Article 78) and the obligatory participation of Committee representatives in commissions' sessions, which formulate opinions about the draft acts and their compliance to European Union law (§1 Article 79).

The verification procedure is slightly different in reference to non-governmental drafts. Here, the President of the Sejm, having received the non-governmental drafts, orders, prior to the first reading, that an opinion concerning the compliance of the draft in question with EU law (§7 Article 31) be presented by experts of the Chancellery of the Sejm. In practice, such drafts are forwarded by the Chief of the Chancellery of the Sejm upon the request of the President. On the other hand, opinions are issued by the Group for European Integration, established in the Office of Studies and Expertise (see further on). If such an opinion indicates the non-compliance of the draft to European Union law, the President submits it to the Sejm' European Integration Commission for the purpose of obtaining the latter's view. As a result, the privileges of the Commission have been expanded; now, its tasks include, i.a. opinions concerning the compliance of draft acts to European Union law. Such a Commission's opinion is passed on by the President to the applicant (§ 8 Article 3, in connection with point 7 of the appendix to the Rules: "The Commissions Scope of the Work of Sejm Commissions"). A negative opinion issued by the Commission, however, cannot block the initiation of the legislation process, and is merely a signal. Nonetheless, in the course of further procedure, the draft can be changed from the viewpoint of its compliance, especially under the impact of evaluations made by the European Integration Committee. The latter organ assumes the main burden of "care" not only concerning governmental drafts, but also their

non-governmental counterparts. In this manner, all corrections or changes proposed by the Deputies or the Senate in the course of the procedure, and affecting non-governmental drafts, can be verified also by the EIC, according to the same principles as those pertaining to governmental drafts. The encumbrance of the Committee with the fundamental duty of presenting opinions as regards eventual corrections and motions does not infringe upon the obligatory participation of the representatives of the Chancellery of the Sejm in sessions held by Sejm commissions, with the right to submit motions or remarks, i.a. on the compliance of draft acts to EU law, in the case of all drafts examined by the commissions. If the Commission does not take into consideration certain motions or remarks, then the Chancellery of the Sejm submits them to the President of the Sejm, who, in turn, can, forward them to the European Integration Committee (Article 56).

Modifications of the legislative procedure made in 1999 do not lead to the full elimination of drafts other than governmental ones, which are contradictory to EU law. However, their value is that of discouraging and preventing the applicants, or at least pointing out contradictions and enabling to remove them in the future. Moreover, the publication of negative opinions on drafts or corrections may be important during voting, by exerting pressure upon the deputies. The introduction of amendments of the Rules calls for close co-operation of the Government with the Parliament and its services.

The Sejm Chancellery also made some organisational changes. Order no. 10 of the Head of the Sejm Chancellery of 17 April 1998 amended the organisational rules of the Chancellery. In effect, two new organizational units were established: the Department of European Union at the Office of Interparliamentary Relations and the Unit for European Integration at the Office of Studies and Expertise (which, *de facto*, exists since June 1997, and currently has six members). The first unit is to provide services mainly to the Sejm European Integration Commission and a Permanent Delegation of the Sejm and the Senate for the Parliamentary Joint Commission of the Republic of Poland and the European Union (§ 29 item 3).

On the other hand, by responding to adaptation challenges and initiatives of amendments to the Sejm Rules, the European Integration Unit has to issue opinions, upon the request of Sejm organs, with respect to the compliance of the draft acts to the Community law, as well as opinions on the binding Community legal system, issue opinions and provide consultations to deputies as regards the Community law, prepare opinions, studies and material on the functioning of the EU institutions, European integration processes and those related to the accession of new countries to the Union, organize seminars concerning activities of the Unit, support other units in this respect, and cooperate with the legal services of the Parliaments of European countries and European Union institutions as regards an exchange of information on integration processes (§ 34). Obviously, an effective fulfilment of tasks by the European Integration Commission and the European Integration Unit will be possible only in close cooperation with the European Integration Committee, and especially with the Department of the Harmonisation of Law and Treaty Issues.

The activities presented above are direct and do not eliminate the source of problems. In this situation, it should be considered whether legislative initiative in the trans-

position of directives and amendments to the transposing acts should not be reserved exclusively for the Government (preferable change). However, this would require an appropriate legal regulation, e.g. in a law.

The concluding of the accession agreement will mean that in some issues Poland will delegate competence to the European Communities within a scope subject to the Community law. Such delegation will signify that regulations to be issued by the Communities will be binding also for Poland, thus withdrawing from the Polish Parliament the competence to establish law within the rage covered by those acts, unless they allow to undertake implementation action. The Government should be entitled to responsibility in this respect, abstaining from a submission of draft acts in areas restricted by the regulations.

The effects of accession to the European Union with respect to establishing Polish law (obligation to implement directives, prohibition to overlap or cover the areas under regulation, obligation to ensure protection equivalent to nation-wide legal protection), as well as establishing provisions of the Community law, in which the Government of the Republic of Poland would participate, should encourage the Government and the Sejm and the Senate to enter into closer cooperation. Such cooperation should cover, in particular, an obligation of the Government to submit to the Parliament, in a term appropriate for the adoption of a position, all information on draft acts of the Community law, which would lead to a transfer of the execution of the sovereignty powers, amendments to the legislation or financial burdens to the state budgets (in practice acts of I and III pillar). Such information should not only cover the draft document itself, but also its justification, appointment of the Minister responsible, and the date of the eventual adoption of the act by the EC. In this context, the position of the Sejm Commission for European Integration Issues should be also strengthened on a statutory basis, so that the Government might not approve the Community act (it would be obliged to impose a requirement of the previous parliamentary debate in the Council of the European Union) without a positive opinion by this Commission. The changes described here would require the creation of appropriate legal provisions (preferable changes).

b) Courts

A significant role in the process of executing and safeguarding the observance of Community law in Poland will be played by the courts in the understanding proposed by Article 175 of the Constitution. The first task to be accomplished in order to fulfil this obligation effectively is to grant competence in this respect (all Polish courts should have such a right). Courts should be able to apply the Community law in full. This law, as we know, covers treaties, including, in particular, founding treaties, regulations, directives, and decisions. Therefore, there arises the doubt whether Article 178 item 1 of the Constitution will not hamper their application, which stipulates that they are only subject to the Constitution and laws. It may happen that in a restrictive and one-sided interpretation they will refuse to apply, e.g. regulations or directives which were not transposed with reference to their direct effect; this, in turn, may become the reason

why Poland will be responsible for violating the Community law. Such a doubt acquires importance in view of the necessity to ensure priority to the Community law. Therefore, one should consider whether it would be desirable to reformulate Article 178 so that the courts become subject only to the Constitution, and apply the law binding in the Republic of Poland (preferable change).

The application and safeguarding of the observance of the Community law by the courts will also require a number of changes linked to a prejudicial questions to the Court of Justice, the possibility to use provisional measures, the necessity to ensure an interpretation in line with the Community law, and to ensure the execution of sentences and decisions of the Community organs containing financial obligations. Especially with respect to the first issue amendments should be introduced in the Penal, Civil and Administrative Codes (as well as other acts, according to which the deciding organs exist under the concept of a court in the understanding of the Court of Justice). Such an amendment should give the courts the opportunity (and impose an obligation in the case of courts of last instance) to apply for the preliminary ruling of the Court of Justice, if the further proceedings are impossible without a prior explication of the effectiveness of the Community rule or its importance (taking into account the conditions of applying for preliminary rulings developed in the jurisdiction of the Court of Justice). Courts should also have a possibility to cancel proceedings until the sentence of the Court of Justice is obtained. The procedure of the prescription of claims for the period of prejudicial proceedings should be also suspended, and the claims themselves ensured. The decision on submitting the preliminary question should be determined as an exclusive area of the court; however, it might be appealed to the court of the higher instance, since the parties would incur expenses of witnesses, experts, representatives of the parties and the national court. The national courts should clearly be bound by the judgment of the Court of Justice.[13] Due to a relatively small familiarity with foreign rules, it seems that such changes are deemed necessary.

The right to apply the provisional measures by the courts, that is suspending the application *ad casum* of each rule of Polish law (also of the act - once more the problem concerns Article 178 item 1 of the Constitution), should be related to the submitting of the legal question. When the court wavers whether the rule of the act, which does not execute the Community law, but is contradictory, may be omitted, it should suspend its application and submit prejudicial question to the Court of Justice. If the provision executing the Community rule or the Community provision is involved, the courts should be able to suspend their application exclusively after the fulfilment of obligations, referred to in the previous part of the study. The appropriate powers should be included in the proceedings codes (necessary changes).

The effectiveness of the Community law may be ensured if national provisions in the areas covered by the Community law (in particular the directives) are interpreted

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[13] Cf. N. P ó ł t o r a k: "Zmiany w postępowaniu przed sądami polskimi jako konsekwencja przystąpienia Polski do Unii Europejskiej" [Changes in Proceedings before the Polish Courts in Consequence of Accession of Poland to the European Union] [in:] *Polska w Linii Europejskiej..., op. cit.*, p. 270-275.

according to the rules of this law. Due to this fact, it might seem reasonable to set a provision, which would impose the obligation of compliant interpretation (also compliance to the judgments of the Court of Justice); such a provision, however, should also denote limits of compliant interpretation established by the Court of Justice, and referred to in the previous part of the study. It is also possible to leave this issue to the practice of the Polish courts (preferable change, even merely possible).

Finally, it is important to introduce to the Civil Code provisions which would ensure the execution of the judgments of the Court of Justice and the Court of first instance, as well as decisions of the Council and Commission containing financial obligations of private persons. It appears that even today Article 777 of the Civil Procedure Code allows to recognise that those acts will potentially be executive titles (they are "other judgments, agreements or acts, which are subject to execution in the way of judicial execution"). However, one needs to establish a provision of the acts, by virtue of which they will be subject to judicial execution. On the other hand, a necessary change involves the procedure of granting the clause of effectiveness, and reviewing the authenticity of the execution titles, to which reference is made (exclusively, a revision of authenticity; also compare Article 784 of the Civil Procedure Code in the context of the possibility of considering the Court of Justice as a special court). Such changes should be deemed necessary.

Due to establishing the principle of the responsibility of the state for damages suffered as a result of violating the rights of individuals by the state, irrespective of the direct effect of the act, it is necessary to introduce provisions which would allow the courts to decide on such damages and establish appropriate compensation. Apparently, appropriate material decisions should be placed in independent legal acts (those determining the principle and conditions of the responsibility stated in the jurisdiction of the Court of Justice: this would extend in a specific way to Article 77 of the Constitution, which guarantees a right to compensation for any harm as a result of the illegal action of the public authority organ, provisions of the Civil Code which do not seem appropriate in this respect - see also Article 416 and following of the Civil Code). On the other hand, the Civil Procedure Code should be applied in the proceedings. Possibly, the group of courts which are to decide on the compensation should be limited (necessary change).

From the point of view of an effective application of the Community law in full, it is also desirable to publish all acts of the Community law and jurisdiction of the Community Courts, before accession of Poland to the EU, so as to make them commonly available (preferable change). On the other hand, it seems necessary to publish separately the Community acts and jurisdiction after accession, since they will have to be published in Polish. Nonetheless, it is important to do one's best in order to make them commonly available.

c) Constitutional Tribunal

Pursuant to the Constitution, the Constitutional Tribunal is entitled to examine the compliance, among others, of international agreements to the Constitution (Article 188 s. 1).

A right to examine the compliance of international agreements to the Constitution is especially important due to the accession to the Union and subsequent amendments to the primary law (primary law treaties). With respect to such agreements, the Constitutional Tribunal should prepare a position that would ensure the protection of the identity of the Polish Constitution.[14] In the face of a lack of clear constitutional provisions, which constitute a "core" of the Constitution, such issues will have to be decided by the Constitutional Tribunal itself. At the same time, it should be reminded that only preventive, not repressive, control will only be allowed from the point of view of the Community law.

Article 188 s. 2 and 3 makes the ratified international agreements a model of controlling acts and other legal rules. In the first case, only agreements ratified with the previous approval of the Parliament, expressed in the law, constitute it.[15] Due to accession to the EU, one should be aware of the fact that sometimes the EC conclude agreements with third entities (countries from outside EU, other international organizations) independently, that is, without the participation of the Member States. This occurs under the exclusive competence of the Communities (e.g. the common trade policy - Article 113 of the Treaty). Such agreements will also be an evaluation model for Polish law.

In view of the observance of primacy and direct effect principles, it is just as important to exclude the possibility that the Constitutional Tribunal examines the importance of the acts of Community law, as well as questions of the courts with respect to the compliance of normative acts with the ratified international agreements, with reference to the agreements of primary Community law, as well as with the Constitution in relation to the Community regulations or directives (Article 188, 193 of the Constitution). Such competence, on an exclusivity basis, is entrusted to the Court of Justice (Article 173, 177 of the Treaty). An appropriate regulation should be contained in the act on the Constitutional Tribunal (necessary change).

Some problems also arise as regards the right of the Constitutional Tribunal to decide on the constitutional claim (Article 188 item 5 in relation to Article 79 of the Constitution). It is specially important to resolve whether the constitutional claim will be allowed[16] in the case of a necessity to examine the compliance to the Constitution of a normative act in the form of a Community regulation or other Community act. Such doubt grows when the judgment passed on the basis of the normative act was issued after having obtained the preliminary ruling of the Court of Justice.[17] It seems that the possibility to submit a claim should be excluded, since the Court of Justice may not usurp the examination of the compliance of the Community law to the Constitution.

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[14] A different approach by J. G a 1 s t e r: *Konstytucyjnoprawne aspekty..., op. cit.,* p. 70-71, who claims that it is not necessary, since the principle of statehood is a sufficient warranty. However, the author is not completely consistent, and he states at the same time that Article 90 should include a negative material clause, that is, determine execution; the pertinent competence may not be delegated.

[15] In his scrutiny, J. G a 1 s t e r concludes that it may have a destructive impact upon the development and implementation of the Constitution *(ibid.*, p. 76).

[16] According to Article 79, it may be submitted with respect to compliance to the Constitution of the law or other normative act, on the basis of which the court or the public administration organ finally decided on constitutional freedoms, rights and obligations.

[17] K. W ó j t o w i c z; *Skutki przystąpienia Polski..., op. cit.,* p. 89.

Due to the above, an appropriate amendment should be made in the act on the Constitutional Tribunal (necessary change).

3. Problem of the Way of Introducing Amendments to Polish Law

It seems that for an effective execution of the Community law it is not only relevant that some provisions of the Polish law will be subjected to amendments; the way in which they will be made is equally significant. Modifications may be introduced through a number of specific amendments of Polish acts. However, this task may be achieved also in a more system-like way, that is, by means of an act on the legal effects of Poland's accession to the EU, which should be passed together with the ratification of the Treaty on Accession (direct effect and primacy principles only function after accession).

Such an act might be of a triple character. Its contents, simplified to some extent, would be as follows. In the first part, the act might contain general principles and fundamental provisions. They should include provisions developing the provisions of the Constitution. Therefore, they should state that the European Community law forms part of the Polish legal system (the status of specific sources of the Community law should be specified). Then, they should stipulate that directly applicable acts of the law of the Communities (regulations) are of direct applicability, without a need for their publication in *Dziennik Ustaw* [Journal of Laws]. An additional provision should declare that in the event of a contradiction previous or subsequent of the Polish legal rule with a rule of the Community law of direct effect, the latter should apply.

The first part should also contain provisions on the obligation of all public organs to execute an effective Community law and its safeguarding under the terms used in Polish law. There must also be place for provisions on responsibility for compensation on the part of the Treasury of State or organs of regional self-governments, due to a violation of the Community law towards persons. This part should also enumerate provisions allowing a person to appeal to the organs of legal protection and Polish courts, to decide in cases of a violation of the Community law.

The second part should contain the issues discussed above, concerning the statutory regulation of the relations between the Government and the Parliament in the European integration process. Finally, the third part should contain provisions which would amend rules binding in the detailed issues, discussed under specific modifications.