

# Representation of Local Government Interests and the Legislative Process

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## Abstract

*The basic principle of the functioning of local self-government is its independence, which is limited by the applicable law created in accordance with the principle of subsidiarity. The article analyzes the normative acts concerning the participation of local self-government bodies in the law-making process. Observation of the practice of their application leads to the conclusion that these solutions are not effective, and they do not correspond to the constitutional guarantees of the territorial self-government system position. The conclusions propose a new mode of selecting the Polish Senate and Self-Government Commission as well as the Polish delegation to the EU Committee of the Regions, which could improve the influence of territorial self-government bodies and the quality of solutions adopted in legal acts.*

**Keywords:** representation of Self-Government, Advisory Body, Joint Government and Self-Government Commission, Senate of the Polish Republic, EU Committee of the Regions, the legislative process in Poland

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## 1 Regulation of Self-Government Position in the Polish Constitution from 1997

In modern constitutionalism, it is already a standard that the basic law regulates not only organization of state organs, but also of territorial self-government. The current Polish Constitution is very reserved in matters of local self-government. The key provision regarding the position of the local government contained in Chapter I regulating the principles of the political system is Article 16 which states that the inhabitants of the units of basic territorial division shall form a self-governing community in accordance with law. This provision also constitutes that local government shall participate in the exercise of public power. The substantial part of public duties which local government is empowered to discharge by statute shall be done in its own name and under its own responsibility. The Basic Law also contains a separate chapter entitled “Local Government,” which specifies the position of the local government, adopting the alleged legal competences of the local government providing that local government shall perform public tasks not reserved by the Constitution or statutes to the organs of other public authorities. However, the Constitution does not specify the full structure of Polish self-government. It is limited to the indication of one basic unit, constituting in Article 164 paragraph 1 of the Constitution, that the commune (Polish: gmina) shall be the basic unit of local government. But the Constitution allows for the creation of other local government units, providing in the same provision that other units of regional and/or local government shall be specified by statute. Thus, the problem of the structure of regional self-government is not constitutional, but as a result of the constitutional delegation, it is a statutory matter.

This means that neither the competences of the regional self-government nor its detailed structure are stabilized by the provisions of the constitution. It follows that it is possible to combine

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and divide the current voivodship-level self-government units. At present there are also postulates to correct the boundaries of voivodships, and even to establish new voivodships. The presumption of competence of the commune indicated in the constitution—see Article 164 (3) of the Constitution—which stipulates that the commune shall perform all tasks of local government not reserved to other units of local government makes a total resignation from other local government units even more possible.

## **2 Representation of Interests of Local Self-Government from the Constitutional Perspective**

It should be emphasized, however, that the constitution recognizes the category of the legal interest of local self-government, determining that units of local government shall possess legal personality. They shall have rights of ownership and other property rights. The Constitution also provides that the self-governing nature of units of local government shall be protected by the courts. In particular, this concerns disputes between local government bodies and state authorities. Article 166, paragraph 3 of the Constitution specifies, moreover, that the administrative courts shall settle jurisdictional disputes between units of local government and units of government administration. Thus, the constitution allows and guarantees the legal interest of local government units, which, what is worth emphasizing, may be different from the interest of state authorities. This applies to the obvious reasons, competences and rights contained in the adopted applicable law. However, I am of the opinion that the interest of local government should also be extended to the process of its creation. The law-making process may lead not only to the creation of new legal provisions but also to the amendment of the currently binding and guaranteed by the provisions of the Constitution. This view is confirmed by the solutions of a number of laws providing for the necessity of consultation before the adoption of a project with the local government.

However, it cannot be overlooked that the interests of the authorities at various levels of local government only remain to a certain extent convergent. It will be in the interest of all of them to strive for decentralization of competence and implementation of the principle of subsidiarity. It may, however, happen that the interests of local self-government bodies may be divergent. This was also noticed by the creators of the Constitution, introducing the institution of disputes of competence between different territorial self-government bodies (Article 166 of the Constitution).

For the purpose of these observations, the interests of units of local government represented by commune self-government bodies, and county (Polish: powiat) and regional government represented by voivodship self-government bodies may be separated. This division is particularly visible after Poland's accession to the European Union, where the voivodship self-government became a serious subject in matters concerning the distribution of EU funds. In the light of currently binding legal solutions, almost half of these funds are distributed by the voivodship self-government. The normative basis for this activity was the Act of 12 May 2000 on the principles of supporting regional development, the Act of 20 April 2004 on the National Development Plan and the Act of 6 December 2006 on the principles of conducting development policy. Currently, two levels of interests of territorial self-governments can be identified, implemented at the level of national legislation and no less important at European level.

## **3 Binding Regulations Concerning the Participation of Local Self-Government in Legislation and Evaluation of their Operation**

Participation in the creation of legal regulations at the national level is defined by numerous statutory regulations. In particular, the regulations of Article 34 paragraph 3 of the Standing Orders of the Sejm of the Republic of Poland should be indicated here. They set forth that an explanatory statement shall also refer to the results of prior consultations and shall distinguish various proposals and opinions presented, especially when there exists a statutory obligation to seek such opinion. In the case of a Committee Bill or a Deputies' Bill in respect of which no consultations have been held, the Marshal of the Sejm shall send such a bill for consultations before referring them for the

first reading, in accordance with procedures and principles specified in separate statutes. These consultations concern first of all self-government bodies.

Similar regulations also apply to the Senate. Article 79a of the Rules and Regulations of the Senate provide that the chair of the Legislation Committee shall request the relevant institutions or organizations to present their opinions on the Bill if the obligation to obtain such opinions results from statutory provisions or from European Union legislation. The Bill shall be submitted to public consultations via the Senate internet site. In addition, the chair of the Legislation Committee shall set an appropriate deadline for presenting the opinions referred to in para. 1 and remarks collected in public consultations so that they may be taken into account during the first reading of the bill.

In both chambers of the parliament there are also special committees dealing with territorial self-government matters. In the Sejm this is the Local Government and Regional Policy Committee responsible for the organization and functioning of local government structure, administration of communal property, municipal economy, physical planning and development of regions and local communities; the scope of activity of the Committee also encompasses examination of outlines of regional policy of the State. In the Senate there is the Local Government and Public Administration Committee dealing with organization and functioning of local-government structures, regional development, local-government finance, communal property management, functioning of state administrative bodies, relations between the State and churches and confessional associations, preservation and development of cultural identity of the national, ethnic and language minorities, along with the protection of their rights.

Similar provisions apply to the government legislative process. In particular, the Act on the Act of 8 August 1996 on the Council of Ministers Art. 7. 4. A member of the Council of Ministers, implementing the policy determined by the Council of Ministers, “in particular: . . . 3) cooperates with territorial self-government, social organizations and representatives of communities both professional and creative.” In addition, the Act of 4 September 1997 on government administration departments provides, in Article 38 paragraph 1, that “in order to fulfill its tasks, the minister managing a specific department cooperates, on terms and in the manner specified in separate regulations and in the scope resulting from the needs of a given department, with other members of the Council of Ministers and other government administration bodies and state organizational units, local self-government bodies.”

The working regulations of the Council of Ministers of October 29, 2013 also indicate in paragraph 21 that “the handling of government documents includes: . . . 2) arrangements, public consultations or opinions on the project.” It seems, therefore, that the interests of local self-government in the law-making process are properly represented. The systemic practice of recent years, however, does not confirm this conclusion. This is partly due to the general problems of the work of the Sejm and the Senate in the law-making process. This particularly applies to the rush in adopting draft laws. Thus, the time for a real consultation is extremely short. In addition, the solutions adopted in the course of work on the act in the Sejm are subject to numerous modifications and often differ significantly from those resulting from the consulted text of the draft law. Amendments to the adopted Act may be proposed practically to start the voting procedure. Because of those reasons the Constitution provides for both the fact that the Marshal of the Sejm may refuse to put to a vote any amendment which has not previously been submitted to a committee—see Article 119 (3) of the Constitution—as well as for the fact that the sponsor may withdraw a Bill in the course of legislative proceedings in the Sejm until the conclusion of its second reading—see Article 119 (4) of the Constitution.

It is also noticeable that the activities specially dedicated to the territorial self-government of the commission, apart from the consideration of projects addressed to them, do not address the problems that are important for the future of self-government, limiting themselves to handling problems of secondary importance. It can even be said that important problems concerning self-government are solved in other leading parliamentary committees, such as the European Union Affairs Committee or Public Finances Committee. It seems that the most important problem of local governments is the problem of their financing. Own revenues of self-government units are growing, but subsidies from the state are still the most important source of financing local government tasks.

Debt of territorial self-government units is also growing, which is partly due to the growing role of EU funds and the necessity to co-finance. The control over the redistribution of budgetary funds is of greater significance than consultation of legal acts including those resulting from the multiannual financial perspectives of the European Union.

In all these indicated legal acts, consultation is only a statutory obligation. Their omission may affect the recognition of the Constitutional Tribunal. They do not provide a real impact on the adopted legal solutions. The dates of consultations are short and substantive proposals are rarely accepted positively. It follows from this conclusion that not only the opinion on the creation of legal acts seems to be insufficient, but also the participation in creating their assumptions and detailed solutions is lacking. Such an institution is at least assumed by the Joint Commission of the Government and Local Self-government which constitutes “a forum for working out a common position of the government and local self-government” (Gawłowski 2015; Zachariasz 2015). Its task is to consider problems related to the functioning of territorial self-government and the state’s policy towards the local government, as well as matters concerning local self-government that are within the scope of the European Union and international organizations to which the Republic of Poland belongs.

The commission consists of representatives of the government and self-government. The governmental side of the Joint Commission consists of the minister competent for public administration and 11 representatives appointed and dismissed by the Prime Minister at the request of the minister competent for public administration. The local government party is represented by appointed representatives of national organizations of local government units. Representatives of both parties selected by the plenum members work in 12 problem teams and 3 working groups. They are additionally supported by experts. Detailed solutions indicate a certain conventionality of the body’s operation. It consists of a small group of members. Legal solutions predict that each party is represented by 12 members. The key in my opinion is that the local government side consists of representatives of national organizations of local government units. Thus, we have a greater representation of these organizations than a representative delegation of local government units. Some observations can also be made about the Commission’s mode of operation, which allows a circular mode of decision-making, eliminating discussion on the problem being resolved, and delegating the Commission’s competences to teams. The limitation of the discussion is indicated by the fact that the subject of a one-day meeting of the Commission sometimes constitutes 50 points on the agenda.

It should also be noted that there is a lack of proper representation of the interests of local self-government in the Sejm and the Senate. An illustration of this phenomenon may be the number of cases that local self-government bodies submit to the Constitutional Tribunal. In total, since the Constitutional Tribunal started its activity, it has dealt with fifty-two cases in which the applicants for examining the compliance of legislative provisions with the constitution were local self-government entities. However, this statistic does not take into account the cases in which, for various reasons, applications originating from these bodies did not pass the initial screening stage before being examined by the full adjudication panel of the Constitutional Tribunal. However, controlling the constitutionality of law brings many disadvantages. First of all, the effects of the judgments of this body work for the future. According to the Constitution a judgment of the Constitutional Tribunal shall take effect from the day of its publication, however, the Constitutional Tribunal may specify another date for the end of the binding force of a normative act — see Article 190 (3) of the Constitution. The second drawback is its durability. Proceedings before the Tribunal usually last no less than a few months. At the same time, it should be stated that it is less important from the point of view of the interests of local government that the regulation of a sub-statutory act is incompatible with the Constitution, because any judge can decide on the non-compliance of such provisions. It is because the Constitution stipulates that judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes — see Article 178 (1).

A separate, but important problem is representing the interests of the voivodship in the structures of the European Union. Since Poland’s accession to the European community, each province has decided to have its permanent representation in Brussels. From that time on, regional self-government has evolved towards the pursuit of political interests. Establishing the European Union

in a gentle but consistent manner influences the system of local authority. This process applies not only to structural changes in local authority, but may, above all, affect the essence and nature of their activity (John 2001, 63).

An example of this may be the document of the Council of Europe—European Charter of Regional Self-government which states that “the right and the capacity of the largest territorial units of each state, with elected bodies, administratively placed between the central government and local self-government and having prerogatives, . . . to manage on their own responsibility and in the interests of residents an essential part of public affairs, in accordance with the principle of subsidiarity”—see Article 3 (1). The Charter also granted regions the right to their own legislation, to participate in the activities of the European institutions, including interregional and cross-border cooperation. Regions forming part of the cross-border area may, respecting the rules of all legal systems concerned and of international law, establish jointly implementing or legislative bodies for themselves”—see Article 8 (2).

Other legal acts that should be mentioned in this context are the European Framework Convention on cross-border cooperation between communities and territorial authorities adopted by the Council of Europe on May 21, 1980 and the European Charter of Border and Cross-Border Regions adopted by the Council of Europe on November 20, 1981.

The European Union has a dominant influence on regions, whose role in relation to regionalism is described as the role of an ally. Europe is the ally of the regions, eroding the state from the top, while the regions do it from the bottom up, providing new resources and opportunities for regional autonomy (Keating 2004, 24). The role of regions today is based to a smaller degree on the authoritative allocation of values, and more on the social mobilization around development and economic growth. The European Union does not require the existence of regions in the Member States, but only the division of units for statistical purposes. Pursuant to the provisions of the regulation, a given Nomenclature of Territorial Units for Statistics (NUTS) territorial unit includes administrative units distinguished on the basis of the state of the population: NUTS 1 level unit should be inhabited by 3 to 7 million people, the population of the smaller NUTS 2 unit is 0,8–3,0 million,<sup>1</sup> even NUTS 3 units should have a population of 150 to 800 thousand. Nevertheless, it is widely believed that the establishment of a provincial level in Poland was an effect of the integration of Poland with the EU (Orłowski and Sobczak 2012). However, it cannot be overlooked that some EU Member States such as Portugal and Ireland have set up regional planning units to become beneficiaries of regional policy. These countries only have to strengthen their administrative capacity within those geographic units that have agreed to be included in the European Union statistical system, but have not created a new level of self-government with its representative institutions (Ziller 2006, 200).

The shape of the regions adopted in the countries of Central Europe, including Poland, is a modern economic gerrymandering, a kind of legal engineering that enables greater structural assistance of the European Union. To a small extent it takes into account the traditions of administrative divisions, a network of economic, cultural or social connections of these areas. Nowhere, however, outside of Poland, was it decided that the capital of the state, developing faster than the rest of the territory of the state, did not constitute a separate statistical unit.

The construction of the Polish self-government of the province is firmly anchored, as mentioned earlier, in the European Local Self-Government Charter of October 15, 1985. The implementation of tasks in the field of programming and implementation of regional development was dominated by Polish voivodship self-governments after Poland’s accession to the European Union. Voivodship self-governments have subordinated their organizational structures and forms of proceedings to the comprehensive modernization of their regions, both in the economic, social and cultural spheres (also in the county and commune dimension).

The institution that ensures the influence of regions on the decision-making process and the creation of law is the EU European Committee of the Regions (CoR). It is an assembly of local and regional representatives that provides sub-national authorities (i.e., regions, counties, provinces, municipalities, and cities) with a direct voice within the EU’s institutional framework.

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1. [In the journal European practice of number notation is followed—for example, 36 333,33 (European style) = 36 333.33 (Canadian style) = 36,333.33 (US and British style).—Ed.]

Established in 1994, the Committee of the Regions was set up to address two main issues. First, about three quarters of EU legislation is implemented at local or regional level, so local and regional representatives needed to have a say in the development of new EU laws. Second, there were concerns about a widening gap between the public and the process of European integration; involving the elected level of government closest to the citizens was one way of closing the gap (Piattoni 2012; Truskolaski and Waligóra 2012).

The EU's Assembly of Regional and Local Representatives has 350 full members and the same number of deputy members. The number from each EU country reflects the size of its population, but ranges from a representation of an average of 88087 citizens of Malta per seat to 3,45 million citizens per German seat. Its members are locally and regionally elected representatives including mayors, regional presidents and councilors.

With regard to Poland, the procedure for determining the composition of the delegation is set out in the Act of 6 May 2005 on the Joint Commission of the Government and Local Self-government and on representatives of the Republic of Poland in the Committee of the Regions of the European Union. It provides that the Council of Ministers submits to the Council of the European Union an application containing a list of 21 candidates for membership and 21 candidates for deputy members of the Committee of the Regions of the European Union, referred to as the "Committee of the Regions." Candidates for members and candidates for deputy members of the Committee of the Regions shall be appointed from among those holding the office of municipal, county or voivodship councilor or mayor (mayor, president of the city), a member of the county board or members of the province board. This means that such a person must be an active self-government participant.

The Council of Ministers lists candidates for the members and candidates for deputy members, appointed by the national organization representing the voivodship self-government units and represented in the Joint Government and Territorial Self-Government Committee—10 candidates for members and 10 candidates for deputy members, all-Poland organization representing local government units county—3 candidates for members and 3 candidates for deputy members. In the case of municipal self-government organizations, communes with more than 300 thousand inhabitants—nominate their 2 candidates for members and 2 candidates for deputy members. Municipalities with the status of a city appoint their candidates in the number of 3 candidates for members and 3 candidates for deputy members. On the other hand, the municipalities whose headquarters are located in the cities located on the territory of these municipalities appoint 1 candidate for a member and 1 candidate for a deputy, while municipalities without a city status and having no seats in their municipalities in cities located on the territory of these municipalities—2 candidates for members and 2 candidates for alternate members. In practice the list of candidates, as appointed by the above-mentioned associations, is then agreed by the Joint Government and Self-Government Commission and presented to the Polish Prime Minister for formal approval and then to the Commission for European Affairs of the Sejm and Senate.

It should be noted that in determining the final candidates for the members of the committee the deciding factor is the government, as evidenced by the fact that almost all current members of the delegation to the Committee of the Regions represent the European People's Party, the party to which the party politicians forming the Polish government belonged in 2014.

## Conclusions

One of the ways to solve this problem would be by admitting people sitting in local self-government bodies to the Senate (Biszytyga and Zientarski 2014; Orłowski and Sobczak 2013). However, the obstacle in this respect is the existing incompatibility of the deputies' and senators' mandate with their function in the local government. This inconsequence, however, does not result directly from the provisions of the Constitution. According to the Constitution the mandate of a Deputy shall not be held jointly with the office of the President of the National Bank of Poland, the President of the Supreme Chamber of Control, the Commissioner for Citizens' Rights, the Commissioner for Children's Rights or their deputies, a member of the Council for Monetary Policy, a member of the National Council of Radio Broadcasting and Television, ambassador, or with employment

in the Chancellery of the Sejm, Chancellery of the Senate, Chancellery of the President of the Republic, or with employment in government administration. This prohibition shall not apply to members of the Council of Ministers and secretaries of state in government administration—see Article 103 (1) of the Constitution. At the same time the Constitution provides for the fact that other instances prohibiting the holding of a mandate of a Deputy or prohibiting the performance of a mandate jointly with other public functions may be specified by statute. These prohibitions now arise from the provisions of Article 25b and Article 27 of the Act of 8 March 1990 on municipal self-government, Article 21 paragraph 8, Article 26 paragraph 3; Article 23 sec. 4 of June 5, 1998 on county self-government and Article 31 paragraph 3, the Act of June 5, 1998 on the self-government of the voivodship.

The abolition of these bans with regard to Senators would allow the use of knowledge and experience of people holding positions from elections in local self-government bodies. The extent of this incompatibility can still be maintained in relation to persons employed in local government administration as well as to persons holding functions in executive organs not originating from general elections.

This proposal will also have a positive effect in relation to the representation of the second chamber. Currently, the regulations of the Constitution in the scope of the Senate show that the second chamber in Poland differs slightly, as far as its political composition is concerned, from the Sejm. It remains the representation of the Nation, elected for the same term as the Sejm, but with a much smaller competence than the first chamber. At the same time, senators are elected in majority elections, which means that leading politicians decide to run for the Sejm, where proportional elections give them greater guarantees of obtaining a mandate. What is also important is that the abolition of the incompatibility of the senator's mandate and the councilor's mandate to the regional assembly does not require constitutional changes, but only statutory changes. It should also be added that the actual election campaign guaranteeing the mandate of the regional council, due to the smaller number of seats to be filled in electoral districts, is significantly higher than in the elections to the Sejm. Therefore, it can be assumed that persons occupying the mandate of the councilor of the voivodship parliament are recognizable by voters to a degree similar to the majority of deputies who do not occupy the leading positions in their political parties.

Supplementary to these solutions is that the local side of the Joint Commission ensures that candidates for members and candidates for alternate members in the Committee of the Regions are represented by all voivodships. This solution only seems to ensure proper representation of individual voivodship self-government units. It is not difficult to notice that a specific voivodship can be represented by the head of a rural commune. Therefore, I think that the existing solutions should be modified in such a way that each voivodship self-government is represented by one member of the Committee of the Regions. In the situation of a large political polarization, such a candidate should be indicated by the regional council and not by the national organization representing the voivodship self-government units. Finally, I also believe that the representation of the remaining levels of local government can be limited to 5 members and 5 deputy members.

### **Legal Acts (in alphabetical order)**

Commission Decision of 24 June 1988. Setting up a Consultative Council of Regional and Local Authorities. 88/487/ECC, Official Journal of the European Communities, L 247, 6 September 1988.

Community Charter of Regionalization. 18 November 1988, OJ UE 19.12.88, No C 326/289.

Europejska Karta Samorządu Terytorialnego, sporządzona w Strasburgu dnia 15 października 1985 r. DzU z 1994 r. nr 124 poz. 607.

Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. uchwalona przez Zgromadzenie Narodowe w dniu 2 kwietnia 1997 r., przyjęta przez Naród w referendum konstytucyjnym w dniu 25 maja 1997 r., podpisana przez Prezydenta Rzeczypospolitej Polskiej w dniu 16 lipca 1997 r. DzU z 1997 r. nr 78 poz. 483.

Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 13 kwietnia 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy o działach administracji rządowej. DzU z 2018 r. poz. 762,

- as amended (see: DzU z 2018 r. poz. 810, DzU z 2018 r. poz. 1090, DzU z 2018 r. poz. 1467, DzU z 2018 r. poz. 1544, DzU z 2018 r. poz. 1560, and DzU z 2018 r. poz. 1669).
- Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 13 kwietnia 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy o samorządzie województwa. DzU z 2018 r. poz. 913, as amended (see: DzU z 2018 r. poz. 1000, and DzU z 2018 r. poz. 1432).
- Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 26 marca 2012 r. w sprawie ogłoszenia jednolitego tekstu ustawy o Radzie Ministrów. DzU z 2012 r. poz. 392, as amended (see: DzU z 2015 r. poz. 1064, and DzU z 2018 r. poz. 166).
- Obwieszczenie Marszałka Sejmu Rzeczypospolitej Polskiej z dnia 9 maja 2018 r. w sprawie ogłoszenia jednolitego tekstu ustawy o samorządzie powiatowym. DzU z 2018 r. poz. 995, as amended (see: DzU z 2018 r. 1000, DzU z 2018 r. poz. 1349, and DzU z 2018 r. poz. 1432).
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- Regulation (EC) No 1059/2003 of the European Parliament and of the Council of 26 May 2003 on the establishment of a common classification of territorial units for statistics (NUTS). Official Journal of the European Union, L 154, 21 June 2003.
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- Uchwała Komisji Wspólnej Rządu i Samorządu Terytorialnego z dnia 9 maja 2006 r. w sprawie regulaminu Komisji Wspólnej Rządu i Samorządu Terytorialnego. MP z 2007 r. nr 32 poz. 375, as amended (see: MP z 2012 r. poz. 927)
- Uchwała Nr 190 Rady Ministrów z dnia 29 października 2013 r. Regulamin pracy Rady Ministrów. MP z 2013 r. poz. 979.
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- Uchwała Senatu Rzeczypospolitej Polskiej z dnia 23 listopada 1990 r. - Regulamin Senatu. MP z 1991 r. nr 2 poz. 11.
- Ustawa z dnia 12 maja 2000 r. o zasadach wspierania rozwoju regionalnego. DzU z 2000 r. nr 48 poz. 550.
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