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Warsaw, 7 May 2021

**Statement of the Legal Experts Group of the Stefan Batory Foundation
on the Polish Prime Minister's petition to the Constitutional Tribunal to verify the
compliance of the provisions of the Treaty on European Union with the
Constitution of the Republic of Poland**

On 1 May 2004, following a referendum on membership, Poland joined the European Union. A year later, Poland's Constitutional Tribunal in full court confirmed that the Treaty concerning the accession of the Republic of Poland to the European Union complies with the Polish Constitution.

The Prime Minister's petition of 29 March 2021 for the Constitutional Tribunal to verify the compliance of certain provisions of the Treaty on European Union with the provisions of the Constitution seeks to undermine the principles which Poland undertook to abide by when it joined the European Union. Should the Constitutional Tribunal rule that the provisions of the TEU contravene the Constitution, this will represent not only a flagrant violation of European Union Law, but also of the Constitution, according to which Poland respects international law binding upon it.

In the applicant's view, the provisions of the TEU that are not compliant with the Constitution are those that entitle or oblige the authorities applying the law to "derogate from applying the Constitution" where it does not comply with EU law, prescribe application of the law in a way inconsistent with the Constitution, or entitle courts to check the independence of judges appointed by the President of Poland and to verify the resolutions of the National Council of the Judiciary (KRS) concerning a motion to the President to appoint judges.

Among the provisions of the TEU identified by the Prime Minister as contravening the Polish Constitution are norms defining fundamental rules of EU law, including:

- the principle of sincere cooperation, which obliges member states to make every effort to ensure the obligations resulting from EU law are adhered to as well as refraining from actions that could threaten the fulfilment of the EU's objectives

- the principle of the rule of law
- the principle of effective judicial protection of citizens, resulting from the constitutional traditions common to the member states and substantiating the above principle (value) of the rule of law.

The Prime Minister's petition is based on false premises and targeted at denying the interpretation of these principles determined by the Court of Justice of the European Union (CJEU), including in response to the prejudicial questions of Polish courts. When joining the European Union, Poland committed to abide by CJEU case-law.

The applicant states that "the primacy of application [of EU law] is fragmentary, concerning EU competences, and at the same time conditional, since it does not change the hierarchy of sources of the law and as such is subordinate to norms of a constitutional status". We believe that juxtaposing European Law and the Polish Constitution creates the appearance of a contradiction between these two legal orders and results solely from the intention to utilise the politicised Constitutional Tribunal to legitimise the dismantling of the rule of law. The "reforms" of the Polish justice system implemented in the last few years in fact destroy it, thereby violating both the Constitution and EU law, since the Constitution and the founding Treaties are built on an identical axiological basis of the values of a democratic legal state.

Irrespective of the above, we point out that established CJEU case-law demonstrates that, whereas organisation of the justice system in member states comes under their competence, in its implementation these states are obliged to abide by their commitments resulting from European Union law. As a result, the CJEU has ruled among other things that both the selection method of members of the KRS and its performance of its duties are subject to evaluation from the point of view of European Union law. The KRS's potential lack of independence from the legislative and executive undermines the independence of judges and may negatively affect their impartiality. This constitutes a basis for questioning the independence of courts in which judges appointed in this way rule. In accordance with the principle of the primacy of EU law over national law, assertion of lack of independence of a national judicial authority means questioning its status as a court in the understanding of European Union law and results in the need to disregard national regulations giving jurisdiction to such an authority.

We recall that in its recent ruling on resolutions of the KRS, the EU Court of Justice emphasised that the effects of the principle of primacy of EU law apply to all bodies of a member state, including courts and tribunals, and thus also the Polish Constitutional Tribunal.

According to European Union law, the Constitutional Tribunal is not authorised to conduct an independent assessment of the constitutionality of the provisions of the TEU. With the above in mind, we are certain that the procedure before the Constitutional Tribunal in the case from the Prime Minister's petition should be discontinued owing to the inadmissibility of issuing a ruling.

We warn that if the Constitutional Tribunal rules in accordance with the Prime Minister's petition, Poland will be in violation of the international obligations to which it freely consented. The state will then be obliged to bear responsibility for this or may be forced to leave the European Union in order to withdraw from its commitments.

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