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The Polish Parliament under the Lisbon Treaty – adaptation to the institutional reform

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Introduction

Among the number of institutional reforms introduced by the Lisbon Treaty, one of the most important is the strengthening of the role of national parliaments in the European Union. For this very reason the Treaty is referred to as the "Treaty of European Parliaments".[1] Some experts argue that a new institution has been formed in the European Union – the national parliaments acting jointly.[2] The significance of these changes is great, yet the real role of parliaments will depend on their readiness to fulfil their new obligations and their ability to exercise their new powers. That, in turn, will depend on whether some essential adjustments are made on the legislative, procedural and logistic levels.

The purpose of this study is to look closer at the process of the adaptation of the Polish parliament – the Sejm and the Senate – to the Lisbon Treaty reforms. These transformations are quite deep. A new law has been prepared, the so–called Act on Cooperation, which governs the principles of the cooperation between the government and the two chambers of the Polish parliament in matters related to EU membership. Even though the adaptation has not yet been completed (an initiative of President Bronisław Komorowski has also appeared, proposing to amend the Constitution of the Republic of Poland), it is worth examining the changes that have been made within the twelve months under the rule of the Lisbon Treaty, which entered into force on 1 December 2009.

The paper begins with a short outline of the most important principles of the involvement of both chambers of the parliament in EU policy-making in Poland. The Polish adjustments have been systematised and divided into statutory, regulation and constitutional ones. Furthermore, while listing the individual changes introduced by the Treaty, the role of national parliaments has been discussed together with the Polish response to these changes.[3]

[1] Conference at the Senate of the Republic of Poland "Treaty of Lisbon – Treaty of European Parliaments", Warsaw 22–23 February 2010

[2] Davor Jančić, *A New Organ of the European Union: "National Parliaments Jointly"*, "Federal Trust Policy Commentary", The Federal Trust for Education and Research, February 2008 – http://www.fedtrust.co.uk/uploads/Parliaments_Jointly.pdf [access: 10 January 2011].

[3] This publication has been prepared as part of the project implemented in cooperation with the Institute for European Policy EUROPEUM in Prague and the German Institute for International and Security Affairs – Stiftung Wissenschaft und Politik (SWP) in Berlin, with the support of the Heinrich Böll Foundation. The results of the project also include two similar analyses referring to the German, Czech and Slovak parliaments: Peter Becker, Daniela Kietz, *The German Parliament in the Lisbon EU: Guarding subsidiarity, defending sovereignty?*, German Institute for International and Security Affairs, Berlin 2011; David Král, Vladimír Bartovic, *The Czech and the Slovak parliaments after the Lisbon Treaty*, Institute for European Policy EUROPEUM, Prague 2010.

The role of the Sejm and the Senate in EU policy-making in Poland

The tasks and the powers of the Polish parliament in matters related to EU membership are currently governed mainly by the Act on Cooperation[4] and by the Rules of Procedure of both chambers.[5] As this analysis will further show, it is the amendments to these particular documents that constitute the most important elements of adapting the Sejm and Senate to the reforms of the Lisbon Treaty.

As in other Member States, the participation of the Sejm and the Senate in Polish EU–related political activities relies on the strong committees dealing with EU matters: the Sejm Committee for European Union Affairs and the Senate's European Union Affairs Committee. The two committees have wider prerogatives than other parliamentary committees. They can interact directly with the government and their opinions are expressed on behalf of the entire chamber (the Sejm or the Senate, respectively). It is for this reason that the Sejm Committee for European Union Affairs is sometimes called the "little Sejm".[6] The Committee enjoys high prestige and MPs are eager to seek membership on it. However, it can be composed of not more than forty-six MPs[7] and its composition must reflect, proportionally, the size of all parliamentary clubs and groups.

The Committees have the right to give opinions on drafts of EU legislation, on the government's position concerning such drafts and the stance that the government is planning to take on the legislation at the Council of the European Union. The opinions are not binding and the "weight" of the opinions issued by the Sejm and the Senate varies. The opinion in theory should form the basis for the government's position. But in practice, that only means that if the government fails to take the opinion into consideration, it is obliged to explain, without delay, the reasons for such divergence. Thus, failure to consider the opinion of the Committee does have some legal consequences, though it does not affect the validity of the stance taken by the representative of Poland in the Council. Nevertheless, the Committee has full control over the extent to which its opinions are taken into consideration during the legislative process.

The Senate Committee does not have a similar control tool at its disposal.

[4] Currently it is the Act dated 11 March 2004 on cooperation between the Council of Ministers and the Sejm and the Senate in matters concerning the membership of the Republic of Poland in the European Union (Journal of Laws of 2004 No. 52, item 515; Journal of Laws of 2005, No. 160, item 1342), but on 13 February 2011 a new act will enter into force, the Act of 8 October 2010 on the cooperation of the Council of Ministers with the Sejm and the Senate in matters concerning the membership of the Republic of Poland in the European Union (Journal of Laws of 2010, No. 213 item 1395).

[5] *The Rules of procedure of the Sejm of the Republic of Poland* – schedule to the announcement of the Speaker of the Sejm of the Republic of Poland dated 21 January 2009. (M.P. [Official Gazette of the Republic of Poland] of 2009, No. 5, item 47 as amended.); *The Rules of Procedure of the Senate of the Republic of Poland* – Schedule to the announcement of the Speaker of the Senate of the Republic of Poland dated 13 May 2010 (M.P.[Official Gazette of the Republic of Poland] of 2010, No. 39, item 542).

[6] Ziemowit Cieślik, *Udział Sejmu w stanowieniu prawa Unii Europejskiej [Participation of the Sejm in the making of the European Union's law]*, [in:] *Rola Sejmu i Senatu w Unii Europejskiej. Seminarium dla nowo wybranych posłów VI kadencji [The role of the Sejm and the Senate in the European Union. Seminar for the newly elected deputies of the 6th Term of Office]*, Kancelaria Sejmu, Wydawnictwo Sejmowe, Warsaw 2007, p. 38.

[7] Their number is normally close to this limit.

The failure to consider the opinion of the Senate Committee does not lead to any consequences. This, in turn, is a result of the fact that the Senate does not have any controlling powers over the government. Therefore the role of the Sejm Committee in this process is much more significant.

The Sejm Committee for European Union Affairs has adopted a number of organisational solutions whose aim is to facilitate the process of setting priorities in the situation when the EU legislative agenda contains a large number of issues. The system has been devised of appointing two deputies – co–rapporteurs (one from the ruling party and one from the opposition party) who prepare positions of the Committee on a given draft and on the government position. If none of them submits objections to the draft, the Committee takes the decisions without considering the matter, provided that no other member of the Committee objects. All such drafts are considered by the Committee collectively (the so–called A list) and without debate.[8]

Polish adjustments to the Lisbon Treaty

The process of adjustment of the Polish parliament to the changes introduced by the Lisbon Treaty may be divided into three stages: legal changes, procedural changes and constitutional changes. The necessity of implementing the provisions of the Lisbon Treaty led to a decision to carry out a comprehensive modernisation of the Polish system of cooperation between the executive and the legislative branches on European matters, using the experience of Poland's six years of membership in the European Union. Hence the decision to amend the 2004 Act on Cooperation, governing the principles of the government's cooperation with the Sejm and the Senate on European affairs. Only at a later date will changes to the Sejm Rules of Procedure be made, in order to set in detail the principles of exercising the new powers. Whereas in the Senate, the changes to the Rules of Procedure were made even before the Act on Cooperation entered into force. The adjustment process may be concluded with the planned amendment to the Constitution. Work on the amendment of the Constitution is in progress. For this reason this publication presents the situation one year after the Lisbon Treaty's entry into force, paying particular attention to the key legal changes.

Figure 1. Outline of the Polish parliament adjustment process

The diagram in Fig. No. 1 shows an outline of the adjustment process, although it should only be treated as approximation. As already mentioned, changes to the Sejm Rules of Procedure had been introduced before the work on

[8] Ziemowit Cieślik, *Udział Sejmu w stanowieniu prawa Unii Europejskiej*, *op. cit.*, p. 42.

the Act on Cooperation was completed. In addition, the amendment of the Constitution would probably not conclude the adjustment process as it would entail the need for another amendment to the Act on Cooperation.

The new Act on Cooperation

Officials from the Chancellery of the Sejm admit that the entry into force of the Lisbon Treaty has made it necessary not only to make some legal and procedural changes in order to adjust the operation of both chambers to the new rules, but has also provided a stimulus for reform, re–organisation and modernisation of the Polish model of participation in EU policy-making. After six years of EU membership, it was possible to evaluate the cooperation so far, to find its strengths and weaknesses.

The Act will come into effect on 13 February 2011.

The Act is based on the 2004 act and copies a lot of its provisions. It defines the obligations of the government to the Sejm and the Senate and their bodies: the obligation to cooperate (Art. 2), the obligation to provide information on EU documents (for example, consultation documents, work plans, drafts of international agreements to which the European Union is planning to become a party), the obligation to communicate the government position on drafts of EU legislation. The Sejm, the Senate or their bodies (competent under the respective Rules of Procedure) can require the government to provide information on any other matter related to membership in the European Union (Art. of 3 sec. 2).

Certain changes have been made to the mechanism of reviewing the draft positions of the Council of Ministers. The government still has fourteen days for sending the draft position, which – as before – must include an assessment of the legal, social, economic and financial impact of a regulation, as well as information about the legislative procedure and the mode of voting in the Council. A novelty in the Act is the introduction of an obligation to attach information concerning the compliance of the draft regulation with the principle of subsidiarity (Art. of 7 sec. 3 pt 3), a matter which will be discussed later. The bill extends the time for providing opinions on draft government positions from twenty-one to forty-nine days.

In the new Act, the obligation to seek the opinion of the Sejm and the Senate before considering a piece of EU legislation at the Council was retained. In addition, in case of failure to seek the opinion of the parliament or failure to consider it, the government is obliged to explain its reasons (Art. 10–15). Another novelty, arising directly from new regulations of the Lisbon Treaty, is a provision concerning filing complaints to the Court of Justice by the Sejm and the Senate (Art. 17). As a matter of fact, this has raised some controversy in the relations between the government and the parliament as will be discussed later.

The provision concerning the cooperation at exercising European Union law is a copy of the provision from the previous Act (Art. 18). What is new is Sec. 4, introduced by the Senate, imposing on the government the obligation to notify the Sejm and the Senate of legislative works related to the implementation of European Union legislation whose date of implementation has expired or will expire shortly.

This provision can contribute to the improvement of Polish performance (traditionally one of the worst in the European Union) in the implementation of EU directives.

Some technical changes have also been introduced concerning the issuing of opinions by the Sejm on candidates for positions in EU institutions (changes to the names of EU courts – Art. 19). Articles 21 and 22 are also new. They apply to cooperation during the Polish Presidency of the Council, imposing an obligation provide information about the course of the Presidency and at the same time introducing certain exemptions from the obligation to seek the opinion of the parliament when considering the legislative acts at the Council during the Presidency.

In the fifth chapter of the Act on Cooperation, an amendment to the 2000 Act on International Agreements[9] has been introduced. Article 23 introduces, among other things, the procedure for the withdrawal of Poland from the European Union and the procedure of ratification of treaty revisions by the so-called passerelle procedure. The most important statutory changes arising from the Lisbon Treaty will be discussed further down in the paper.

The government took an active part in the work on the Act. It was on the government's initiative that the above-mentioned exemptions from the requirement to keep the parliament informed during the course of the Presidency have been introduced. Controversy in the relations between the parliament and the Council of Ministers appeared mainly in connection with the filing of complaints to the Court of Justice, deadlines applying to the government and the application of the passerelle procedure.

Changes to the Rules of Procedure of both chambers

Another stage of the adjustment process of the Sejm – it was the first for the Senate – included changes in the Rules of Procedure of both chambers. In the explanatory statement to the draft, it had been written that "because of constraints resulting from the principle of autonomy of both chambers (Art. 112 of the Constitution), some of the provisions implementing the provisions of the Treaty should be embedded in the Rules of Procedure of the Sejm and of the Senate rather than in the Act itself".[10] Internal work rules related to issues such as the procedure for examining the compliance with the subsidiarity principle, the procedure for applying to the Court of Justice or the procedure of veto against the passerelle procedure, require regulation within the Rules of Procedure.

At the request of the Sejm Bureau of Research [Biuro Analiz Sejmowych], instead of the two–week *vacatio legis* originally put in the draft Act on Cooperation, a three–month time for its implementation has been introduced (Art. 25). This time

[9] Act dated 14 April 2000 on international agreements (Journal of Laws of 2000, No. 39, item 443; Journal of Laws of 2002, No. 216, item 1824).

[10] Draft law on the cooperation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the European Union z with the explanatory notes, Sejm print no. 3000, p. 1 (explanatory notes).

has been designed for both chancelleries to launch all the procedures provided for by the new Act, to prepare the changes in the Rules of Procedure and to bring them into effect. Problems such as the division of responsibilities between European affairs committees and sector committees or the idea of a joint Sejm and Senate committee for European Affairs will require decisions at the political level.

At the Senate, the changes to the Rules of Procedure were introduced even before the completion of the work on the new Act. Two provisions concerning the subsidiarity procedure examination were included in the Rules. If the Committee decides that an EU legislative proposal does not comply with the principle of subsidiarity, it submits a draft resolution to the Speaker of the Senate, who sends the proposal to the competent committees, including the Committee for European Union Affairs (Art. 75d of the Senate Rules of Procedure[11]). The procedure applied in case of filing a complaint to the Court of Justice is similar. The Committee submits it to the Speaker, who then sends the draft to the appropriate committees, including the Committee for European Union Affairs (Art. 75e). In the case of the passerelle procedure, the Speaker sends the matter to the competent committees, including the Committee for European Union Affairs, which then present a joint report. The Senate adopts a resolution expressing its opposition to the decision of the European Council with the absolute majority of votes in the presence of at least half of the senators (Art. 75 f–g). Further changes may be introduced into the Rules of Procedure after the work on the Act is completed.

Amendment of the Constitution?

The Constitution of the Republic of Poland doesn't contain provisions which would directly regulate the role of the legislative branch in EU policy-making in Poland, including the adoption of EU law, or other regulations directly concerning the competence of authorities in relation to the Polish membership in the European Union. Changing the Constitution by adding a new chapter devoted to Polish membership in the European Union was discussed even before the accession in 2004. A debate on this subject was initiated by the publications of the Institute of Public Affairs.[12] An amendment of the Constitution would make it possible to properly structure the division of competencies and to protect EU policy-making against conflicts of competence. As the Constitutional Tribunal noted in its ruling of 2005, "The Polish Constitution does not contain provisions directly regulating the role of the Sejm and the Senate in the European Union law-making process (the constitutional legislator should consider the advisability of having this matter regulated) ".[13]

[11] *The Senate Rules of Procedure*, *op. cit.*

[12] See, Jan Barcz, *Ustrojowe aspekty członkostwa Polski w Unii Europejskiej [The political system aspects of Polish membership in the European Union]*, Institute of Public Affairs, Warsaw 2003. See also: Jerzy Jaskiernia, *Członkostwo Polski w Unii Europejskiej a problem nowelizacji Konstytucji RP {Polish membership in the European Union and the problem of amending the Constitution of the Republic of Poland]*, Wydawnictwo Naukowe ”Scholar”, Warsaw 2004.

[13] Judgment of the Constitutional Tribunal dated 12 January 2005 (K 24/04) ”Inequality in competences of

The issue of having the division of competencies in EU policymaking regulated in the Constitution was particularly visible at the time of the conflict of competencies between Prime Minister Donald Tusk and President Lech Kaczyński about who should represent Poland during European Council summit meetings. However, the solution was reached not by amending the Constitution, but through the decision of the Constitutional Tribunal.[14] The situation was similar in 2005, when the Constitutional Tribunal ruled on the competence of the Senate to pronounce its opinion on the position of the government concerning EU legislative proposals. The Tribunal decided then that giving an opinion on the position of the government did not constitute performing of a control function over the government, which is reserved exclusively for the Sejm, but a legislative function. Therefore both chambers should have equal rights in this respect.

The necessity to amend the Constitution was also mentioned in the explanatory notes to the draft of the new Act on Cooperation: "Whereas the new powers of the Sejm and the Senate are not found in the Polish ground–law, it should be acknowledged that the proper implementation of the Treaty provisions, in principle, requires that appropriate changes be made to the Constitution of the Republic of Poland".

In mid November 2010, in his first legislative initiative, President Bronisław Komorowski proposed an amendment to the Constitution, including an addition of a chapter devoted to the membership of Poland in the European Union.[15] The proposal prepares the Constitution for the adoption the euro, adapts the law to certain provisions of the Lisbon Treaty and puts in order the division of competencies in EU policy-making. Such changes would not conclude the process of adjustment to the Treaty, since after their implementation it would probably still be necessary to amend the Act on Cooperation. It would, however conclude the work on the most significant issues. Its success will depend on political agreement which may be difficult to reach in a year of parliamentary elections. The special committee of the Sejm for the amendment of the Constitution[16] began work on 24 November 2010.

Sejm and Senate committees in respect of European Union legislative proposals", p. 11.

[14] In the view of the Constitutional Tribunal, "the precise division of competence between the central constitutional bodies of the state must be made, primarily, by interpretation of the assumptions underpinning the construction of the political system as shaped by the Constitution of the Republic of Poland, referring, in particular, to its origins (including the evolution of the competencies of individual organs of the executive power) and to the fundamental principles of the Constitution" – see the judgment of the Constitutional Tribunal of 20 May 2009 (Kpt 2/08) "Conflict of competence concerning the indication of the central constitutional organ of the state which is authorised to represent the Republic of Poland at the meetings of the European Council".

[15] The proposal is available at the website of the Polish President's Chancellery – http://www.prezydent.pl/aktualnosci/wiadomosci/art,1523,prezydent–zglaszam–pierwsza–inicjatywe–ustawodawcza.html [access: 18 November 2010].

[16] Special Committee for considering the draft proposals of acts amending the Constitution of the Republic of Poland and draft proposals of acts related to those amendments. The Committee is considering the President's proposal together with three proposals submitted by MPs.

Adjustment of the Sejm and the Senate to the Lisbon Treaty provisions

Assessment of reforms

Experts disagree about the significance and effectiveness of the changes regarding the powers of national parliaments introduced by the Lisbon Treaty into the institutional system of the European Union. For example, an expert of the British parliament believes that with regard to examining the compliance of EU legislation with the subsidiarity principle, the Treaty, in fact, does not bring anything new – it had been one of the elements of examination carried out in the British parliament even before the Treaty. An opinion has even appeared that the parliament will not let the subsidiarity issue divert its attention from the material content of the proposals.[17]

In the Polish parliament the changes have been received in a more positive way. That is at least the assessment of Sejm Chancellery officials. A view prevails that the Treaty indeed enhances the role of national parliaments in the European Union, albeit less so on account of particular powers than as a result of the increased self–awareness of parliaments concerning their role. Subsidiarity is nothing new for the Polish Sejm, either, because it could address this issue earlier, although not directly to the European Commission. The officials also admit that it is the government and not the parliament which is the main legislator with regard to EU law. Parliaments have lost their direct influence over the making of EU law and they do not get it back, not in the least, through the Treaty of Lisbon. Their influence on EU decision-making processes depends not on the Treaty provisions but on domestic regulations, on the role of the parliament in the system of coordination of EU policy-making.

The most important reforms of the Lisbon Treaty are listed below, with indications of Poland's future response to these changes.

Direct communication with the European Commission

The main innovation of the Lisbon Treaty directed at national parliaments is the obligation imposed on the European Commission to send them all documents connected with the European Union legislative process. Previously all documents were handed over to parliaments by the government. This change is mainly of a technical nature, but it also means that deputies and senators will be able to get acquainted with documents of the European Commission and to start working on them at an earlier stage.

At this point it is worth recalling the experience so far of the Polish

[17] Andrew Makower, *Życie po Lizbonie – dostosowanie rozwiązań administracyjnych [Life after Lisbon – adjustment of administrative solutions]*, materials from a conference at the Senate of the Republic of Poland "Treaty of Lisbon – Treaty of European Parliaments", Warsaw, 22–23 February 2010.

parliament in direct communication with the European Commission. It was envisaged by the so-called "Barosso Initiative" of 2006, under which – in spite of the lack of a treaty obligation – the European Commission would send EU legislative proposals to national parliaments, expecting them to give their opinion. Although such opinions were in no way binding, they let the European Commission know the position of parliaments and, if necessary, make corrections to the proposals.

The Sejm and the Senate used that instrument only to a very little extent. None of the chambers of the Polish parliament found its way to the group of the most active ones, such as the senates of France and the Czech Republic, the German Bundesrat, the British House of Lords or the parliaments of Sweden, Denmark and Portugal which altogether submitted almost three fourths of the 718 opinions the European Commission received in the years 2006–2009. During that period, the Polish Senate issued only one opinion, and the Sejm – six opinions (Table 1).

Table 1. Number of responses by the Sejm and the Senate to the proposals sent under the so-called "Barroso Initiative"

	2006	2007	2008	2009
Sejm	1	0	5	0
Senate	1	0	0	0

Source: European Commission, *Annual Report 2008 on relations between the European Commission and the National Parliaments*, COM(2009) 343, 7 July 2010; European Commission, *Annual Report 2009 on relations between the European Commission and the National Parliaments*, COM(2010) 291, 2 June 2010.

Examining the compliance of legislative proposals with the subsidiarity principle

The most important and the most widely discussed innovation of the Lisbon Treaty regarding the role of national parliaments in the decision-making process of the European Union, is granting them the role of "the guardians of subsidiarity". This power has been described in the two above-mentioned Protocols attached to the Lisbon Treaty.

Parliaments can assess the compliance with the subsidiarity principle *ex ante* and *ex post*. For the *ex ante* evaluation, the so–called "yellow card" and "orange card" procedures have been introduced (also called an "early warning" mechanism). Any chamber of a national parliament which decides that a draft EU legislative act does not comply with the principle of subsidiarity, may issue a so-called reasoned opinion within eight weeks from the date of transmission of the draft (Art. 6 of Protocol on the application of the principles of subsidiarity and proportionality). If such a view is expressed by one third of parliamentary chambers (one quarter when the legislative act regards the area of freedom,

security and justice), the draft must be reviewed. After such review, the proposal may be maintained, withdrawn or amended, with reasons given for the decision ("yellow card" procedure). If an ordinary majority of chambers give their opinion against the draft (only within the framework of the ordinary legislative procedure), and the European Commission decides to maintain the proposal, it is obliged to justify why it believes the proposal to be compliant with the principle of subsidiarity. Opinions of parliaments and the opinion of the European Commission will be attached to the draft and will be taken into account in the decision-making process. The European Parliament and the Council will then assess the compliance of the act with the subsidiarity principle before the first reading and with the ordinary majority (in case of the European Parliament) or with a 55% majority of votes (in case of the Council) can decide about its non-compliance with this principle ("orange card"). This means the end of the legislative process. The "orange card" procedure applies, however, only to the legislative acts adopted under the ordinary legislative procedure (it does not apply to the acts adopted under the special legislative procedure), which does constitute a certain restriction on the application of the new powers of parliaments.

The subsidiarity principle
Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. (Art. 5. of the Treaty on European Union).

The *ex post* evaluation consists in granting parliaments the right to refer an act to the Court of Justice in case of non-compliance with the subsidiarity principle, following the internal procedure of a given parliament or a given chamber or through the agency of the executive branch. This evaluation method will be more widely discussed further down in the paper.

What is important, in the case of bicameral parliaments, each chamber acts autonomously in the above-mentioned competence framework, both issuing reasoned opinions, as well as submitting their complaint to the Court of Justice. This represents significant enhancement of the status of the upper chambers, including the Polish Senate, in the area of EU matters.

The Sejm and the Senate have participated in subsidiarity checks carried out by the Conference of Community and European Affairs Committees (Conférence des Organes Specialisés dans les Affaires Communautaires, COSAC).[18] According to officials, the checks have been successful and no serious problems have been encountered.

In the period between January and December 2010, national parliaments of the Member States issued, in total thirty three reasoned opinions, out of which two were prepared by the Sejm, and four by the Senate.[19] Reasoned opinions on two drafts of EU legislative acts were submitted by both chambers of the Polish

[18] Forum of cooperation of parliaments in the European Union – http://www.cosac.eu.
[19] As at 8 December 2010 – http://www.ipex.eu.

parliament. One of the Senate's opinions regarded the seasonal workers directive. It was the act on which the greatest number of reasoned opinions were issued –– seven –– but still too few to launch the "yellow card" mechanism.

The officials working at the Polish parliament are rather sceptical about the possibility of applying the "yellow" and the "orange card" procedures. Such view is probably common all over Europe. An opinion prevails that it will be easier to convince their own government and win a majority in the Council than to obtain reasoned opinions from one third of parliamentary chambers in the European Union. This instrument can serve the purpose of exerting pressure on the European Commission rather than being put to official use.

The internal procedures concerning the subsidiarity principle must be regulated in the Rules of Procedure of the Sejm and the Senate. What is important, under the new Act on Cooperation, the Council of Ministers will be obliged to include information about the compliance of an EU legislative proposal with principle of subsidiarity in the so-called government positions sent to the parliament. Thus in practice, it will be the responsibility of the government to check compliance with the subsidiarity principle, and the two chambers will have to decide to what extent they agree with this assessment.

Referral to the Court of Justice

The procedure of examining the compliance of EU legislative acts with the subsidiarity principle *ex post* raised some controversy in the relations between the parliament and the government during the work on the Act on Cooperation. A problem that required solution was whether the Sejm or the Senate should submit their complaints independently or through the government. The Council of Ministers proposed that the government should be an intermediary in submitting a complaint only when it shared the objections of the Sejm or the Senate – otherwise the chamber should file the complaint independently. That would make it possible to avoid a conflict situation when the government would have to submit a complaint with which it disagrees.[20]

Experts of the Sejm Bureau of Research argued that even though the solution proposed by the government seemed more effective and logically justified, it could, however, be regarded as unconstitutional.[21] Irrespective of the power granted to parliaments in the Treaty of Lisbon, parliament chambers cannot present their position directly on the forum of international organisations, therefore adoption of such a solution would require a prior amendment to the Constitution. Eventually the Act provides for an obligation to file a complaint to the Court of Justice by the Prime Minister on the basis of a resolution of the Sejm or of the Senate (Art. 16). The chambers authorise the Prime Minister to represent

[20] During a meeting of the Sejm Committee for European Affairs such a solution was compared to a situation when a person who does not want the divorce, is forced to draft the petition – see ”Biuletyn z posiedzenia Komisji do spraw Unii Europejskiej” [Newsletter of the meeting of the European Affairs Committee], no. 175 (3655/VI term of office, 9 April 2010, pp. 16–17.

[21] *Ibidem*, pp. 17–18.

them in matters related to their complaint (Art. 16 sec. 2) and only they (the chamber filing the complaint, respectively) can decide to withdraw it (Art. 16 sec. 4).

Passerelle procedures

The Lisbon Treaty grants national parliaments the power of veto against some of the passerelle procedures. These procedures can be divided into two groups: structural ones, defined in the Treaty on European Union as "simplified revision procedures" (Art. of 48 sec. 6–7 of the consolidated version of the Treaty[22]), and the *ad hoc* passerelle procedures provided for in other articles of the Treaty. The simplified revision procedure according to Art. 48 applies to:

- revision of the Third Part of the Treaty on the functioning of the European Union – "Internal policies and action of the Union" (Art. 48 sec. 6),[23]
- going from the unanimity vote to qualified majority vote in the Council in a given area of EU activity (Art. 48 sec. 7),
- going from the special legislative procedure to ordinary legislative procedure in a given area of EU activity (Art. 48 sec. 7).

All the above-mentioned decisions shall be made unanimously by the European Council. In the first case "the decision shall not enter into force until it is approved by the Member States in accordance with their respective constitutional requirements" (Art. 48 sec. 6). Thus no special role has been envisaged here for national parliaments, but the Sejm and the Senate have been included in the Polish procedure for approval of such a decision. According to Art. 23 of the new Act on Cooperation, amending the Act on international agreements, any act adopted in this mode shall require ratification with the consent granted in the form of a statute by force of Art. 89 sec. of 1 of the Constitution of the Republic of Poland.

A role for parliaments has been envisaged in the provisions of the Lisbon Treaty in two remaining cases, where the requirement for the approval of the decision by the Member States has been replaced with the power of veto against such decisions granted to parliaments. An objection of any parliament lodged within six months means that the decision is not adopted.

In this particular case, the Act on Cooperation does not provide for ratification as such. However, a similar solution has been used. According to Art. 14 of this act, a decision on the Polish position is made by the President at the request of the government with the consent given in a statute. The Act on Cooperation determines, whether the representative of Poland will be in favour of adopting a

[22] Official Journal of the EU, 2010/C 83/01, 30 March 2010.

[23] This concerns the activity of the European Union in the following areas: internal market, free movement of goods, persons, services and capital, agriculture and fisheries, area of freedom, security and justice, competition, taxation and approximation of laws, economic and monetary policy, employment, social policy, European Social Fund, education, youth and sport, culture, public health, consumer protection, Trans–European networks, industry, cohesion policy, research and development, environmental protection, energy, tourism, civil protection, administrative cooperation (Treaty on the functioning of the European Union, Part Three, Titles I–XXIV, Official Journal of the EU 2010/C 83/01, 30 March 2010).

legislative proposal or whether he will abstain from voting. If the President refrains from making a decision, the representative of Poland shall vote for rejecting the proposal. The procedure does differ, but as a matter of fact, the role of the Sejm and the Senate is similar – under this procedure, the parliament may block the decision by failing to pass the relevant statute.

The same procedure has been applied to other passerelle procedures defined in the Treaty, applicable to specific areas of EU activity. Article 14 of the Act on Cooperation deals with procedures in which the European Council decides unanimously,[24] whereas Art. 15 of the same act applies to the procedures where the Council (of the European Union) decides.[25] Since each of these procedures actually leads to the amendment of the treaty without carrying out the ratification process, the decision has been made that the national procedure of deciding about the Polish position on those issues should include the parties that would have been involved if ratification had been required. Thus the Sejm and the Senate will be able to block every such decision.

In the course of work on the Act on Cooperation, the passerelle procedures caused a lot of controversy – of both legal and political nature. Doubts were raised by the very fact of involving the parliament and the President in deciding about the position of Poland within the decision-making process in the Council or in the European Council, as foreign policy is the responsibility of the government. One of the experts regarded the solution described above, including the statutory consent, to be an infringement upon the constitutional powers of the Council of Ministers to decide about the position to be presented at the meetings of the European Council as well as a violation of the division and balance of powers[26] (two experts held an opposite view[27]).

The critical opinions in that matter were shared by the Senate, which

[24] The provisions in question: Art. 31 sec. 3 of the Treaty on European Union – extension of the right of the Council to act by qualified majority in the area of foreign policy, Art. 312 sec. 2. of the Treaty on the functioning of the European Union – authorising the Council to act by qualified majority when adopting the so-called multiannual financial framework and the acts referred to in the Protocol No. 9 (on the decision of the Council relating to the implementation of Art. 16 sec. 4 of the Treaty on European Union and Art. 238 sec. 2 of the Treaty on the functioning of the European Union between 1 November 2014 and 31 March 2017 and as from 1st April 2017).

[25] The provision in question is Art. 81 sec. 3 of the Treaty on the functioning of the European Union – going from the special legislative procedure to the ordinary legislative procedure in case of certain aspects of family law, Art. 153 sec. 2 of the Treaty on the functioning of the European Union – applying the ordinary legislative procedure to certain aspects of labour law, Art. 192 sect. 2 of the Treaty on the functioning of the European Union – applying the ordinary legislative procedure to certain aspects of environmental protection law, Art. 333 sect. 1–2 of the Treaty on the functioning of the European Union – applying the qualified majority vote in the Council or the ordinary legislative procedure to decisions on enhanced cooperation.

[26] Piotr Czarny, *Opinia prawna na temat wybranych rozwiązań projektu ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Legal opinion on selected provisions of the proposed act on the cooperation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the European Union (in reference to print no. 3000)*, 4 June 2010.

[27] Andrzej Szmyt, *Opinia prawna na temat wybranych rozwiązań projektu ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Legal opinion on selected provisions of the proposed act on the cooperation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the European Union (in reference to print no. 3000)*, 4 June 2010.

proposed an amendment according to which the opinion of the Sejm and the Senate concerning the decision of the European Council in the above-mentioned issues would not be binding for the government. The Council of Ministers would seek the opinion of the Sejm and the Senate, and if it failed to take it into account, it would explain the reasons for the divergence.[28] Thus the Senate abandoned the concept of the necessary requirement for a statutory consent. Quoting the opinions of constitutional law specialists (Bogusław Banaszak and Ryszard Piotrowski), the Senate argued that raising the act concerning a specific position of the government on a decision of the European Council to the rank of a statute was inadmissible, since such an act would not be of general character, and only such regulations – according to the legal doctrine and the body of the Constitutional Tribunal's judicial decisions – can constitute a statute.[29] Ryszard Piotrowski shared the doubts expressed by of one of the Sejm experts, and stated that the proposed model for deciding on the government position violated the constitutional division of powers. Making the action of the Council of Ministers in European matters dependent on passing a statute constitutes an excessive interference of the legislative branch in the competence of the government. The role of the President is still another problem – the proposed act confers on him powers related to EU policy-making which do not have grounds in the Constitution.[30]

The government, on the other hand, voiced some practical concerns as to the application of statutory consent to decisions made under Art. 48 sec. 7 of Treaty on the European Union, towards which national parliaments have the right of veto anyway under the simplified treaty revision procedure. It was argued that there was no need to guarantee that the Sejm and the Senate could influence the position of the government in this respect, as it had already been guaranteed by the right of veto at the EU level.[31]

From a political point of view, it was the role of the President in the process that sparked the greatest disputes. According to the adopted act, whereby the decision on the position of Poland in the European Council within the scope of the above-mentioned articles shall require a consent granted in a statute, the final decision shall belong to the President. Whereas the solution proposed by the

[28] See, the resolution of the Senate of the Republic of Poland dated 12 August 2010 r. on the act on cooperation of the Council of Ministers with the Sejm and the Senate of the Republic of Poland on matters related to the membership of the Republic of Poland in the European Union, Sejm print no. 3339.

[29] With the exceptions set forth in the Constitution (for instance, a budget act, a ratification act) – see Bogusław Banaszak, *Opinia prawna na temat zgodności z Konstytucją RP wybranych regulacji zawartych w projekcie ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Legal opinion on selected provisions of the proposed act on the cooperation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the European Union*, OE–141, Senate of the Republic of Poland.

[30] Ryszard Piotrowski, *Opinia prawna na temat zgodności z Konstytucją RP wybranych regulacji zawartych w projekcie ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej [Legal opinion on selected provisions of the proposed act on the cooperation of the Council of Ministers with the Sejm and the Senate on matters related to the membership of the Republic of Poland in the European Union*, print no. 754, Senate of the Republic of Poland.

[31] See, the statement made by minister Maciej Szpunar during a meeting of the Sejm Committee for European Union Affairs – "Biuletyn z posiedzenia Komisji do spraw Unii Europejskiej" [Newsletter of the meeting of the European Affairs Committee], no. 175 (3655/VI term of office, 9 April 2010), p. 10.

government and the Senate, which does not require passing of a statute, would mean that the President would be excluded from the process of making a decision on these matters, the Sejm's and the Senate's right of veto would be preserved, as they can always veto a decision independently, under Art. 48 sec. 7 of the Treaty on the European Union, as I have mentioned before. It is, however, difficult to say whether the parliament would ever decide to exercise the right of veto, which could be difficult to do politically if a decision has been approved by all Member States (including the Polish government) at the Council or the European Council.

Eventually, the Sejm rejected the amendments proposed by the Senate and did not include the government's proposal. As far as the passerelle procedures are concerned, the above-mentioned solutions have been applied (ratification or agreement), thus guaranteeing influence over the decision to all bodies: the Sejm and the Senate, which express their opinion in a statute, and the President who actually makes the decision.

The presidential proposal of an amendment to the Polish Constitution also applies to the passerelle procedure. It introduces a distinction between the simplified revision procedures that entail the transfer of the competence of state authorities to the EU level and the ones that entail no such consequences. The former would require a consent expressed by a two third majority of votes by the Sejm and by an absolute majority of votes by the Senate (by analogy to the ratification procedure of the currently binding Art. 90 of the Constitution), in case of the latter, statutory solutions would apply.[32]

Flexibility clause

Another possibility to actually change the treaties without conducting a formal procedure is provided by the so-called flexibility clause, included in Art. 352 of the Treaty on the functioning of the European Union. It enables the European Union to undertake action not provided for in the treaties, if it is necessary to attain the objectives set out in the treaties. In such a situation, at the request of the European Commission, the Council may unanimously adopt the appropriate measures without the need for treaty amendments, provided that it obtains the consent of the European Parliament.

Articles 7 and 11 of the new Act on Cooperation apply to the acts adopted on the basis of the flexibility clause. According to these provisions, before a proposal is considered by the Council, the government is obliged to seek the opinion of the relevant bodies of the Sejm and the Senate before presenting the position of Poland on the proposal. These opinions, similarly to the opinions concerning other EU legislative proposals, should constitute the basis for the Polish position, but they are not binding. Failure to take them into consideration results in the obligation to make appropriate explanations before the Sejm committee. Thus, unlike in case of the passerelle procedures, no special powers of the parliament have been provided for in relation to the flexibility clause.

[32] See footnote 25.

Withdrawal from the European Union

In the Lisbon Treaty, the possibility of a Member State's withdrawal from the European Union has been included for the first time. In the withdrawal procedure, set forth in Art. 50 of the Treaty on European Union, no role for national parliaments has been envisaged. It does, however, state that the European Council shall conclude an agreement with the withdrawing state setting out the arrangements for its withdrawal. Such an agreement must be ratified, which requires the approval of the national parliament.

Making the Polish procedure for withdrawal from the European Union more specific caused some legal controversies during the work on the Act on Cooperation (Art. 23), which regulates this issue by an amendment to the Act on international agreements (addition of Art. 22 a).[33] This provision, however, does not introduce any new procedure specially for the act of withdrawal from the European Union, but only confirms the application in such a case of the ordinary procedure of terminating an international agreement which requires a statutory consent (Art. 89 sec. 1 of the Constitution). As one of the expert opinions on the draft act says: "The new provision – in its essence – in comparison with the current state of affairs, constitutes only an »explicit confirmation« of the existing interpretation that a decision to withdraw from the European Union is not an alternative – to the act of «terminating» – form of withdrawing by Poland from the obligations arising from treaties establishing the European Union".[34] Both according to the current legal situation and in accordance with the new act, would require statutory consent and the act would be passed with an ordinary majority of votes by the Sejm and the Senate.

Another solution was also considered, assuming the need to get the qualified majority of two thirds of votes for such an act to be passed. That would be an application of the procedure provided for in Art. 90, which had been accepted for the act of accession to the European Union (the *actu contrario* principle). Experts, however, decided that such a solution, without a prior change of the Constitution, would be incompatible with the ground–law. As it was stated in another opinion, "the requirement for any other majority applies only when the Constitution provides for it, and in case of the act giving consent to terminate an international agreement, referred to in Art. 90 sec. 1, such a requirement has been provided for in the Constitution".[35] In spite of such opinions, the amendment introducing the application of the two thirds majority of votes was introduced by the Senate into the proposal,[36] yet was later rejected.

[33] Act dated 14 April 2000 on international relations (Journal of Laws of 2000, No. 39, item 443; Journal of Laws of 2002, No. 216, item 1824).

[34] Andrzej Szmyt, *Opinia prawna na temat wybranych rozwiązań projektu ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej*, *op. cit*.

[35] Krzysztof Skotnicki, *Opinia prawna na temat wybranych rozwiązań projektu ustawy o współpracy Rady Ministrów z Sejmem i Senatem w sprawach związanych z członkostwem Rzeczypospolitej Polskiej w Unii Europejskiej*, *op. cit*.

[36] Resolution of the Senate of the Republic of Poland dated 12 August 2010 r. on the act on cooperation of the Council of Ministers with the Sejm and the Senate of the Republic of Poland on matters related to the

In his initiative to amend the Constitution, President Bronisław Komorowski also proposed such a solution. According to this proposal, a decision to withdraw from the European Union would be made by the government with the consent granted in a statute. Such a statute would be passed with the two third majority of votes at the Sejm and with an absolute majority of votes at the Senate.[37]

An important competence granted to national parliaments by the Lisbon Treaty is also the monitoring of the European Union's activities within the framework of the so-called areas of freedom, security and justice, including the operation of Europol and Eurojust (Art. 12 c of the Treaty on the European Union, Art. 85 and 89 of the Treaty on the functioning of the European Union). However, because of the lack of secondary legislation, the monitoring is currently not carried out. An initiative of the European Commission in this matter is expected that would propose the implementation of provisions in cooperation with national parliaments. According to information obtained at the Chancellery of the Sejm, the issue of implementing these provisions of the Treaty could become one of the subjects of the parliamentary dimension of the Polish Presidency of the Council of the European Union and the presidency of the Conference of Community and European Affairs Committees.

Conclusions

The changes introduced by the Lisbon Treaty have had a twofold positive effect on the participation of the Sejm and the Senate in the EU policy-making in Poland. Firstly, these changes have lead to the reflection on and the evaluation of the system of cooperation between central institutions in EU matters. This should lead to improving the effectiveness of this cooperation, to filling the gaps in the existing law and to proper organisation of a number of issues, especially those connected directly with the reforms of the Lisbon Treaty. For example, provisions were introduced, concerning the cooperation on European matters during the Polish EU Presidency. However, such a comprehensive approach has been the reason why the adjustment process in the Polish parliament has taken such a long time.

Secondly, the Treaty has had a positive effect on the role of the Sejm and the Senate in EU policy-making not only through its provisions, but also indirectly – through domestic regulations which have been subsequently adopted. In the course of the adjustment process, national parliaments have managed to gain greater powers. For example, this was how the Sejm and the Senate gained decisive influence on the Polish position within the passerelle procedure.

The adjustment process is still underway, but the completion of work on the new Act on Cooperation concluded its most important and most time-consuming phase. The effectiveness of the parliament's activity in European matters will

membership of the Republic of Poland in the European Union (Sejm print no. 3339).

[37] See footnote 25.

largely depend on changes in the Rules of Procedure and – to an even greater extent – on the willingness of members of parliament to make use of the tools they have received.

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