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KEY EUROPEAN COMMUNITIES AND EUROPEAN UNION TREATIES AND ACCORD IN THE CASE LAW OF THE GERMAN AND THE POLISH CONSTITUTIONAL TRIBUNALS[1]

Introduction

The year 2017 marks the 60th anniversary of signing the Treaties of Rome which paved the way for European integration, first within the framework of European Communities (henceforth EC) and later the European Union (EU). This article examines the legal aspects of the foundation treaties of EC and EU from the point of view of the Polish and the German Constitutional Tribunals (henceforth TK and BVG respectively). The recognition of the legal nature of those treaties by national constitutional tribunals has far-reaching legal and political consequences whose significance is hard to overestimate. The adoption by a constitutional court of a specific legal qualification of the foundation treaties not only determines their position in the system of national law but also enshrines a set of formulas with a lasting influence on the relations between a member state and the EU. And last not least the qualification influences the position of a national constitutional tribunal within the European community of constitutional courts, especially in connection

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with the question which tribunal has the last word in the European constitutional conversations[2].

Should there be any doubt why the article focuses on case law rather than the relevant clauses in the Constitution of either country, let me point to the facts. Neither the Polish Constitution nor the German *Grundgesetz* (henceforth GG or the German Basic Law) does determine in explicit terms the legal status of the foundation treaties. That gap has been filled by the evolving case-law of the constitutional tribunals although from the first they had the option of endorsing the formula adopted by the body acting as the constitutional tribunal of the Communities, i.e. the Court of Justice of the European Communities (CJEC) and since 2009 the Court of Justice of the European Union (CJEU).

The CJEC's view of the relations between community law and national law as well as between the EC and the member states is expressed in a series of rulings in the early 1960s. Nowhere is it expressed as unequivocally as in the judgment of 5 February 1963 (Case 26/62): "The European Economic Community constitutes a new legal order of international law for the benefit of which the states have limited their sovereign rights, albeit within limited fields, and the subjects of which comprise not only the Member States but also their nationals"[3]. In the light of this statement 'the new legal order' is constituted *not* or *not only* by the member states, but by the European Economic Community itself; moreover the EEC is given the status of an independent subject of a new distinct class of international law. Its qualitative distinctness results from the claim that community law is autonomous (self-standing) and directly applicable. The subsequent rulings of the CJEC, as I. Pernice notes, refrain from making any further reference to international law[4].

The thesis that the Foundation Treaty has the status of a constitutional document is laid down in Judgement of 23 April 1986 (Case 294/83), which says: "It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, in as much as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty"[5]. In the following decades this formula has been used to define the relationship between community or EU law and international treaties within the meaning of Article 216 of the Treaty on the Functioning of the European Union (2007). Earlier,

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[2] M. Claes, M. de Visser, P. Popelier, C. Van de Heyning, *Constitutional Conversations in Europe*, Cambridge 2012.

[3] The CJEC, Judgment of 5 February 1963, case 26/62, (NV Algemene Transport – en Expeditie Onderneming van Gend & Loos v. Netherlands Inland Revenue Administration), ECLI:EU:C:1963:1.

[4] I. Pernice, *The Autonomy of the EU Legal Order – Fifty Years After* Van Gend, [in:] *50th Anniversary of the Judgment in Van Gend en Loos, 1963–2013*, organizing committee: A. Tizziano, J. Kokott, S. Prechal, Luxembourg 2013, p. 56.

[5] The CJEC, Judgement of 23 April 1986, case 294/83, (Parti écologiste, Les Verts', European Parliament), ECLI:EU:C:1986:166, para. 23.

in Opinion 1/91 of 14 December 1991 the CJEC made a comparison between a 'regular' international treaty, namely the European Economic Area Agreement and the EEC Foundation Treaty, which "albeit concluded in the form of an international agreement, none the less constitutes the constitutional charter of a Community based on the rule of law"[6]. This statement can be taken as one of the manifestations of the process of constitutionalization of the foundation treaties of the EC and later EU which, driven by political enthusiasts of 'ever close union', reached its culmination in the Treaty establishing a Constitution for Europe, signed in Rome in 2004. However, it was because of its constitutional character that it was rejected by French and Dutch voters in referendums held in May 2005. Whereas the grand project of a European Constitution was scrapped, the fundamental provisions mentioned above were reaffirmed in a the CJEU Opinion issued ten years later[7]. In another ruling regarding the relationship between the primary EU treaty law and international law – in this case a UN Security Council resolution – the CJEU again evoked the concept of 'the constitutional charter', which indirectly upheld the right of the CJEU to control the compatibility with EU primary law of secondary legal norms based on the Security Council resolution. The Judgement of 3 September 2008 says "the Community is based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid review of the conformity of their acts with the basic constitutional charter, the EC Treaty, which established a complete system of legal remedies and procedures designed to enable the Court of Justice to review the legality of acts of the institutions"[8].

Neither the Polish TK nor the German BVG have followed the case-law doctrine of the CJEU; instead they have insisted on ratifying the foundation treaties on the basis of their national constitutions and an independent legal qualification with a marked international-law perspective. It would be worth to analyse what is the perspective of constitutional tribunals in other member states, but the scope of this article does not permit me to go further than analysing just the case load of the Polish and German constitutional courts. The choice of the German Constitutional Court is dictated by the following considerations. The Federal Republic of Germany is one of the founder members of the EC, and thus the BVG had to grapple

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[6] The CJEC, Opinion of 14 December 1991, Opinion 1/91, (EEA I), ECLI:EU:C:1991:490, para. 21.

[7] CJEU, Opinion of of 8 March 2011, (Opinion 1/09) ECLI:EU:C:2011:123 para. 65; "It is apparent from the Court's settled case-law that the founding treaties of the European Union, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for the benefit of which the States have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only Member States but also their nationals (…). The essential characteristics of the European Union legal order thus constituted are in particular its primacy over the laws of the Member States and the direct effect of a whole series of provisions which are applicable to their nationals and to the Member States themselves…"

[8] CJEC, Judgement of 3 September 2008 in joined cases C-402/05 P and C-415/05 P (Yassin Abdullah Kadi, Al Barakaat International Foundation), ECLI:EU:C:2008:461, para. 285.

with problem addressed in this article in the early phases of the process of European integration. As a result, the BVG case- law doctrine is no doubt sufficiently developed and spans all the stages of European integration, from the creation of the EC through its transformation into the EU, the attempts of its constitutionalization up to latest thorough reforms carried out in 2007. Moreover, the BVG case law constitutes a conspicuous reference point for similar institutions in other member countries, including Poland[9].

This analyse, based on the case law of the German BVG and the Polish TK, focuses on those highly significant formulas and statements that deal, firstly, with legal aspects of the EC and EU foundation treaties and, secondly of other international agreements concluded within the European Union in accordance with the "Schengen intergovernmental method".

1. The German BVG and the Foundation Treaties of the European Communities

1.1. Before Solange I

Already the first rulings of the BVG regarding the enforcement of community law in the Federal Republic of Germany contain unequivocal statements about the legal status of the foundation treaties. While rejecting a constitutional complaint of a German firm against some EEC regulations the BVG declared (1 BvR 248/63 of 18 October 1963) that "the EEC Treaty is in a sense the constitution of this Community. The legal provisions enacted by the Community organs within their Treaty powers, the 'secondary Community law', constitute a separate legal order, whose norms are different from either international law or national law of the Member States. Community law and the domestic law of Member States are 'two autonomous legal orders, different from each other'; the law created by the EEC Treaty derives from an 'autonomous source of law'"[10]. While making these distinctions the judges no doubt had in mind the *Van Gend en Loos* case brought before the CJEC by a Dutch court[11]. In its preliminary ruling (Case 26/62 [5 February 1963]) the CJEC affirmed, among others, the autonomy of EC law and the primacy of EC

[9] M. Bainczyk, *Odwołania do prawa obcego w orzecznictwie Trybunału Konstytucyjnego w sprawach związanych z integracją europejską*, [w:] *Polska komparatystyka prawa. Prawo obce w doktrynie prawa polskiego*, red. A. Wudarski, Warszawa 2016, s. 505.

[10] BVerfGE 22, 293; Order of the First Senate of 18 October 1967,1 BvR 248/63 and 216/67, para. 13, translation: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=593 [accessed: 10.08.2017].

[11] A. Bleckmann, *Stellungsnahmen. Sekundäres Gemeinschaftsrecht und deutsche Grundrechte. Zum Beschluss des Bundesverfassungsgerichts vom 29. Mai 1974 r. III. Zur Funktion des Art. 24 Abs. 1 Grundgesetz*, „Zeitschrift für ausländisches öffentliches Recht" 1975, p. 80; H.P. Ipsen, *Rechtsprechung. Verfassungsbeschwerde gegen Verordnungen der EWG. Anmerkung*, „Europarecht" 1968, p. 138 f.

treaty law over the legal order of the member states. The ruling assumes that the treatises function as 'a constitution' and, furthermore, that they combine the nature of both international treaties and a constitution, i.e. the supreme law, of the European Communities and the foundation of their new legal order. Given the fact that these were still early days of the BVG jurisprudence, such an explicit affirmation of the CJEC doctrine could not but be welcomed by EC-enthusiasts. They saw in it a foretoken of a rebalancing of the relationship between German constitutional law and European law in favour of the latter[12].

1.2. Constitutional conversations in Europe: **Solange I** – **Kadi** – ***Treaty of Lisbon***

From the historical perspective, i.e. the development of the BVG jurisprudence concerning the relationship of community law and national law and the development of fundamental rights protection on the community level, another important landmark was the BVG judgment in the *Solange I* case (2 BvL 52/71 [29 May 1974]). It dents the doctrine of primacy of Community law by disallowing, if only exceptionally, the validity and the enforcement of an community law provision if the latter were to be found incompatible with the national constitutional law. But, as the BVG insists, such exceptions should by no means not undermine the principle of precedence of Community law: "Community law is just as little put in question when, exceptionally, Community law is not permitted to prevail over cogent constitutional law, as international law is put in question by Article 25 of the Basic Law when it provides that the general rules of international law only take precedence over simple federal law, and as another system of law is put in question when it is ousted by the public policy of the Federal Republic of Germany"[13]. The *Solange I* ruling of 1974 marked the end of an era of unconditional openness of the German GG to Community law because it implied the supremacy of the principles of the German constitutional law which embody the country's unassailable constitutional identity. Probably to the great surprise of its authors their 'exception clause' triggered off a long-lasting discussion on the level of Europe's constitutional courts, and which, thirty-four years later, was repeated to a certain extent by the CJEU[14].

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[12] W. Hallstein, *Europapolitik durch Rechtsprechung*, [in:] *Wirtschaftsordnung und Staatsverfassung. Festschrift für Franz Böhm zum 80. Geburtstag*, ed. H. Sauermann, E.J. Mestmächer, Tübingen 1975, p. 209; J.A. Frowein, *Europäisches Gemeinschaftsrecht und Bundesverfassungsgericht,* [in:] *Bundesverfassungsgericht und Grundgesetz*, ed. Ch. Starck, M. Drath, vol. 2, Tübingen 1976, p. 189.

[13] BVerfGE, 37, 271; Order of the Second Senate of 29 May 1974, 2 BvL 52/71, para. 42, translation: https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=588 [accessed: 12.08.2017].

[14] A. Frąckowiak-Adamska, *Prawa podstawowe a środki wspólnotowe przyjmowane w wykonaniu rezolucji Rady Bezpieczeństwa ONZ*, http://www.prawaczlowieka.edu.pl/index.php?dzial=komentarze&komentarz=0ec09ef9836da03f1add21e3ef607627e687e790-c0 [accessed: 14.08.2017].

In its ruling in the *Kadi* case (C-402/05 [2008]), the CJEU held that, as a matter of principle, the EU law did not need to accept unconditionally (i.e. exempt from judicial review) any obligation under international law, if the consequence could be an infringement of basic constitutional rights. The Court stated that "the obligations imposed by an international agreement cannot have the effect of prejudicing the constitutional principles of the EC Treaty, which include the principle that all Community acts must respect fundamental rights, that respect constituting a condition of their lawfulness which it is for the Court to review in the framework of the complete system of legal remedies established by the Treaty"[15].

However, the judgment of the BVG on the Lisbon Treaty (2 BvE 2/08 [30 June 2009]), while asserting the primacy of constitutional identity over the principle of favourable predisposition EU law, cites both its *Solange I* judgement as well as the CJEU judgement in the *Kadi* case. Commenting on the latter, the BVG says "The Court of Justice of the European Communities based its decision of 3 September 2008 in the *Kadi* case on a similar view according to which an objection to the claim of validity of a United Nations Security Council Resolution may be expressed citing fundamental legal principles of the Community (…). The Court of Justice has thus, in a borderline case, placed the assertion of its own identity as a legal community above the commitment that it otherwise respects. Such a legal construct is not only familiar in international legal relations as a reference to the *ordre public* as the boundary of a treaty commitment; it also corresponds, if used constructively, to the idea of contexts of political order which are not structured according to a strict hierarchy"[16]. While admitting that there is no strict hierarchy of the legal systems in question, the BVG justifies the alignment of the two judgments by pointing that either of them allows the constitutional tribunal to choose one system of law as a standard reference. Once a legal reference system is given exclusive recognition, it is only natural for it to develop barriers against the encroachments of other, 'external' systems[17]. For the BVG the supreme standard is lodged in the German Basic Law, and the defensive mechanism against the misapplication of Community/EU law relies on the principle of constitutional identity, whereas for the CJEU the core reference standard is to be found in the constitutional principles embodied in the Foundation Treaties, which can also act as a bar on the performance of obligations incurred under an international treaty.

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[15] CJEU, Judgement of 3 September 2008 in joined cases C-402/05 P and C-415/05 P, (Yassin Abdullah Kadi, Al Barakaat International Foundation), ECLI:EU:C:2008:461, para. 28; W. Czapliński, *Glosa do wyroku TS z dnia 3 września 2008 r., C-402/05 i C-415/05. Prawo UE a prawo międzynarodowe*, „Europejski Przegląd Sądowy" 2010, 4, p. 38 ff.

[16] BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 340, ECL I:DE:BVerfG:2009:es20090630.2bve000208, translation: http://www.bverfg.de/e/es20090630_2bve 000208en.html [accessed: 25.08.2017].

[17] See: D. Kochanov, *Equality Across the Legal Order; Or Voiding EU Citizenship of Content*, [in:] *The Reconceptualization of European Union Citizienship*, E. Guild, C.J. Gortázar Rotaeche, D. Kostakopoulous, Leiden Boston 2014, p. 311.

1.3. The Solange II *Judgment*

The so-called *Solange II* judgement (2 BvR 197/83 [22 October 1986]) marks a major shift in the position of the BVG with regard to the questions of scope of national courts' and the CJEU jurisdictions as well as the mutual relationship between the German legal order and EEC law. The explanation is as follows: "The functional interlocking of the jurisdiction of the European Communities with those of the member states, together with the fact that the Community Treaties, by virtue of the instructions on the application of law given by the ratification legislation under Articles 24 (1) and 59 (2), first sentence, of the Basic Law, and the subordinate law passed on the basis of the Treaties are part of the legal order which applies in the Federal Republic and have to be adhered to, interpreted and applied by its courts, give the European Court the character of a statutory court within the meaning of Article 101 (1), second sentence, of the Basic Law in so far as the legislation ratifying the Community Treaties confers on the Court judicial functions contained therin"[18]. This justification is significant for two reasons. First, the BVG cites both Article 24 para. 1 of the GG[19] concerning the transfer of sovereign powers to international organizations and the general provision of Article 59 para. 2 of the GG[20] concerning international treaties. Secondly, while the Foundation Treaties are an integral part of the German system of law which all state and public institutions of the Federal Republic have to observe and implement; the courts are no exception, but, it is worth noting, their compliance is secured by the obligation derived from a national law to apply a law that has been ratified – the German order to apply the law (*der Rechtsanwendungsbefehl*)[21]. In other words, the binding force of treaties has its source in the national law and for this reason is subject to constitutional limitations.

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[18] BVerfGE 73, 339; Order of the Second Senate of 22 October 1986, 2 BvR 197/83, para. 77; translation at https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=572 [accessed: 20.08.2017].

[19] Art. 24 (1) of the Basic Law for the Federal Republic of Germany: (1) The Federation may by a law transfer sovereign powers to international organisations; The Basic Law in the revised version published in the Federal Law Gazette Part III, classification number 100-1, as last amended by Article 1 of the Act of 23 December 2014 (Federal Law Gazette I p. 24380, translation: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [accessed: 20.08.2017]).

[20] Art. 59 (2) Treaties that regulate the political relations of the Federation or relate to subjects of federal legislation shall require the consent or participation, in the form of a federal law, of the bodies responsible in such a case for the enactment of federal law. In the case of executive agreements the provisions concerning the federal administration shall apply mutatis mutandis. Translation: https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.pdf [accessed: 20.08.2017].

[21] M. Bainczyk, *Polski i niemiecki Trybunał Konstytucyjny wobec członkostwa państwa w Unii Europejskiej*, Wrocław 2017, p. 147 ff, http://www.bibliotekacyfrowa.pl/Content/79679/Polski_i_niemiecki_Trybunal_Konstytucyjny.pdf [accessed: 4.09.2017].

2. The German BVG and the Treaty of Maastricht

The Treaty of Maastricht, hailed as a breakthrough opening "a new stage in the process of creating an ever closer union among the peoples of Europe" (Article 1 of the TUE), has a dual nature: it was both a new EU foundation treaty and a revised version of the TEEC. The BVG undertook a thorough scrutiny of the Maastricht Treaty for its compatibility with the German Basic Law. In its judgment (2 BvR L 134/92 and 2159/9 [12 October 1993]) the BVG not only examined the new competences, including monetary union policies, now vested in the European Communities but also attempted to find an appropriate designation for the new political entity created by the Treaty (it called the EU a *Staatenverbund*, or 'a compound of States')[22]. However, no adjustments were made in the description of the legal status of the Treaty Maastricht. Here the BVG restated the its traditional stance, set out in the *Solange II* and subsequent judgments, that "also after the coming into force of the Union Treaty the Federal Republic of Germany is a member of a compound of states; as their joint authority is derived from the member states it cannot have binding effect in Germany without due legal sanction and consent". This statement makes it clear that the Treaty cannot acquire validity in the Federal Republic of Germany unless it is enshrined in law i.e. a legislative act promulgated by the Bundestag with the approval of the Bundesrat. Importantly, that procedure requires that the act conforms with the GG.

But it is the continual process of handing over legislative and budgetary competences by the national parliament to EU institutions that brings out the crucial importance of the BVG ruling on the Treaty of Maastricht to the fore. On every occasion such a transfer takes place it needs to obtain a democratic approval (as required by the provision of Article 38 para. 1 of the GG). As the German law does not permit the use of the referendum on issues like European integration the control of the process of transfer of public powers is exclusively in the hands of the Bundestag and the Bundesrat. A decision about the transfer is taken however within their "responsibility for integration" (*Integrationsverantwortung*)[23] invented and developed by the BVG.

Another important feature of the BVG Maastricht ruling is its explicit reference to the doctrine of the Masters of the Treaties and to the German order to apply community and EU law. Germany, according to the text, is one of the Masters of the Treaties "which have given as the reason for their commitment to the Maastricht Treaty, concluded «for an unlimited period» (Art. Q), their desire to be members of the European Union for a lengthy period; such membership may,

[22] *Ibidem*, p. 198.

[23] U. Hufeld, *Erster Teil: Historisch – systematischer Kontext. 1. Abschnitt: Europäische Integration und Verfassunsgänderung*, [in:] *Systematischer Kommentar zu den Lissabon Begleitgesetzen*, ed. A. v. Arnauld, U. Hufeld, Baden-Baden 2011, p. 33.

however, be terminated by means of an appropriate act being passed. The validity and application of European law in Germany derive from the order governing application of law contained in the Act of Consent. Germany is therefore maintaining its status as a sovereign State in its own right as well as the status of sovereign equality with other States in the sense of Art. 2, sub-para. 1 of the UN Charter of 26 June, 1945 (…)"[24].

Actually, an explicit designation of the Treaty of Maastricht is an international treaty can be found in that part of the judgment where, in reply to the complainants, the BVG addresses the concern that the EC/EU may accumulate an ever broader range of vaguely defined competences to the detriment of the member states. So, referring to the Maastricht Treaty, the BVG judges admit that since „the text of a Treaty under international law has to be negotiated between the contracting parties, the demands placed upon the precision and solidity of the Treaty provisions cannot be as great as those which are prescribed for a statute according to the principle of parliamentary prerogative [Parlamentsvorbehalt] (…). The important factor is that the Federal Republic of Germany's membership and the rights and obligations which arise from it, in particular the legally binding direct activity of the European Communities in the domestic legal territory, have been defined foreseeably for the legislator in the Treaty, and that the legislator has standardised them to a sufficiently definable level in the Act of Consent to the Treaty (…)"[25]. In other words, even though an international treaty may be less clear or precise than the text of an act of parliament, the Maastricht Treaty's description of competences handed over to the EC and the EU is sufficiently clear-cut and unequivocal. An additional guarantee for the member states was a clear distinction between making use of competences transferred to the European institutions under the Treaty of Maastricht and the right to amend them. The latter was reserved for the member states only.

All of the points made here to appraise the Treaty of Maastricht in accordance with the traditional categories of international law can be found in the following statement from the BVG Judgment of 12 October 1993: "The Maastricht Treaty constitutes an agreement under international law establishing a compound of States of the Member States which is oriented towards further development. The intergovernmental community is dependent upon the Treaty continually being constantly revitalised by the Member States; the fulfilment and development of the Treaty must ensue from the will of the contracting parties. Art. N of the Maastricht Treaty therefore provides for all Member States to submit proposals for amendments of the Treaties, which amendments shall enter into force after

[24] BVerfGE 89, 155; Judgement of 12 October 1993, BvR 2134/92, 2 BvR 2159/92, para. 112; translation: http://www.judicialstudies.unr.edu/JS_Summer09/JSP_Week_1/German%20ConstCourt%20Maastricht.pdf [accessed: 21.08.2017].

[25] *Ibidem*, para. 106.

being ratified by all the Member States in accordance with their respective constitutional requirements (…)"[26].

The arguments can be summed up as follows:

1. The Treaty of Maastricht is an agreement under international law.
2. Provisions of the treaty have to describe with sufficient clarity and precision the scope of competences handed over by a public institution to an international organization.
3. The European Union is not a state but a compound of states which is going to evolve further.
4. This international community is founded upon a treaty whose application must be based on the consensus of the member states.
5. Each of the member states can come up with a proposal to amend the treaty, but to become law the amendment needs to be ratified all the member states, in accordance and in conformity with the each country's constitutional law.

It should be noted that its traditional approach and insistence that no change can be introduced into the treaties without the agreement of the member states did not prevent the BVG from embracing a novel, 'fast-track' method of getting through amendments of the text of the treaty; at the same time, though, the BVG insists that the fast-track amendments have go through the usual ratification procedure with its constitutional requirements, which, in the case of the Federal Republic of Germany means the drafting and adopting an appropriate of act of consent (*Zustimmungsgesetz*) in accordance with Article 23, para 1, sentence 1 or 3[27].

3. The German BVG and the Treaty of Lisbon

Following the crisis, or as it has been called 'a period of reflection', triggered by the rejection of the Treaty establishing a Constitution for Europe in the French and Dutch referendums in 2005[28], the member states started negotiating a replacement which became the Treaty of Lisbon on its signing in Portugal's capital

[26] *Ibidem*, para. 140.

[27] *Ibidem*, para. 136; Besides the formal procedure for modifications of the treaties (Art. N of the Maastricht Treaty), the agreement of the Member States may also be given under an abbreviated procedure (see in particular Art. K. 9 of the Maastricht Treaty, Art. 8 e para. 2, Art. 201 para. 2 of the EC Treaty). Each of these treaty amendments or additions requires, however, the agreement of the Member States in accordance with their respective constitutional requirements. Art. 23, para. 1, sentence 2 of the GG requires a federal law to be enacted for any further assignment of sovereign rights. Amendments to the treaty principles upon which the Union is founded, and comparable regulations which would amend or add to the content of the GG or make such amendments or additions possible, require, pursuant to Art. 23, para. 1, sentence 3 and Art. 79, para. 2 of the GG, the agreement of a two-thirds majority of the members of the Federal Parliament.

[28] J. Hesse, *Vom Werden Europas, Der Europäische Verfassungsvertrag: Konventsarbeit, politische Konsensbildung, materielles Ergebnis*, Berlin 2007, p. 166.

in December 2007[29]. Initially referred to as a Reform Treaty, it was a thorough remake of the foundation treaties (TEC and TEU). Although committed in principle to the deconstitutionalization of its luckless predecessor, it did take over a number of substantive provisions from the discarded the Treaty establishing a Constitution for Europe[30].

Because of its broad material scope, including a novel procedure of introducing amendments to primary treaty law, it came under close scrutiny of a number of constitutional courts[31], not excepting the German BVG[32]. The judicial reviews unleashed a many-stranded constitutional conversations in which the voice of the BVG carried special weight, and the publication of its Judgment on the Lisbon Treaty of 30 June 2009 provoked even more spirited discussion in the legal academy[33]. While addressing a wide range of issues, the Judgment makes a number of points about the legal groundwork of the EU and the nature of the treaties that make up that foundation. These statements can be gathered under four heads: 1. The doctrine of the Masters of the Treaties, 2. The principle of conferral of competences and the precision of treaty provisions, 3. Rules and procedures of treaty amendment, and 4. Withdrawal from the EU.

The issue signalled by the first of these headings is one of institutional authority, ambit and control, or, in other words, who has the right, let alone the last word, to interpret, enforce or derogate from the treaty provisions. The BVG judges note that the changes in the structure, scope and functioning of the EU under the

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[29] *Prezydencja niemiecka a stan debaty o reformie Unii Europejskiej. Aspekty prawne i polityczne*, ed. J. Barcz, Warszawa 2007.

[30] R. Grzeszczak, *Federalizacja UE. Federalisation of the European Union*, s. 7, http://robertgrzeszczak.bio.wpia.uw.edu.pl/files/2012/10/federalizacja-systemu-unii-europejskiej-390.pdf [accessed: 30.08.2017].

[31] M. Wendel, *Lisbon Before the Courts: Comparative Perspectives*, „European Constitutional Law Review" 2011, No. 7.

[32] M. Bainczyk, *Zasada demokracji jako źródło warunków uczestnictwa Republiki Federalnej Niemiec w UE – wyrok niemieckiego Bundesverfassungsgericht w sprawie Traktatu z Lizbony (cz. I)*, „Europejski Przegląd Sądowy" 2013, No. 8, p. 33–38; M. Bainczyk, *Zasada demokracji jako źródło warunków uczestnictwa Republiki Federalnej Niemiec w UE – wyrok niemieckiego Bundesverfassungsgericht w sprawie Traktatu z Lizbony (cz. II)*, „Europejski Przegląd Sądowy" 2013, No. 9, p. 26–31.

[33] T. Giegerich, *Ostatnie słowo Niemiec w sprawie zjednoczonej Europy – wyrok Federalnego Trybunału Konstytucyjnego w sprawie Traktatu z Lizbony*, "Europejski Przegląd Sądowy" 2011, No. 3, p. 4–17; K.F. Gräditz, Ch. Hillengruber, *Volkssouveränität und Demokratie ernst genommen – Zum Lissabon – Urteil des BVerfG*, „Juristen Zeitung" 2009, No. 18; M. Kottmann, Ch. Wohlfahrt, *Der gespaltene Wächter? Demokratie, Verfassungsidentität und Integrationsverantwortung im Lissabon-Urteil*, „Zeitschrift für ausländisches öffentliches Recht" 2009, Vol. 69; N. Lammert, *Europa der Bürger – Europäische Perspektive der Union nach dem Lissabon-Vertrag*, [in:] *Europa in der Welt. Von der Finanzkrise zur Reform der Union*, ed. I Pernice, R. Schwarz, Baden-Baden 2013; C.O. Lenz, *Zum Verhältnis des BVerfG zu Europa und seinen Gerichten nach seinem Lissabon-Urteil*, [in:] *Europa in der Welt. Von der Finanzkrise zur Reform der Union*, ed. I. Pernice, R. Schwarz, Baden-Baden 2013; M. Nettesheim, *Ein Individualrecht auf Staatlichkeit? Die Lissabon-Entscheidung des BVerfG*, „Neue Juristische Woche" 2009, p. 2867.

Lisbon Treaty do give more room to Europe's supranational bodies, but that does not worry them in the least. The (national) safeguards built into the system are working and the nation states continue to hold the reins: "The Member States remain the masters of the Treaties". The BVG Judgment addresses the appellants' concerns head-on, in a confident and reassuring tone: "In spite of a further extension of competences, the principle of conferral is retained. The provisions of the treaty can be interpreted in such a way that the constitutional and political identity of the fully democratically organised Member States is safeguarded, as well as their responsibility for the fundamental direction and elaboration of Union policy. After the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will also remain a sovereign state and thus a subject of international law"[34].

The intention of the authors of these words is clear, yet speakers of German could well respond to the repetitive, reassuring '*bleibt*' ('remains') with a matching, one-syllable '*noch*' ('for now'). We too, even without the benefit of this linguistic cue, may well end up asking questions like: For how long will the member states remain the Masters of the Treaties? For how long will the Federal Republic of Germany remain a sovereign state and a subject of international law? It seems that – from the German perspective – the successive changes in the EU treaties lead to the abandonment of the traditional model of relations between nation states and an international (supranational) organization. The stages of that process are not too hard to map: a member state acting as a primary subject of international law > the foundation treaty of an international organization, the treaty is an international agreement that can be changed only if all member states give their consent at an intergovernmental conference > the international organization as a secondary subject of international law. In view of the number and the quality of competences transferred to the EU as well as the alterations in decision-making about amendments to the EU treaty foundations one may get the impression – if things continue to move in that direction – that the EU is set to morph into a sovereign subject.

Similarly as in its earlier rulings, in its Lisbon Treaty Judgement the BVG points out that the legal basis of the adoption of the Treaty in Germany is established by an order to apply the Treaty i.e. an act of parliament, passed by the Bundestag and approved by the Bundesrat. Moreover, according to the BVG, the principle of primacy of EU law is upheld by and validated by German law, i.e. the constitutional mandate to adopt EU law (Article 23, para. 1 of the GG); at the same time, however, the adoption of EU law is limited by the 'eternity clause' of Article 79 para. 3 of GG, whose meaning is developed to include the principle of constitutional identity and judicial review by the BVG[35].

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[34] BVerfG 123, 267, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, ECLI:DE:BVerfG:2009:es20090630.2bve000208, para. 298, translation: http://www.bverfg.de/e/es20090630_2bve000208en.html [accessed: 05.09.2017].

[35] BVerfG 123, 267, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 339; „The primacy of application of European law remains, even with the entry into force of the

As far as the new ways of proceeding in matters of amendment of the text of the EU treaties the BGV in its Lisbon Judgment raises no objections but does not give the green light either. The new procedures, though an innovation with no precedent in international law, are declared compatible with the GG[36], but each change made in this way will have to obtain the approval not only from the Federal government but also from the German law-makers, preferably in the form of a regular act of parliament. With its eye on the sensitive area of transfer of competencies and the scope of the principle of conferral the BVG admonishes the decision makers in Berlin to keep vigilant and reminds the parliamentarians in particular of their integration responsibility for the constitutional identity of the German state[37].

Not all of the changes introduced by the Lisbon Treaty can be categorized as measures facilitating the extension of the supranational powers of EU *vis-à-vis* the member states. The most conspicuous innovation that points in the opposite direction is the exit clause, which, under Article 50 sets down the procedure of withdrawal from Union. This provision, as the BVG observes, is an explicit vindication of the Masters of the Treaties and its role as barrier to the transformation of the EU into a state in its own right: "The treaty makes explicit for the first time in primary law the existing right of each Member State to withdraw from the European Union (Article 50 TEU). The right to withdraw underlines the Member States' sovereignty and also shows that the current state of development of

Treaty of Lisbon, a concept conferred under an international treaty, i.e. a derived concept which will have legal effect in Germany only with the order to apply the law given by the Act Approving the Treaty of Lisbon (…). It is a consequence of the continuing sovereignty of the Member States that in any case in the clear absence of a constitutive order to apply the law, the inapplicability of such a legal instrument to Germany is established by the Federal Constitutional Court. Such determination must also be made if, within or outside the sovereign powers conferred, these powers are exercised with the consequent effect on Germany of a violation of its constitutional identity, which is inviolable under Article 79.3 of the Basic Law and is also respected by European treaty law, namely Article 4.2 first sentence Lisbon TEU". M. Bainczyk, *Polski i niemiecki Trybunał…, op. cit*., p. 172–174.

[36] BVerfG 123, 267, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 306: (2) „The controlled and justifiable transfer of sovereign powers to the European Union, which is the only way in which this is possible under constitutional law, is also not called into question by individual provisions of the Treaty of Lisbon. The institutions of the European Union may neither in the ordinary (a) and simplified revision procedures (b) nor via the so-called bridging clauses (c) or the flexibility clause (d) independently change the foundations of the European Union under the treaties and the order of competences *vis-à-vis* the Member States".

[37] BVerfG 123, 267, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 409: b) „If the Member States elaborate European treaty law on the basis of the principle of conferral in such a way as to allow treaty amendment without a ratification procedure solely or mainly by the institutions of the Union, albeit with the requirement of unanimity, a special responsibility is incumbent on the legislative bodies, apart from the Federal Government, as regards participation; in Germany, participation must, at national level, comply with the requirements under Article 23.1 of the Basic Law. The Extending Act does not comply with these requirements in so far as the *Bundestag* and the *Bundesrat* have not yet been accorded sufficient rights of participation in European lawmaking and treaty amendment procedures".

the European Union does not transgress the boundary towards a state within the meaning of international law"[38].

In the light of legal doctrine the introduction of the exit clause into the text of the treaty was not that revolutionary because even before Lisbon it had been possible to leave the EU. Customary international law allows a sovereign state to withdraw from its treaty obligations and so does the Vienna Convention on the Law of Treaties, though under some conditions. Now that Great Britain is set to leave the EU, the fact that the scenario of a secession was taken into account in all seriousness by the authors of the Lisbon Treaty has proved well-nigh prophetic, or at any rate very handy. It is worth noting that in its interpretation of Article 50 of the TEU the German BVG points to sovereignty as the basis of the right of a member state to withdraw from the EU and cites Article 54 para. 1 of the Vienna Convention on the Law of Treaties to insist that such a decision may be taken unilaterally, regardless of the will of other member states. Moreover, according to the BVG, in the light of Article 50 para. 3 TEU withdrawal from the EU takes effect by the end a set period of two years after the notification of the decision regardless of any negotiated settlement, the seceding state does not have to give reasons for its decision nor does it have to submit to any external verification if 'the constitutional requirements' for the withdrawal, as stipulated by Article 50 para. 1 TEU, have indeed been met[39].

4. The German BVG and international agreements concluded *via* the Schengen method

Although the Lisbon Treaty Judgment does not state it *expressis verbis* the combined effect of the scope of the competences transferred to the EU and the multiple fast-track processing of treaty amendment proposals (via ordinary and simplified revision procedures, or the so-called bridging clauses, or the flexibility clause) has led to a change in BVG's perception of the EU foundation treaties. They are treated as international law agreements *sui generis*, which means that their adoption and implementation, here the BVG Judgment gets explicit, puts a special burden of responsibility on the constitutional organs of the state.

As soon as the first of the Lisbon Treaty fast-track measures came through in May 2010 the machinery of constitutional review was set in motion in Germany and other EU member states, including Poland[40]. Leaving aside the compatibility

[38] BVerfG 123, 267, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 329.

[39] BVerfG, Judgment of the Second Senate of 30 June 2009, 2 BvE 2/08, para. 330.

[40] J. Barcz, *Orzecznictwo niemieckiego Federalnego Trybunału Konstytucyjnego wobec reformy strefy euro. Studium prawno-porównawcze*, Warszawa 2014; M. Bainczyk, *Wybrane aspekty nowelizacji prawnych podstaw członkostwa Polski w Unii Europejskiej. Uwagi na tle wyroków polskiego i niemieckiego trybunału konstytucyjnego w sprawie aktów normatywnych stabilizujących strefę euro*, "Krakowskie Studia Międzynarodowe" 2014, nr 1, s. 155–189.

issues raised by that decision of the Council of Europe, let us note that reforms of the EU economic and financial architecture are put in place by acts of secondary law and agreements under international law[41]. The latter category includes agreements connected with specific EU policies which can be ranked as international law even though they have not been concluded in a manner prescribed by the foundation treaties. Such out-of-bounds procedures have been dubbed the 'Schengen method' after the 1985 Schengen Agreement, the first treaty created in this way and later added to the *acquis communautaire*[42].

In its ruling of 12 September 2012 the BVG took a firm stand on the right of the German constitutional organs (i.e. in the last resort the BVG itself) to oversee and possibly block any international agreement of this kind. The wording of the Judgment leaves no doubt as to what, according to its authors, is at stake: "Article 38 of the Basic Law [i.e. the GG] protects the citizens with a right to elect the Bundestag from a loss of substance of their power to rule, which is fundamental to the structure of a constitutional state, by far-reaching or even comprehensive transfers of duties and powers of the Bundestag, above all to supranational institutions (…). The same applies, at all events, to comparable commitments entered into by treaty, which are connected institutionally to the supranational European Union, if the result of this is that the people's democratic self-government is permanently restricted in such a way that central political decisions can no longer be made independently"[43]. The significance of the declaration that international agreements 'which are connected institutionally to the supranational European Union' are also subject to a review – *prima facie* and with respect of their foreseeable consequences – of their conformity with the provisions of Article 79 para. 3 of the GG and that the vote on the review carries a grave responsibility is hard to overestimate. Designed to see off the biggest challenge in the history of court and to reassure the German public at a moment of crisis, this principled statement will weigh heavily on all future discussions about reforming the European Union.

In its recently published 'Reflection paper on the deepening of the economic and monetary union' the European Commission outlines three ways forward towards the goal of consolidating and completing the EMU by 2025[44]. "A stronger

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[41] J. Barcz, *Główne kierunki reformy ustrojowej post-lizbońskiej Unii Europejskiej (2010–2017). Sanacja i konsolidacja strefy euro* [*Main Directions of the Post-Lisbon Constitutional Reform of the EU (2010–2017). Renovation and Consolidation of the Eurozone*], Piaseczno 2017, p. 35, http://janbarcz.republika.pl/teksty/J.Barcz%20-20III_Glowne%20kierunki%20reformy%20ustrojowej%20post-lizbonskiej%20UE_2017.pdf [accessed: 10.09.2017].

[42] J. Barcz, *Traktat z Lizbony. Wybrane aspekty prawne działań implementacyjnych*, Warszawa 2012, p. 38 f, 72.

[43] BVerfG, Judgment of the Second Senate of 07 September 2011 – 2 BvR 987/10, para. 98, translation: http://www.bverfg.de/e/rs20110907_2bvr098710en.html [accessed: 10.09.2017].

[44] https://ec.europa.eu/commission/sites/beta-political/files/reflection-paper-emu_en.pdf [accessed: 10.09.2017].

EMU can only happen if Member States accept to share more competences and decisions on euro area matters, within a common legal framework. Several models are possible: the EU Treaties and the EU institutions, an intergovernmental approach, or a mixture of both as is already the case today"[45]. The 'intergovernmental approach' is another phrase for the Schengen method, i.e. the setting up of international agreements outside the legal framework of the EU, but with the intention of incorporating them into it at a convenient time and using the occasion to supplement and amend existing EU law[46]. However, the BVG is well prepared to tackle this backstairs strategy for it has ensured through its case law that each and every amendment or extension of the treaties already in place needs clearance. In particular the Judgment of 12 September 2012 identifies those elements of the Schengen-method supplements or contaminated treaty law that must never be given the stamp of approval. "The Basic Law [the GG] not only prohibits the transfer of competence to decide on its own competence (*Kompetenz-Kompetenz*) to the European Union or to institutions created in connection with the European Union. (…) It is therefore constitutionally required not to agree dynamic treaty provisions with a blanket character, or if they can still be interpreted in a manner that respects the responsibility for integration, to establish, at any rate, suitable safeguards for the effective exercise of such responsibility"[47]. What is striking in this prohibition of the transfer of competence to create its own competences (*Kompetenz-Kompetenz*) not only with regard to the EU but also 'institutions created in connection with the European Union'.

As with EU foundation treaties, the BVG rules out on principle the adoption of blanket treaty provisions of a dynamic nature. Conclusion and application of international agreements of the Schengen type is a subject 'responsibility for integration'. The BVG's stance on European integration combines openness and defensiveness. While their balance has been changing in response to changes in the functioning of the European Union, it seems that recently the BVG has gone on the defensive, developing the case law of the last fifty years and extending its range from foundation treaties to international agreements of the Schengen type.

5. The Polish Constitutional Tribunal and the EC / EU foundation treaties

One year after Poland's accession to the EU the Polish Constitutional Tribunal had to define the legal character of the foundation treaties as part of the procedure to verify the compatibility of the accession treaty with the Polish Constitution. In

[45] The European Commission, 'Reflection paper on the deepeining of the economic and monetary union', p. 29.

[46] J. Barcz, *Główne kierunki reformy ustrojowej…, op. cit.,* p. 195 f.

[47] BVerfG, Judgment of the Second Senate of 12 September 2012, 2 BvR 1390/12, para. 105, translation in English at: http://www.bverfg.de/e/rs20120912_2bvr139012en.html [accessed: 10.09.2017].

its Judgment of 11 May 2005 the TK decided, like the BVG, rather than to allow the treaties the attribute of constitutionality to rank them as international agreements on the transfer of competences within the meaning of Article 90 para. 1 of the Constitution. Because of the importance of those agreements for the functioning of organs of the state, the accession process became subject of a special procedure prescribed in Article 90 para. 2–5 of the Polish Constitution[48]. The designation of the foundation treaties as agreements under international law within the meaning of Article 87 para. 1 and Article 91 of the Constitution cleared the way for establishing a basic formula to describe the relationship between primary EC/EU law and the Constitution. Once recognized by the TK as international law the Accession Treaty, the TEEC and the TUE came within the purview of the provision of Article 91 para. 2 that international agreements ratified upon prior consent granted by statute shall have precedence over statues. However, at the same time the TK observed, in connection with Article 8 para. 1 of the Constitution, that "the Constitution remains – by virtue of its special legal force – 'the supreme law of the Republic of Poland' in relation to all international agreements binding upon the Republic of Poland. This also applies to ratified international agreements transferring competences 'in relation to certain matters'"[49]. The TK Judgment also invoked the doctrine of the Masters of the Treaties: "The Accession Treaty was concluded between the existing Member States of the Communities and the European Union and applicant States, including Poland. It has the features of an international agreement, within the meaning of Article 90(1) of the Constitution. The Member States remain sovereign entities – parties to the founding treaties of the Communities and the European Union. They also, independently and in accordance with their constitutions, ratify concluded treaties and have the right to denounce them under the procedure and on the conditions laid down in the Vienna Convention on the Law of Treaties 1969"[50]. It is worth noting that the TK chose to buttress the recognition of the Accession Treaty and the EU Foundation Treaties as international agreements by citing the Polish Constitution and the Vienna Convention on the Law of Treaties. Both espouse the view that such agreements are made by sovereign states which retain their sovereign right to decide on their treaty obligations. While this position is similar to the one taken by the German BVG in its judgment on the Treaty of Maastricht, the TK's reference to the doctrine of the Masters of the Treaties is no doubt an example of migration of ideas between the German and the Polish Constitutional tribunal.

[48] TK, Judgment of 11 May 2005, K 18/04, Part III, Chapter 3: The position of international agreements on the transfer of competences in the Polish system of law.

[49] TK, Judgment of 11 May 2005, K 18/04, Part III, para. 4.2.

[50] *Ibidem*, para. 8.5.

6. The Polish Constitutional Tribunal and the Treaty of Lisbon

The issue the legal nature of the treaties was addressed again in TK's landmark judgment on the Treaty of Lisbon on 24 November 2010. The TK undertook a constitutional review of the Treaty in accordance with Article 188, para. 1 of the Polish Constitution in reply to a complaint lodged by a group of MPs and senators. In its judgment the Tribunal upheld the stance it took earlier in its ruling of 11 May 2005, but importantly, introduced a distinction between EU treaties and other international agreements. The former, so the TK, enjoy 'a special presumption of constitutionality' which results from the fact that "the ratification of that Treaty occurred after meeting the requirements which were more stringent than those concerning amendments to the Constitution"[51]. By granting this distinction the TK de facto imposed a sort of self-restraint clause on its own freedom of action. The nature of the constraint is explained as follows: "the presumption of constitutionality of the Treaty may only be ruled out after determining that there is no such interpretation of the Treaty and no such interpretation of the Constitution which allow to state the conformity of the provisions of the Treaty to the Constitution"[52]. In other words, as a consequence of the presumption the TK cannot hand out a decision about the unconstitutionality of the Treaty until all EU-friendly interpretations have been overthrown. This argument attracted a great deal of criticism event from judges of the TK[53], among others, the validity of the distinction between EU foundation treaties and other international treaties.

Like its German counterpart, the TK gave a stamp of approval to the Treaty of Lisbon's new ways of amending the EU treaties. In declaring their compatibility with the Polish Constitution, the TK pointed out some international-law 'remnants' in that part of the Treaty, e.g. the commitment to 'the principle of unanimity as a guarantee of respect for the sovereignty of the EU Members States'. The simplified procedures, in the opinion of the TK, represent a compromise "between the efforts to enable the EU to react to transformational challenges which require modification of the primary law and the preservation of constitutional identity of the Member States"[54]. Unlike the BVG, the Polish TK did not specify the constitutional and legal benchmarks for the governmental and parliamentary approval of amendments made at the EU level. It declared that instructions of this kind are unnecessary and a decision should be taken by the Polish constitution-maker and legislator[55].

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[51] TK, Judgment of 24 November 2010, K 32/09, Part III, para. 1.1.2.; translation: http://trybunal.gov.pl/fileadmin/content/omowienia/K_32_09_EN.pdf [accessed: 12.09.2017].

[52] *Ibidem*.

[53] TK, Judgment of 24 November 2010, K 32/09, dissenting opinion of judge M. Grant.

[54] TK, Judgment of 24 November 2010, K 32/09, Part III, para. 2.2.

[55] *Ibidem,* Part III, para. 2.6.: „It is not the task of the Constitutional Tribunal to specify the content of the statute granting consent to ratification of an international agreement, as referred to in Article 90 of the Constitution, neither is it to specify the rules of participation of the parliament and

7. The Polish TK and the problem of treaty amendments introduced *via* the 'Schengen method'

Having in mind the proposed by the Commission three ways forward towards the goal of consolidating and completing the EMU by 2025 TK's reactions to the international agreements introduced by means of the Schengen method seem worth to mentioned. That said, the case law even in that field is rather small; the only piece of EU legislation which has attracted TK's more sustained attention is the Treaty establishing the European Stability Mechanism (TESM). A constitutional review the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union (TSCG) brought before the Court was discontinued in March 2013 for formal reasons. The TK Judgement of 26 June 2013 is a hybrid assessment of the European Council Decision of 25 March 2011 amending Article 136 TFUE with regard to a stability mechanism for Member States whose currency is the euro for its conformity with the Polish Constitution and the EU primary law. The TK found that in the absence of changes in the Polish Constitution in connection with the introduction of new amendment procedures to EU treaties by the Treaty of Lisbon consent to the binding of Poland the decision of the European Council in accordance with Article 48 para. 6 of the TEU can only be given on the basis of general provisions of the Constitution regulating the ratification of international agreements, i.e. either Article 89 para. 1 of the Constitution or 'the European integration' clause from Article 90. Article 90 opens the way for a transfer of competences vested in the organs of the state to an international organization but only after the agreement has been approved in a ratification procedure by a qualified majority in in the Sejm and the Senate or by the Nation in a referendum. In 2012 the Polish government decided that would take the route of granting consent to ratification in accordance with Article 89 because it did not entail the conferral of competences to the EU. This decision found the approval of the TK. Following the lead of the CJEU the Polish Tribunal held that the European Council Decision of 25 March 2011 was compatible with Article 48 para. 6 of the TEU. The reason why TK Judgement referred only indirectly to the EMS may be connected with fact that the interpretation of that EMS Treaty could influence the contents of its decision on the constitutionality of the amendment of Article 136 of the TFEU. The Judgement points out that the TEMS and TFEU are two entities with full legal personality, acting separately despite the many similarities between them, formal (e.g. para. 2 of the preamble of the TEMS echoes Article 136 para. 3) and in matters of substance. With regard of the latter the TK notes two important provisions, one, that "the mechanism would operate in a way that would comply with European Union law" and, two, that the ESM Treaty, operating outside the legal framework

government as regards the implementation of the Treaty of Lisbon (…). It is the task of the Polish constitution-maker and legislator to resolve the problem of democratic legitimacy of the measures provided for in the Treaty, applied by the competent bodies of the Union".

of the EU, "made use of the Union's institutions, in particular the Commission and the ECB"[56]. Yet at another point of the Judgment the TK states that states that "the ESM Treaty is not part of EU law enacted within the scope of law-making competences assigned to the EU. In particular, newly-added Article 136(3) of the TFEU may not be regarded as such a basis"[57]. What is however more important for future reforms of the functioning of the European Union, the TK suggested that if Poland were to decide to join the euro area and ratify the EMS Treaty it should follow the procedure set out in Article 90 of the Constitution[58]. Only at that point would the TK be able to verify the constitutionality of that international agreement.

It seems that the TK took a similar approach to the Treaty on Stability, Coordination and Governance in the Economic and Monetary Union. While acknowledging the interrelationship of the TSCG with EU law, the TK assigned it the status of an international agreement: "The recitals of the compact comprise that the objective of the Contracting Parties is to incorporate the provisions of this Treaty as soon as possible into the Treaties on which the European Union is founded. At the same time, pursuant to its Article 2, the Fiscal Compact shall be applied insofar as it is compatible with the Treaties on which the European Union is founded and with EU law, and it shall not encroach on the competence of the Union to act in the area of the economic union. The Contracting Parties have agreed to apply and interpret the provisions of the Fiscal Compact in conformity with the Treaties on which the European Union is founded, in particular Article 4(3) of the Treaty on European Union, and with European Union law, including procedural law whenever the adoption of secondary legislation is required"[59]. In its Judgment of 26 June 2012 the TK did not concern itself further with the Fiscal Compact on the grounds that it was an intergovernmental agreement and had hardly anything in common with the European Council Decision 2011/199/EU. A separate constitutional review of the TSCG and the Ratification Act of the TSCG was discontinued in March 2013 for formal reasons.

Summing-up

1. Both the German BVG and the Polish TK take a traditional view of the EC/EU foundation treaties by defining them as international agreements whose signing, ratification and termination in accordance with the provisions of the Vienna Convention on the Law of Treaties depends on a sovereign decision of the member state. This principle is the key element of the doctrine of the 'Masters of the Treaties' adopted first by the BVG and later by the TK.

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[56] TK, Judgement of 26 June 2013, K 33/12, Part III, para. 4.

[57] *Ibidem*, para. 7.3.7.

[58] *Ibidem*, para. 7.3.9.

[59] *Ibidem*, para. 4.3.2.

2. The foundation treaties as international agreements in the sense given to that term by the provisions of the German Basic Law and the Polish Constitution shall be concluded and applied in accordance with constitutional provisions and have to conform to the rules set for international agreements in respective constitutions. The BVG complemented this approach with an institution of an order to apply EU law i.e. EU law cannot take effect in Germany until it is approved by an act of parliament and with the scope of the latter.
3. This above mentioned formula has enabled the constitutional tribunal to have 'the last word' over the adoption and application of EU foundation treaties in Germany and in Poland. However, in its Judgment on the Lisbon Treaty the Polish TK relaxed its grip by allowing the Treaty a 'presumption of constitutionality'.
4. In their judgments on the Lisbon Treaty both Constitutional Tribunals gave their approval to the novel fast-track procedures to amend EU treaties. Yet, the BVG supplemented its endorsement with a fairly specific catalogue of irreparable impediments. It is intended as practical guide for future use by the Bundestag.
5. Recently the BVG and the TK saw themselves under pressure to find the fitting a legal description to the practice of making alterations in the EU by the backdoor, i.e. 'the Schengen method'. Both Tribunals came to the conclusion that in so far as these agreements 'are connected institutionally to the supranational European Union', they are subject to a ratification test: in Germany, whether they do not infringe on that country's constitutional identity, and in Poland, whether they meet the criteria formulated on the basis of Article 90 para. 1 of the Polish Constitution.
6. If the EU continues to rely for its expansion on the Schengen method, we may expect a steady accumulation of the case law triggered by that process and its formidable legal complexities. For Poland one sure way of getting ready for these developments is introduce appropriate amendments into the Constitution.

Traktaty założycielskie Wspólnot i Unii Europejskiej w orzecznictwie niemieckiego oraz polskiego Trybunału Konstytucyjnego

Przedmiotem niniejszego artykułu jest analiza charakteru prawnego podstaw funkcjonowania WE i UE, a więc traktatów założycielskich z punktu widzenia polskiego oraz niemieckiego Trybunału Konstytucyjnego. Zarówno w Konstytucji RP, jak i w Ustawie Zasadniczej RFN nie został określony *expressis verbis* charakter prawny traktatów założycielskich, a nastąpiło to w drodze twórczej wykładni prawa, dokonywanej przez trybunały konstytucyjne. Określenie charakteru prawnego tychże traktatów przez trybunały konstytucyjne ma nie tylko dalekosiężne konsekwencje prawne, ale także polityczne. Przyjęcie określonej kwalifikacji prawnej traktatów założycielskich nie tylko determinuje ich miejsce w systemie prawa krajowego, ale także zasadniczo wpływa na relacje pomiędzy danym państwem członkowskim a UE. *Last but not least* kwalifikacja ta wpływa również

na pozycję samego trybunału konstytucyjnego w ramach europejskiej wspólnoty sądów konstytucyjnych, a także jest istotna z punktu wskazania, który trybunał ma „ostatnie słowo" w konwersacjach konstytucyjnych w Europie. W artykule analizie poddane zostały wybrane, najważniejsze tezy z orzecznictwa FTK, a następnie polskiego TK, dotyczące charakteru prawnego traktatów stanowiących podstawę prawną integracji europejskiej, a także umów międzynarodowych zawieranych w ramach metody „schengeńskiej".
Słowa kluczowe: Federalny Trybunał Konstytucyjny RFN, Trybunał Konstytucyjny RP, traktaty założycielskie UE, metoda schengeńska

Key European Communities and European Union treaties and accord in the case law of the German and the Polish Constitutional Tribunals

This article examines the legal nature of the foundation treaties of the EC and the EU from the point of view of the Polish and the German Constitutional Tribunals. Neither the Polish Constitution nor the German Basic Law does determine in explicit terms the legal status of the foundation treaties. The recognition of the legal nature of those treaties by national constitutional tribunals has far-reaching legal and political consequences whose significance is hard to overestimate. The adoption by a constitutional court of a specific legal qualification of the foundation treaties not only determines their position in the system of national law but also enshrines a set of formulas with a lasting influence on the relations between a member state and the EU. And last but not least the qualification influences the position of a national constitutional tribunal within the European community of constitutional courts, especially in connection with the question which tribunal has the last word in the European constitutional conversations. This analysis, based on the case law of the German BVG and the Polish TK, focuses on those highly significant formulas and statements that deal, firstly, with legal aspects of the EC and EU foundation treaties and, secondly with legal aspects of international agreements concluded within the European Union in accordance with the "Schengen intergovernmental method".
Key words: German Federal Consitutional Court, Polish Constitutional Court, founding treaties of the EU, Schengen method