

**Decision**  
**of 1 March 1994 (U. 7/93)**

The Constitutional Tribunal sitting with the bench composed of the Chairman Zdzisław Czeszejko-Sochacki, and Judges: Lech Garlicki and Błażej Wierzbowski (Reporting Judge)

(...)

held

**paragraph 20 of the Regulation dated 22 August 1990 and issued by the Minister for Foreign Economic Cooperation on Customs Supervision and Review and Revenue Collection (Journal of Laws, Number 61, Item 357, as amended in Journal of Laws, Number 17, Item 73) contravenes the delegation included in article 70; section 5, sub-section 2 of the Customs Law Act dated 28 December 1989 (Journal of Laws, Number 75, Item 445, as amended in 1991, Number 60, Item 251; Number 73, Item 320, and Number 100, Item 442; in 1992, Number 21, Item 85; in 1993, Number 60, Item 279, and Number 129, Item 598), and, consequently; it contravenes article 56, section 3 of the Constitutional Act dated 17 October 1992 on the Mutual Relations between the Legislative and Executive Branches of the Republic of Poland and Local Self government (Journal of Laws, Number 84, Item 426) and article 1 of the constitutional rules upheld under article 77 of the said Constitutional Act.**

**Subject to article 9, section 2 of the Constitutional Tribunal Act dated 29 April 1985 (uniform text, Journal of Laws, 1991, Number 109, Item 470, as amended in 1993, Number 47, Item 213), section 20 of the Regulation referred to in the conclusion of this decision shall be amended or repealed in accordance with the decision no later than within three months from the decision's submission to the Minister for Foreign Economic Cooperation. Otherwise, the provision in question shall be null and void after the elapse of three months.**

(...)

Reasoning

IV

1. The essence of the problem in this case is to establish whether in setting the rate for the handling charge in section 20 of the Regulation dated 20 August 1990, the Minister for Foreign Economic Cooperation exceeded his statutory delegation under article 70, section 5, sub-section 2 of the Customs Law Act. Supporting a positive response to this question, the Applicant first of all invokes the meaning of the term „charge” as set in doctrine, claiming that under the challenged provision the Minister for Foreign Economic Cooperation turned additional handling charges into fines. Defending the contrary position, the participants in the proceedings invoke that the lawmaker assigned a sanctionary (disciplinary) nature to the handling charge. In doing so, they refer to article 70, section 1, sub-section and article 70, section 3 of the Customs Law. The Applicant also lodged the allegation that the challenged provision contravenes article 1 of the upheld constitutional regulations. This forces one to consider the following problem, too: Can a situation in which the lawmaker in assigning a sanctionary character to an obligation without specifying the elements of the sanction and leaving such elements to be regulated in an act ranking below a statute be considered in conformity with the democratic rule of law?

2. The Constitutional Tribunal pointed out on numerous occasions what should be taken into account in examining the constitutionality and legality of a regulation. One should

particularly recall the views included in the reasoning attached to the Constitutional Tribunal's Decisions dated 5 November 1986 (U. 5/86) and 20 September 1988 (Uw. 6/88). In examining the constitutionality and legality of a regulation, it must be established: a) whether the regulation was passed under an express (not only presumed) delegation of a statute; b) whether, in terms of the object and content of the regulated relations, the regulation falls within the limits of the delegation granted by the lawmaker to issue such a regulation permits one to lay down provisions regulating a specific issue in a manner that differs from the regulation in existing legislation. So, without an express statutory delegation, a regulation cannot enter the area of legal issues regulated under other statutes or transform, modify, or even repeat them (U. 5/98). The constitutionality of a regulation is also conditional on the statement that it is issued not only in accordance with the provisions of the statute on which it is based, but also with all the remaining body of legislation directly or indirectly regulating the content of the regulation (Uw. 6/88). These views are corroborated by subsequent decisions of the Constitutional Tribunal and still remain valid.

3. It is beyond contention that the challenged provision of section 20 of the Regulation dated 22 August 1990 was issued on the basis of the delegation of the Minister for Foreign Economic Cooperation granted in article 70, section 5, sub-section 2 of the Customs Law Act. It is contentious, however, whether the challenged provision falls within the limits of the delegation granted by the lawmaker and whether it enters the area of legal issues regulated by other statutes, and specifically by the Penal Tax Act dated 26 October 1971 (Journal of Laws, 1974, Number 22, Item 103; as amended in 1985, Number 23, Item 100; in 1990, Number 14, Item 84 and Number 86, Item 503; in 1991, Number 100, Item 442 and Number 107, Item 458; and in 1992, Number 21, Item 85 and Number 68, Item 341). And, if it does, whether the delegation to enter the area is sufficiently explicit.

4. First of all, it is essential to establish the scope of the term „additional handling charge” used in article 70, section 5, sub-section 3 of the Customs Law Act. The Applicant invokes doctrine-based arguments and points out the relation existing between a charge and the corresponding act of a state body. Such an understanding of the term charge may be questioned with respect to the entire legal system. There is a long-standing tendency in legislative practice (which is not subject to evaluation by the Constitutional Tribunal at this point) to introduce tax elements into the construction of charges (cf. J. Jaskiewiczowa: *Elementy podatkowe opłat publicznych w Polsce, Studia podatkowe i budżetowe*, [Fiscal Elements of Public Charges in Poland], *Tax and Budget Studies*, Torun.1964, pp.1-60). The relation between a charge and an act of a state body cannot, however, raise doubts with respect to the provisions of customs law. The customs duty itself is in fact a special kind of obligation including tax elements, but classified by the lawmaker as a charge (article 2, sub-sections 15 of the Customs Law Act). By qualifying the term „charge” with the term „handling,” the lawmaker remove the remaining doubt as to the existence of a relation between this subset of charges under customs law and acts of customs authorities. This is also reflected in article 70, section 2, sub-section 2 of the Customs Law Act. The Minister for Foreign Economic Cooperation understands the term „handling charge” in the same way in the title of Chapter 4 and in section 19 of the Regulation dated 22 August 1990. By qualifying the term „handling charge” with the word „additional,” the lawmaker creates a subset covered by the term and including only charges for additional acts performed by the customs authorities. The placement by the Minister for Foreign Economic Cooperation of the challenged provision in the chapter „charges for acts performed by the customs authorities” indicates that the organ issuing the regulation recognized the relation between the additional handling charge with acts performed by the customs authorities and the place of this obligation in the system of customs duties created by the lawmaker. All these facts lead to the

conclusion that the additional handling charge referred to in article 70, section 5, sub-section 2 of the Customs Law Act is a charge collected in connection with additional acts (as opposed to ordinary acts) performed by the customs authorities. This is so because in all the provisions of customs law in which the lawmaker uses the term „additional handling charge” (see III, 3) it is necessary for the customs authorities to perform acts which are not performed by these authorities as part of their ordinary, routine procedures. That the performance of such additional acts was necessary was acknowledged by representatives of the Minister during the hearing. In light of the above remarks, it must be concluded that the additional handling charge should have the character of a flat-rate charge collected from the person bearing specific customs obligations on account of additional acts performed by the customs authorities.

5. The participants in the proceedings raised arguments referring to article 70, section 2, subsection 3 and article 70, section 3 of the Customs Law Act against the above understanding of the term „additional handling charge.” These arguments are not justified. First of all, if one assumed that they are justified, one would have to concede that in one statute the lawmaker uses the same term in two different meanings. Such a conclusion is unacceptable as one would have to impute irrational behavior to the lawmaker.

Moreover, it must be noted that in both provisions invoked by the participants in the proceedings, there is a relation between the additional handling charge and additional acts performed by the customs authorities. In the situation described in article 70, section 2, subsection 3 of the Customs Law Act, it is then necessary to institute customs proceedings by law (article 47, sub-section 2 of Customs Law) or to perform various acts in order to clarify the matter. Likewise, it is beyond any doubt that the necessity to perform additional acts also arises in the situation provided for under article 70, section 3 of the Customs Law Act, as the disclosure as a result of customs inspection of a means of transportation or goods not declared for customs clearance necessitates the performance of a series of acts by the customs authorities.

Apart from that, the arguments of the participants in the proceedings are based on the faulty assumption that, by in some cases assigning to the handling charge an additional function mobilizing entities having specific customs obligations to timely and appropriate fulfillment of such obligations, the lawmaker changed the meaning of the term „additional handling charge” in such cases. The lawmaker may, without introducing a new term to the statute, assign the institution mentioned in the statute with a special function if it [the lawmaker] precisely specifies the conditions in which such an institution is to fulfill this special function. Such a manner of making law can be criticized if one takes into account the transparency of a legal system although its application is permitted with respect to a statute. The body authorized to issue a regulation cannot, however, conclude that the delegation to regulate by regulation the details of an institution includes a delegation to assign such an institution with a special function by the body acting under statutory delegation on the basis of the fact that such an institution is equipped by the lawmaker with a special function in a strictly defined situation.

Such a situation occurs in the case of customs law. Under article 70, section 3 of the Customs Law Act, the lawmaker undoubtedly assigned the function of a penalty to the institution of the additional handling charge. However, the lawmaker precisely specified the situation in which such a modified institution may be used (upon disclosure, as a result of customs inspection, of a means of transportation or goods not declared for customs clearance). The lawmaker specified the entities obligated to remit the additional handling charge, such as a carrier or forwarder (that is entities professionally engaged in a fairly specialized economic activity), from which, given the content of the agreement with the entity engaged in foreign

trade, the professional approach, and special obligations imposed on these entities under customs law (e.g., article 40, section 3, and article 43) one can expect particular conscientiousness in performing customs obligations. The lawmaker also precisely determined the amount of the additional handling charge (the customs value of the goods).

These specific provisions of article 70, section 3 of the Customs Law Act cannot be applied to article 70, section 5, sub-section 2 of the Customs Law Act and in such an unjustified manner extend the limits of the statutory delegation.

6. The participants in the proceedings argue that the lawmaker intended to assign the sanctionary character to the additional handling charge referred to in article 70, section 2, sub-section 3 of the Customs Law Act. Such a conclusion is indicated by the use of the words „for failure to fulfill customs obligations in a timely manner.” On the assumption that this was really the case article 70, section 2, sub-section 3 of the Customs Law Act would be not as administrative and financial (as in the above-mentioned understanding of the charge) in character, but rather repressive or quasi-penal. In such a case, however, a provision of such a character would have to be subject to all the special requirements that, under constitutional regulations, are associated with repressive regulations and not related to administrative regulations.

It is indisputably the case that under the rule of law, penal regulations should precisely specify both the unlawful act and the punishment (as the Constitutional Tribunal argued in its decision of 25 September 1991, S. 6/91). It is, likewise, indisputably the case that in light of the constitutional division of subject matter between statutes and executive orders, the basic elements of both the act and the punishment must be specified in the statute itself, and cannot be left for free regulation under an executive order

The Constitutional Tribunal is of the opinion that the above constitutional requirements with respect to penal regulations should be applied to all repressive regulations (sanctionary and disciplinary in character), that is to all the regulations that are intended to subject the citizen to a form of punishment or sanction. This reasoning follows from, among other things, article 1 of the upheld constitutional regulations.

Article 70, section 2, sub-section 3 of the Customs Law Act defines the act (failure to fulfill in a timely manner the customs obligations referred to in articles 42 and 52, sections 2 and 3), while if the provision is to be understood as assigning a penal (sanctionary) nature to the handling charge, the provision fails to specify the elements of such punishment and leaves their specification to the Minister for Foreign Economic Cooperation by regulation. Such a solution could not be reconciled with the exclusivity of a statute (which clearly also binds the lawmaker) as it should be understood with respect to penal (repressive) regulations. On the other hand, the solution could be reconciled with the principle of exclusivity of a statute on the assumption that article 70, section 2, sub-section 3 provides for an administrative regulation, which does not assign repressive function to the institution of the additional handling charge. It must be emphasized that when the wording of a statutory rule may provide grounds for differing interpretations, priority must always belong to the interpretation that enables the rule to be assigned content that conforms with the Constitution, whereby the rule remains in force.

7. Historical interpretation allows one to acknowledge that the lawmaker, despite the rather imprecise, brief phrase „for failure to fulfill in a timely manner” (article 70, section 2, subsection 3), did not assign a penal character to the additional handling charge. The default penalty under the provisions that were formerly in force had a penal character (see III, 2). The lawmaker did not, however, adopt the terms used in the regulations in force as at the passing of the Customs Law Act dated 28 December 1989, but reintroduced the terms used in the

Regulation of the President of the Republic of Poland on Customs Law dated 27 October 1933 and the executive provisions accompanying that Regulation (see III. 1). And it is beyond any doubt that under these provisions, the additional handling charge (*akcydencja*) did not have a repressive character, but constituted a surcharge for additional acts performed by the customs authorities. It cannot be assumed that the lawmaker deliberately rejected the terms that precisely define the essence of the obligation („default penalty”) in order to retain inherently the same obligation under a different term concealing the actual the same obligation under a different term concealing the actual nature of the obligation. In such a case, not only the concealment of the essence of the charge, but also further constriction of the conditions governing its collection would be at stake. While in the case of a default penalty one can exculpate oneself on the grounds of no fault (there is, after all, a difference between default and delay, perceived in the earlier regulations), in the case of the additional handling charge the difference between default and delay does not matter any longer.

Similarly, a comparison of the draft statute with the text passed on 28 December 1989 and the motives for the changes presented in the discussion on the draft version (see III, 3) lead to the conclusion that the lawmaker deliberately rejected the idea of assigning a repressive character to article 70, section 2, sub-section 3. Only as a side issue, one must note that „the belief in the rationality of the Minister” (omitted from the text of the statute) constitutes an exceedingly weak guarantee of civil rights, as evidenced by this case and the examples invoked by the Applicant.

8. Also, the allocation of the revenues from the received charges (including additional handling charges) for improvements in the operation of the customs authorities and bonuses to employees subject to the authority of the President of the Central Board of Customs (article 70, section 4 of the Customs Law Act) can serve as evidence that the lawmaker did not intend to make the amount of the additional handling charge conditional on the behavior of the entity subject to a customs obligation. On the assumption to the contrary, the outcome would be paradoxical: the longer the period between the moment a customs obligation arises and the institution of proceedings by law (article 47 of the Customs Law Act), the higher the additional handling charge allocated for bonuses to customs employees. This observation should also be applied to the period between the moment the case is forwarded to the customs office designated in the forwarding document and the moment the goods are delivered to the same customs office. This would motivate employees to token activity in the form of merely ensuring that customs obligations do not expire. The examples quoted by the Applicant and the facts from the cases decided by the Chief Administrative Court (see III, 6) serve as evidence that the challenged provision makes it dangerously easy to achieve such a paradoxical outcome. Meanwhile, according to the intention of the lawmaker (which can be inferred from article 71, section 4 of the Customs Law Act), not the additional handling charge as such, but the interest on the charge and the customs duty, counted from the date the condition provided for in the statute is violated, were to play (at least to the extent regulated in the invoked endnote to the statute) a mobilizing role with respect to entities that bear customs obligations.

9. What has been said so far enables one to conclude that the challenged provision of article 20 of the Regulation dated 22 August 1990 exceeds the limits of the delegation under article 70, section 5, sub-section 2 of the Customs Law Act because it transforms the institution of administrative charge into an institution that is repressive in nature. It is not, however, justified to claim that the challenged provision enters the subject matter regulated by the Penal Tax Act, a claim emphasized by the Applicant’s representative in the course of the hearing. The reason for this has mainly to do with the substantive scope and the construction of article 20 of the Regulation dated 22 August 1990.

For the purpose of a complete evaluation of all the arguments raised in this case, one must additionally note that the challenged provision does not impose an administrative penalty. Such an institution, in which one can perceive the counterpart of a contractual penalty known under civil law, is sometimes used in public law in order to motivate entities that bear non cash obligations to the timely and proper fulfillment of such obligations. The default penalty from earlier customs regulations had this sort of character. The additional handling charge is still understood to be a default penalty in the practice of the customs authorities and in decisions of the Chief Administrative Court (see III, 6). As it has been said above, the repressive element present in an administrative penalty prevents the amount of penalty from being determined by an executive order and leads to the conclusion that it should be determined by statute.

This is so because an administrative penalty can only be meted out subject to the existence of the subjective element of guilt. Entities that fail to fulfill an administrative obligation must, therefore, be allowed to defend themselves and to argue that any such failure results from a circumstance for which they cannot be held liable. It is inconsistent with democratic rule of law to automatically and rigorously regulate the legal situation of the entity holding an obligation as manifested in section 20 of the Regulation dated 22 August 1990, as the amount of the additional handling charge is not conditional on the reasons for the untimely performance of a customs obligation. Therefore, the obligation provided for under section 20 of the Regulation dated 22 August 1990 goes beyond the formula of an administrative penalty and, in fact, becomes a specific form of public levy.

(...)