

## PARTICIPATION OF THE PRESIDENT OF THE REPUBLIC OF POLAND IN THE PROCESS OF IMPLEMENTING EUROPEAN UNION

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**Abstract.** *The implementation of European Union law is an obligation of the member states of this international organisation. In essence, it consists of the implementation of European Union law in the national legal system so as to ensure not only its validity but also its effective functioning. In the reality of the legal system of the Republic of Poland, implementation in fact implies enacting laws for the implementation of EU law in the national legal system. In this process, the leading role is played by the Council of Ministers, and the Sejm and the Senate. However, one cannot forget the important role of the President of the Republic of Poland, without whose participation the implementation process would not be completed. This paper is an attempt to provide a theoretical analysis of the participation of the Head of State in the implementation process, with particular emphasis on the systemic practice in recent years.*

**Key words:** *implementation of EU law, President of the Republic of Poland, European Union law*

### 1. INTRODUCTION

Pursuant to Article 10 (§2) of the Constitution of the Republic of Poland, the President is a constituent part of the dualistic executive, including the President of the Republic of Poland and the Council of Ministers.<sup>1</sup> Within the framework of powers exercised by the President, he participates in the process of implementation of EU law into the legal system of the Republic

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<sup>1</sup> The Constitution of the Republic of Poland, *Dziennik Ustaw* No. 78, item 483 (of 2 April 1997); <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>

of Poland (Grzybowski, 2004: 7). The President's participation in this process is essential for the proper implementation of EU law. However, the scope of his participation may concern only the final stage of the implementation process, where it is limited to the necessary minimum, or it may also concern the first stage of the implementation process related to the preparation of draft laws implementing EU law in the legal system of the Republic of Poland (Więckowska, 2004: 79). In the second case, it is an optional possibility, constituting an exception to the principle that the obligation to prepare and bring draft implementation laws to the Sejm's deliberations rests with the Council of Ministers. The President is one of the entities indicated in Article 118 (§1) of the Constitution as having the legislative initiative. Thus, it is possible for draft implementation laws to be submitted to the Sejm on the initiative of the President of the Republic. However, in view of the division of competences and tasks provided in the Constitution for the President and for the Council of Ministers, it can be said that this would be an exception to the rule, where it is a clear competence of the government. This is because, in principle, the constitutional position of the President is to exercise the function of arbitrator and the function of reserve power (Chorążewska, 2005: 68). This means that, as a rule, the President should not carry out day-to-day state policy, which is the domain of the Council of Ministers. Thus, the President should only act on current state policy in exceptional situations. This position is also confirmed by the content of Article 126 (§3) of the Constitution, according to which the President performs his tasks to the extent and on the principles set out in the Constitution and laws. Further confirmation of this understanding of the role and tasks of the head of state is provided in Article 133 (§1 and §3) of the Constitution. They clearly indicate the area of foreign policy as an area of presidential competence. This is a confirmation of the lack of jurisdiction of the head of state in matters of day-to-day state policy (Mojak, 1997: 54).

## 2. LEGAL REGULATIONS AND POSITIVE CONSTITUTIONAL LAW

Given that the President of the Republic is explicitly vested with authorities in the area of foreign policy, he has jurisdiction to participate in the implementation of EU law into the legal system of the Republic of Poland. Thus, the President's involvement in the preparation of draft implementation laws could imply a violation of the division of competences within the bicameral executive branch functioning under the parliamentary-cabinet system. An additional element confirming such an interpretation of the mutual relations and of the functions, role and tasks of the Council of Ministers and the President are the provisions contained in the Constitution, as a result of which the system of the Republic of Poland is described as a rationalised parliamentary-cabinet system (Łabno, 2005: 7). This is because the provisions in question lead to an additional strengthening of the position of the Council of Ministers within the political system of the Republic of Poland. This strengthening also implies an even clearer positioning of the President of the Republic as a subject who, as a rule, does not get involved in day-to-day issues of current state policy. The presented way of perceiving and understanding mutual relations within the bicameral executive branch was also confirmed in the ruling of the Constitutional Court concerning the manner of representation of the Republic of Poland at the summit of the European Council (Decision of the Constitutional Court of 20 May 2009 in case ref. no. Kpt 2/08). However, the President has instruments with which he can initiate the process of implementation of EU law into the legal system of the Republic of Poland and influence its course (Trubalski, 2016: 116). As already mentioned, the President has the legislative

initiative. Thus, he can submit draft laws to the Sejm in the area of implementation of EU law and participate through his representative in the course of the legislative process. It should be noted that the exercise of the legislative initiative by the President belongs to the personal powers of the head of state, which do not require the countersignature of the Prime Minister. Thus, the President may take a decision in this regard at his discretion, but bearing in mind his constitutional competences and systemic roles. Despite the formally envisaged possibility for the President to participate in the legislative process, the view that he should not participate in the first stage of the implementation process (i.e. preparing the draft implementation law) should be considered correct. The role of the President becomes important at the final stage of the implementation process (i.e. signing the bill), which involves examining its content in terms of its compliance with the Constitution. Without the President's participation, the implementation process cannot be completed. Thus, the President's interpretation of the constitution enjoys precedence over other state bodies, except for the Constitutional Court, whose rulings have a final and universally binding force.

Turning to the analysis of the President's participation in the final stage of the implementation process, it must be emphasized once again that this participation is obligatory. First of all, it should be noted that upon completion of the legislative process before the Sejm and the Senate, pursuant to the provision of Article 122 (§1) of the Constitution, the Speaker of the Sejm submits the enacted bill to the President for signature. Once the enacted bill has been presented for signature, the President may decide to sign the law or refuse to sign it. He may also refer the enacted bill to the Constitutional Court to examine its constitutionality. (Article 122 (§3) of the Constitution). The second option is for the President to exercise a legislative veto. The Sejm may re-enact such a law by a majority of 3/5 votes, in the presence of at least half of the statutory number of MPs (Balicki, 1999: 42). In such a case, the President signs the law within seven days and orders its publication in the Journal of Laws of the Republic of Poland. If a law is re-enacted by the Sejm, the President may not refer it to the Constitutional Court for examination of its compliance with the Constitution (Article 122 (§5) of the Constitution). Based on the constitutional law premises, the President may also take actions with respect to the enacted law sent for his approval. As noted earlier, the point of departure of such actions is to interpret the provisions of the Constitution and to ensure its observance. Thus, after analysing the sent law, the head of state may conclude that it is constitutional. Consequently, he shall sign it within 21 days of its submission and order its promulgation in the Journal of Laws of the Republic of Poland (Article 122 (§2) of the Constitution). He may also raise doubts as to the constitutionality of particular provisions contained in the law presented for signature. In such a situation, prior to signing the act, the President may submit a motion to the Constitutional Court concerning the compliance of the act with the Constitution (Article 122 (§4) of the Constitution). As evident from the provision in question, this is an optional possibility that may occur if the President has doubts as to the constitutionality of the submitted law. As a result of the examination of the law by the Constitutional Court, he may declare that the law is constitutional or that the law is not constitutional. If the law is found to be constitutional, the President cannot refuse to sign it (Article 122 (§3) of the Constitution). If, on the other hand, the Constitutional Court has declared the law unconstitutional, the president shall refuse to sign the law (Article 122 (§3) of the Constitution). Depending on the nature and, above all, the extent of the inconsistency, the President may, after consultation with the Speaker of the Sejm, sign the law with the omission of the provisions deemed unconstitutional or return the law to the Sejm to remove the inconsistency (Trubalski, 2016: 120). The possibility described above for the President to

refer the adopted bill to the Constitutional Court is prior in nature, as it can take place before the law is signed. The Constitution also allows the President to address the Constitutional Court, which will be consequential. This is because he can sign the law and order its promulgation and then refer to the Constitutional Court to examine its compliance with the Constitution (Mołdawa, Szymanek, 2010: 13).

Therefore, the participation of the President in the final stage of the implementation process should be considered crucial. The participation of the head of state in this process should be treated as a manifestation of his role as the guardian of the Constitution. Assuming that it is formally possible to implement EU law into the legal system of the Republic of Poland by means of regulatory acts of the executive on implementing the law, it should be noted that the President of the Republic of Poland also has the formal possibility to issue such regulations. Therefore, the participation of the head of state in the process of implementation of EU law could include issuing such regulations. However, in view of the fact that the President, despite the absence of formal obstacles, is not the subject who exercises the legislative initiative with regard to implementation laws, it should be analogously concluded that he is even less the subject competent to issue implementation regulations as executive acts to laws. Despite the formal possibility for the President of the Republic of Poland to participate in initiating the implementation process, and issuing implementation regulations, it should be concluded that the head of state is not the competent body to undertake such actions (Wojtyczek, 2001: 54). Nevertheless, the President can influence actions related to current state policy through his authority.

In certain situations related to the creation of EU law enforceable in the legal system of the Republic of Poland, there is cooperation between the President and the Council of Ministers. Their cooperation on this matter is significant as it concerns EU legal acts of great importance for the functioning of this international organisation as well as individual member states (Prokopowicz, 2019: 207-237). The detailed premises of cooperation and its mode are regulated by the provisions of Articles 14 and 15 of the Act on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters Related to the Membership of the Republic of Poland in the European Union (hereinafter: the Cooperation Act)<sup>2</sup>. In turn, as a result of the cooperation between the President and the Council of Ministers, the Head of State is entitled to take a binding decision on the subject of EU lawmaking. However, the decision in question is not of a substantive nature. It concerns the possibility to use a derogation from the standard law-making procedure in a given situation (Barcz, 2012: 150). Here, the subject matter of consideration are the issues relating to EU security, defence and foreign policy matters. As the EU's security, defence and foreign policy issues constitute a rather sensitive area, and one that rubs against the very essence of the sovereignty and independence of each Member State, qualified majorities comprising a sufficient majority of the European Council members and a sufficient majority of the EU's population are required when the EU legislates in this area. The consent of the representative of the Republic of Poland sitting in the European Council is necessary in the case of the above-described derogations in the procedure for the enactment of EU law that may be directly applicable in the legal system of the Republic of Poland or that requires implementation in the legal system of the Republic of Poland. This body has the power to

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<sup>2</sup> Act on Cooperation of the Council of Ministers with the Sejm and the Senate in Matters relating to the Membership of the Republic of Poland in the European Union of 8 October 2010, *Dziennik Ustaw* of 2010, No. 213, item 1395; [https://www.sejm.gov.pl/prawo/ustawa\\_kooperacyjna\\_eng/kon12.htm](https://www.sejm.gov.pl/prawo/ustawa_kooperacyjna_eng/kon12.htm)

authorise the European Council to deviate from the procedures usually adopted in a given situation in favour of procedures that are more lenient and, therefore, easier to obtain. However, as already mentioned, the lowering of formal requirements for the majority necessary for EU lawmaking in the fields of security, defence or finance encroaches significantly on competences hitherto envisaged for the EU Member States. It may also have serious and long-term political, military and financial consequences.

For this reason, the Cooperation Act (2010) contains special procedures to best secure the process of authorising the Polish representative in the European Council to express his/her position in this area. This is important because the opposition of even one representative of a Member State sitting in the European Council blocks the possibility of authorising the Council to legislate the EU through a less stringent majority procedure. The consent of the representative of the Republic of Poland to legislate in the area of security, defence, or EU finances on the basis of less stringent procedures implies consent to regulate at the EU level issues that have hitherto been the responsibility of individual Member States. Normally, EU lawmaking in these areas required a large qualified majority. In addition, Member States opposed to a particular solution could seek to build a so-called blocking minority, which meant that a qualified majority was deemed not to have been achieved. The reduction of these requirements by the unanimous position of the European Council must be regarded as a significant weakening of the competence of the Member States in the areas in question and a transfer of this competence to the law-making bodies of the EU. This implies a weakening of the position of the state vis-à-vis the EU, as well as the practical possibility of adopting solutions that are unfavourable to certain EU Member States. This is why the consent of the representative of the Republic of Poland in the European Council to lower the requirements necessary for the adoption of a legal act was subject to very strict conditions.

### 3. INTERPRETATION AND CRITICISM OF THE CONSTITUTIONAL FRAMEWORK ON THE AUTHORITY OF THE HEAD OF STATE

Analysing the issue in question, one may come to the conviction that the solutions adopted in the Cooperation Act in this regard are a derivative of the regulations set out in Article 90 (§1) of the Constitution (Wojtyczek, 2007: 238). The creators of the Cooperation Act rightly perceived that, in the case of such sensitive issues as security, defence and foreign policy, it is necessary to create special procedures in order to forestall an action in this area that is not fully thought out or not fully in line with the interests of the state. In effect, the adopted solution differs somewhat from that provided in Article 90 (§2) of the Constitution, which establishes a high qualified majority in both chambers of parliament, allowing the passing of a law giving consent to the ratification of an international agreement on the basis of which the competences of the bodies of state power in certain matters are transferred to an international organisation or international body. Pursuant to Article 14 of the Cooperation Act, the decision on the position of the Republic of Poland on the draft EU legal act in the scope discussed above in the period between 1 November 2014 and 31 March 2017 (as regards matters governed by the Treaty on the Functioning of the European Union) and from 1 April 2017 (in respect of matters governed by the Treaty on the European Union) shall be taken by the President, upon the proposal of the Council of Ministers and with the consent of Parliament embodied in the law. In other words, the interaction of the Council of Ministers, the Parliament and the President of the Republic is necessary (Wojtyczek, 2010: 31).

However, despite the request of the Council of Ministers and the consent of Parliament embodied in the enacted law, the President can take a negative decision, or refuse to take a decision. This means that he has the decisive vote and is not bound by the position of the other bodies acting in the case. The President's autonomy in this respect is dictated by two fundamental issues. Firstly, the fact that he is not politically accountable to the Sejm, and that the Prime Minister is accountable on his behalf to the Parliament by countersigning official acts of the head of state (Trubalski, 2016: 125). Any binding of the President by the content of an adopted legislative act would mean that the Head of State is effectively accountable to the Sejm, which would clearly constitute a violation of the basic principles of the political system of the Republic of Poland and the mutual relations between the legislature and the executive. In the reality of the current Constitution, the body of the executive power controlled by and accountable to the Sejm is the Council of Ministers (Wójtowicz, 2008: 78). On the other hand, the concept of leaving the final and binding decision to the President in this respect deserves full approval, as the essence of the President's actions is to be active in special situations. Such situations include the possibility to delegate to the EU the competence to legislate in the area of security, defence or foreign policy. Moreover, the issues in question seem to go beyond the conduct of day-to-day state policy reserved for the Council of Ministers. In addition, issues concerning security, defence and foreign policy fall within the competences and roles exercised by the head of state under the Constitution.

The indicated competences of the President are not only part of the roles exercised by the President as set out in the Constitution concerning security, defence and foreign policy of the state. The possibility for the head of state to take decisions in these areas is primarily an expression of the President's role as the guardian of the Constitution and the guardian of state sovereignty. The possibility to legislate at the EU level in the fields of security, defence and foreign policy, and even more so the lowering of the formal requirements for a majority of votes for legislating in this area, is undoubtedly related to the competences hitherto specific only to sovereign states. Therefore, the transfer of competences in this area to the EU and its bodies is linked to the loss of some competences in this area by states. So far, competences so closely related to the core of sovereignty of the EU Member States have not been transferred to the EU and its bodies. Therefore, the introduction of a special mechanism in the Cooperation Act concerning this range of matters should be considered as appropriate (Wojtyczek, 2007: 341). A similar procedure for presidential decision-making is set out in Article 15 of the Cooperation Act. The identical decision-making procedure is envisaged in the provision of Article 14 of the Cooperation Act. However, when drafting a legislative act, the substantive scope of the national legislation to be covered by EU regulation may differ. The EU regulation covers the issue of judicial cooperation in civil matters. More specifically, it concerns family law regulations with cross-border implications. Another area covered by the EU regulation is social policy issues relating to labour issues. In addition, fiscal environmental issues and issues related to enhanced cooperation come into play (Chruściak, 2011: 246).

The President's interaction with the Council of Ministers, and the Sejm and the Senate, in matters related to Poland's EU membership is an important element of the systemic concept of law implementation. It does not directly concern only the law implementation process but also the law-making process at the EU level and the participation of representatives of the Republic of Poland in it. Nevertheless, the law enacted at the EU level determines the shape and scope of the implementation process and, above all, the

content of (national) laws implementing EU law. In this context, the distinctive features of the President's participation in the legislative process and authority to approve the lawmaking decisions are crucial. Currently, it can be said that the procedure established in the provisions of the Cooperation Act is sufficient for lawmaking at the EU level in the fields of security, defence and foreign policy (Trubalski, 2016: 129).

When juxtaposing the procedure provided for in the provisions of the Cooperation Act with the procedure envisaged in Article 90 (§2) of the Constitution, it should be stated that the procedure contained in the Constitution pertains to the general delegation of competence in certain matters. On the other hand, the procedure envisaged in the Cooperation Act relates to the individual delegation of competence to the representative of the Republic of Poland to consent to the creation of EU law in areas considered sensitive due to the very essence of state sovereignty (Wojtyczek, 2007: 42).

#### 4. CONCLUSION

During the many years of Poland's membership in the European Union, the systemic practice of the implementation of EU law into the legal system of the Republic of Poland indicates that the President's role and participation in the implementation process has increased over time, when compared to its initial level. It refers not only to the content of the implementation laws but also to the President's role as the guardian of the Constitution. This is particularly significant in the context of actions taken by the EU and its bodies regarding the model of the judiciary in Poland, or attempts to transform the EU into a federation of states. The initiatives emerging at the level of the EU institutions regarding the establishment of a common army are also not without significance. In that context, it can be said that the importance of the President of the Republic of Poland in the implementation process as well as in the overall membership and functioning of Poland in the EU has been growing over the past years.

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## **UČEŠĆE PREDSEDNIKA REPUBLIKE POLJSKE U PROCESU IMPLEMENTACIJE PRAVA EVROPSKE UNIJE**

*Primena prava Evropske unije obaveza je država članica ove međunarodne organizacije. U suštini, ova obaveza podrazumeva implementaciju prava Evropske unije u nacionalni pravni sistem kako bi se osigurala validnost kao i efikasno funkcionisanje pravnog sistema Republike Poljske. U praksi, implementacija zapravo podrazumeva donošenje zakona za implementaciju prava Evropske unije u nacionalni pravni sistem. U ovom procesu vodeću ulogu imaju Savet ministara (vlada), Sejm i Senat (parlament). Međutim, ne može se izostaviti značajna uloga predsednika Republike Poljske koja je vremenom rasla, a bez čijeg učešća ne bi bilo moguće završiti proces implementacije prava Evropske unije u nacionalni pravni sistem. Svrha ovog rada je pokušaj teorijske analize učešća Predsednika (kao šefa države i čuvara Ustava) u procesu implementacije prava EU u nacionalni pravni sistem, sa posebnim osvrtom na sistemsku praksu poslednjih godina.*

**Ključne reči:** *implementacija prava Evropske unije, predsednik Republike Poljske, pravo Evropske unije.*