78/5/A/2009

DECISION
of 20 May 2009
Ref. No. Kpt 2/08*

The Constitutional Tribunal, in a bench composed of:

Bohdan Zdziennicki – Presiding Judge
Stanisław Biernat
Zbigniew Cieślak
Maria Gintowt-Jankowicz
Mirosław Granat
Marian Grzybowski – Judge Rapporteur
Wojciech Hermeliński
Adam Jamróz
Marek Kotlinowski
Teresa Liszcz
Ewa Łętowska
Marek Mazurkiewicz
Janusz Niemcewicz
Andrzej Rzepliński
Mirosław Wyrzykowski – Judge Rapporteur,

Grażyna Szałygo - Recording Clerk,

having considered, at the hearings on 27 March and 20 May 2009, in the presence of the applicant, the President of the Republic of Poland and the Public Prosecutor-General, an application of 17 October 2008 by the Prime Minister (who presides over the Council of Ministers) to settle a dispute over powers between the President of the Republic of Poland and the Prime Minister which concerns determining the central constitutional organ of the state that is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the state,

decides as follows:

1. The President of the Republic of Poland, the Council of Ministers and the Prime Minister (who presides over the Council of Ministers), while exercising their constitutional duties and powers, observe the principle of cooperation between the public powers, expressed in the Preamble and Article 133(3) of the Constitution of the Republic of Poland.

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*The operative part of the decision was published on 28 May 2009, Official Gazette - *Monitor Polski* (M. P.) No. 32, item 478.

2. The President of the Republic of Poland, as the supreme representative of the Republic, may – under Article 126(1) of the Constitution - decide to participate in a particular session of the European Council, if he finds it useful for the exercise of the duties of the President of the Republic of Poland, specified in Article 126(2) of the Constitution.

3. The Council of Ministers, under Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution, determines the stance of the Republic of Poland to be presented at a given session of the European Council. The Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed stance.

4. The participation of the President of the Republic of Poland in a given session of the European Council requires cooperation of the President with the Prime Minister and the competent minister, according to the principles set out in Article 133(3) of the Constitution. The goal of the cooperation is to ensure uniformity of actions taken on behalf of the Republic of Poland in the relations with the European Union and its institutions.

5. The cooperation of the President of the Republic of Poland with the Prime Minister and the competent minister enables the President to refer – in matters related to the exercise of his duties specified in Article 126(2) of the Constitution – to the stance of the Republic of Poland determined by the Council of Ministers. The cooperation also makes it possible to specify the extent and manner of the intended participation of the President in a session of the European Council.

STATEMENT OF REASONS

I

1. The application by the Prime Minister to settle a dispute over powers.

1.1. In his application of 17 October 2008, the Prime Minister – pursuant to Article 192 in conjunction with Article 189 of the Constitution of the Republic of Poland as well as Article 53 of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereinafter: the Constitutional Tribunal Act) – referred to the Constitutional Tribunal for it to "settle a dispute over powers between the President of the Republic of Poland and the Prime Minister as regards determining the central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the State". Therefore, the object of the dispute over powers is the power to represent the Republic of

Poland (as an EU Member State) at the sessions of an EU body, i.e. the European Council, and the related power to present the stance of the Republic of Poland at those sessions.

1.2. In the view of the applicant – the Prime Minister (hereinafter: the applicant), the object of the dispute over powers "is a specific action which may be described as »valid determination of the composition of the delegation of the Republic of Poland to attend a session of the European Council«".

The applicant categorises the existing, in his opinion, dispute over powers as "a positive powers dispute concerning the differences in opinions between the President of the Republic of Poland and the Prime Minister as to the powers to conduct the foreign policy of the Republic of Poland by participating in the sessions of the European Council and presenting the stance of the Republic." According to the applicant, the said dispute amounts to determining whether the President of the Republic of Poland alone decides about his participation in the sessions of the European Council, or whether – taking into consideration the constitutional position and powers of particular organs of the state – the final decision in this regard (in the event of lack of agreement between the President, wishing to participate in a session of the European Council, and the Prime Minister) is to be taken by the Prime Minister.

The core of the dispute, in the view of the applicant, amounts to the fact that the President holds the view that he alone may decide (regardless of the stance of the Council of Ministers) about his participation in a session of the European Council. By contrast, the Prime Minister holds the view that he is authorised to designate all the members of the delegation of the Republic of Poland. This leads to the conclusion that the participation of the President of the Republic of Poland (in the sessions of the European Council) should take place only upon consent of the Prime Minister, who takes into consideration the participation of the President of the Republic in the delegation designated by himself.

1.3. Pursuant to Article 192 of the Constitution, the Prime Minister is among the persons whom the Constitution *expressis verbis* authorises to submit applications for settling disputes over powers to the Constitutional Tribunal. In accordance with Article 53(1) of the Constitutional Tribunal Act, a positive powers dispute occurs where two (or more) central constitutional state organs "have considered themselves competent" to decide in the same case or have made a ruling in it. This should be understood in the following way: there is a dispute between central constitutional organs of the state as to their competence *ratione materiae* (cf. Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym*, Warszawa 1999, p. 176). In this sense, the dispute regards the power to decide about the participation of the President of the Republic of Poland in a particular session of the European Council and the power to present the stance of the Republic of Poland at the forum of the Council in the situations where the President is willing to participate in a given session.

In the view of the applicant, the core of the presented dispute over powers is an actual discrepancy in opinions as to the scope of powers of the parties to the dispute. The point is the legally justified ability of state organs to "precisely update (...) the potential obligation to take action, specified by law" (J. Boć, [in:] *Konstytucje Rzeczypospolitej oraz*

komentarz do Konstytucji RP z 1997 r., J. Boć (ed.), Wrocław 1998, p. 292). According to the applicant, the adjudication of the Constitutional Tribunal would allow for determining, more precisely, the legal shape and scope of powers of the central constitutional organs of the state, being the parties to the dispute.

According to the applicant, the discrepancy in opinions is regarded as a dispute over powers (within the meaning of Article 189 of the Constitution) where the discrepancy: a) involves divergent and incompatible interpretations of a constitutional provision, b) concerns a particular situation. Therefore, in the view of the applicant, the adjudication of the Constitutional Tribunal may not be merely based on an abstract interpretation of provisions. It should bear the characteristics of adjudication on a real legal dispute.

1.4. Substantiating the real character of the dispute over powers, to which the application relates, the applicant indicated that the said dispute had arisen, in particular, in the context of the session of the European Council devoted to the financial crisis, energy security as well as the energy and climate package, which was held in Brussels on 15-16 October 2008.

With regard to the indicated session of the European Council, the President of the Republic of Poland publicly announced that he intended to take part in that session of the European Council and that he had the power to make the decision alone – regardless of the stance of the Prime Minister – as to his participation in the session of the European Council. This view was first announced in the press, and then it was presented in a legal analysis of the scope of powers of the President of the Republic of Poland which was published on the website of the Chancellery of the President of the Republic of Poland (on 13 October 2008, i.e. two days before the relevant session of the European Council).

The President of the Republic of Poland presented this stance to the Prime Minister during the meeting on 13 October 2008. It was reported during the press conference after the said meeting. The actual manifestation of the stance of the President of the Republic of Poland was – in the view of the applicant – the participation of the Polish President in the session of the European Council in Brussels (15-16 October 2008) "against the decision of the Prime Minister determining the composition of the delegation of the Republic of Poland for the session of the Council".

1.5. In the substantiation of his application, the Prime Minister stresses that, pursuant to the Constitution, the internal affairs and foreign policy of the Republic of Poland are conducted by the Council of Ministers. The Council of Ministers exercises general control in the field of relations with other states and international organisations. In the opinion of the Prime Minister, conducting foreign policy also entails representing the Republic of Poland at the sessions of the European Council and presenting the state's stance there. In the view of the Prime Minister, it follows that "the final decision as regards the persons representing the Republic of Poland at the summit of the European Council is to be taken by the Prime Minister, therefore the participation of the President of the Republic of Poland should concern the cases agreed with the Prime Minister, who takes this into account when designating the delegation".

1.6. The stance formulated this way has been manifested in the Resolution No. 196 of the Council of Ministers of 9 October 2008 on representing the Republic of Poland at the sessions of the European Council (M. P. No. 75, item 674; hereinafter: the Resolution No. 196). This Resolution contains a regulation, according to which the composition of the delegation of the Republic of Poland for a session of the European Council is determined by the Prime Minister.

On the basis of the Resolution No. 196, the Prime Minister decided that the composition of the delegation would be as follows: the Prime Minister, the Minister of Foreign Affairs and the Minister of Finance. The information about the composition of the delegation was presented to the President of the Republic of Poland at the meeting of the President with the Prime Minister on 13 October 2008.

1.7. According to what the applicant has stated, the dispute over powers to be settled by the Constitutional Tribunal concerns "the discrepancies as to the scope of powers of central constitutional authorities of the state, i.e. the President of the Republic of Poland and the Prime Minister (who presides over the Council of Ministers)". In particular, it consists in indicating which of the two state authorities has the power to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the Polish state [at those sessions]". In the opinion of the applicant, the dispute concerns a specific action which may be described as »valid determination of the composition of the delegation of the Republic of Poland to attend a session of the European Council«".

According to the applicant, the dispute amounts to the fact that the President holds the view that he alone may decide (regardless of the stance of the Council of Ministers) about his participation in a session of the European Council. By contrast, the Prime Minister believes that he is the only person authorised to determine the full composition of the delegation of the Republic of Poland. In his view, the participation of the President of the Republic in the sessions of the European Council may only concern the cases agreed jointly by the President of the Republic of Poland and the Prime Minister.

The applicant has drawn attention to the present as well as prospective dimension of that dispute. The sessions of the European Council are held regularly, at least twice every six months. Therefore, regardless of the fact that the dispute indicated in the application arose in relation to a specific session of the European Council (which was held in Brussels on 15-16 October 2008), the President of the Republic maintains his stance also with regard to the future sessions of the European Council. In the view of the applicant, this circumstance is an additional argument for fulfilling the premisses concerning the object and the scope ratione personae of the dispute over powers within the meaning of Article 189 of the Constitution, i.e. a dispute which is subject to adjudication by the Constitutional Tribunal.

1.8. Specifying the object of the dispute over powers, the applicant emphasises the significance of the principle that the organs of public authority function on the basis of, and

within the limits of, the law, as expressed in Article 7 of the Constitution. In the light of this principle, all activities of the organs of public authority are specified by law. The law determines both the basis and scope of functioning of an organ of public authority.

Specifying precisely the powers vested in the organs of public authority, i.e. indicating the legal basis for taking the actions specified by law is vital for the possibility of taking certain actions by particular organs of the state. If the law does not explicitly specify the power of a state organ with regard to its activity in the relevant regard, such a power does not exist (cf. L. Garlicki, commentary to Article 189, [in:] *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz*, L. Garlicki (ed.), Warszawa 2007, Vol. 5, p. 3). The view presented here, in the applicant's opinion, has been adopted in the well-established jurisprudence of the Constitutional Tribunal (see the judgment of 20 July 2006, Ref. No. K 40/05, OTK ZU No. 7/A/2006, item 82 and the earlier rulings of the Tribunal referred to therein, from the period when the "Small Constitution" of 17 October 1992 was binding).

In this context, in the view of the applicant, the essential element of the dispute is the question whether the President of the Republic of Poland alone decides about his participation in the sessions of the European Council, "or whether – taking into consideration the constitutional position and powers of particular organs of the state – the final decision in this regard (in the event of lack of agreement between the President, who is willing to participate in a session of the European Council, and the Prime Minister) is to be taken by the Prime Minister".

1.9. In the substantiation of his application, the Prime Minister also makes reference to the regulations contained in the European Union's Treaties. In particular, he draws attention to Article 4 of the Treaty on European Union (hereinafter: the EU Treaty) and the description of the function of the European Council in the EU institutional system, which is contained therein. Pursuant to Article 4 of the EU Treaty, the European Council provides the Union with the necessary impetus for its development and defines the general political guidelines thereof.

What is particularly important is that Article 4 of the EU Treaty sets out the rules of participation in the sessions of the European Council. It stipulates that the European Council shall bring together the Heads of State or Government of the Member States („*les chefs d`État ou de gouvernement des États*"; „*die Staats- und Regierungschefs*") and the President of the European Commission. They shall be assisted by the Ministers for Foreign Affairs of the Member States and by a Member of the European Commission.

1.10. The Treaty on European Union – in Article 4 – does not impose, on the Member States, fully uniformed rules for each Member State as regards the representation of the State at the sessions of the European Council. In the view of the applicant, i.e. the Prime Minister, the wording "the European Council shall bring together the Heads of State or Government of the Member States" is historically justified. In particular, it takes into account the constitutional position of the President of France, the different status of Prime Ministers in particular Member States, as well as the need for equal and balanced political representation. At the same time, the applicant stresses that the provisions of Article 4 of the EU Treaty have been elaborated on and made more specific in the "Rules for

organising the proceedings of the European Council", adopted at the session of the European Council in Seville (21-22 June 2002). These rules specify, *inter alia*, the up-to-date frequency of the sessions of the European Council (twice every six months), the number of seats each delegation of the Member States shall have in the meeting room (two) and the total size of the delegation of each Member State (it should be limited to 20 people).

1.11. In the situation where the composition of the delegations of particular Member States is merely generally specified in Article 4 of the EU Treaty, which is binding on all the Member States, what is vital when determining the composition of the delegations in particular Member States is the regulations of the national law of each Member State.

In the view of the applicant, as regards including the President of the Republic of Poland in the Polish delegation, among the regulations of national law, Article 126 of the Constitution is of fundamental importance. This provision specifies the position of the President of the Republic of Poland, within the system of government, as well as his duties. According to Article 126, the President of the Republic of Poland is the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority. Pursuant to Article 126, the President ensures observance of the Constitution, safeguards the sovereignty and security of the State as well as the inviolability and integrity of its territory.

In the opinion of the applicant, one may not draw the conclusion, from the constitutional description of the President as "the supreme representative of the Republic of Poland", that the President remains "the supreme state authority". Indeed, pursuant to Article 10 of the Constitution, the system of government is based on the separation of powers among the organs of the legislative, executive and judicial branches. Relations between particular "branches" are based on the principle of balance.

Making reference to the doctrinal interpretation, (see P. Sarnecki, Commentary to Article 126, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, L. Garlicki (ed.), Warszawa 1999, Vol. 1, p. 3)), the applicant stresses that the regulations contained in Article 126 play a triple role: a) constitute a "starting point and specify the interpretative guidelines for distinguishing the roles of both organs of the executive branch", b) specify "the interpretative guidelines for determining the content of provisions on the powers of the President", c) constitute "the basis for taking actions which have no legal effects by the President" (such as participating in assemblies, delivering speeches and addresses, as well as attending conferences and meetings).

The applicant also mentions the view that Article 126 of the Constitution does not constitute a separate rule governing competence. Indeed, the duties of an organ of the state may not be regarded as tantamount to its powers to take actions which have legal effects. In the applicant's opinion, a similar line of reasoning is present in the jurisprudence of the Constitutional Tribunal, which stresses the aptness of distinguishing the duties of an organ of public authority from its powers. In the view of the applicant, powers, as "one of legal forms of carrying out duties, must be explicitly granted by the binding norms". It is inadmissible to derive them from the duties assigned to a given organ of public authority.

With regard to the President of the Republic of Poland, that principle – according to the applicant – is expressed in Article 126(3) of the Constitution, which stipulates that the President exercises his duties "within the scope of and in accordance with the principles specified in the Constitution and statutes".

1.12. In the applicant's view, Article 126(1) of the Constitution, "to a large extent" specifies the position of the President of the Republic of Poland within the scope of exercise of his specific powers. In the opinion of the applicant, the President is still independent and takes initiative as regards shaping the relations of the Republic of Poland with other states and international organisations, provided that "there is no constitutional requirement to act upon motion of other organs of the state" (the Council of Ministers, the Prime Minister (who presides over that Council), or the Minister of Foreign Affairs), with authorisation (e.g. of the Sejm and Senate, when ratifying certain international agreements) or within the framework of cooperation (e.g. with the Prime Minister and the Minister of Foreign Affairs).

In the applicant's view, Article 133 of the Constitution specifies the powers of the President of the Republic of Poland "as representative of the State in foreign affairs". This provision enumerates, in particular in paragraph 1, specific powers of the President.

1.13. In the applicant's view, what is of fundamental significance for specifying the powers of the President of the Republic of Poland is Article 133(3) of the Constitution. In accordance with this regulation, "the President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy". In this context, the applicant points out that the Constitution of 2 April 1997 does not contain the clause from Article 32(1) of the "Small Constitution" of 1992, which vested "general control in the field of foreign relations" in the President. The Constitution of 1997 grants the power to exercise general control in the field of relations with other states and international organisations to the Council of Ministers (Article 146(4)(9)).

From the above-mentioned circumstances, the Prime Minister draws a conclusion that the powers of the President of the Republic of Poland with regard to foreign affairs are "qualified as exceptions and they always must have an explicit and specific constitutional basis". Moreover, according to the applicant, what follows from Article 133(3) of the Constitution is the "obligation to seek compromises and – in the case of the President – to refrain from decisions and actions which have not been discussed earlier with the Prime Minister or the Minister of Foreign Affairs".

At the same time, the Prime Minister emphasises that, pursuant to Article 146(1) of the Constitution, conducting the internal affairs and foreign policy of the Republic of Poland falls within the competence of the Council of Ministers. In accordance with Article 146(2), the Council of Ministers also conducts the affairs of state which are not reserved to other state organs and local self-government. In the view of the applicant, this confirms the special position of the Council of Ministers as an organ of the state that "conducts the affairs of State". In the opinion of the Prime Minister, the Council of Ministers is vested with "the main responsibility for the state of public affairs", which arises from the fact that the Council conducts the internal affairs and foreign policy of the state.

1.14. The applicant stresses the significance of Article 146(4)(9) of the Constitution. In accordance with that regulation, the Council of Ministers shall "exercise general control in the field of relations with other States and international organisations". In the view of the applicant, the field of relations with international organisations comprises the duties of the Council of Ministers which are related with the functioning of the EU institutions". In the applicant's opinion, Article 146(4)(9) not only indicates specific powers of the Council of Ministers, but it gives the Council of Ministers "legal capacity to take certain actions".

In the opinion of the applicant, what arises from assigning the Council of Ministers with general control in the field of relations with international organisations (within the framework of conducting foreign affairs) is the power of the Prime Minister (who presides over the Council of Ministers) to "designate persons to represent the Republic of Poland at a session of the European Council". This is confirmed by both the presumption of the competence of the Council of Ministers, arising from Article 146(2) of the Constitution, as well as the lack of a constitutional provision granting the powers in this regard to the President of the Republic of Poland. In the applicant's view, Article 126(1) may not be regarded as such a provision, for it specifies a general role of the President of the Republic of Poland within the system of government, but it does not assign his duties with autonomous powers.

1.15. In this context, the Prime Minister expresses the view that the conviction of the Polish President that he is entitled to participate in a "summit" of the European Council and present the stance of the Republic of Poland there - due to being the supreme representative of the Republic of Poland – is not confirmed in the binding provisions of the law. In the opinion of the applicant, "indeed, indicating the constitutional status of the President as the supreme representative is not a sufficient basis for undertaking representation on his own as regards the matters which symbolise the state (making declarations of will on behalf of the state) or as to making particular decisions". What is indispensable in this regard is the possibility of referring to the provisions which set out rules governing competence.

The applicant recalls a doctrinal view (see P. Sarnecki, Commentary to Article 126, *op.cit.*, p. 5) that the term "representative" – which denotes "representing the Republic of Poland in person" – refers to the case of "sheer" representation; in other words, it refers to the situations where the President does not undertake any actions apart from "representing the state" (i.e. being present in a given place and at a given time). This interpretation is justified – according to the applicant – by the character of the office of the President of the Republic of Poland, as provided for by the constitution-maker.

1.16. In the view of the applicant, the interpretation of the regulations of the Constitution assumed in the application is supported by the arguments arising from the position and role of the European Council. The European Council does not enact legal acts, but it takes mainly political initiatives and decisions. They are presented in the form of conclusions of the Presidency the European Council. In accordance with the so-called Seville rules of June 2002, these conclusions should be as concise and as precise as

possible. They comprise decisions and guidelines adopted by the European Council at a given session.

In the view of the Prime Minister, "the scope of activities of the (European) Council mainly includes (...) the fields which are coherent with particular departments of government administration; that is those which clearly fall within the remit of powers of the Council of Ministers". The implementation of the conclusions adopted by the Council "must lead to creating policies of the Member States in accordance with those conclusions". In the applicant's opinion, "this clearly leads to the conclusion that the right to designate the persons representing a Member State is enjoyed by the organ of the state whose scope of competence includes conducting internal affairs and foreign policy", i.e. the Council of Ministers.

In the view of the applicant, it is also practical reasons that call for granting the disputable power to determine the composition of the delegation of the Republic of Poland. In the case of the Council of Ministers (and its particular members, and in particular by the Minister of Foreign Affairs) being responsible before the Sejm for the entirety of foreign policy, other organs of the state may not act in this regard, as they are excluded from the responsibility indicated here. A diverse solution would result in an ostensible responsibility of the Council of Ministers, whereas the exercise of control by the Sejm would be limited.

The Prime Minister considers it to be obvious that "the President of the Republic of Poland is not responsible before the Sejm". In these conditions – according to the applicant – "any attempts at interpreting the constitutional wording »cooperation in respect of foreign policy«, which result in granting the President a fictitious scope of independent powers with regard to foreign policy, infringes on the scope of powers of the Council of Ministers and constitutes a *contra legem* interpretation". Also, the applicant holds the view that "such powers may not (...) be derived from the constitutional description of the President as the supreme representative of the Republic of Poland". This would constitute "inadmissible presumption of powers being contrary to the constitutional principle of legalism".

1.17. In the view of the applicant, the ultimate right to take a decision as regards the participation in the sessions of the European Council, which is vested in the Prime Minister, does not rule out the participation of the President of the Republic of Poland in a given session of that Council. However, according to the applicant, this should regard unusual situations, in particular extraordinary "summits" dealing with extraordinary circumstances which have impact on e.g. Poland's security.

In the opinion of the applicant, the decision of the President of the Republic of Poland, as regards his participation in such a session, should be taken as a result of cooperation between the President and the Prime Minister, in accordance with Article 133(3) of the Constitution. The President would only be obliged to present the stance that has previously been agreed with the Prime Minister and the Minister of Foreign Affairs. In the view of the applicant, "the constitutional right to shape and present, in a binding way, the stance of the Republic of Poland at a session of the European Council" is enjoyed by the Council of Ministers, represented by the Prime Minister (presiding over that Council).

1.18. In accordance with the requirements of Article 53(2) of the Constitutional Tribunal Act (which specifies the indispensable elements of the application to settle a dispute over powers), the applicant has indicated the following provisions of the Constitution, which – in his opinion – have been infringed on: Article 126(1), Article 133(3) and Article 146(1), Article 146(2) and Article 146(4)(9) in conjunction with Article 148(1), (4) and (5).

In the opinion of the applicant, the said infringement consisted in deriving the interpretation, on the basis of Article 126(1), that the President of the Republic of Poland had independent power to participate in the session of the European Council in Brussels (15-16 October 2008), despite the clear stance of the Prime Minister in that regard. According to the applicant, this constituted interference, by the President of the Republic of Poland, with the powers of the Prime Minister which are specified in Article 146(1), Article 146(2) and Article 146(4)(9) in conjunction with Article 148(1), (4) and (5) of the Constitution. In the applicant's view, the interpretation and exercise of powers by the President exceeded the scope of his powers outlined in Article 133(3) of the Constitution.

What calls for settling the dispute over powers is the public interest. Moreover, the commencement (and resolution) of the dispute is justified by the inability of the relevant state authority (here: the Prime Minister) to properly solve the problem.

II

2. The stance of the President of the Republic of Poland with regard to the application by the Prime Minister.

2.1. In a letter of 21 November 2008, submitted to the Constitutional Tribunal, the President of the Republic of Poland presented his stance concerning the application by the Prime Minister to settle the dispute over powers.

The key elements of the stance of the President of the Republic of Poland, formulated pursuant to Article 27(4) in conjunction with Article 33 of the Constitutional Tribunal Act, are as follows:

"I. The application submitted by the Prime Minister does not meet the criteria for a dispute over powers, as referred to in Article 189 of the Constitution in conjunction with Article 53(1) of the Constitutional Tribunal Act.

II. The participation of the President of the Republic of Poland in a session of the European Council, as a member of the delegation of the Republic of Poland, regardless of the stance of the Prime Minister, does not infringe on Article 126(1), Article 133(3) as well as Article 146(1), Article 146(2) and Article 146(4)(9) in conjunction with Article 148(1), (4) and (5) of the Constitution".

2.2. First of all, the President referred to the scope of jurisdiction of the Constitutional Tribunal, as regards disputes over powers. The President made reference, in particular, to Article 53(1) of the binding Constitutional Tribunal Act, focusing on the

description of the character of a "positive powers dispute" and a "negative powers dispute".

At this point, the President of the Republic made reference to the decision of the Constitutional Tribunal of 23 June 2008 (Ref. No. Kpt 1/08). He drew attention to the fact that the wording used in Article 53(1) of the Constitutional Tribunal Act – "have considered themselves competent" and "have made a ruling" – should be considered in the context of a dispute between central constitutional organs of the state over their scope *ratione materiae*. This should be a real dispute, and not a theoretical (i.e. potential) one, which could stem from the intention to receive a binding interpretation by the Constitutional Tribunal that would precede the dispute.

In the opinion of the President of the Republic of Poland, a dispute over powers which is subject to jurisdiction of the Tribunal is merely "the question about powers (their existence or lack thereof, and their legal scope) as well as »the clash (conflict) of powers«". However, it is inadmissible to adjudicate, within the scope of the procedure which is appropriate to disputes over powers, on "the possibility of questioning other aspects of actions of state authorities in respect of their conformity to the law". The actions of the President, taken within the scope of the powers vested in him, are not – as such – subject to assessment by the Constitutional Tribunal".

Also, the President pointed out that, in the decision of 23 June 2008 (Ref. No. Kpt 1/08), the Tribunal had considered the President's role within the system of government as "the supreme representative of the Republic of Poland", specified in Article 126(1) of the Constitution, to be vital for the assessment of the character and significance of the President's actions. Further on, he stressed in the reasoning (citing the view of Professor P. Sarnecki) that, being the supreme representative of the Republic of Poland, the President at the same time remains the guarantor of the continuity of state authority.

2.3. The role of the supreme representative of the Republic of Poland denotes the metaphoric "embodiment of the Polish State", in the situations where the national and international law as well as certain customs require the embodiment of the Republic of Poland by a specific person. The President, in person, represents the Polish State in a continuous way, by his sole presence, even if he does not take any specific action. Certain public acts require, in accordance with the tradition, that they should be carried out with the involvement of the state, and hence they are reserved to the President. The said acts do not have to be of a special binding force. These may also be acts which are formally without binding force, but which are "particularly ceremonial or which strongly emphasise the involvement of the State itself". The President is "the symbol of the State and, in that sense, he represents it".

As the guarantor of the continuity of state authority, the President should aim at preserving the fundamental values of the Polish statehood, especially those which are of a permanent and unchanging character. In the view of the President, these values may not be disregarded while devising current (and long-term) policies, and while setting even the furthest goals for development. They must be taken for granted, and regarded as permanent

points of reference. In the opinion of the President, "it is logical and understandable" that their guarantor becomes a person who is also the supreme representative (...) of statehood". According to the President (who is relying on the doctrinal interpretation – cf. P. Sarnecki, *Prezydent Rzeczypospolitej Polskiej. Komentarz do przepisów*, Kraków 2000, p. 31), the provisions of Article 126(1) and (2) "(...) unambiguously present the vision of an active President who gets actively involved in the course of state affairs and affects them within the scope of his powers". The President of the Republic of Poland, "acting as the head of state, and in particular as a political arbiter (the guarantor of the continuity of state authority), is obliged to constantly fulfil that role, »keep his finger on the pulse« of the entirety of state affairs", preserve the values he is constitutionally appointed to protect and actively support their preservation, both by encouraging appropriate actions as well as counteracting any attempts at infringing those values".

2.4. The President of the Republic of Poland does not conduct foreign policy (it is conducted, pursuant to Article 146(1), by the Council of Ministers). Nevertheless, his duties, as set out in Article 126(2) of the Constitution, have multifaceted relevance to conducting foreign policy by the government. In the view of the President, Article 133(3) of the Constitution addresses the obligation of cooperation, in respect of foreign policy, not only to the President, but also to the Prime Minister and the competent minister. Indeed, this obligation arises directly from the Preamble of the Constitution, which *expressis verbis* mentions "cooperation between the public powers". What ensues from the obligation of cooperation is a number of specific duties, including: informing one another of all major plans, drafting major decisions, and mutual inspiration in the field of conducting foreign policy.

2.5. What follows from Article 10(2) of the Constitution is the duality of the organs of the executive branch. Its consequence is the activity of the President of the Republic of Poland and the Council of Ministers as two holders of executive power that are separate as regards their organisation, powers and duties. Exercising his constitutional (and statutory) duties and powers, the President acts independently of the Council of Ministers and "on his own responsibility". He is not politically responsible before the Sejm and is not subject to supervision by the Sejm. In the event of breaching the law, he is legally (constitutionally) responsible for his activity (pursuant to Article 145 of the Constitution).

The prohibition of holding the office of the President together with other public (state) offices is meant to maintain the distance between the holder of that office and the remaining constitutional organs of the state. However, this is not tantamount to absolute political neutrality of the President of the Republic of Poland in the course of performing his duties. Political involvement of the President ensues from the mode of election as well as – in the President's opinion – "the state duties vested in him". All the circumstances indicated here, regardless of the fact that the constitution-maker has entrusted the Council of Ministers with "conducting the foreign policy", justify the activity of the President which is manifested, *inter alia*, in his participation in the sessions of the European Council, which is a political body of the European Union.

2.6. In the view of the President, the emergence of a real dispute over powers is conditioned by issuing a decision in a given case by the organ of the state being a party to the dispute. Otherwise, one central constitutional organ of the state merely questions the powers of another state organ which arise from the Constitution or a statute. At the same time, the President emphasised that merely the way the central constitutional organs of the state exercised their powers might not be the object of assessment by the Constitutional Tribunal, in accordance with the procedure appropriate for a dispute over powers, since there were no characteristics of a dispute over powers.

The President of the Republic of Poland stressed in his stance the need to consider Article 54(1) of the Constitutional Tribunal Act. This regulation provides for the obligation to suspend the proceedings before the organs of the state which are in dispute over powers. The Constitutional Tribunal Act also provides for the possibility that the Tribunal will decide to rule on the disputed issues provisionally, including the suspension of enforcement actions, if this is necessary to prevent an occurrence of serious damage or if prescribed by a particularly vital social interest (Article 54(2) of the Constitutional Tribunal Act).

In the opinion of the President of the Republic of Poland, the provisions of Article 54(1) of the Constitutional Tribunal Act should be interpreted in the context of procedural regulations which provide, *inter alia*, for an obligatory suspension of proceedings before the organs of the state being parties to a given dispute. The lack of possibility of suspending proceedings before the President of the Republic of Poland as well as before the Prime Minister, in the view of the President, weighs against regarding a real discrepancy in the opinions of these two constitutional authorities of the state as a dispute over powers strictly in the sense of the term.

2.7. The President of the Republic of Poland analysed the actual circumstances which the applicant – the Prime Minister – regarded as premisses of emergence of the dispute over powers. In particular, the following actual circumstances were the objects of examination:

a) the adoption (by the Council of Ministers) of the Resolution No. 196 of 9 October 2008 on representing the Republic of Poland at the sessions of the European Council (M. P. No. 75, item 674), confirming the stance that the members of the delegation of the Republic of Poland are to participate in a session of the European Council are designated by the Prime Minister;

b) the participation of the Polish President in the session of the European Council in Brussels (15-16 October 2008), "against the decision of the Prime Minister determining the composition of the delegation of the Republic of Poland for the session of the Council".

III

3. The stance of the Public Prosecutor-General.

3.1. In a letter of 16 December 2008, the Public Prosecutor-General held the view that the power to determine the composition of the state delegation for a session of the

European Council – pursuant to Article 148(4) in conjunction with Article 146(1) and Article 146(4)(9) of the Constitution – was vested in the Prime Minister, and not in the President of the Republic of Poland.

In the substantiation, the Prosecutor considered, in the first place, whether the application referred to the Constitutional Tribunal met all the criteria of a dispute over powers. In his opinion, although there is no doubt that the criteria concerning parties to disputes over powers have been met, one may have doubts as to whether the application meets the criteria of a dispute over powers as regards the object of the application.

The Public Prosecutor-General stated that when considering that the assumption of the application was the fact that the Prime Minister was competent to determine the composition of the state delegation, which conducted the foreign policy of the state, it was necessary to assess whether the decision of the President that he should be included in the delegation fell within the scope of powers to determine the composition of the delegation.

In the opinion of the Prosecutor, it should be recognised that making a decision about joining the delegation, the composition of which has been determined by the Prime Minister, complements the decision of the Prime Minister, and therefore it is an act within the scope of powers to determine the composition of the delegation. Although the President, deciding to join the delegation did not make a formal act that would change the decision of the Prime Minister, in fact he made such a change. In the opinion of the Public Prosecutor-General, the President took action which fell within the scope of the powers of determining the composition of the delegation; therefore, it should be concluded that the application meets the criterion for the object of a dispute over powers.

Also, the Public-Prosecutor stated that settling the dispute over powers concerns solely the power to determine the composition of the delegation for a session of the European Council, and not other issues related with the exercise of constitutional powers of the President of the Republic of Poland in the field of foreign relations.

3.2. In the view of the Public Prosecutor-General, there are some difficulties with finding a detailed rule governing competence which would *expressis verbis* grant the power to determine the composition of the delegation to one of the organs of the executive branch. The analysis of Article 146(1) and (2), indicated in the application as a source of that power, leads to the assertion that the foreign policy is conducted by the Council of Ministers and constitutes one of the components of its policies. In turn, Article 148(4) of the Constitution stipulates that the Prime Minister shall ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation. According to the Public Prosecutor-General, it is necessary to consider the question whether ensuring the implementation of the foreign policy of the state, being the policy of the Council of Ministers, and specifying the manner of its implementation comprises in its scope determining the composition of the state delegation for the sessions of the European Council. In the opinion of the Public Prosecutor-General, the answer to this question should be affirmative – he regards determining the composition of the delegation for a session of the European Council as an act ensuring and specifying the manner of implementation of the foreign policy.

3.3. In the opinion of the Public Prosecutor-General, the wording of Article 4 of the EU Treaty indicates that as regards the participation, on behalf of the Republic of Poland, at the sessions of the European Council, this could be the Prime Minister, as the head of the government, as well as the President, the head of state, individually or possibly together. Opting for the mixed model, in the opinion of the Prosecutor, requires finding procedural solutions in constitutional norms which will allow to avoid similar conflicts in the future, as the participation in the sessions of the European Council will each time require specifying which of the two constitutional organs of the state will represent the Republic of Poland.

The Public Prosecutor-General holds the view that Article 148(4) of the Constitution comprises the Prime Minister's power to determine the composition of the delegation, and also specify – within the scope of Article 4 of the EU Treaty – which of the authorities indicated there is to take part in a given session of the Council. According to the Public Prosecutor-General, it is obvious that the Prime Minister may not, in an authoritative way, decide, without the consent of the President of the Republic of Poland, about the inclusion of the President in the delegation. He may do so only upon consent or upon motion of the President, since the mutual relations of the two authorities of the executive branch need to be based on cooperation. What follows from Article 133(3) of the Constitution is the obligation of cooperation between the two authorities, despite the fact that the direct addressee of that provision is the president of the Republic of Poland. According to the Public Prosecutor-General, it is impossible to assume that it would be plausible for the President to cooperate with the Council of Ministers, without recognising that the obligation of cooperation is imposed also on the Prime Minister.

3.4. In the view of the Public Prosecutor-General, taking the decision about joining the state delegation, and submitting this decision by the President, should be regarded as the official act of the President, as referred to in Article 144(2) of the Constitution, and as one which requires the signature of the Prime Minister. According to the Public Prosecutor-General, there are grounds to include this act among the acts which are exempt from the requirement of the said signature, as among such acts there is no mention of a decision about the inclusion of the President in the official state delegation. In the view of the Public Prosecutor-General, it should be stated that the norms of the Constitution do not allow the President, which is important from the legal point of view, to independently make decisions about joining the delegation that exercises the duties from the field of the state's foreign policy. The power to designate the members of the delegation is vested in the Prime Minister.

3.5. In the opinion of the Public Prosecutor-General, what needs to be additionally discussed is the issue whether the position of the President of the Republic of Poland within the system of government does not authorise him to represent the state in international relations, regardless of the appointment (designation) of the state representatives to perform a specific duty. In the view of the Public Prosecutor-General, the content of the constitutional provisions which are relevant in this regard, i.e. Article

126(1) and Article 133, leads to the conclusion that, despite describing the Polish President as the supreme representative of the Republic of Poland, his powers as regards foreign relations do not include independent representation of the Republic, in a way that would be legally binding for the state as the subject of rights and obligations and as the subject of international relations. Such independent representation on the part of the President at the international forum should be regarded as action which has no legal effects, which is purely declarative in character.

The Public Prosecutor-General asserts that even if the President's decision about joining the delegation which carries out the duties from the field of foreign policy, is considered to be action which is independent form the procedure for determining the composition of the delegation by the Prime Minister, it should be stated that the decision does not fall within the scope of the powers of the President of the Republic of Poland, as set out in the Constitution.

IV

1. The hearing before the Constitutional Tribunal on 27 March 2009.

1.1. The hearing on 27 March 2009 was attended by the authorised representatives of the Prime Minister (who presides over the Council of Ministers), the President of the Republic of Poland and the Public Prosecutor-General. The applicant was represented by: Mr Maciej Berek, President of the Government Legislation Centre (RCL), and Mr Piotr Gryska, Director of the Legal Office of the RCL. The stance of the President of the Republic of Poland was presented by the following representatives: Mr Piotr Kownacki, Head of the Chancellery of the President of the Republic of Poland, and Mr Andrzej Duda, Undersecretary of State in the Chancellery of the President of the Republic of Poland, and Prof. dr hab. Dariusz Dudek (Professor), as the plenipotentiary of the President of the Republic of Poland. The Public Prosecutor-General was represented by the following persons: Prosecutor Andrzej Pogorzelski, Deputy of the Public Prosecutor-General, and Prosecutor Andrzej Stankowski, Prosecutor of the Public Prosecutor's Office.

The representatives of the Prime Minister maintained the application for settling the dispute over powers by the Constitutional Tribunal, as well as the stance presented in the substantiation of the application.

The representatives of the President of the Republic of Poland maintained the assertions made in the letter by the President. They emphasised that, in the view of the President of the Republic of Poland, the application by the Prime Minister did not meet the criteria for a dispute over powers, as referred to in Article 189 of the Constitution in conjunction with Article 53(1) of the Constitutional Tribunal Act. The representatives of the President presented the key arguments which were the basis of the President's stance. Moreover, the plenipotentiary of the President submitted a pleading which supplemented the arguments presented in the reply to the application.

The representatives of the Public Prosecutor-General maintained the stance the Public Prosecutor-General which had been presented in the pleading of 16 December 2008. They requested the Tribunal to state that the power to determine the composition of the

Polish state delegation for a session of the European Council is vested in the Prime Minister.

1.2. In the next phase of the hearing, the representative of the Prime Minister took a position on the view of the President that the application of the Prime Minister did not fulfil the criteria which are necessary for settling a dispute over powers by the Constitutional Tribunal. He stated that there was a dispute over powers between central constitutional organs of the state, and that it consisted in the discrepancy in opinions on the scope of powers of the central constitutional organs of the state which were the parties to the dispute.

The representative of the applicant indicated that the dispute arose in the situation when one central constitutional organ of the state asserted that its competence comprised the power to take certain action which another central constitutional organ recognised as an action falling within the scope of its powers. He added that the President, by taking part in the session of the European Council, despite the fact that he had not been designated as a member of the delegation by the Prime Minister, had actually enlarged the composition of the delegation; and thus he had taken action falling within the scope of determining the composition. However, that power is vested in the Prime Minister.

In addition, the representative of the Prime Minister stressed that the application referred to the Constitutional Tribunal was inappropriately interpreted by the President of the Republic of Poland. The misinterpretation consisted in the fact that the applicant had indicated, as the premiss of the emergence of the dispute over powers, the Resolution No. 196 of the Council of Ministers. He explained that the Prime Minister referred to the Resolution in his application only for informative reasons, after indicating the detailed constitutional provisions which constituted the basis of the application. He also pointed out that the above-mentioned Resolution of the Council of Ministers referred neither to the President of the Republic of Poland nor to his powers or obligations.

Drawing attention to the character of the European Council, as a body of the European Union, the representative of the applicant emphasised that the reason for such general wording as regards specifying the composition of the European Council, in Article 4 of the EU Treaty, was considered to be the intention to allow participation in the European Council to all the persons who bear the main burden and responsibility for conducting European policy in a given EU Member State.

The representative of the Prime Minister referred to the erroneous – in his opinion – interpretation of the application, assumed by the President of the Republic of Poland, that supposedly the allegation was an attempt to prove the subordination of the President of the Republic of Poland to the Prime Minister. In the opinion of the representative of the Prime Minister, it is not possible to derive such assertions from the object of the dispute over powers, specified in the application. It does not follow from the indication of the applicant that the President of the Republic of Poland is obliged to cooperate with the Prime Minister, that this obligation is one-sided; cooperation always requires the activity of these two authorities.

Also, the representative of the Prime Minister indicated that the presence of the President of the Republic of Poland affected the composition of the delegation in a

binding, legal and authoritative way. He acknowledged the statement about the President's hierarchical supremacy in the system of government in the Republic of Poland. However, he stressed that it should be taken into consideration whether the fact of being the supreme representative of the state implied a specific power and whether a separate power to take action might – as the President claimed – be derived from the content of Article 126(1) of the Constitution.

The representative of the applicant underlined that, in the view of the Prime Minister, the settling of the dispute over powers by the Constitutional Tribunal was in the interest of the state; since there was a situation where two organs of the executive branch, on the basis of the constitutional provisions concerning them, did not find a unanimous answer to the question which of them was competent to act within the scope which was of considerable significance to the relations with the European Union.

1.3. Referring to the arguments of the representatives of the Prime Minister, the representative of the President pointed out that the obligation of the President to cooperate with the Prime Minister was emphasised in the application, but there was no discussion of the mutuality of the obligation of cooperation. This issue was elaborated on solely by the Public Prosecutor-General.

The representative of the President also underlined that the official delegation for the session of the European Council in October 2008 comprised three persons: the Prime Minister and two ministers. By contrast, according to the President, the Treaty on European Union – indicates that the European Council shall bring together the heads of state or government of the Member States (this is an ordinary disjunction, and not an exclusive one). Therefore, the following three hypotheses are admissible: either the head of state (in the case of Poland – the President of the Republic of Poland) in person and on his own, or the Prime Minister (who presides over the Council of Ministers) in person and on his own, the President and the Prime Minister jointly representing the Republic of Poland. Moreover, the plenipotentiary of the President stated that on no account did the said provision allow for such an arrangement which, firstly, would eliminate the head of state and, secondly, would allow for the participation of two ministers from the relevant ministry.

The representative of the President of the Republic emphasised that the President embodied the state, the existential values of the Polish state, and its position also on an international arena (or within the framework of European integration), and not the present ruling party which conducted the internal affairs and foreign policy of the state. He pointed out the need to distinguish between the two terms: "state delegation" and "government delegation". The Prime Minister, as the head of the state delegation and the head of government, is one of the representatives of the Polish state. In the President's opinion, the Prime Minister does not have the power to decide whether the President may or may not be a member of the Polish state delegation designated for a particular session of the European Council.

The representative of the President of the Republic of Poland emphasised that the Article 126(1) and (2) of the Constitution was relevant as regards powers. Although it does not constitute an independent source of derivation of powers (in a legal sense), it

undoubtedly remains the source of "that type of official actions which consist in embodying the Polish state as such".

The representative of the President moved on to refer to the issue which had been touched upon in the letter of the Public Prosecutor-General, and which concerned recognising the act of the President (in the form of the decision about participation in the sessions of the European Council) as an official act which required a countersignature. In this context, he stated that the Constitution did not enumerate all the powers of the President of the Republic of Poland. Even as regards prerogatives which are considered to be exceptions from the requirement of a countersignature, a far-fetched interpretation is permissible in order to respect the role of the President within the system of government. Moreover, he stressed that the participation of the President in a session of the European Council was neither an official act nor an official act requiring a countersignature, nor was an invalid official action due to the lack of a countersignature or due to not submitting it for a countersignature. He also stated that the infringement of powers (the President infringed on the powers of the Prime Minister and exceeded the scope of his powers), indicated by the applicant, had not taken place.

The representative of the President indicated that, pursuant to Article 54(1) of the Constitutional Tribunal Act, the proceedings before the Tribunal resulted in the suspension of the proceedings before the organs of the state which are in dispute over powers. In the case at hand, neither the President nor the Prime Minister carried out proceedings which would need to be suspended. The representative of the President asserted that the dispute between the President and the Prime Minister did not bear the characteristics of a dispute over powers and it was merely an attempt to determine a binding interpretation of the Constitution. Therefore, he maintained the application for discontinuing the proceedings before the Constitutional Tribunal on the grounds that the pronouncement of a judgment was inadmissible.

1.4. Addressing the arguments presented by the representatives of the President, the representative of the Public Prosecutor-General stated that – in his opinion – the President's act which consisted in declaring his participation in the session of the European Council (against the decision of the Prime Minister), regardless of the fact that the act had been made in writing, or had been oral, it might not be regarded merely as an official action. That act should be assigned a rank of an official act. According to the Public Prosecutor-General, there is no constitutional basis which would allow the President to unambiguously determine whether to participate and present his own stance at a session of the European Council. If such a power were vested in the President, it should be included – in the opinion of the Public Prosecutor-General – among the official acts which require a countersignature.

With reference to the argumentation of the representatives of the President, the representative of the Public Prosecutor-General emphasised that it might not be assumed that it followed from the existence of safeguards against the negative effects of an invalid decision (issued by the wrong organ of the state) – those safeguards being the provisions on suspending the proceedings - that the emergence of a dispute over powers was contingent upon the occurrence of proceedings which might be "formally suspended".

1.5. In the subsequent stage of the hearing, the first of the Judge Rapporteurs asked the representatives of the applicant about the links between the wording from the application that the point was to settle "a dispute over powers between the President of the Republic of Poland and the Prime Minister as regards determining the central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the State" and the accompanying expression that the dispute emerged "in the event of lack of agreement between the President, wishing to participate in a session of the European Council, and the Prime Minister". Moreover, the judge asked for an explanation of the significance of the action of "valid determination of the full composition of the delegation of the Republic of Poland for a session of the European Council" for settling the dispute over powers. He also asked about the legal basis and limits of the action of determining the composition of the delegation and whether the action of determining the composition of the delegation by the Prime Minister was a form of "ensuring the implementation of the policies adopted by the Council of Ministers" or whether it was "specifying the manner of their implementation". Subsequent questions concerned the meaning of the constitutional expressions: "the President of the Republic of Poland shall be the supreme representative of the Republic of Poland" (Article 126(1)), "the President of the Republic, as representative of the State" (Article 133(1)), and also the relation between the constitutional terms "managing the work of the Council of Ministers" or "conducting the policy of the state" as well as between the terms "representing the Republic of Poland' and "conducting the foreign policy of the Republic of Poland".

As regards the position and role of the President within the system of government, the Judge Rapporteur asked who was entrusted with the power to "embody the Republic of Poland", and also who ultimately assessed whether the act of representing the Republic of Poland by the President fell within the scope of conducting the foreign policy (the Prime Minister, the Council of Ministers, or the President when self-evaluating his activity). The questions that followed pertained to: the impact of the President's presence at a session of the European Council on the possibility of conducting the state policy, at this forum, by the Council of Ministers (in the context of sceptical evaluation of the impact of the President's presence on such a possibility by the applicant); the issue to what extent the composition of the delegation of the Republic of Poland for a particular session of the European Council should be adjusted to the planned agenda of that session, and relevant decisions should be the object of cooperation of the Prime Minister and the President; as well as whether the wording of Article 146(2) of the Constitution contains the presumption of the scope ratione materiae, or whether it corresponds to the term "the presumption of powers", used by the applicant. During the series of further questions, the Judge Rapporteur requested an explicit answer to the question whether the object of the dispute over powers – in the applicant's view – was to indicate the central constitutional organ of the state which was authorised to represent the Republic of Poland at the sessions of the European Council and/or to present the state's stance, or whether the dispute concerned determining, in a binding way, the composition of the delegation of the Republic of Poland. He also requested the applicant to indicate a constitutional provision which, in the applicant's view,

constituted the basis for the power to "determine the composition of the delegation in a binding way".

Answering the questions, the representative of the Prime Minister indicated that designating members of the delegation determined who and what stance he/she would present at a session of the European Council. He claimed that the fact of refraining from taking a stance on a given matter was "in itself a way of presenting and taking a stance". In this context, one may not separate determining the composition of the delegation, determining the way of representation and presenting the stance – they are inextricably linked. Acting – in his view – within the scope of his powers, the Prime Minister determines the composition of the delegation, having consulted the ministers who are competent in that regard. The persons who are members of the delegation represent the Republic of Poland and present the agreed stance.

The legal basis of the activity of "determining the composition of the delegation" is constituted by Article 146(1) and Article 146(4)(9) of the Constitution, as well as by Article 146(2) of the Constitution.

The Prime Minister both ensures the implementation of the policies adopted by the Council of Ministers and specifies the manner of their implementation. In the opinion of the representative of the applicant, this regards the internal affairs and foreign policy (as specified in Article 146(1)), apart from which no other policy is conducted by the Council of Ministers. According to the applicant, the internal affairs and foreign policy, conducted by the Council of Ministers, are components of the policy of the Republic of Poland, understood holistically.

"Representing the Republic of Poland" is one of the forms of carrying out foreign policy. In the case of the President of the Republic, each act of representation he is involved in – even if the act has no legal effects – is still the case of conducting policy and is a component of the general term "conducting foreign policy". The representative of the applicant stated that "representation", in some forms, might not be the case of conducting policy; however, with regard to the President of the Republic, he found it difficult to imagine a situation where the President represented the Republic of Poland on the international arena and this was not regarded as an element of the policy conducted by the state. He stated that he could not indicate such forms of representation of the state by the President which would be separate from carrying out foreign policy, particularly in respect of the fact that the President was the supreme representative of the state.

The representative of the Prime Minister admitted that the President of the Republic of Poland was the supreme representative of the Republic. Due to that fact, "no-one may limit the act of representation of the President of the Republic". Nevertheless, in a situation where the said act would fall within the scope of competence of the Council of Ministers to conduct foreign policy, there may be a clash.

The precedence to assess whether a particular act of the President of the Republic of Poland falls within the scope of conducting foreign policy should be given to the Council of Ministers, which is a constitutionally competent organ of the state as regards conducting foreign policy and which is responsible for its effectiveness.

In the context of assessing the impact of the presence of the President at a session of the European Council on the possibility of exercising the powers to conduct (foreign and

European) policy by the Council of Ministers, the representative of the Prime Minister stressed that both the Constitution of the Republic of Poland and the provisions contained in the European Union's Treaties provided for the participation of one delegation from a given Member State at a session of the European Council. The organisers of the sessions of the European Council do not draw a distinction between representing the state and conducting its foreign policy. The Prime Minister, as the one who specifies the manner of implementation of the policies adopted by the Council of Ministers, pays attention to the fact that the stance of the government (being at the same time the stance of the Republic of Poland) should be presented adequately to the current situation at the time of a given session of the European Council, taking into account the requirement of professionalism. The change of the manner of presenting the stance may have impact on the effectiveness of that presentation, and indirectly – on the possibility of conducting European policy by the Council of Ministers.

The representative of the Prime Minister admitted that the President of the Republic of Poland did not question the participation of the members of the Council of Ministers (including, in particular, the Prime Minister, who presides over that Council) at the sessions of the European Council. Nevertheless, deciding about his participation in the sessions, he indirectly influenced the scope within which the other members of the Council of Ministers could participate in those sessions.

When asked about the content of the regulations of Article 126(1) and (2) of the Constitution, the representative of the Prime Minister stated that – in the view of the applicant – those regulations comprised the President's actions regardless of the fact whether they had legal effects or not. He admitted that the regulations of Article 126(3) and Article 146(4)(9) of the Constitution contained equivalent terms: "within the scope of and in accordance with the principles specified in the Constitution and statutes" - which referred to both the actions of the President and the Council of Ministers.

In the opinion of the applicant, the tasks of the President, specified in Article 126(2) of the Constitution may and should be carried out on the basis of detailed powers vested in him. The President of the Republic of Poland may not undertake actions which have legal effects solely on the basis of Article 126(1), as this would be inconsistent with the meaning of Article 126(3) of the Constitution. According to the representative of the Prime Minister, in the area constituting the object of the dispute over powers, i.e. determining the composition of the delegation of the Republic of Poland for a session of the European Council, the President of the Republic of Poland does not have a separate power and may not derive it from Article 126(1) of the Constitution.

With regard to the request for definite indication of the object of the dispute over powers, the representative of the Prime Minister stated that it was: "the power to determine the composition of the delegation for a session of the European Council, to the extent this regards the President, who expresses willingness to participate in such a session". The consequence of determining the composition of the delegation is its power to represent the state and present the state's stance. The initial moment of emergence of the dispute is thus the moment of determining the composition of the delegation.

In the opinion of the representative of the applicant, the constitutional basis of the power to "determine the composition of the delegation in a binding way" is the general

presumption of powers which should be construed as a presumption of undertaking any actions, which are necessary or possible, in order to conduct the policy.

1.6. In his questions to the representatives of the Public Prosecutor-General, the Judge Rapporteur requested that the legal bases be indicated with regard to the statement, which had been included in the letter of the Prosecutor, that the power to determine the composition of the state delegation for a session of the European Council was vested in the Prime Minister, and not in the President of the Republic of Poland. Also, he asked about the meaning of the expressions related to "declaring his participation in the state delegation for a session of the European Council" by the President, and whether that act required a countersignature of the Prime Minister. Further questions concerned the relation between the term "safeguards the sovereignty and security of the State" and the President's participation in a particular session of the European Council, and also the shape of cooperation between the President of the Republic of Poland, the Prime Minister and the minister who is competent in that regard.

In the view of the representative of the Public Prosecutor-General, the term of "general control", as referred to in Article 146(4)(9) of the Constitution, allows for some vagueness with regard to the powers of the Council of Ministers in the relations with other states and international organisations. It may be argued whether the European Union is "still an international organisation", or whether it is "already a supranational one".

The wording "within the scope of and in accordance with the principles specified in the Constitution" occurs with regard to both the constitutional duties of the Council of Ministers (Article 146(4)(9)), and the duties of the President (Article 126(3)), but the duties of the President of the Republic of Poland have been set out more generally.

The Resolution No. 196 of the Council of Ministers on representing the Republic of Poland at the sessions of the European Council constitutes certain *superfluum*; it may not be a source of obligations for the organs of the state which are not subordinate to the Council of Ministers, let alone for the President. The President's declaration to be a member of the state delegation for a session of the European Council constitutes an official act and – in the opinion of the Public Prosecutor-General – requires the countersignature. The requirement of effectiveness of the foreign and European policy conducted by the Council of Ministers excludes the possibility of presenting diverse stances of the Republic of Poland on vital matters at the sessions of the European Council.

1.7. With regard to the question of the Judge Rapportuer, the representatives of the President of Republic of Poland concluded that Article 126(1) of the Constitution obliged the President to represent the Republic of Poland as a state "where this is indispensible".

They stressed that neither in writing nor in his speeches had the President questioned the participation of the Prime Minister in any of the sessions of the European Council. Article 126(2) of the Constitution authorises, and at the same time obliges, the President to: ensure observance of the Constitution, safeguard the sovereignty and security of the State as well as the inviolability and integrity of its territory. This is a provision that calls to action. In turn, Article 126(3) stipulates that the President exercises his duties within the scope of and in accordance with the principles specified in the Constitution or

statutes. The mere participation of the President in the sessions of the European Union is an actual action.

1.8. With regard to the questions of the other Judge Rapporteur, the representatives of the President described the decision-making process concerning his participation in the session of the European Council which took place on 15 and 16 October 2008. They stated that, before the departure for the session, the Council of National Security had not been summoned. They claimed that making it impossible for the President of the Republic of Poland to take part in the session of the European Council, due to the refusal to provide a state plane was, in a sense, a test of power, which was aimed at limiting the exercise of constitutional duties with regard to the supreme representative of the Republic of Poland. However, they stated that despite the tense atmosphere around the President's journey by a chartered plane, and despite the fact that the accompanying persons had not been allowed to enter the building where the session had been held, there had been neither discrepancies in opinions nor presentation of a divergent stance on any matter, and the issues concerning the place at the negotiation table had been decided on the spot.

The constitutional basis for the decision of the President of the Republic of Poland to participate in a session of the European Council is Article 126, which creates a possibility of participation, but not an obligation. According to the representatives of the President, international relations also include the systemic principles of the office of the President, as referred to in that provision, which go beyond the understanding of policies as short-term actions associated with a particular political group.

The representatives of the President stated that Article 133(3) of the Constitution did not constitute a separate rule governing competence; however, a number of specific obligations followed therefrom, in particular as regards informing one another about significant plans concerning the field of foreign policy, consulting the drafts of major decisions or inspiring one another. The primary authority here is the President of the Republic of Poland, but by indicating cooperating authorities – the Prime Minister and the competent minister – the Constitution determines that these authorities are obliged to the same degree. They also stated that initiating cooperation is an obligation of an authority that undertakes a given action; this is often the government.

With regard to the interpretation of Article 142(2) of the Constitution, they indicated that the President issued decisions within the scope of carrying out individual actions with regard to individual addressees, since normative legal acts (constituting legal norms, such as regulations which are equivalent to statutes) which contain general norms, whereas individual acts, issued within the scope of a power, exercise that power with regard to a particular addressee. The representatives of the President stated that that President did not issue any decisions.

Defining the terms used, they pointed out that the "role" of an organ of the state might be regarded as tantamount to its powers or the main objectives and results of the activity, as indeed it was difficult to find a power of a constitutional organ of the state which would not be encompassed in the duties entrusted thereto. They admitted that the exercise of powers always had legal effects, e.g. a change of the legal situation of the Polish state with regard to its obligations. However, they stated that the participation of the

President in the sessions of the European Council was an actual action – which had no legal effects, in a sense that it did not involve the necessity to issue official acts by the President. They pointed out that not in every case, while representing the state abroad, the President exercised the powers which had legal effects. In their view, receiving the conclusions of the presidency by the European Council may not be regarded as an action that has legal effects, which is similar to exercising powers of Polish organs of the state.

The representatives of the President defined the term "head of state" as a metaphorical expression belonging to the legal register, as a colloquial and traditional expression, which referred to a monarch or president of the republic as the supreme representative who embodied and symbolised the state, or was even "a live symbol of the state". Nevertheless, they emphasised that, despite being the supreme representative of the state, the head of state was not entrusted with the role of an entity with the supreme power. They concluded that the highest level of democratic legitimacy of the Polish President– which arose from general elections – had vital significance for the interpretation of the duties, role and responsibility of the President. This circumstance may not be overlooked in the relations between the two segments of the executive power, since the President is the supreme representative of the Polish state, pursuant to the will of the entire Nation that is at the same time a constitution-maker and who decides in elections about entrusting the role to a particular person, and only indirectly has an impact on the appointment of the Council of Ministers.

1.9. The representatives of the Prime Minister stated that he submitted the application to determine the dispute over powers in the situation of the emergent and unresolvable dispute between the parties. They stressed that the object of the adjudication is neither the assessment of actual events which took place in October 2008, nor the actual assessment of the actions of the parties to the dispute, but the dispute in a legal sense. They stated that the refusal to provide means of air transport had been justified by the fact that the delegation – with the composition determined by the Prime Minister – had already departed for the session of the European Council.

2.1. The considerations contained in the pleading of the plenipotentiary of the President, submitted at the hearing on 27 March 2009, were to a large extent presented in the speeches of the representatives of the President during the hearing. First of all, the pleading contained criticism of the way the object of the dispute over powers had been presented, with the allegation of imprecision of the divergent wording, as well as the allegation of assigning the character of "competence" and/or "decision" to the disputed actions. The plenipotentiary of the President also referred to the position of the President in the system of government, according to the model adopted in the Constitution of 2 April 1997. He stated that within the scope of the executive power, the President had few and limited powers, but that might not lead to the conclusion that the President's position within the system of government amounted to the fulfilment of a symbolic role.

The plenipotentiary of the President concluded that what had not been indicated in the *petitum* of the application was the legal character of the "action" which consisted in determining, in a binding way, the composition of the delegation of the Republic of Poland

for a session of the European Council. He emphasised that the President did not claim that he had the power to determine the composition of the Polish delegation, including the government delegation. However, he stated that the President's participation did not depend on the government and resulted from the authorisation contained in the Constitution. According to the plenipotentiary of the President, the applicant carries out extrapolation, asserting that the decision of the President about his participation in the "delegation" is in its essence a decision concerning the entire composition of the delegation, and this is solely the power of the Prime Minister.

The plenipotentiary of the President stated that the lack of guidelines as to the conditions and form of "including" the President in the delegation led to the conclusion that the inclusion was based on the freedom of discretion. In his view, it is necessary to specify whether the dispute is between the Prime Minister and the President, or whether between the President and the Council of Ministers, or whether between the Prime Minister and the Council of Ministers on the one side, and the President on the other.

He also admitted that the view of the applicant should be accepted; namely, that the actions of the President should have a specific legal basis. However, in the opinion of the plenipotentiary of the President (based on the views of the doctrine), the requirement concerns only those actions which have legal effects, in other words, which create a new legal situation.

In the opinion of the President, the provision of Article 126(1) of the Constitution has an absolute character and is not subject to grading or imposing restrictions.

The plenipotentiary of the President drew attention to the view of the doctrine that the policies of the government might be within certain limits – i.e. when it came to the protection of the values indicated by the Constitution – controlled and adjusted by the President (see P. Sarnecki, *Prezydent Rzeczypospolitej*…, *op.cit.*, p. 55). He also emphasised that it might not be accepted that in the context of European integration, the provision of Article 126(1) of the Constitution, which pertained to the role of the President as the supreme representative of the state, was subject to derogation or restriction.

The plenipotentiary of the President indicated that the presumption arising from Article 146(2) of the Constitution might not be the source of powers. He added that, with regard to the action of the President, the applicant required that "specific provisions formulating rules governing competence" be referred to, whereas – as regards an analogical scope – he himself relied solely on the aforementioned presumption of powers.

Next the plenipotentiary of the President presented the views of the doctrine concerning the so-called "sheer representation" (see P. Sarnecki, Commentary to Article 126..., *op.cit.*, p. 5). He criticised the stance of the applicant which limited the possibility of participation in a session of the European Council by the President only to particularly ceremonial occasions, "extraordinary summits", and only after assuming that the President was obliged to present the stance formerly agreed with the Minister of Foreign Affairs and the Prime Minister. The plenipotentiary of the President considered that to be limited representation which was reduced to fulfilling the role of a representative of the government, and not of the Polish state.

With reference to the stance of the Public Prosecutor-General, the plenipotentiary of the President stated that it was divergent from the application of the Prime Minister, and

the aim of the dispute specified by the Public Prosecutor-General (to determine whether the President alone might decide about his participation, or whether the decision in that regard belonged to the Prime Minister) did not strictly reflect the request presented in the application. Moreover, in his view, one may not agree with the view presented in the letter of the Public Prosecutor-General which qualified the participation of the President in a session of the European Council as implementation of an official act, deprived of the necessary countersignature. This action should be categorised as an official action which does not require a countersignature and which arises from Article 126 of the Constitution. Such an action – not being an official act – may not be, according to the President, the object of the dispute over powers.

In the conclusion of the pleading, the plenipotentiary of the President stated that the constitutional description of the role of the President as the supreme representative of the Republic of Poland had a normative meaning and contained a norm which was binding in two ways. First of all, it obliges the person holding the office to actively take all action (official acts, official duties and other public activities), respecting the status and related systemic duties of the guarantor of the fundamental principles underlying the existence of the Polish state. Also, it obliges other entities, in particular the organs of public authority, including the Council of Ministers, and the Prime Minister presiding over it, to fully respect the status of the head of the Polish state.

2.2. In a letter of 10 April 2009, the Public Prosecutor-General, referred to the letter of the plenipotentiary of the President of the Republic of Poland submitted at the hearing on 27 March 2009. He explained that the assessment presented in his previous letter, concerning the aim of the dispute over powers carried out before the Constitutional Tribunal, was to point out the ultimate consequences of adjudication by the Tribunal. The object of adjudication of the Constitutional Tribunal in that case is – in his opinion – to determine who and in what manner may make a decision about the President's participation in the state delegation and whether there was a clash of powers in that regard.

The Public Prosecutor-General shared the view of the plenipotentiary of the President that the actions of the President which were not official acts did not require the countersignature of the Prime Minister. However, in his opinion, participation in the delegation of the European Council may not be regarded solely as an official action. In the view of the Public Prosecutor-General, this is an official act in the form of an individual decision, and the fact that it concerns the President does not change anything. This also refers to the other members of the delegation who are designated in accordance with a different procedure.

The Public Prosecutor-General maintained the view that any official acts of the President which do not fall within the scope of his prerogatives require the countersignature of the Prime Minister. In the opinion of the Prosecutor-General, the President has no power to decide about his participation in a session of the European Council. If he had such a power, then it would be exercised as an official act and would require the countersignature. The Prosecutor-General emphasised that one might not infer, from Article 126(1) and (2) of the Constitution, the power to make official acts which

involved decision-making. However, such powers have been exhaustively set out in Article 133 of the Constitution.

2.3. Also, the Constitutional Tribunal received a letter of 14 April 2009 by the representatives of the Prime Minister which constituted a reply to the pleading by the plenipotentiary of the President which had been submitted at the hearing on 27 March 2009. The representatives of the Prime Minister stated that the considerations presented in the letter of the plenipotentiary of the President actually aimed at extending the scope of the proceedings and constituted an inadmissible attempt - in the light of the proceedings carried out by the Constitutional Tribunal - at receiving an abstract interpretation from the Constitutional Tribunal. The representatives of the applicant stressed that the application to settle the dispute was not aimed at undermining the role of the President and making the role of the Prime Minister absolute, but was necessitated by the need to sort out the relations between constitutional state authorities as regards conducting foreign policy, which is carried out within the framework of participation in the sessions of the European Council.

The representatives of the Prime Minister recalled the course of work on the Constitution, indicating that the constitution-maker had decided to base the executive power on the principle of duality of the executive branch and on the reduction of the powers of the President. In accordance with that model, the Council of Ministers holds a dominant position in the executive branch, and the position of the President represents the concept of the president as an arbiter. The representatives of the applicant concluded that the intentions of the makers of the Constitution of 1997 were to draw the system of government closer to the model of government involving a chancellor.

Moreover, the representatives of the Prime Minister argued that Article 126(3) was not merely a confirmation of the general principle of legalism, which is confirmed – in their opinion – by the materials from the work on the draft of the Constitution, where it was considered to be a starting point to distinguish between the roles of the two organs of the executive branch. They regarded the considerations on the "sheer representation" of the state by the President as incomprehensible.

With regard to the allegation of extrapolation in the context of regarding the presence of the President at a session of the European Council as a decision influencing the entire composition of the delegation, and thus falling within the scope of powers of the Prime Minister, the representatives explained that, in their view, the presence of the President made it possible or limited the possibility of presenting the stance adopted by the government by the persons appointed by the Prime Minister. Therefore, the President not only chooses the composition of the delegation, but also has an impact on the policies conducted by the government, since the said conducting is affected by not only the content of the stance, but also by the fact who and how presents the policies. The representatives of the Prime Minister maintained the arguments presented in the previous letter, requesting that the dispute over powers be settled by the Constitutional Tribunal.

3. On 30 March 2009, the Constitutional Tribunal referred letters to the authorised representatives of the Prime Minister and the President, requesting information as to which

of state authorities (the President of the Republic of Poland or the Prime Minister) has represented the Republic of Poland at the sessions of the European Council since 1 May 2004, as well as with regard to which agenda items during the plenary deliberations at the sessions of the European Council on 15-16 October 2008 and 19-20 March 2009, the Republic of Poland was represented by: 1) the President and the Prime Minister, 2) the Prime Minister and the Minister of Foreign Affairs (or the Minister of Finance), 3) the President and the Minister of Foreign Affairs (or the Minister of Finance).

On 14 April 2009, the Constitutional Tribunal received written replies from the representatives of the Prime Minister and the President which contained a detailed list of the state authorities which have represented the Republic of Poland at the subsequent summits of the European Council since the accession of the Republic of Poland to the European Union. The representatives of the applicant and the President also provided the information on the course and agendas of the sessions of the European Council in October 2008 and March 2009.

4. The hearing before the Constitutional Tribunal on 20 May 2009.

4.1. At the hearing on 20 May 2009, the participants in the proceedings consistently maintained their earlier views, presented both in the pleadings and during the hearing on 27 March 2009.

4.2. The representatives of the Prime Minister stated that the European Council was the supreme political body of the European Union, and although the outcomes of its activity did not have the character of legal norms, they were significant for conducting the policies of the Member States. The sessions of the European Council bring together the representatives of those states, and the results of those meetings are conclusions or guidelines. The representatives of the Prime Minister stressed the lack of constitutional provisions which regulated the rules of Poland's membership in the European Union and unambiguously specified the manner of shaping relations, in the context of the state's system of government. However, in their view, this did not mean a systemic void; and if a provision of EU law contained the disjunction "Heads of State or Government", it should be determined whether this was an exclusive disjunction or an ordinary one, taking into consideration the Polish system of government. They also pointed out the informal way of conducting the deliberations and proceedings of the European Council, which resulted in the situations where silence of the representatives of a given Member State with regard to a particular conclusion was sometimes interpreted as consent to adopt the conclusion in the proposed form. However, they indicated that some of the conclusions of the European Council had the character of very precise decisions which were binding in a political sense.

The representatives of the applicant indicated that the subject matter and agendas sessions of the European Council are prepared by the presidency whose partner is the government of a given Member State, and admitted that they did not know whether such information had been passed on to the President. They also stated that there were no such issues which were addressed at the sessions of the European Council, about which the President had no right to be informed. However, they separated the President's right to

information from his right to have decisive impact by representing the Republic of Poland in the European Council, since the presence of the President meant the absence or hindered participation of another member of the delegation, and thus this had a legally binding impact on the possibility of presenting the stance of the Republic of Poland. They emphasised that the actual presence of a minister at a session of the European Council was a prerequisite for conducting his/her duties, as part of the work of a delegation which had very limited time to present the stance of a given Member State. At the same time, they acknowledged that the European Council was the only EU institution, in the sessions of which the President of the Republic of Poland could take part.

The representatives of the Prime Minister defined the basic terms used in the case: a power – as a set of provisions authorising a given organ of the state to have a legally binding impact on the situation of external entities, to revise a legal obligation in order to bring it up to date, or to create the legal situation of other entities; competence – as assignment of certain matters to a given organ of the state; a role – as the most general indication of the areas falling with the scope of interest of a public entity; whereas a duty – either as a means of fulfilling a role (by conducting duties a role is fulfilled) or as a derivative of a power (exercising a power is at the same time conducting a duty).

With regard to "the uniformity of foreign policy", they indicated that it was a constitutional value which all the actions of public entities should serve. It should be understood as a "common position" which is expressed by the state in its external relations so that this could be presented in a cohesive and consistent way, regardless of the fact who conducts that policy and in what place he/she is. They stated that an indispensible characteristic of cooperation, as referred to in Article 133(3) of the Constitution, was its mutuality which meant an attempt at working out a common stance as to the organ of the state to represent the Republic of Poland and the content of the stance, with the proviso that, in the event of no effects of cooperation, one of state organs was authorised to determine the case in an unambiguous way. What they also regarded as proper was to consider the particular relation between the Member States and the European Union, which encompassed the elements of the international law with harmonised Community elements and elements of classic intergovernmental cooperation (due to the structure of the European Union and the way of its operation under the three pillars, the first of which has a Community character, but the remaining two involve cooperation at an intergovernmental level).

With regard to the "conferred competences", pursuant to Article 90 of the Constitution, they stated that the competences comprised the matters which had previously belonged to the competent organs of public authority, and which fell within the scope of competence of the European Union, as provided for by the Union. Article 146(1) of the Constitution indicates the Council of Ministers as an organ of the state which conducts the internal affairs and foreign policy of the Republic of Poland; hence every conferral will be the conferral of competences which fall within the scope of policies previously carried out by the Council of Ministers.

The representatives of the Prime Minister stated that ensuring "observance of the Constitution", as referred to in Article 126(2), was a "role" which was fulfilled within the scope of the powers of the President of the Republic. Therefore, the President ensures the

observance of the Constitution within the limits of his own powers, and that wording is not tantamount to "observance of the Constitution". In other words, in all actions which are vested in the President of the Republic of Poland - pursuant to specific provisions on powers – observance of the Constitution is a significant criterion, according to which the President carries out evaluation in the areas where he has the power to do so. Nevertheless, this does not mean any special powers as regards the interpretation of the Constitution. They stated that none of the duties set out in Article 126(2) of the Constitution, nor any of the other matters that could appear at the forum of the European Union, exclude the presence of the President. The areas of particular interest to the President, in the context of the system of government, are the premisses that, in particular, should be taken into account in the process of cooperation, the result of which should be agreed decisions. However, they pointed out that, paradoxically, security and foreign cooperation, i.e. the areas which were closer to the President in the constitutional sense are under the pillar of intergovernmental cooperation, and therefore there would be duties which in the order of the Polish system of government may solely be assumed by the government.

In conclusion, they stated that the government was responsible for conducting foreign policy. In the light of the Polish system of government, the Republic of Poland is represented at the sessions of the European Council – in the first place – by the Prime Minister. This does not exclude the presence of the President of the Republic of Poland, however only when the constitutional premisses are fulfilled. It is the Prime Minister who is ultimately competent to determine the composition of the Polish delegation for a session of the European Council and there are neither two delegations nor a government delegation and a person representing the Republic of Poland apart from that delegation. They stated that the President might express his will and interest in participation in the delegation, but when there was no agreement, the decision belonged to the Prime Minister – not due to his superiority over the President, but due to his responsibility for the actions undertaken by the Polish state within the structures of the European Union.

4.3. The representatives of the Republic of Poland indicated that the European Council should be perceived not in terms of decisions, but in terms of shaping the political and legal culture. The participation in the sessions consists in actual actions which have no legal effects, a majority of the adopted conclusions, almost not discussed during sessions, are negotiated in an informal way, in the form of working consultations, which are organised by the presidency. However, the effect of the sessions of the European Council are the statements that may be specified as political decisions, which are also binding for the states whose representatives do not take a position during the sessions of the European Council. They pointed out that the formula for working out a consensus in the European Council is based on a presumed consent (*tacito consensu*), and emphasised that the simultaneous presence of the President of the Republic of Poland and the Prime Minister at a session confirmed the harmony and unanimity of the stance of the supreme representatives of the state. They stated that the presence and, thus, the participation in political decisions did not mean taking actions which had legal effects (nor did it mean carrying out official acts). They also pointed out that the representatives of the applicant had not indicated any actions of the President that would have an imperative character,

would lead to a clash or would prove discrepancies in relation to the Polish stance presented at the European forum.

According to the representatives of the President of the Republic of Poland, every action of the EU bodies as well as the mere existence, accession and functioning of the Republic of Poland in the structures of the Union (and the functioning of the structures of the Union alone) are related to the issue of the state sovereignty, and therefore the President, in accordance with the roles vested in him pursuant to the Constitution, is always authorised to participate in the sessions of the European Council, as the issues raised there fall within the scope of Article 126(2) of the Constitution. Since the constitution-maker has used the most general term "security", then it should be understood in the most general way – as one comprising any areas in which the security of the state may be taken into account, including energy security. The representatives of the President stressed that there was no possibility of limiting the status of the President within the system of government, in the aftermath of European integration, and they regarded an *a priori* statement that the President's presence was, at a given session, undesirable or not needed as a misunderstanding. They emphasised that the official presence of the person holding the President's office had legal significance, and implied not only powers, but also important obligations.

In their view, the President of the Republic of Poland is not the "head of state" in the sense of the supreme state authority; however, he is the supreme representative of the state, and when this representation takes on the form of representing the state in foreign affairs – he is the supreme representative in foreign affairs. The functioning of the Republic of Poland within the structures of the European Union does not eliminate or limit the character of the President as the supreme representative of the state and the guarantor of the principles underlying the existence of the state, specified in Article 126 of the Constitution.

The representatives of the President expressed the view that Poland had a single foreign policy, the uniformity of which was guaranteed by relevant procedures and cooperation. The said policy is not devised solely by one authority, which yet does not weaken the position of Poland in the European Union. Regarding the Council of Ministers, or the Prime Minister presiding over that Council, as the only creator of foreign policy of the state - would be tantamount to assuming that he overrides the principle of separation of powers. Then foreign policy would constitute the sphere of sole duties and competence of the government, and such an exception from the constitutional principle of separation and balance of powers is not constitutionally admissible.

In the view of the representatives of the President, "cooperation" – in model conditions – takes place both at the formal level, as well as at the level of informal and working consultations, and there is no impediment that all the authorities involved in devising a stance of the Republic of Poland submitted the results of their work before every session of the European Council, via the Office of the Chancellery of the President. The imperative of cooperation is addressed to all the authorities mentioned in the Constitution, and the cooperation does not consist in the activity of one party and the passivity of another. Analysing the previous arrangement and representation of the Republic of Poland at the sessions of the European Council, the representatives of the

President stated that previously cooperation at the stage of preparations for such a session compensated for or replaced the need for the President's participation in the sessions of the European Council; however, this has changed in the current political situation. Previously the cooperation between the President and the government was good enough for the President to be sufficiently informed about the course of action and the plans of the government, and thus he decided that there was no need to participate in the sessions of the Council. In the opinion of the representatives of the President, the policy devised by the government may be – within the limits indicated in Article 126(2) of the Constitution – supervised and adjusted by the President, and the powers in that respect (in the field of international law obligations or in the personal, diplomatic, realm) arise from Article 133 of the Constitution. However, there is an area of cooperation which encompasses much more than merely the actions of the President upon motion, initiative or agreement, in which consensus within the framework of political and legal culture as well as concern for the common good is possible. In that sense, neither the Prime Minister nor the competent minister of foreign affairs should surprise the head of state with their actions.

The representatives stressed that the President of the Republic of Poland was not subject to designation by another authority, nor was he a member of a delegation determined by the Prime Minister, for his title to participate in the sessions of the European Council ensued from direct constitutional authorisation. Nevertheless, he is a member of the representatives of the Polish state, the head of a delegation construed this way, and it is him who, simply for the protocol reasons, the EU partners address; this does not make the host of the state's foreign policy, i.e. the government, legally incapacitated. If a session of the European Council is simultaneously attended by the President and the Prime Minister, then they constitute joint representation, whereas when only the Prime Minister (and e.g. one of the ministers) is present, then there is no doubt that the minister does not represent the state, but is a member of the delegation and acts as "support" for the Prime Minister. The representatives of the President stated that sitting at a deliberation table was not necessarily a prerequisite for the competent minister to conduct his/her duties, since the Prime Minister managed the work of the Council of Ministers and should be able to present its stance; especially that a session of the European Council does not have an expert character and, at the level of heads of state and government, the political issues discussed are of a fundamental character. They stressed that Article 126(2) of the Constitution had normative content, and possible passivity of the President within the scope of that provision might result in the President being held constitutionally responsible.

They indicated that within the framework of ensuring "observance of the Constitution", the President was the addressee of the constitutional norm and should adhere to the provisions of the Constitution. However, with regard to the particular official acts and actions, he should take into consideration the role vested in him within the system of government, including the role of the guarantor (guardian) of specific constitutional values.

In conclusion, the representatives of the President of the Republic of Poland stated that, in that case, the legal requirements of a dispute over powers had not been met. The adjudication anticipated by the applicant would create a procedure in that respect,

regardless of the deficit of explicit rules governing competence, which is inadmissible. They stated that the case amounted to *post factum* evaluation whether the Prime Minister, by means of relevant agencies and services, could refrain from notifying the President of the Republic of Poland about the place, date and subject matter of the session of the European Council, and whether he could determine the indispensability of the President's presence at the session, due to being responsible for determining the composition of the Polish delegation.

4.4. The representatives of the Public Prosecutor-General stated that the object of the dispute over powers was the formal power to determine the composition of the state delegation for a session of the European Council, which was vested in the Prime Minister. They emphasised that allowing for the possibility of the President's participation in a session of the European Council against the stance of the Prime Minister (who determined the composition of the delegation), would entail excluding the President from the delegation, which in turn was inadmissible. They also stated that "conducting foreign policy" by the Council of Ministers meant its power to take any actions on behalf of the Polish state. They underlined that foreign policy had to be aimed at enhancing the security of the state and its sovereignty, and they concluded that "conducting the policy" meant taking into account both the long-term and short-term goals as well as planning and carrying out any short-term and long-term actions. The rational objective of the EU legislator was to ensure the uniformity of representation as regards particular Member States. Separating the realm of decision-making from the realm of representation is impossible, since the representation at the forum of the European Council does not have a civil law character, but a political one, and always entails making decisions on behalf of the state, whether in an explicit or implicit way.

With regard to the competences conferred upon the European Union, the representatives of the Public Prosecutor-General stated that the scope of the said competences was changing, and the Polish organ of public authority, authorised to represent the stance at the forum of the European Council, should be an organ exercising the powers that were transferred from the realm of national competences to the realm of the competences of a supranational body.

As regards the issue of "ensuring observance of the Constitution", they indicated that this was an element establishing the systemic position of the President, the implementation of which required a specific power. It does not follow from Article 126(2) of the Constitution that there is any preference for the President's interpretation of the Constitution, although the President should, whenever possible, be active in evaluating whether other organs of public authority act in accordance with the Constitution.

V

The Constitutional Tribunal has considered the following:

1. The object and scope of the dispute over powers as formulated in the application by the Prime Minister.

1.1. Pursuant to Article 189 of the Constitution, the Prime Minister referred an application to the Constitutional Tribunal for it to: "settle a dispute over powers between the President of the Republic of Poland and the Prime Minister as regards determining the central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the State". This way, the applicant indicated, as the object of the dispute, the power to represent the Republic of Poland at the sessions of the European Council (as an EU body) and the related power to present the stance of the Polish state at that forum.

1.2. In the view of the Constitutional Tribunal, the object of the dispute over powers therefore comprises – according to the application by the Prime Minister – two functionally related powers:

a) "to determine" a central constitutional organ of the Republic of Poland that is authorised to represent the state at the sessions of the European Council;

b) "to present" the stance of the Republic of Poland at the sessions of the European Council.

The dispute concerns, in particular, the situation where the President of the Republic of Poland decides to take part in a session of the European Council, whereas the Council of Ministers has not provided for (or planned) that.

1.3. In his application to settle the dispute over powers, the Prime Minister expressed the view that the object of the dispute – apart from the powers to decide about the participation in a session of the European Council – was the power to "present the stance of the Republic of Poland at a session of the European Council". In another place in the application, the dispute over powers was described as a dispute concerning the power "to determine the composition of the delegation of the Republic of Poland for a session of the European Council".

The characteristics of the dispute over powers indicated here, the settling of which the Prime Minister requests, in a sense complicate the examination of the application. The concepts used to render the characteristics ("presenting the stance of the Republic of Poland at a session of the European Council", "determining, in a binding way, the composition of the delegation of the Republic of Poland for a session of the European Council") regard – which should be stressed – to a greater extent, particular actions undertaken in relation to the sessions of that body or during such a session, than the constitutionally specified powers of the Council of Ministers or the Prime Minister (who presides over that Council). To some extent, this is not only a dispute over the legally specified powers of state constitutional organs of the state, but also a dispute over the rules and scope of specific actions related to the manner of representing the Republic of Poland at a particular session of the European Council.

1.4. The Constitutional Tribunal states that the power of a constitutional organ of the state is the power granted by the constitution-maker or the legislator to act with legally specified consequences within the specified scope ratione materiae; undertaking such action may be a legal obligation or entitlement of a given organ of the state.

In this context, the Constitutional Tribunal stresses that the powers understood in this way should not be regarded as tantamount to the systemic roles of state organs (the roles fulfilled within the constitutional system), to the duties (i.e. legally specified objectives and consequences of functioning of particular state organs), or to the scope ratione materiae (the areas of actions specified in respect of their objects).

Settling disputes over powers between central constitutional organs of the state, the Constitutional Tribunal adjudicates on the content and limits of powers of the state organs being the parties to a given dispute. The object of adjudication may be both the scope ratione materiae of the disputed powers (the content of actions of the state organs being parties to the dispute over powers), as well as the scope ratione personae (indication of authorities that have the power to take certain actions specified by law).

Examining a dispute over powers, the Constitutional Tribunal determines the existence of powers or lack thereof in the case of a central organ of the state and the shape of the disputed power. The question about power is usually raised in the context of a specific individual situation, where two (or more) of the central organs of the state consider themselves competent to take the same legal measure or where neither (none) of the said organs of the state consider themselves competent to take a given measure.

The wording of Article 189 of the Constitution does not give grounds to assume that the jurisdiction of the Constitutional Tribunal is restricted to settling the disputes over powers provided for in the Constitution. The duties of the central constitutional organs of the state are carried out by exercising powers which arise both from the Constitution and statutes, and moreover – from other universally binding acts (ratified international agreements, and even – regulations). The general term "a dispute over powers", as used in Article 189 of the Constitution indicates that the Tribunal settles disputes over powers, regardless of the rank of the provision which provides for the powers. As regards central constitutional organs of the state, determining the content and scope of particular powers is done by juxtaposing detailed rules governing competence with certain roles and duties, specified in the Constitution, of specific state organs which are parties to a given dispute over powers.

Settling a dispute over powers by the Constitutional Tribunal amounts to taking a legally binding position in a situation where there is a discrepancy in stances between two or more organs as to the scope (limits) of powers of one of them. The discrepancy may arise from the assertion that both organs of the state have power to issue a given act or take a given legal measure (positive powers dispute) or the assertion that neither of them is competent in the said regard. Also, the dispute must be real, and not merely a potential interpretative doubt. The organ of the state that initiates the dispute over powers should prove the real character of the dispute over powers and make the legal interest in the adjudication probable.

Undoubtedly, the Prime Minister, as an authority submitting an application to settle the dispute over powers, as well as the President of the Republic of Poland, as an authority being a party to the dispute (and in any case: interpreting differently the power to represent the Republic of Poland at the sessions of the European Council than the applicant), remain central constitutional organs of the state within the meaning of Article 189 of the Constitution. Therefore, the dispute - referred to the Constitutional Tribunal to be settled -

fulfils the requirements set out in Article 189 of the Constitution, with regards to the scope ratione personae.

The content of the application of the Prime Minister (and the argumentation presented by his representatives at the hearing before the Constitutional Tribunal), the content of the reply of the President to the application of the Prime Minister, as well as the content of the pleading of the plenipotentiary of the President submitted on the first day of the hearing and the statements of the representatives of the President indicate that there were different stances as regards the power to represent the Republic of Poland in the course of particular sessions of the European Council and the power to present the stance of the Republic of Poland at those sessions. The discrepancies occurred in practice, in relation to particular sessions of the European Council (in particular: the session on 15-16 October 2008). As a result, the case pertaining to the application by the Prime Minister of 17 October 2008 displayed real elements of a dispute over powers within the meaning of Article 189 of the Constitution.

1.5. Taking into consideration the object of the dispute over powers, it should be emphasised that the Constitution of the Republic of Poland was enacted prior to the accession of Poland to the European Union. By contrast to the constitutions of the EU Member States (e.g. France or Finland), the Polish legislator has not made relevant amendments or additions in the constitutional regulations concerning the scope of activity and powers of state organs in order to make them more specific in relation to the membership in the European Union. Many issues concerning the powers and roles related to the membership in the EU has not been explicitly and directly regulated in the Constitution of 2 April 1997. The authors of the Constitution decided that problems that might potentially arise might be resolved by observing the principle of favourable predisposition and respect towards regulations of EU Treaties and international law obligations which bind the Republic of Poland (which primarily arises from Article 9 of the Constitution). In the opinion of the Constitutional Tribunal, differentiating between particular powers of central constitutional organs of the state should be made – in the first place – in accordance with the interpretation of the fundamental assumptions of the system of the government defined in the Constitution of the Republic of Poland, making reference in particular to the genesis (including the evolution of the powers of the organs of the executive branch) and the primary principles of the Constitution.

1.6. One of those assumptions is the functioning of two central constitutional organs (authorities): the President and the Council of Ministers, but with regard to each of them there is a different basis as regards appointing them to fulfil constitutional roles. These organs are characterised by their scopes of relevant activities and powers; at the same time, it has been indicated which situations require mutual and loyal cooperation.

The existence of two organs of the executive branch, where each of them fulfils roles which differ as regards their scope and kind, entailing actions taken on behalf of the Republic of Poland also in foreign relations, determines the diverse participation of these organs of the state, to the extent and in the manner set forth by the Constitution and statutes (pursuant to Article 126(3) and Article 146(1), (2) and (4) of the Constitution), in the

shaping of the relations between the Republic of Poland as an EU Member State and other institutions of the European Union.

1.7. The policy of the Republic of Poland towards the European Union, being also related to Poland's membership in the EU, is not explicitly regulated in the Constitution, which is understandable due to the time of the enactment of the Constitution.

There is no doubt that the provision which applies to the relations between the European Union and its other Member States is Article 146(4)(9) of the Constitution. The wording of this provision is so broad that it refers to all the states and international organisations, including those that Poland belongs to as well as others (regardless of the character and degree of integration of a given organisation).

Poland's relations with the European Union defy the constitutional boundaries of "foreign policy' or "internal affairs". The EU law constitutes, at the same time, part of the national law order. It is applied by the organs of the Polish state. In this regard, the consequences of the EU membership may be regarded as falling within the scope of the internal affairs.

By contrast, Poland's relations with other Member States, as well as contacts with the EU (Community) institutions and bodies, display the characteristics of foreign policy. At the same time, it should be taken into account that some EU institutions and bodies are composed of representatives of the Member States (the European Council, the Council of the European Union, the Committee of Permanent Representatives – COREPER, numerous committees functioning in accordance with the so-called comitology procedure, units of Community and EU agencies). Thus, the representatives of the Republic of Poland participate in the adoption of decisions which, hence, do not have a fully external character with regard to the Republic of Poland.

Therefore, Poland's relations with the European Union do not have a homogeneous character. However, undoubtedly, as a whole, they fall within the scope of "the internal affairs and foreign policy of the Republic of Poland" (Article 146(1) of the Constitution) and "the affairs of State" (Article 146(2) of the Constitution).

2. The European Council – roles and duties, participation in its sessions.

The European Council is an institution of the European Union. Pursuant to Article 4 of the Treaty on European Union (hereinafter: the EU Treaty), the European Council shall provide the Union with the necessary impetus for its development and shall define the general political guidelines thereof. The European Council shall bring together the Heads of State or Government of the Member States and the President of the Commission. They may be assisted by ministers of foreign affairs of the Member States and a member of the Commission. The European Council shall meet at least twice a year, under the chairmanship of the Head of State or Government of the Member State which holds the Presidency of the Council. The European Council shall submit to the European Parliament a report after each of its meetings and a yearly written report on the progress achieved by the Union.

Therefore, the European Council deals with the most important strategic issues of the European Union. The subjects of the sessions of the European Council are the issues concerning the future of the EU, and also the most serious current problems, occurring within as well as outside the EU, which directly or indirectly concern the European Union.

This may be issues falling under all three pillars of the EU: the European Community and its policies, common foreign and security policy as well as police and judicial co-operation in criminal matters. Apart from the general authorisation, arising from Article 4 of the EU Treaty, the European Council bases its activities on specific authorisations granted by the Treaties.

The European Council adopts political decisions. They may have a different character and degree of generality and imperativeness. Then, some of the decisions are implemented in the form of legal acts by the institutions which are competent with regard to creating EU law, i.e. the Council of the European Union and the European Commission. Frequently, before taking legislative initiative, the European Commission refers to the European Council for political acceptance of the planned actions. The European Council also constitutes the ultimate forum for resolving conflicts between particular Member States which have not been resolved at lower levels of mutual interaction, and especially in the Council of the European Union (i.e. an EU institution which is composed of the Member States' ministers who are competent in that regard).

The European Council adopts its decisions and arrives at its arrangements by way of consensus, without carrying out a formal voting. The outcomes of the sessions of the European Council are included in the conclusions of the end of the EU presidency assigned for a given six-month period. They are published directly after a given session of the European Council.

In accordance with the rules for organising the proceedings of the European Council, adopted at the session in Seville on 21-22 June 2002 (the so-called Seville conclusions). The European Council has its sessions, in principle, four times a year (twice during a six-month period of the presidency of a given Member State or States). In exceptional circumstances, the European Council may hold an extraordinary session.

The proposals for the agenda of the European Council are prepared by the Committee of Permanent Representatives (COREPER) and the committees which are competent with regard to the issues falling under the second and third pillar of the European Union, as well as by the General Secretariat of the Council of the European Union.

The sessions of the European Council are prepared by the General Affairs and External Relations Council, which gathers the ministers of foreign affairs of the Members States. This Council coordinates all the preparatory work and devises agendas for its session. During such a session, which is held at least four weeks prior to a session of the European Council, the General Affairs and External Relations Council, acting in accordance with the proposal of the current presidency, prepares a detailed agenda of a session including: the list of matters to be approved or signed, in which case a debate is unnecessary; a list of matters to be discussed, which is to specify general political guidelines; a list of matters to be discussed which allow for adopting a decision in

accordance with the procedure set out in paragraph 9 of the Seville conclusions; a list of matters to be discussed which are not to be the object of conclusions.

On the day preceding a session of the European Council, the General Affairs and External Relations Council gathers at the last preparatory session and adopts the final agenda, which may not be then extended without consent of all the delegations from the Member States.

During a session of the European Council when the conclusions are adopted, each Member State is entitled to two seats. The phrase "Heads of State or Government", from Article 4 of the EU Treaty, who are members of the European Council (participate in its sessions), refers to the national constitutions and legislation of particular Member States.

3. Separation of powers between central constitutional organs of the executive branch.

The experience of functioning of the two central organs (authorities) of the executive branch– the President and the Council of Ministers – in the years 1989-1997 were one of the bases for the constitutional solutions during the period of work on the Constitution of 2 April 1997. Despite the efforts of the authors of the Constitution, no clear-cut separation of powers was made, as *inter alia* the dispute under examination may suggest, between the two segments of the executive branch in order to eliminate a possibility of a dispute (conflict). The dispute (conflict) exists although the regulations binding in the years 1989-1997, which constituted the most serious source of tension and conflicts, were eliminated from the constitutional order.

The Constitution specifies the legal principles and basis of the duties, roles, powers, rules of cooperation and mutually dependent actions taken by the two organs of the state. Applying the Constitution, one should also take into consideration the rules which have not been regulated therein *expressis verbis*, which constitute the essence of the mechanism of state government. The unwritten principles and rules may have the character of constitutional customs, a well-established practice of operation, or they may be a derivative of canons of legal, and in particular constitutional, culture which have developed in democratic states.

The need for taking into account both the rules which are expressed in the Constitution and those which arise from other binding sources is related to the fact that the scopes of the powers of two (or more) organs of the state may overlap, but the means to exercise them remain different. In particular, the duties assigned to two (or more) organs of the state may be referred to the same term (such as security); nevertheless their real content is contingent upon the duties of a given state organ which arise from the system of government, its powers as well as the scope and kind of responsibility.

In the situation where an issue being the object of the dispute over powers – i.e. indicating the central constitutional organ of the state which has the power to represent the Republic of Poland at a session of the European Council in order to present the stance of the state there – has not been constitutionally regulated in an explicit and unambiguous way, what is indispensible is a reliable interpretation of relevant constitutional provisions.

4. The duties and powers of the Council of Ministers as regards the internal affairs and foreign policy of the Republic of Poland.

4.1. Article 146(1) of the Constitution stipulates that the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland. The Constitutional Tribunal states that the "European" matter, being the object of the sessions of the European Council, is primarily the matter which belongs to the traditionally understood "internal affairs" (policies concerning the economy, agriculture, transport, natural environment, etc). The larger the extent to which the subject matter of the sessions of the European Council pertains to the internal affairs (or rather the particular areas of internal affairs) which are conducted by the Council of Ministers and for which that Council of Ministers bears political responsibility, the less justified is the participation of another state organ in the sessions of the European Council.

In the situation where the source of the dispute over powers is, above all, the way of understanding the matter of the foreign affairs and external relations, as well as the powers of the central constitutional organs of the executive branch in this regard, the analysis is focused on that matter.

4.2. The regulations of Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution indicate the scope of the competence and duties of the Council of Ministers in the field of external relations of the Republic of Poland. Article 146(1) reserves conducting "foreign policy" for the scope of competence of the Council of Ministers. The sphere of that policy as well as the affairs "not reserved to other State organs" (including the President of the Republic of Poland or local self-government) are vested in the Council of Ministers (Article 146(2) in conjunction with Article 146(1)). The scope of competence of the Council of Ministers, specified in Article 146(1) and (2), determines the duties and powers of that Council.

Many arguments indicate that conducting foreign policy is the domain of the Council of Ministers. Firstly, the Council of Ministers fulfils the constitutional duty of exercising "general control in the field of relations with other States and international organizations" (Article 146(4)(9)), which, secondly, entails ensuring the external security of the state (Article 146(4)(8)). Thirdly, the Council of Ministers conducts "the internal affairs and foreign policy of the Republic of Poland" (Article 146(1)). Fourthly, the Council of Ministers has a sole power to sign international agreements and, fifthly, with regard to the Council of Ministers, there is a presumption of powers concerning "the affairs of State" (Article 146(2)). Since there is the principle that conducting foreign policy is the domain of the executive branch, and within the framework of the executive branch, it is vested in the Council of Ministers, then the consequences of such a regulation leave no doubt: all other organs of the executive branch may conduct only the duties and exercise only the powers that arise from the Constitution or statutes, and also they need to recognise political responsibility of the government for conducting foreign policy.

The Constitutional Tribunal states that the wording of Article 146(1) of the Constitution contains the presumption of exclusive competence of the Council of Ministers as regards the substantive aspects of "conducting foreign policy". This does not necessarily

mean the sole power of the Council of Ministers in the realm of representing the Republic of Poland in relations with other states and international organisations. Indeed, what should be taken into consideration is Article 133(1), which describes the President of the Republic of Poland as "representative of the State in foreign affairs". Pursuant to Article 146(2) of the Constitution, the Council of Ministers deals with all the matters pertaining to representing the state, except for those cases which are clearly reserved – in Article 133(3) - for the President of the Republic of Poland, and the conducting of which requires cooperation with the Prime Minister and the Minister of Foreign Affairs.

The Constitutional Tribunal assumes that the scope of "conducting foreign policy" also encompasses participation in sessions, decision-making committees and meetings with the representatives of other states and international (supranational) organisations.

An addition to the regulations of Article 146(1) and (2) of the Constitution is paragraph 4 point (9) of that Article. It specifies that the role of the Council of Ministers is to "exercise general control in the field of relations with other States and international organizations". Also here, the provision specifying the role of the Council of Ministers as exercising "general control" is not a competence provision in the full sense of the word. Indeed, it does not specify, due to the emphasis on the word "general" (with regard to the term "control"), particular control competences. What is more, it is preceded (in Article 146(4) *ab initio*) by a proviso that the Council of Ministers exercises its "general control" "in accordance with the principles specified by the Constitution and statutes". Thus, the constitution-maker himself assumed and announced that the principles and scope of exercising the relevant "general control" would be specified.

4.3. The conducting of internal affairs and foreign policy is vested in the Council of Ministers. Pursuant to Article 148(4), the Prime Minister shall "ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation" (which determines the position and role of the Prime Minister).

The Prime Minister has not been entrusted, by the Constitution, with explicitly stated and constitutionally reserved duties and powers with regard to relations with other states and international organisations. Consequently, his actions are derivative of the constitutional role to "represent the Council of Ministers" (Article 148(1)) and the constitutional duty to "ensure the implementation of the policies adopted by the Council of Ministers and specify the manner of their implementation" (Article 148(4) of the Constitution). The constitutional requirement of cooperation between the President of the Republic of Poland and the Prime Minister (and the competent minister) as regards foreign policy refers to the Prime Minister as the authority exercising the duties (powers) set out in Article 148(1) and (4) in the area of foreign policy, falling within the scope of activity (competence) and powers of the Council of Ministers. The Prime Minister, cooperating with the President in respect of foreign policy (Article 133(3) of the Constitution), exercises his powers arising from Article 148(1) and (4), and hence he acts within the scope of competence assigned to the Council of Ministers *in corpore*, over which he presides, and not explicitly within the scope of activity and powers of the Prime Minister alone. What remains a form of carrying out the duty specified in Article 148(4) of the

Constitution is determining, by the Prime Minister, the manner of representation of the Council of Ministers at a given session of the European Council.

4.4. Conducting foreign policy and exercising "general control" in that regard (Article 146(1) and Article 146(4)(9)), and also remaining an authority which is competent in matters "not reserved to other state organs" (Article 146(2) of the Constitution), encompasses determining the content of the stance of the Republic of Poland within the scope of all its foreign relations, including the entire scope and all the forms of relations with the European Union. For that reason, determining the stance of the Republic of Poland each time it is to be presented at a session of the European Council falls, pursuant to Article 146(2) of the Constitution, within the exclusive competence of the Council of Ministers. The Council of Ministers, the Prime Minister (who presides over the Council of Ministers) and subordinate organs of government administration are also responsible – in accordance with Article 146(2) – for preparing the said stance, negotiating indispensable arrangements with the governments of other Members States and with the EU institutions. The Council of Minister – acting through its representatives i.e. the Prime Minister and the designated minister (who is a member of the Council of Ministers) – is competent to decide about the content, place, form and scope of presentation of the said stance (*inter alia*) at a session of the European Council. Also, it may independently authorise the Prime Minister (the designated minister) to make any necessary modifications to the said stance within the framework of foreign policy (and in particular European policy), determined by itself due to current needs ensuing from the course of debates in the European Council.

4.5. Developing and taking ("presenting") the stance of the Republic of Poland at the sessions of the EU political institution – the European Council, therefore, constitutes a vital element of conducting foreign and European policy by the Council of Ministers (as affairs not reserved to other state organs, within the meaning of Article 146(2) of the Constitution). These fall within the scope of activity of the Council of Ministers, pursuant to Article 146(2). The Council of Ministers is competent to decide about the members of the delegation for a particular session of the European Council (within the "limits" set in Article 4 of the EU Treaty and the resolutions of the European Council, including currently the so-called Seville conclusions). Also, it may specify the content and manner of presenting the stance of the Polish state as well as its possible modifications both at a given session of the Council and (particularly) during the discussions preceding the session.

4.6. A general power to represent the Council of Ministers is vested – pursuant to Article 148(1) – in the Prime Minister. He also specifies the manner of implementation of the policies adopted by the Council of Ministers, the work of which he manages (Article 148(4)). The participation of the Prime Minister in the sessions of the European Council directly results from his systemic position and duties within the Council of Ministers and more broadly – within the system of state organs. As part of specifying the manner of implementing the policies of the Council of Ministers, the Prime Minister may

also determine the manner of representing the Council of Ministers during the preparations for a given session as well as at the session of the European Council.

5. The constitutional position and duties of the President of the Republic of Poland versus the question of participation in the sessions of the European Council.

5.1. Article 10(2) of the Constitution establishes the principle of dualism of the executive power, and thus the President of the Republic of Poland and the Council of Ministers act as separate central authorities of the executive branch which are distinct as regards their structures, powers and duties. The President of the Republic of Poland acts independently of the Council of Ministers and "on his own responsibility", as regards fulfilling the role and duties assigned to him by law. This pertains to the role of the President specified in Article 126(1) of the Constitution, and in particular as regards his actions which have no legal effects and do not involve issuing official acts.

Ensuring observance of the Constitution (Article 126(2)), the President of the Republic of Poland himself interprets and applies its provisions when exercising his duties specified in the Constitution and statutes.

However, the principle of the President's independence with regard to conducting his duties has been constitutionally limited, when it comes to issuing official acts. The constitution-maker has drawn a distinction in this regard between the situations specified in Article 144(3) of the Constitution, in which the President independently exercises his powers, and all the other situations where the official acts of the President require the countersignature of the Prime Minister (which entails assuming, by the Prime Minister, political responsibility to the Sejm for the issuance and content of those acts). Indeed, within the entire scope of his activity, the President is not subject to supervision by the Sejm and is not responsible to the Sejm. The real political evaluation of actions of the President takes place when a President in power stands for re-election for the second term of office, and is manifested in the act of re-election. The President is politically responsible to the Nation.

5.2. The President of the Republic of Poland does not have the powers to independently conduct foreign policy of the state which arise from the provisions of the Constitution. Indeed, pursuant to Article 146(1) of the Constitution, conducting that policy falls within the scope of constitutional competence of the Council of Ministers. Also, the competence of the Council of Ministers encompasses, in accordance with Article 146(2) of the Constitution, the affairs of the state which are not reserved to other state organs. The category of affairs specified in Article 146(2) may include the relations between the Republic of Poland and the European Union which do not constitute classic foreign policy, and which are also not regarded as the area of internal policy understood in a traditional way.

5.3. Assigning the duty (role) of the supreme representative of the Republic of Poland" to the President of the Republic of Poland is not tantamount to entrusting this authority with the duty to "conduct foreign policy". Pursuant to Article 146(4)(9) of the

Constitution, "to the extent and in accordance with the principles specified by the Constitution and statutes", it is the Council of Ministers that shall "exercise general control in the field of relations with other States and international organizations".

5.4. The status of the President as regards external affairs (foreign policy) – taking into account the state of constitutional regulation at the time of drafting the Constitution of 1997 – manifests the intention of the constitution-maker. The President has not been granted the powers that were vested in him under the rule of the "Small Constitution" of 1992, namely the power to exercise "general control" in the field of foreign affairs, and in the area of external and internal national security (Article 32(1) and Article 34 of the "Small Constitution"); neither has he been granted the power to have a final say on the choice of candidate for the post of the mister responsible for foreign affairs (as well as the ministers who are responsible for internal affairs and national defence). The lack of the said powers (in conjunction with the provisions of Article 146 of the Constitution) indicates a clear intention of the constitution-maker to include conducting foreign policy in the scope of competence and powers of the Council of Ministers and the Prime Minister (who presides over it), which is specified in the Constitution. The limitation of the powers of the President was also a reaction to the strong position of the President in the "Small Constitution", as well as to the criticism of the functioning of central organs of the executive branch. It was seen in the previously binding constitutional regulation as one of the sources of dysfunction of the state as regards foreign policy. The solutions adopted in the Constitution of 1997 were to prevent such dysfunction, or at least to counteract it.

5.5. The Constitution does not set out the powers to conduct foreign policy and exercise general control over that policy by the President of the Republic of Poland. The duties of the President, specified in Article 126(2) (which serve as certain guarantees of the values indicated there), as well as the powers set out in Article 133(1) of the Constitution, are characterised by a great deal of (direct and indirect) reference to external policy (both foreign and European), which is conducted by the Council of Ministers.

The Constitution distinguishes the systemic position of the President as "the supreme representative of the Republic of Poland" from his systemic role of "representative of the State in foreign affairs".

The constitutional regulation describing the President of the Republic of Poland as "representative of the State in foreign affairs" does not differ from a classic definition of the role of the head of state. The constitutional construct reveals the assumption that the President remains included in the realm of foreign policy, but within the scope which is determined by the Constitution and statutes. Exercising his duties and powers, he is obliged, pursuant to the Preamble and Article 133(3) of the Constitution, to cooperate with the Prime Minister and the competent minister.

The Constitutional Tribunal takes into account the circumstance that two terms were used in Polish when regulating the role of the President of the Republic of Poland: *przedstawiciel* (Eng. 'a delegate') and *reprezentant* (Eng. 'a representative') of the Republic of Poland. In colloquial Polish, these terms are often regarded as synonyms.

However, according to the established rules of interpretation, the use of different terms justifies the need for differentiation between their meanings. Indeed, it should be presumed that, when using different terms with regard to the actions of the President in the field of external relations of the state, the constitution-maker had the reasonable assumption in mind that terms which are lexically diverse should be assigned meanings which are not identical. The participation in a session of the European Council - on behalf of a given Member State - is not, in fact, limited to sheer representation, nor is it limited to actual actions; it involves participating in the process of adopting political decisions (by way of consensus) by this EU institution.

5.6. Pursuant to Article 126(1) of the Constitution, the President of the Republic of Poland is the supreme representative of the Republic of Poland, and moreover – the guarantor of the continuity of state authority.

In the view of the Constitutional Tribunal, Article 126(1) of the Constitution has assigned a universal character to the role of the President as "the supreme representative of the Republic of Poland", in the sense that this role is fulfilled by the President both in the context of external relations and internal affairs, as well as – regardless of the circumstances, place and time. There are no legal premisses, on the basis of which the forum of the EU political institution, i.e. the European Council, should be excluded *a limine* from the scope of fulfilling that role. Since the Constitution designates only the President as "the supreme representative of the Republic of Poland, the President – within the scope of and in accordance with the principles specified in the Constitution and statutes – independently decides about the place and the form of fulfilling this role set forth in Article 126(1) of the Constitution. The systemic position of "the supreme representative" entails that the scope of the self-contained role of the President primarily regards "the embodiment of the majesty of the Republic of Poland".

At the same time the Constitutional Tribunal emphasises that the systemic position of the President as "the supreme representative of the Republic of Poland" does not mean that the President is the supreme state authority of the Republic of Poland. Despite the suggestions put forward during the proceedings in this case, the Polish term "*najwyższe przedstawicielstwo*" (Eng. supreme delegation) does not also mean "*najwyższa reprezentacja*" (Eng. supreme representation). Finally, what is important, assigning the systemic role of the "supreme representative of the Republic of Poland" to the President does not directly entail entrusting the President with the duty to conduct foreign or "EU" policy. The Constitution does not state that the President has a general power to participate in the sessions of the European Council, and in particular – a power to present the stance of the Republic of Poland at the sessions of the said Council.

5.7. The systemic position of the President as "the supreme representative of the Republic of Poland" and "the guarantor of the continuity of State authority" has been constitutionally determined – in Article 126(2) – by indicating the constitutional duties of the President. The said provision stipulates that the President of the Republic of Poland

shall: (a) ensure observance of the Constitution, (b) safeguard the sovereignty and security of the State as well as the inviolability of its territory. It should be assumed that Article 126(2) outlines the scope of the duties which the Constitution provides for the President, thus delineating the boundaries and character of his systemic roles specified in Article 126(1) of the Constitution.

The Constitutional Tribunal draws attention to three circumstances. Firstly, the wording of Article 126(2) of the Constitution indicates that the provision specifies duties, and not powers. Secondly, the duties set out in Article 126(2) are carried out by the President together and in cooperation with other organs of the state. With regard to none of the indicated duties, the President has the sole power to carry them out in the forms which have legal effects. Thirdly, as regards the duties (goals) set out in Article 126(2), the President may not carry them out freely. When carrying them out, he may only exercise the powers specified in the Constitution and statutes. The said powers may only be exercised by the President in the situations where this serves the purposes expressed in Article 126(2) of the Constitution.

5.8. Having assumed that the duties set out in Article 126(2) are carried out by the President, within the scope of his constitutional role (position) as "the supreme representative of the Republic of Poland" and as "the guarantor of the continuity of State authority", it should be analysed – for the benefit of the case – to what extent it is possible that there will be situations which will necessitate the participation of the President in a session of the European Council (due to his constitutional duties).

The duty of the President to safeguard the inviolability and integrity of the territory of the Polish state comprises the obligation to counteract any attempts at cession of even the smallest part of the territory of Poland, including also the territorial waters. This also entails preventing political disintegration of the territory of Poland, emergence of diversified public orders going beyond the scope of constitutionally permitted decentralisation of powers. This also regards counteracting any attempts at introducing territorial autonomy and any aspirations to federalise Poland. This duty complements safeguarding the sovereignty and security of the state.

Due to the criteria for membership in the European Union (Article 49 of the EU Treaty and the conclusions of the Copenhagen European Council in 1993), including the basic condition, i.e. prior resolution of border disputes between the Member States, and moreover – due to the content of Article 11 of the EU Treaty, the occurrence of threats to territorial integrity of the Member States is unlikely.

A constitutional duty of the President, specified in Article 126(2) *in fine*, is to safeguard the inviolability and integrity of the territory of the state. The issue of territorial integrity does not constitute the matter of the EU law or Community policies. Also, the provisions of the Treaties, provisions of the Accession Agreement, as well as the previous experience of the functioning of the European Union, do not indicate that the European Council has the power to adopt (or adopts) decisions in the matters concerning the inviolability and integrity of the territory of particular Member States, including the Republic of Poland. This circumstance is not without significance for the participation of

the President of the Republic of Poland in the session of the European Council motivated by the exercise of the constitutional duties indicated in Article 126(2) of the Constitution.

When analysing the issues of sovereignty, it should be stressed that the Council may adopt decisions solely within the scope of competences of particular organs of the state (especially those of the executive branch, to a lesser extent those of the legislative branch, and to the least extent – of the judiciary), which have been conferred on the European Union for the joint exercise thereof by the European Council. The issue of sovereignty, also in the context of the President's duties set out in Article 126(2) of the Constitution, has been covered by the Constitutional Tribunal in the judgment of 11 May 2005 in the case K 18/04 (OTK ZU No. 5/A/2005, item 49). In the said case, the constitutionality of the Treaty of Accession has been confirmed. The Constitutional Tribunal presented the view – which is still valid today – that the object of conferral that is subject to the assessment of conformity to the Constitution (as regards respecting the sovereignty and security of the state) comprises the competences of state organs "in relation to certain matters". They have earlier been determined "on the basis of and within the scope of the Constitution", and therefore in accordance with its axiology expressed in the wording of the Preamble to the Constitution. Emphasising the significance of the recovered possibility of a sovereign and democratic determination of the state's own fate, the Preamble declares the need for "cooperation with all countries for the good of the Human Family", for the fulfilment of the obligation of "solidarity with others" and for respect for universal values. This obligation refers not only to internal affairs, but also to foreign relations. Similar values, belonging to the common legal inheritance of European countries, also determine the goals and direction of the activity of the Communities and the European Union.

Pursuant to Article 6(1) of the EU Treaty: "The Union is founded on the principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law". These principles are shared by the Member States.

The Tribunal emphasises that the object of the decisions of the European Council are the matters referred by the Member States for the joint handling via the EU institutions. Both the manner and object with regard to the conferral of competences of organs of state authority, in relation to certain matters, maintain the attribute of being "consistent with the Constitution" as "the supreme law of the Republic of Poland". By contrast, the change in the scope as regards the conferral of the competences of state organs on the European Union requires amendments to the Treaties constituting the basis of the Union.

From the point of sovereignty and the protection of other constitutional values, what is significant is the limitation of conferral of competences "in relation to certain matters" (and thus without infringing the "core" competences, which allow for sovereign and democratic determination of the fate of the Republic of Poland).

The Constitutional Tribunal states that the sessions of the European Council which are devoted to amending the Treaties constituting the basis of the Union may be related to the issue of sovereignty of the Republic of Poland, which would justify the participation of the Polish President therein.

Article 126(2) of the Constitution entrusts the President of the Republic of Poland with the duty to "safeguard" the security of the state. The basic scope of carrying out that duty is related with the exercise of the powers of the President as the Supreme Commander of the Armed Forces of the Republic of Poland. Moreover, the President has the superseding power in the situation of a serious threat to the state related to the introduction of the martial law, a state of emergency as well as an order of (general or partial) mobilisation. Therefore, the President has, at his disposal, vital measures to safeguard the sovereignty, security and territorial integrity of the Republic of Poland. From that perspective, the participation of the President in the sessions of the European Council should be perceived as serving (supplementing) the exercise of the duties specified in Article 126 of the Constitution, and carried out in the relations with the European Union.

The European Council may deal with the issues pertaining to the security of the Member States, and thus – the security of the Polish state. There have been numerous doubts and facets of the dispute, as regards the scope of participation of the President of the Republic of Poland (who exercises the constitutional duty to "safeguard the security" specified in Article 126(2) of the Constitution) in the sessions of the European Council. Thus, the Constitutional Tribunal stresses the usefulness of distinguishing the semantic scope of the term "security of the State" (Article 126(2) of the Constitution) and the meanings of the term "security" in the particular areas of the functioning of the state (e.g. energy security, environmental security and health safety), which are in particular connected with the duties, powers and responsibility of the Council of Ministers and its particular members managing the relevant units of government administration.

The Constitutional Tribunal is not settling the dispute concerning a specific session of the European Council. Nevertheless, it draws attention to the fact that the duties mentioned in Article 126(2) are the duties carried out by the President together and in cooperation with other organs of the state. With regard to none of the indicated duties, the President has the sole power to exercise the duties. For instance, as regards ensuring observance of the Constitution, the partner of the President is the Constitutional Tribunal, and as regards safeguarding the inviolability of the Polish territory – the Council of Ministers, and in particular the Minister of National Defence.

5.9. As mentioned before, the Constitution distinguishes the systemic position of the President as "the supreme representative of the Republic of Poland" from the systemic role of "representative of the State in foreign affairs". Regardless of the suggestions of the representative of the President in this case, these terms are not identical. Thus, it is inadmissible to assume an interpretation based on assigning the same meanings to different terms.

The construct describing the President of the Republic of Poland "as representative of the State in foreign affairs" is a manifestation of an obvious attribute of each republican head of state and, in the system of government of the Republic of Poland, it has no other meaning than the meaning of this classic attribute. The constitutional construct manifests an assumption that the President is involved in conducting foreign policy, but within the scope determined by the Constitution and statutes; whereas, when exercising his duties and powers, he is obliged to cooperate with the Prime Minister and the competent minister.

5.10. The powers of the President as representative of the State in foreign affairs are set out in Article 133(1) of the Constitution. The President ratifies and renounces international agreements, and notifies the Sejm and the Senate thereof; he appoints and recalls the plenipotentiary representatives of the Republic of Poland to other states and to international organisations; as well as he receives the Letters of Credence and Recall of diplomatic representatives of other states and international organisations accredited to him. In all these cases, the exercise of the President's powers is shared with appropriate organs of the state. For example – the enactment of a statute granting consent to ratification of an international agreement takes place only upon motion by the Council of Ministers; the President may not ratify an international agreement without the prior enactment of a statute granting consent to such ratification; the official act of ratification of an international agreement by the President does not constitute a personal power (prerogative) and, to be effective, it requires the countersignature of the Prime Minister, presiding over the Council of Ministers; appointing and recalling the plenipotentiary representatives of the Republic of Poland is done upon motion by the Minister of Foreign Affairs; receiving the Letters of Credence and Recall of diplomatic representatives of other states requires cooperation with the Minister of Foreign Affairs.

5.11. The participation of the President (also when not consulted with the Prime Minister) in a session of the European Council brings about certain constitutional and political consequences.

Firstly, the presence of the President of the Republic of Poland and the Prime Minister (who presides over the Council of Ministers) at a session of the European Council affects who presides over the state's delegation (due to diplomatic precedence).

Secondly, the European Council is not shaped as a forum where a given Member State is primarily represented by a person with the attribute of the supreme representative of the state, but who is not involved in the day-to-day work of the government. There are no legal grounds to adopt the assumption that the mere status of "the supreme representative of the Republic of Poland" unequivocally determines the participation of the President in a session of the European Council.

6. The normative content of the President's obligation to cooperate with the Prime Minister and the competent minister (Article 133(3) of the Constitution).

6.1. The Preamble of the Constitution obliges the authorities of the Republic of Poland to cooperate. This obliges them to: mutually respect the scope of duties and powers of constitutional organs of the state, and moreover – respect the dignity of the offices and of the persons who hold them, be loyal to each other, act in good faith, notify each other of initiatives, be ready to cooperate and compromise, and carry out such arrangements diligently.

The concurrence of the aims as the manifestation of the idea of cooperation is a consequence of the fundamental principle of the system of government, expressed in Article 1 of the Constitution: "the Republic of Poland shall be the common good of all its

citizens". The constitutional organs of the state have been obliged to undertake such action which will facilitate the implementation of the principle contained in Article 1 of the Constitution.

6.2. The Constitutional Tribunal states that it follows from the Preamble of the Constitution and Article 133(3) that the President, the Prime Minister and the competent minister are permanently obliged to cooperate as regards carrying out the duties which do not fall exclusively within the scope of their competence. Cooperation constitutes a series of actions undertaken on the initiative either by the President or the Prime Minister or both of the said authorities, within the scope defined by the Constitution and statutes. Exercising some of the duties (and powers) of the Council of Ministers requires certain constitutional or statutory cooperation with the President of the Republic of Poland. With regard to the duties of the President, the requirement of cooperation with the Prime Minister and competent ministers has much wider scope. Therefore, there is no complete symmetry between one scope of constitutional obligations to cooperate and another.

Constitutionally imposed, this cooperation remains – in the view of the Constitutional Tribunal – purposeful praxeologically due to the connection between "conducting foreign policy" and exercising "general control" in that regard by the Council of Ministers (represented by the Prime Minister) and the realm of fulfilling the constitutional role and duties by the President of the Republic of Poland (as "the supreme representative of the Republic of Poland" and the guarantor of "the sovereignty and security of the state"), as well as also due to unity (uniformity) of the conducted European policy and the need for effective functioning of the state.

6.3. The obligation of cooperation, as set forth in Article 133(3) of the Constitution, i.e. in respect of foreign policy is primarily, though not entirely, the duty of the President. This constitutional norm sets the obligation to seek compromises, in the case of the President – refraining from decisions and actions which have not been earlier discussed by the Prime Minister or the Minister of Foreign Affairs. The obligation of the organs of the state to cooperate implies a legal imperative that action in the area of foreign and European policy be uniform. At the same time this imperative contains constitutional prohibition against creating two parallel and independent centres for conducting foreign policy. Cooperation within the meaning of Article 133(3) means that the President may not, acting with the best intentions, conduct competent policy to the one agreed by the government. This would be against the Polish raison d'état, and hence the significance the Constitution assigns to the uniform stance of the executive branch in foreign relations. When dealing with international organisations or institutions, the President may not take a stance which would be contrary to the stance of the government, due to the significance of uniform foreign policy as an indicator of the raison d'état.

The obligation of cooperation also concerns the Prime Minister and the competent minister, and in particular it imposes, on those authorities, the obligation to be ready to cooperate with the President of the Republic of Poland.

6.4. The Constitution does not determine the rules and manner of cooperation. The constitution-maker has left this to be worked out in practice i.e. in the course of relations between the President and the Prime Minister, as well as on the basis of current needs. The cooperation encompasses determining the stance of the Republic of Poland in relation to a particular session of the European Council, regardless of the willingness of the Polish President to participate in the session, to the extent that stance falls within the scope of "foreign policy".

As regards the sessions of the European Council, the said cooperation, in particular, entails informing the President of the Republic of Poland by the Prime Minister or the Minister of Foreign Affairs about the subject of the planned session. In the case of the officially notified interest of the Polish President in the matter (matters) concerning the subject of a session of the European Council (which falls within the scope of duties of the President, as set out in Article 126(2) of the Constitution), the Council of Ministers provides complete information on the stance of the government in that regard.

The participation of the President in a given session of the European Council should be the object of cooperation among the central constitutional organs of the state specified in Article 133(3) of the Constitution. This may be a result of arrangement, or even of a joint decision of the President of the Republic of Poland and the Council of Ministers represented by the Prime Minister.

6.5. The cooperation referred to in Article 133(3) of the Constitution takes place each time the President expresses his willingness to participate – due to the duties specified in Article 126(2) of the Constitution – at a session of the European Council. The rule is the representation of the Polish state at a session of the European Council by the Prime Minister. Indeed, conducting foreign policy falls within the remit of the Council of Ministers as such. The Prime Minister specifies the ways of carrying out the duties in that regard and represents the Council of Ministers as a state organ which conducts foreign policy and is competent as regards the affairs of the state not reserved to other organs of the Polish state. The Council of Ministers also conducts general control "in the field of relations with other States and international organisations", within the scope of and in accordance with the principles specified in the Constitution and statutes.

6.6. Both the applicant – i.e. the Prime Minister – as well as the President of the Republic of Poland (with reference to the application) rightly interpret the constitutional obligation of cooperation as an imperative of the constitution-maker addressed to the President of the Republic of Poland, the Prime Minister and the minister competent in respect of foreign affairs. The cooperation implies mutual openness for joint work, and the readiness to undertake it. Since the constitution-maker has specified the scope of the said cooperation relatively broadly, namely "in respect of foreign policy", then he implied in the imperative of cooperation all the forms of the activity by the President, the Council of Ministers and the Prime Minister, who presides over it, which are "targeted" outside of the Republic of Poland. This obligation requires an exchange of information, consultation as well as the possibility of submitting commentaries to the stance of the Council of Ministers, as a state organ conducting

foreign and European policy and, moreover, where necessary, making binding arrangements. The constitutional obligation of cooperation between the President and the Council of Ministers also encompasses the full dimension of representation of the Republic of Poland in the European Union (and within its borders), and also – as indicated before – cases of the President's participation in particular sessions of the European Council, in the regard which is constitutionally determined.

6.7. The following minimal expectations arise from the constitutional obligation of cooperation (specified in Article 133(3) of the Constitution):

a) mutual readiness to cooperate, both on the part of the President of the Republic as well as the Prime Minister and the Minister of Foreign Affairs,

b) the obligation of the Prime Minister to inform the President about the subject matter of the sessions of the European Council and the stance determined by the Council of Ministers,

c) the President's obligation to make himself familiar with the stance determined by the Council of Ministers,

d) the President's obligation to notify about his intention to participate in a particular session of the European Council,

e) mutual readiness to make transparent arrangements with regard to the participation of the President of the Republic of Poland in a session of the European Council,

f) the obligation to observe the arrangements as regards the manner of participation and potential involvement of the President in the presentation of the stance of the Republic of Poland, determined by the Council of Ministers.

6.8. The arrangements made on the basis of Article 133(3) of the Constitution may comprise the issues of the extent and manner of participation of the President in a session of the European Council. The arrangements may include the President's involvement in presenting the stance of the Republic of Poland, determined by the Council of Ministers (and agreed with other Members States), concerning the matters being the subject of a given session of the European Council, which are connected with fulfilling the constitutional duties of the President.

The President's involvement in presenting the stance of the Republic of Poland may not result in diminishing the internal coherence of that stance, or in moving away from the content determined by the Council of Ministers. Neither may it go beyond the limits of arrangements made pursuant to Article 133(3) of the Constitution.

6.9. As regards the matters which have not been taken into account in the said arrangements between the President of the Republic of Poland and the Prime Minister together with the Minister of Foreign Affairs, as well as with regard to the matters which solely fall within the scope of competence of the Council of Ministers, as a state organ conducting foreign and European policy, that organ of the state has the sole power to determine, modify and present the stance of the Republic of Poland at the sessions of the European Council. Within the set scope of competence, it is the Prime Minister or the

minister authorised by the Council of Ministers as a representative (who is a member of the Council of Ministers) to present and modify the stance on behalf of the Council of Ministers.

6.10. The President of the Republic of Poland – even when he does not express his willingness to participate, on the basis of Article 126(1) and (2) of the Constitution, in a particular sesission of the European Council, and does not participate therein – may submit comments on the stance of the Republic of Poland, as part of cooperation with the Prime Minister and the competent minister (pursuant to Article 133(3) of the Constitution), prepared for a session of the European Council.

6.11. On the margin of a legal analysis, the Constitutional Tribunal notes that the functioning of the central organs of the executive branch in practice has shown situations that contradict the principle of cooperation.

For these reasons, the Constitutional Tribunal has decided as in the operative part of this decision.

Dissenting Opinion
of Judge Mirosław Granat
to the Decision of the Constitutional Tribunal
of 20 May 2009 in the case Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act, I submit my dissenting opinion to the following points of the operative part of the decision of the Constitutional Tribunal of 20 May 2009 (Kpt 2/08)

point 3 [ ]

point 4 [ ]

point 5 [ ]

1. The dispute over powers examined by the Tribunal does not concern "foreign policy" of the Republic of Poland (as referred to in Article 146(1) and Article 133(3) of the Constitution) or "foreign relations" (as it is often presented). If the object of the dispute indicated in the application, i.e. "determining a central constitutional organ of the state which is authorised to represent the Republic of Poland at the sessions of the European Council in order to present the stance of the state" (p. 1) is juxtaposed with the field of "foreign relations", then it should be stated that this is not the case of a dispute over powers within the meaning of Article 189 of the Constitution. The Constitution explicitly stipulates that "the Council of Ministers shall conduct the internal affairs and foreign policy of the Republic of Poland" (Article 146(1) and that the Council of Ministers shall "exercise general control in the field of relations with other States and international organizations" (Article 146(4)(9)). By contrast, pursuant to Article 133(3), "the President of the Republic shall cooperate with the Prime Minister and the appropriate minister in respect of foreign policy". In the light of these provisions, "foreign policy" ("foreign affairs") concern classic foreign relations, shaped by international agreements. There is no doubt that "foreign policy" is conducted by the Council of Ministers.

2. In my opinion, the dispute concerns "European matters" or, in other words, "conferred competences". The description of the realm of such matters can be found in the Constitution of the Republic of Poland. These are matters arising from Article 90(1) of the Constitution. The scope of that realm is determined by the competences conferred by the Republic of Poland, i.e. "the competence of organs of State authority" conferred pursuant to an international agreement on "an international organisation or international institution" ("in relation to certain matters"). "Conferred competences" constitute relations between Poland and the organisations referred to in Article 90(1), as well as the matters falling within the scope of the competences of such an organisation. Such a constitutional basis, and not the provisions of Article 146(1) and

Article 133(3) of the Constitution, cited in points 2 and 3 of the operative part of the decision, determines the context in which the dispute "takes place" as to representing Poland at the sessions of the European Council and presenting Poland's stance.

In the judgment of 31 May 2004, concerning the Act on Elections to the European Parliament (Ref. No. K 15/04, OTK ZU No. 5/A/2004, item 47), the Tribunal stated that the European Union was not a state and "analogies to the system of state organisation are not justified" (as above, p. 662). The character of the EU is not sufficiently specified (it is not an international law entity; the lack of explicit premisses for distinguishing, in its case, between a "supranational" and "international" organisation) (cf. as above, p. 681). The previous view of the Tribunal, from the time of Poland's accession to the European Union, indicates the peculiarity of the characteristics of that entity.

3. The significance of Article 90(1) of the Constitution of the Republic of Poland for determining the scope of dispute over powers is that the provision contains an answer to the question about the term "European matters" and their scope [which cases of the state's policy may be specified as "European"]. "European matters" are matters in relation to which Poland conferred the competences of organs of the state, pursuant to Article 90(1) of the Constitution. In this case, it is not necessary to determine whether the matters on the agenda of the European Council are more "internal" or more "foreign", from the point of view of conducting the policy of the state. What is vital for determining the scope of the dispute over powers is the formal criterion for European matters ["conferred matters"]. If the "conferred competences" were analysed as regards their substance, then there would be a need to return to "amalgamation" (merging) of internal and foreign affairs as a characteristic of the activity of Polish state organs in the EU bodies (cf. the statement of reasons for the judgment of the Constitutional Tribunal of 11 May 2005, Ref. No. K 18/04, OTK ZU No. 5/A/2005, p. 674). In any case, in my opinion it is futile, and impossible in practice, to divide these matters into "internal" and "foreign", and to decide which of them take precedence in "European matters", as well as to make the power of the Council of Ministers or of the President of the Republic of Poland to determine and present Poland's stance, at a session of the European Council, dependent on that fact. The rendering of "security of the State", divided in the statement of reasons of the decision into "security of the State" (within the meaning of Article 126(2) of the Constitution) and "security of the State" "in the particular aspects of the functioning of the state", as well as the consequences thereof, are an illustration of the said evaluation.

4. What follows from Article 90(1) of the Constitution is a qualitative difference between the said areas of external relations of Poland. It constitutes *lex specialis* with regard to the general principle of Poland's accession to international organisations (expressed in Article 89(1)(3) of the Constitution). This manifests the legislator's assumption that Poland's accession to an organisation which has an integrative and supranational character, from the legal point of view, is a different act than the membership in a classic international organisation (cf. M. Masternak – Kubiak, "Konstytucyjno – prawne podstawy procedury przystąpienia Polski do Unii Europejskiej", *Przegląd Sejmowy*, 2003, Issue No. 5 (58), p. 43). The reservation of the legislator - that the manner

of expressing consent to the conferral of the competence of organs of State authority" by the Republic of Poland must meet more stringent requirements than an amendment to the Constitution of the Republic of Poland - convinces me that this is a special realm of relations (different from "foreign policy" and conducting thereof). Obviously, the role of Article 90 is more significant than merely "procedural". It is emphasised, in the literature on the subject, that "it contains a great amount of separate systemic content which is of groundbreaking and historical significance" (cf. M. Kruk, "Tryb przystąpienia Polski do Unii Europejskiej i konsekwencje członkostwa dla funkcjonowania organu państwa", [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne*, Warszawa 2006, p. 141). The above argumentation inclines me to remark that Poland's accession to the European Union constituted a moment so significant as regards the constitutionalism of our country that the Tribunal had the opportunity to draw conclusions therefrom for defining the area of the dispute.

Therefore, I object to the reasoning adopted by the Tribunal which explains the role of the Council of Ministers and of the President of the Republic of Poland (and *vice versa*: of the President of the Republic of Poland and of the Council of Ministers), in the dispute over powers which occurs in the context of "conferred competences" from Article 90(1) (and not – I wish to stress that again – in the context of traditional international relations), by means of constitutional categories and terms concerning "foreign policy". The error of reductionism consists here in interpreting the constitutionally singled out [in Article 90] issue of relations with a supranational organisation (and the consequences of conferral of competences for the internal system of government) in the light of the regulations regarding classic international relations. However, the Constitution should not be interpreted in such a way that its regulations concerning one type of relations are applied to another type which emerged later, based on *argumentum a simili*. In the interpretation of the Constitution, such argumentation may not be the basis for adjudicating on the powers of constitutional organs of the state. Similarity of matter does not constitute justification for treating both areas of external policy of the state as equivalent.

Presenting the dispute before the Constitutional Tribunal lacks the thought of the Tribunal expressed in the statement of reasons for the judgment of 12 January 2005, Ref. No. K 24/04 (the Cooperation Act). The Constitutional Tribunal stated that:

The development of the European Union in many cases necessitates a new approach to legal issues and institutions which have been shaped by the tradition for many years (and sometimes even centuries), enriched with jurisprudence and the doctrine, which have also ingrained in the consciousness of generations of lawyers. The necessity for redefining certain – as it would seem inviolable – institutions and terms arises from the fact that in the new legal situation, ensuing from European integration, there may sometimes be a conflict between the well-established understanding of some of constitutional provisions and the newly-emerged need for effective, and at the same time consistent with constitutional principles, impact at the forum of the European Union. (OTK ZU No. 1/A/2005, item 3).

In the context of the case at hand, "a new approach" should have been adopted as regards determining norms which concern shaping the stance of Poland in the European Union. Then I would understand the premiss for which the Constitutional Tribunal refrained from

a restrictive interpretation of the dispute over powers as a form of review in a specific case (the requirement that a dispute be "real"), presented in the decision of 23 June 2008 (Kpt 1/08, OTK ZU No. 5/A/2008, item 97), for the sake of understanding such a dispute as a form of abstract interpretation of the Constitution, as it is the case in the present case.

5. I cannot agree with the method of reasoning applied by the Tribunal (reflected in the analysis presented in the statement of reasons, as well as in some of its conclusions) which consists in extrapolating, from the scope of activity of the European Council and the European provisions regulating the competence of the Council (Article 4 of the Treaty on European Union), the competence of national authorities, specified by the norms of constitutional rank. Even the "governmental" character of the European Council does not provide authorisation to interpret the Constitution of the Republic of Poland in the light of those provisions. Such argumentation redefines the relation of the Constitution to the EU law. In the process of interpretation of the Constitution, its provisions (having primary systemic significance for the integration process) may not be read as directives whose meaning is adjusted to a regulation (subject to its own dynamic) of a supranational organisation such as the European Union.

The consequence of thinking of the type "from the competences of the European Union to the Constitution of the Republic of Poland" is the act of singling out "state security in particular areas of the functioning of the state", from "the security of the State" (as a category from Article 126(2) of the Constitution, which the President is to safeguard), (e.g. energy security, environmental security, health safety); these areas are primarily related to the duties, powers and responsibility of the Council of Ministers and its particular members (point 5.8 of the statement of reasons). The consequence of such an approach of the Tribunal is taking away essential content of "security of the State" as referred to in Article 126(2) of the Constitution (the content which corresponds to key challenges of the contemporary world).

6. The issue of control within the scope of "conferred competences", from the point of view of national authorities, has not been introduced in the Constitution. As regards "conferred competences", a supranational organisation directly exercises public power in Poland (one finds no proviso in the Constitution, which is known from Article 88-1 of the Constitution of the French Republic, on exercising "some of their powers in common" by the French Republic, the Communities and the Union). Therefore, is the Constitutional Tribunal competent to settle the dispute over powers in that regard? In my opinion, it definitely is. The provisions of the Constitution constitute a set of norms which are both general and sufficiently exhaustive that they delineate the separation of powers in the state in respect of the functions and the scope ratione personae. The Tribunal had the obligation to provide a consistent interpretation, taking into consideration the character of the European Union and the significance of Poland's accession to the Union.

Since the competences of state organs were conferred on the organisation which, as it follows from the jurisprudence of the Constitutional Tribunal, is a unique legal entity, in accordance with a procedure meeting the requirements of *pouvoir constitué*, then the Council of Ministers and the President of the Republic of Poland should take part in

determining the stance and presenting it as regards "conferred competences". These authorities participate in the procedure for deciding about conferring competences on an international organisation or institution, and thus they are competent to take part in determining the stance of the Republic of Poland at a session of the European Council and in presenting that stance.

7. Where "the European function" of the state has not been introduced to the Constitution (apart from the meaning of Article 90(1)) and where the Constitutional Tribunal has decided not to determine whether and in what way the provisions on foreign policy may be referred to "conferred competences", and also in the case of objections to regard Article 4 of the EU Treaty as a prism for viewing the Constitution of the Republic of Poland, a decision-making process within the scope of the "conferred competences" must take into account "cooperation between the public powers" (as stated in the Preamble of the Constitution) and the principle of separation and balance of powers (Article 10). Pursuant to Article 10, it is the separation and balance of powers that constitute the basis of "the system of government of the Republic of Poland". In my view, the balance of powers is one of the designata of "cooperation between the public powers". The executive power, as referred to in Article 10 of the Constitution, encompasses the entire activity of the state which has legal effects, apart from legislative and judicial activity" (cf. P. Sarnecki, Commentary to Article 146, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, Wyd. Sejmowe, Warszawa 2001, L. Garlicki (ed.), Vol. II., p. 5). It follows from that provision that "state authority is primarily represented by the executive branch" (P. Sarnecki, as above). Therefore, conferring "the European function" of the state on one organ of the executive branch would infringe on the said meta-principle of constitutional law. In the case where the Constitution does not mention "the European function", what should be a hint in the interpretation of the constitutional provisions is the desire to maintain competence balance, in the light of the principle of separation and balance of powers.

Although the Tribunal places and settles the dispute in the context of "foreign policy" of Poland in the operative part of the decision, in the statement of reasons thereof it mentions Poland's EU policy. This mention is superfluous (the Tribunal specifies neither the content nor the meaning of the category). Refraining from an analysis of the dispute in the light of "conferred competences", the Tribunal however stresses that assigning the President of the Republic of Poland the role of the supreme representative of the Republic of Poland" (in Article 126(1) of the Constitution) does not lead to granting him "the duty to conduct foreign policy" or "EU policy". Despite the fact that the issue of "EU policy" has been left out of the analysis of the Tribunal, the Tribunal takes the duties of the President for granted with regard to matters which (in the view of the Tribunal) do not fall within the scope of the dispute.

8. I am fully aware of the indispensability of constitution-making and/or legislative activities related to "the European function" of the Constitution. Nevertheless, it should be emphasised that, in the culture of some states, there is the notion of constitutional dialogue. Representing Poland in the European Council, with all its formal determinants, requires

maintaining the simplest forms of cooperation (dialogue) between the Prime Minister, the Council of Ministers and the President of the Republic of Poland, which belong to the pre-constitution tradition and do not necessarily require a legal regulation.

9. The President is the supreme representative of the Republic of Poland and the guarantor of the continuity of state authority (Article 126(1)). The nation has granted the President power for a 5-year term of office, in universal and direct elections (Article 127(1)). The constitution-maker specified certain duties of the head of state: ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory (Article 126(2)). I hold the view that pursuant to Article 126 (not only paragraph 1 thereof, as the Constitutional Tribunal argues, but in particular its paragraph 2), the President himself may decide about his participation in a given session of the European Council, i.e. without being granted consent by any other organ of the state.

10. I may not accept point 3 of the operative part of the decision, due to a logical inconsistency contained therein. The conclusions of the reasoning do not have grounds in the assumed premisses. The said point comprises two sentences. The former stipulates that "the Council of Ministers, under Article 146(1), Article 146(2) and Article 146(4)(9) of the Constitution, determines the stance of the Republic of Poland to be presented at a given session of the European Council". The letter, stipulating that "the Prime Minister (who presides over the Council of Ministers) represents the Republic of Poland at the sessions of the European Council and presents the agreed stance", is key to settling the dispute by the Constitutional Tribunal, but does not indicate the legal basis it follows from.

11. Juxtaposing point 3 with point 5 of the operative part of the decision, does not allow to precisely determine the view of the Tribunal, as regards presenting the stance of the Republic of Poland by the Polish President at the sessions of the European Council. The Prime Minister (pursuant to point 3) is undoubtedly competent to represent the Republic of Poland at the sessions of the European Council and to present the agreed stance there. However, it is possible (point 5, second sentence) that the "extent and manner" of intended participation of the President in a particular session of the European Council may be specified on the basis of cooperation between the two authorities (the thesis in point 5 is not possibly an exception, in the reasoning of the Tribunal, from the rule expressed in point 3 of the operative part of the decision). However, it follows from the statement of reasons that the presentation of the state's stance by the President still may not result in "departing from the content agreed by the Council of Ministers". Since the President may at best merely be *porte parole* with regard to the stance of the Council of Ministers, then determining the "extent and manner" of his participation in a given session of the European Council, within the framework of cooperation between the two authorities", is illusory. Assigning such substance to the principle of cooperation between the public powers in the statement of reasons of the decision deprives the head of state of its attributes set out in Article 126(1) and (2) of the Constitution.

12. As I have pointed out above, the Tribunal did not mention the reason for departing from the restrictive interpretation of the premisses indicating the existence of the dispute over powers, which were specified in the decision in the case Kpt 1/08 (both decisions were issued one shortly after another). For the Constitutional Tribunal to examine the dispute, it is vital to establish whether the dispute is "real" (and not "theoretical") (as in the case Kpt 1/08), i.e. that the object of adjudication may only be the question about a power (about its existence or lack thereof, and about its legal shape) as well as about "concurrence (conflict) of powers". In particular, as the Tribunal noted in the statement of reasons in the case Kpt 1/08, "the actions of the President taken within the scope of his powers" (cf. OTK ZU No. 5/A/2008, item 97, p. 971) are not subject to evaluation. It follows from the stance held in this case by the President of the Republic of Poland that he does not aspire to be responsible for determining the composition of the delegation or to shape the stance of the Council of Ministers. The Tribunal has not assigned any significance to this circumstance which is relevant for the evaluation whether the dispute is real. It merely stated the existence of a "discrepancy in opinions" as regards the powers to represent Poland and present Poland's stance at particular sessions of the European Council. It assessed that such differences "occurred in practice". By contrast, in the case Kpt 1/08 (ended by discontinuation of the proceedings), the Tribunal actually analysed "voiced intentions" of the participants in the presumed dispute (p. as above).

Due to the aforementioned inconsistency, the present decision does not contribute to establishing a distinction between the "real" dispute (as referred to in the case Kpt 1/08) and a potential ("foreseen") one which constitutes an attempt at arriving at a binding interpretation of constitutional provisions *in abstracto.*

Dissenting Opinion
of Judge Teresa Liszcz
to the Decision of the Constitutional Tribunal
of 20 May 2009 in the case Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended), I submit my dissenting opinion to points 2, 3 and 5 of the operative part of the decision and the statement of reasons thereof.

1. The basic issue that the Constitutional Tribunal had to examine in this case was whether we deal here with a dispute over powers within the meaning of Article 189 of the Constitution. Pursuant to Article 53 of the Constitutional Tribunal Act, a dispute over powers occurs where "two or more central constitutionally recognised State organs have considered themselves competent to decide in the same case or have made a ruling in it (positive powers dispute) or where the said organs have not considered themselves competent to decide in a particular case (negative powers dispute)". The application by the Prime Minister does not unambiguously indicate what case both organs of the state decided in or in what case both organs considered themselves competent. The application, in many ways, specifies the presumed object of the dispute – in particular – as determining the composition of the delegation of the Republic of Poland for a session of the European Council, or as representing the Republic of Poland at those sessions. However, the Constitution does not regulate the powers indicated here. Enacted before Poland's accession to the European Union, it does not contain any regulations concerning the powers of the organs of the Polish state, as regards the relations of the Republic of Poland with the European Union. When analysing that issue, one needs to take into account the character of the relations between the European Union and the Member States. That character ensues from the fact that these relations – not being the object of internal policy – do not belong to the realm of foreign policy either, but actually constitute the object of the third policy of the state – apart from foreign and internal policies, in principle concerning the competences conferred by the Republic of Poland on the European Union, pursuant to Article 90 of the Constitution. When addressing the problem examined by the Tribunal in a strict way, it may be stated – as the President of the Republic of Poland did – that since the scope of powers of the state organs has not been specified in that regard, then this may not be the case of a dispute over powers. It is worth pointing out here that the President of the Republic of Poland has never challenged the right of the Prime Minister to represent Poland at the forum of the European Council. However, one may not overlook the fact that there is a real dispute between the Prime Minister and the President of the Republic of Poland, which is mainly political and personal in character, but which nevertheless displays essential characteristics of a dispute over powers concerning the representation of the Republic of Poland at the forum of the European Union. For the sake of the state, this dispute should be resolved.

2. Pursuant to Article 4 of the Treaty on European Union (hereinafter: the EU Treaty), "the Heads of State or Government" are involved in the work of the European Council. The use of the inclusive disjunction "or" means, in accordance with the rules of logic, that – from the point of view of the European Union – a Member State may be represented at the sessions of the European Council both by the "head of state" alone, as well as by "head of government" alone, or by both of them together. That regulation of the Treaty has been elaborated on and made more specific in the "Rules for organising the proceedings of the European Council", adopted in Seville in 2002. Pursuant to the Rules, the delegation of each Member State is assigned two seats. However, the Treaty on European Union does not determine (and may not determine) who – the head of the state, the head of government, or the head of the state and the head of government – is to represent a given Member State in the European Council. The regulations concerning that issue are included in the national law (above all, in the constitution) of each Member State.

In order to resolve the dispute, the object of which is the power to represent the Republic of Poland as an EU Member State, at the sessions of the European Council and the power to present the stance of the state at those sessions. The Tribunal had to interpret the provisions of the Constitution concerning the duties, roles and powers of the President of the Republic of Poland and of the Council of Ministers, represented by the Prime Minister, within the scope which is the closest to the relations with the European Union, i.e. the relations with international organisations referred to in Article 146(4)(9) of the Constitution, included in a broadly defined foreign policy.

3. The regulations of vital significance for determining the powers of the Council of Ministers – and thus the Prime Minister – are the provisions of Article 146(2) of the Constitution, which sets out the scope ratione materiae of the Council of Ministers with regard to the matters concerning the policy of the state which are not reserved to other organs of the state, and paragraph 4(9) of that Article which obliges the Council of Ministers to exercise general control in the field of relations with other states and international organisations. In my opinion, it follows from these provisions that the Prime Minister – as the head of government – is, in principle, obliged to participate in the sessions of the European Council and present the stance of the Republic of Poland there.

4. At the same time, the President of the Republic of Poland – as the supreme representative of the Republic of Poland, pursuant to Article 126(1) - has the right (though not the obligation) to participate in every session of the European Council, relying on his own judgment as to whether there is a need for his attendance at a given session, without anyone's consent. Assigning the duty of conducting foreign policy and exercising general control with regard to relations with other states and international organisations does not limit fulfilling the systemic role of the supreme representative of the Republic of Poland by the President. Due to his constitutional position, strong legitimacy which he gains by the manner of election to his office, as well as the entirety of constitutional powers, the President of the Republic of Poland may not be deprived of the power to perform his role as the supreme representative at the forum of the European Council. It should be pointed out that the Constitution describes only the President as the – supreme - representative of

the Republic of Poland. The President is such a representative both with regard to foreign relations as well as internal ones, at any time and in may place, throughout the whole term of his office.

I do not agree with the stance of the Constitutional Tribunal if – as it seems to follow from the statement of reasons (especially points 5.7., 5.8., 6.4., 6.5.) – it limits the possibility of participation of the President in the sessions of the European Council only to these sessions, *inter alia*, which concern the issues related with the fulfilment of the duties set out in Article 126(2) of the Constitution by the President. In my view, point 2 of the operative part of the decision does not introduce such a restriction, since - pursuant to that point - it is the President himself who determines whether his participation in a session is justified or not; however, the final part thereof, referring to Article 126(2) of the Constitution, contains a hint of limitation and hence it may lead to divergent interpretations of that point. In the provision of Article 126(1) of the Constitution, which grants the President the status of the supreme representative of the Republic of Poland (and the guarantor of the continuity of state authority), there is no restriction.

As to the duties specified in Article 126(1) of the Constitution, the President acts independently of the Council of Ministers; this primarily regards the actions which have no legal effects and which do not involve issuing official acts which undoubtedly include participation in the sessions of a political body of the European Union.

I agree with the view of Professor Paweł Sarnecki, who - in the commentary to Article 126(1) of the Constitution – points out that the very status of the President as the supreme representative of the Republic of Poland implies his right to be present wherever there are events which are of significance for the Republic of Poland – i.e. at least to exercise the so-called sheer representation (cf. P. Sarnecki, *Komentarz do Konstytucji Rzeczypospolitej Polskiej*, Warszawa 1999, Vol. I, Article 126).

The participation of the President is particularly justified at those sessions of the European Council whose agendas, at least indirectly, concern the duties of the President, specified in Article 126(2) of the Constitution: ensuring observance of the Constitution, safeguarding the sovereignty and security of the state as well as the inviolability and integrity of its territory. It is necessary to stress here that the indicated duties should be construed in a broad sense, since matters which are seemingly distant from the constitutionally specified duties of the President, such as the issue of the EU enlargement, combating terrorism or relations with third countries, may be of relevance in the context of protection of these fundamental values of Polish statehood which the head of state is to safeguard. At the same time, I strongly disagree with the attempt to limit the interpretation of the term "security of the state", in the light of Article 126 of the Constitution, by excluding the elements such as energy security, environmental security or health safety from the range of its meaning (point 5.8. of the statement of reasons), which contemporarily are of fundamental significance for "security in general" of the modern state. To be able to fulfil the duties specified in Article 126(2), the President should, *inter alia*, be aware of the political plans of the EU which are determined at the sessions of the European Council, and he has the right to gather firsthand information with regard to those matters.

The status of the President, as the supreme representative of the Republic of Poland, excludes the possibility of making his participation in the sessions of the European Council contingent on the consent of another authority, in particular - the Prime Minister, or the possibility of treating the President as "a person accompanying the government delegation". By his presence at the forum, the President fulfils his own duties arising from Article 126 of the Constitution. Also, it should be added that the European Council is the only body of the European Union, at the sessions of which the President may attend, as the other bodies and institutions have an intergovernmental character and a clearly specified composition.

5. Obviously, like the Tribunal, I rule out the possibility of presenting divergent stances by the President of the Republic of Poland and the head of the Polish government at the forum of the European Council, as well as at any other foreign forum. The common good, which the Republic of Poland constitutes, does not allow such a possibility. Therefore, I hold the view that the Tribunal rightly emphasises the obligation of the President and the Council of Ministers (represented by the Prime Minister) to cooperate, as the two components of the executive branch, in particular in relation to matters falling within the scope of activity of the European Council. This obligation, concerning the two authorities to the same extent, primarily arises from the Preamble of the Constitution and - additionally with regard to European matters, as those belonging to the realm of foreign policy - from Article 133(3). I do not agree with the one-sided rendering of that obligation in the operative part of the decision of the Tribunal, in accordance with which the Council of Ministers alone determines the stance in all the matters related to the subject-matter of the sessions of the European Council (point 3), whereas the President may merely "refer" (if I correctly interpret the wording "cooperation (...) enables (...) to refer") – only when it comes to fulfilment of his duties set out in Article 126(2) of the Constitution – to the final stance agreed by the Council of Ministers. I believe that to carry out cooperation, it is necessary for the President to be routinely notified by the Council of Ministers, whose representative takes part in the preparations for the sessions of the European Council, about the dates and the subject-matter of all the sessions, so that the President could decide about his participation in a given session or could present, to the Council of Ministers, his stance on every matter included in the agenda of the session where he finds it fit. And, as regards the matters related to the duties of the President specified in Article 126(2), the President, the Council of Ministers and the Prime Minister should make all efforts to develop a common stance. Indeed, these are matters which are of fundamental significance for the state, in which none of the said authorities had any exclusive duties and powers, but their duties and powers partly overlap.

6. I also challenge points 3 and 5 of the operative part of the decision, to the extent they do not allow (and at least do not allow *expressis verbis*) the possibility of representation and presentation of the stance of the Republic of Poland at a (particular) session of the European Council solely by the President (obviously in the situation where this has been agreed with the Prime Minister). The content of point 5, second sentence, of the operative part of the decision, read in the light of the strong wording of point 3 thereof,

may at best suggest the possibility of the President's participation in that delegation and presentation of his stance in addition to the stance of the head of the government. Also, the statement of reasons (point 6.7.(e)) contains a mention of the arrangements as to "the President's possible involvement in presenting the stance developed by the Council of Ministers". If this is an apt interpretation of the meaning of points 3 and 5 of the operative part of the decision, they constitute, in this regard, the negation of the position of the President as the supreme representative of the Republic of Poland.

For the above reasons, I feel obliged to submit this dissenting opinion.

Dissenting Opinion
of Judge Zbigniew Cieślak
to the Decision of the Constitutional Tribunal
of 20 May 2009, Ref. No. Kpt 2/08

Pursuant to Article 68(3) of the Constitutional Tribunal Act of 1 August 1997 (Journal of Laws - Dz. U. No. 102, item 643, as amended; hereafter: the Constitutional Tribunal Act), as well as § 46 of the Rules of Procedure of the Constitutional Tribunal (*Monitor Polski* – M. P. of 2006 No. 72, item 720), I submit my dissenting opinion to the statement of reasons for the decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08, to the extent the Constitutional Tribunal specified the object and elements of the dispute over powers (Part V point 1).

1. To begin with, what should be stressed is the significance of the adjudication in this case Kpt 2/08. It is the first time that the Constitutional Tribunal has adjudicated a dispute over powers, based on Article 189 of the Constitution, which arose between the President of the Republic of Poland and the Council of Ministers. The adjudication is significant also due to the fact that the legal regulation which is binding in that regard is "characterised by a large degree of vagueness" (cf. L. Garlicki, Commentary to Article 189 of the Constitution [in:] *Konstytucja Rzeczypospolitej Polskiej*. *Komentarz*, Vol. V, L. Garlicki (ed.), Warszawa 2007, p. 2). For this reason, the Tribunal was obliged to determine the legal content and meaning of the term "disputes over powers", as referred to in Article 189 of the Constitution. In other words, it was faced with the necessity to identify the meanings of the basic categories specifying the activity of "central constitutional organs of the State".

2. Although the legislator used the term "dispute over powers", he did not include its definition in the Constitution itself. Certain clarification occurs only at the statutory level, in Article 53(1) of the Constitutional Tribunal Act. Pursuant to that provision, "the Tribunal shall arbitrate disputes concerning powers where two or more central constitutionally recognised State organs have considered themselves competent to decide in the same case or have made a ruling in it (positive powers dispute) or where the said organs have not considered themselves competent to decide in a particular case (negative powers dispute)". Consequently, the statutory definition of disputes over powers is based on the category of competence in a given regard.

From the point of view of the case Kpt 2/08 under examination by the Constitutional Tribunal, it is vital to separate normative matter from the matter which falls outside the sphere of normativeness, as the disputes between central constitutional organs of the state, which arise outside the sphere of normativeness (e.g. political disputes), obviously are insignificant from the point of view of the regulation of Article 189 of the Constitution. In the context of that Article, only the actions normatively specified are significant. Therefore, the dispute over powers is only such a dispute that takes place in the context of actions which are bound by legal norms determining the duties of the organs of the state.

3. Leaving the doctrinal perspective aside, the entirety of duties of the "central constitutional organs of the state" (but also other organs of the state and of public administration) may be narrowed down to the norms specifying the subject, object, content, manner and result of activity. The subject and object of activity (the sum, content and type of matters assigned to a given organ) are determined by the legal norms regulating the competence (cf. Z. Cieślak, *Zbiory zachowań w administracji państwowej. Zagadnienia podstawowe*, Warszawa 1992, p. 56). By contrast, the content of the duties is determined by substantive law norms (see *ibidem*, p. 67) and norms regulating the performance of duties (see *ibidem*, p. 63); whereas the manner of activity is determined by procedural norms regulating the legal forms of activity (cf. *ibidem*, p. 70). By contrast, the result of that activity is determined by substantive law norms, procedural norms and norms regulating the performance of duties. Rules governing competence in a narrow sense play the role of a factor which limits the scope of the application of a given legal form of activity of an organ (see *ibidem*, p. 75)

In the light of Article 189 of the Constitution, it should be stated that mere term "powers" is not legally defined, and what is more, it is rarely used by the legislator in the binding legal order. Construing that meaning is done intuitively. This intuitive meaning of powers also confirmed in the statements of the participants in the proceedings during the hearing of the case Kpt 2/08, encompasses the activity of the subject which is determined normatively and has a direct legal effect (from this perspective it is irrelevant whether the activity is obligatory or optional). By contrast, the term "duty" complements the system of activity of a central constitutional organ of the state, which is not legally indifferent, in such a way that this is a legally delegated activity of the subject which is to implement or protect values; this activity indirectly has legal effects. At the same time, the requirement of correctness of the activity carried out in accordance with the norms regulating the performance of duties is its legality.

4. In the light of the above, it should be concluded that the meaning of the term "disputes over powers" (Article 189 of the Constitution) encompasses positive and negative powers disputes with regard to the activity of the subjects determined by the norms regulating competence, substantive law norms, procedural norms and norms regulating the performance of duties. Therefore, it goes beyond the narrow understanding of the term "disputes over powers", understood as the discrepancies in opinions of two or more organs of the state as to the powers of one of them (cf. L. Garlicki, *op.cit*., p. 4). By contrast, the term "duty" used in the statement of reasons for the decision in the case Kpt 2/08 does not have a normative meaning. This is a category from outside the realm of normative categories, an actual category denoting the state of affairs caused legally by a given activity of the subject (cf. Z. Ziembiński, "O pojmowaniu celu, zadania, roli i funkcji prawa", *Państwo i Prawo,* Issue No. 12/1987, pp. 20 and 22).

I hope that these remarks contribute to disambiguate the meanings of the terms and categories used in the statement of reasons for the decision Kpt 2/08.

For the reasons mentioned above, I feel obliged to submit the dissenting opinion to the statement of reasons for the decision of the Constitutional Tribunal of 20 May 2009 in the case Kpt 2/08.