

176/11/A/2006

PROCEDURAL DECISION

of 19th December 2006

Ref. No. P 37/05

The Constitutional Tribunal composed of the following bench:

Jerzy Stępień – as Chairman

Jerzy Ciemniewski

Zbigniew Cieślak

Marian Grzybowski

Wojciech Hermeliński

Adam Jamróz

Marek Kotlinowski – as Judge Rapporteur

Ewa Łętowska

Marek Mazurkiewicz

Janusz Niemcewicz

Mirosław Wyrzykowski

Bohdan Zdziennicki,

having considered the case, at the sitting in camera on 19th December 2006, concerning the following question of law referred by the Regional Administrative Court in Olsztyn: Does Article 80 of the Act of 23rd January 2004 on excise duty (Journal of Laws – Dz. U. No. 29, item 257 with amendments), stipulating that passenger cars not registered in the territory of Poland in accordance with the road traffic regulations shall be subject to excise duty, conform to Article 90 sentence 1 of the Treaty establishing the European Community stating that no Member State shall impose, directly or indirectly, on the products of other Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products, and, accordingly, to Article 91 of the Constitution, envisaging that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes,

has decided:

to discontinue proceedings, pursuant to Article 39 paragraph 1 point 1 of the Act of 1st August 1997 on the Constitutional Tribunal (Journal of Laws – Dz. U. No. 102, item 643, No. 48, item 552 and No. 53, item 638 of 2000, No. 98, item 1070 of 2001, as well as No. 169, item 1417 of 2005), **given the inadmissibility of pronouncing judgement.**

REASONING:

I

1. By way of its decision of 16th November 2005, the Regional Administrative Court (hereinafter referred to as: RAC) in Olsztyn referred – in accordance with Article 193 of the Constitution and Article 3 of the Act of 1st August 1997 on the Constitutional Tribunal (Journal of Laws – Dz. U. No. 102, item 643 with amendments; hereinafter referred to as: the CT Act) – the following question of law: „Does Article 80 of the Act of 23rd January 2004 on excise duty (Journal of Laws – Dz. U. No. 29, item 257 with amendments; hereinafter referred to as: the 2004 Act), stipulating that passenger cars not registered in the territory of Poland in accordance with the road traffic regulations shall be subject to excise duty, conform to Article 90 sentence 1 of the Treaty establishing the European Community (hereinafter referred to as: the EC Treaty, or the Treaty), stating that no Member State shall impose, directly or indirectly, on the products of the Member States any internal taxation of any kind in excess of that imposed directly or indirectly on similar domestic products, and, accordingly, does it conform to Article 91 of the Constitution of the Republic of Poland, envisaging that an international agreement ratified upon prior consent granted by statute shall have precedence over statutes if such an agreement cannot be reconciled with the provisions of such statutes”. Simultaneously, the referring court decided to stay the proceedings in the case constituting the background to the formulation of the question of law.

The question of law was presented against the following facts of the case. In his motion of 5th April 2005, addressed to the Head of the Customs Office in Olsztyn, Stanisław Piórkowski requested a refund of the overpayment of excise duty that was paid by him by virtue of a purchase of a passenger car in Germany. In the opinion of the taxpayer, the obligation to pay excise duty by virtue of an intra-Community acquisition of a passenger car, does not conform to

Article 23 paragraph 1 and 2, Article 25 and Article 90 of the EC Treaty. Member States may not impose on the products imported from other States of the European Union (hereinafter referred to as: the EU) any direct or indirect taxes in excess of those imposed on domestic products. Simultaneously, Member States have not been deprived of the possibility to determine and differentiate taxes, yet this practice is permissible only where it does not lead to any form of discrimination against imported products.

The Head of the Customs Office in Olsztyn, by way of his decision 2nd June 2005 (Ref. No. 371000-PA1-9106-9/05/JL) rejected the motion demanding the confirmation of the overpayment of excise duty charged by virtue of an intra-Community acquisition of a passenger car, and requesting a refund of the excise duty already paid. As a result of an appeal submitted by the party, the Head of the Customs Chamber in Olsztyn issued a decision of 5th September 2005 (Ref. No. 370000-PA-9116-37/05) upholding the decision of the Head of the Customs Office. In the justification thereof the Head of the Customs Chamber stated that based on the pre-established factual background the first instance organ applied appropriate regulations of substantive law, and in the case at issue there existed no overpayment of the duty or the duty had not been wrongly charged. Regarding the allegations of the non-conformity of the Polish law to Article 23, Article 25 and Article 90 of the EC Treaty, the Head of the Customs Chamber asserted that Polish authorities had not received from the European Commission (hereinafter referred to as: the Commission) any decisions that would have questioned the correctness of levying excise duty on passenger cars. In the Head's opinion, undertaking assessment of conformity of Polish law provisions to Community law falls outside the competence of tax authorities. In the case under consideration no contradiction arises between the Polish legal norm and the European legal norm. Pursuant to Article 249 subparagraph 3 of the EC Treaty, the issue of excise duty has been regulated by way of the Act of 23rd January 2004, which outlines the division of products subject to excise duty into harmonised and non-harmonised ones. The latter category includes, *inter alia*, passenger cars. Member States retain the right to introduce or maintain taxes which are levied on products other than those harmonised, provided that those duties do not give rise to the increase in border-crossing formalities in trade between Member States. No other EU Member State levies excise duties on the acquisition or import of passenger cars, yet the States replace the duty with other charges, *inter alia*, with a registration tax (up to 180% of the gross price of a vehicle), with an annual motor vehicle tax (from 30 euro to 463 euro) or with registration charges. The provision of Article 90 of the EC Treaty shall not prevent such shaping of duty rates relating to non-harmonised products subject to excise duty that is most beneficial from the perspective of social-economic interest of the State, provided that they shall

not exceed the duty levied on similar domestic products. The condition for levying excise duty on a passenger car is lack of registration thereof in the territory of the Republic Poland, made in accordance with the provisions of the Act of 20th June 1997 – Road Traffic Law (Journal of Law – Dz. U. of 2005, No. 108, item 908), and not the status of a product defined as a non-domestic one.

In his complaint lodged to the RAC, the claimant raised an allegation concerning the non-conformity of domestic law to Article 90 of the EC Treaty, and to provisions of the Constitution. The RAC in Olsztyn, while formulating the question of law, emphasised the divergence regarding excise duty in the jurisprudence of administrative courts. It also pointed out that courts are not authorised to autonomously undermine statutes; the competence to review the legality thereof has been vested in the Constitutional Tribunal (hereinafter referred to as: the CT). Taking into account the wording of Article 91 paragraph 1 and 3 of the Constitution, read in conjunction with Article 90 of the EC Treaty, doubts arose for the RAC in Olsztyn in respect of the constitutionality of Article 80 of the 2004 Act, imposing an obligation on Polish citizens to pay excise duty by virtue of an intra-Community acquisition of a second-hand passenger car not registered in the territory of the Republic of Poland. In the opinion of the court referring the question of law, these doubts may not be resolved by the European Court of Justice (hereinafter referred to as: the ECJ), which is competent in interpreting Community law and in adjudicating upon the binding force thereof, yet is not competent in interpreting domestic law of Member States, deciding upon the binding force thereof (and even broader – in deciding upon the conformity or non-conformity of domestic law to Community one) or in the assessment of facts of a case pending before a court of a Member State. The Court emphasised that the case at issue did not concern the interpretation of Community law, but the assessment of conformity of domestic law to the provisions of the EC Treaty. The obligation to apply Community law where a domestic legal provision cannot be reconciled therewith, as stemming from the principle of the precedence of Community law, is merely one aspect of the issue. In consequence, a court must, by way of validation, determine the provision that will constitute the basis for a decision. In the court's opinion, a directly applicable provision of Community law could constitute such a basis only in case, where a challenge concerned an administrative decision regarding the charging of excise duty. In the present case, however, the decision concerns the refusal to confirm the overpayment, and to refund a duty calculated and voluntarily paid by the taxpayer. The issue concerning tax refund is, in such case, regulated by domestic law, namely by Article 75 § 2 point 1 letter a of the Act of 29th August 1997 – Tax Ordinance (Journal of Laws – Dz. U. of 2005, No. 8, item 60 with amendments).

In the referring court's view, Article 90 of the EC Treaty, undoubtedly, imposes an obligation to consider similar domestic and imported products on equal terms, which is strengthened by the principle of extensive interpretation and the definition of similar products, which have been well-established in the jurisprudence of the ECJ. Consequently, Member States may not impose on products imported from other EU Member States any indirect or direct taxation in excess of that imposed on similar domestic products. The allegation of the unconstitutionality of Article 80 *et seq.* of the 2004 Act is supported by the fact that the fiscal burden on a second-hand vehicle imported from another Member State is, unquestionably, heavier than the share of taxes included in the prices of cars on the domestic market, while the obligation to pay excise duty and submit a simplified declaration to the appropriate head of the customs office constitute formalities that impede border-crossing between Member States. These obligations are detrimental to the principle of free movement of goods, and, additionally, remain in conflict with Directive 92/12/EEC. The court extensively presented argumentation of the opponents of the allegation of non-conformity of Article 80 of the 2004 Act to Article 90 of the EC Treaty, which is based on a contention that the condition for imposing excise duty on passenger cars is not the sole crossing of the border or having the status of a non-domestic product, but lack of registration thereof in the territory of Poland. In the court's opinion, this stance contradicts the European Commission's recommendations concerning the recognition of the "initial registration" obtained in other Member States. The tax burden on similar products (second-hand cars purchased in Poland, and in another Member State) is seemingly identical, yet only second-hand cars acquired in Community countries, prior to their initial registration in the territory of the Republic of Poland, are subject to excise duty. The above conclusion seems to be confirmed by the hitherto jurisprudence of the ECJ.

[...]

II

At the outset, it has to be stated that there are several convincing arguments justifying the decision to discontinue the proceedings concerning the question of law referred by the RAC in Olsztyn.

Firstly, the CT's ruling on the merits of the case would result in the interpretation of provisions of Community law, which would fail to take into account interpretation standards relating to all EU Member States. Furthermore, legal environment, where in relation to identical

legal situations the competence of both the ECJ and the CT were recognised, would present a threat of the existence of a double line of adjudication upon the same legal provisions. Undoubtedly, of crucial importance in this matter is the fact that the ECJ safeguards Community law and, while passing judgements, it does not have to take into consideration the standards deriving from legal orders of particular Member States, including the status of the constitution in the system of sources of domestic law thereof. Conversely, the Constitutional Tribunal safeguards the Constitution, which, according to Article 8 paragraph 1 thereof, shall be the supreme law of the Republic of Poland. Against this background a collision may occur between decisions taken by the ECJ and decisions taken by the CT. Taking the above into consideration, one must state that also by virtue of Article 8 paragraph 1 of the Constitution, the Constitutional Tribunal is obliged to such recognition of its position that in fundamental issues relating to the constitutional system of the State it shall retain its status of “the last-word court”. The ECJ and the CT must not be positioned as competing courts. This pertains not only to the “duplication” of both courts or the double line of adjudication upon the same legal issues, but also to lack of functionality in relations between Community and domestic legal orders. It is essential to indicate the different roles of both courts.

Secondly, the RAC in Olsztyn referring the question of law did not realise that the essence of a decision regarding the case pending before it lies – contrary to the court’s contention – in the interpretation of Community law. The court itself points to the existing disputes concerning the issue of how should, in the light of Community law, the excise duty be classified. To date, the jurisprudence of administrative courts (RAC) in cases concerning the application of Article 80 of the 2004 Act has been divergent and inhomogeneous.

Thus: the RAC in Lublin, in its Judgement of 25th May 2005, file Ref. No. I SA/Lu 77/05, found that Polish provisions concerning excise duty levied on second-hand cars imported from the EU did not – as a kind of prohibited customs duty, limiting the freedom of intra-Community trade – conform to Community law. Cars count as non-harmonised products, and, therefore, with regard to Community law each Member State is free to regulate the issue of excise duty levied thereupon, provided that the regulations do not infringe the fundamental freedoms of the internal market. Hence, an importer (exporter) may refuse to pay the duty charged contrary to provisions of the Treaty. In the opinion of the RAC in Lublin, the excise duty should be assessed as infringing the principle of equal treatment of similar domestic and imported products (Article 90 of the EC Treaty). The Administrative Court refused to apply

domestic law and found that decisions of customs authorities had been issued with violation of substantive law.

However, the same RAC, in its Judgement of 11th February 2005, file Ref. No., III SA/Lu 690/04, issued by a different adjudicating bench, dismissed a complaint against a decision regarding the determination of the amount of tax liability arising from excise duty. The court found that the duty constituted one of the elements of the Polish tax system, and, accordingly, the very fact of charging excise duty, as well as the amount thereof, did not infringe the EC Treaty.

The RAC in Łódź, in its Judgement of 23rd June 2005 (file ref. No. I SA/Łd 1059/04) dismissed a complaint against a decision issued by the Head of the Customs Chamber regarding the refusal to confirm the overpayment of excise duty levied by way of intra-Community acquisition of a passenger car. In the reasoning for the judgement the Court stated that it restricted its scope of adjudication to the assessment of conformity of the decision to legal provisions. The case under consideration did not concern the determination of the amount due by virtue of excise duty levied on the basis of regulations that do not conform to the provisions of EC Treaty. The case dealt with the issue of the existence of a potential overpayment of excise duty in case where the taxpayer had already paid the duty, abiding by the obligations that arise from provisions that infringe Community law. The non-conformity of domestic law provisions to the directly applicable Community law provisions results in the authorisation to refuse to apply the former by national courts, or to refer to the ECJ with questions for a preliminary ruling, where doubts arise as regards the interpretation of EU law. It has to be pointed out, however, that such competence has been vested solely in the organs of the judiciary. It has not been vested in tax authorities, which are not competent to challenge the binding force of provisions concerning the existing and chargeable tax liabilities, and hence were not in position to determine whether the calculation of the duty made by the taxpayer in accordance with those provisions was incorrect.

In turn, doubts arose for the RAC in Warsaw, while adjudicating in a case concerning the refusal to refund the excise duty paid by virtue of an intra-Community acquisition of a passenger car, as to the conformity of: Article 80 of the 2004 Act to Article 25 and Article 90 sentence 1 of the EC Treaty; § 7 of the Regulation of the Minister of Finance of 22nd April 2004 on lowering excise duty rates to Article 90 sentence 2 of the EC Treaty, as well as Article 81 of the 2004 Act to Article 28 of the EC Treaty. As a result, pursuant to Article 234 of the EC Treaty, by way of its decision of 22nd June 2005 (file Ref. No. III SA/Wa 679/05), the RAC referred to the ECJ for a preliminary ruling (case registered as: Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie

[Maciej Brzeziński v. The Head of the Customs Chamber in Warsaw], C-313/05) regarding the feasibility of applying domestic law provisions concerning excise duty charged on second-hand cars in the light of provisions of the Treaty, especially Article 90 thereof.

The above-indicated divergences exist not only in the jurisprudence, but is also seen between other official organs of the Republic of Poland and the European Community. Suffice it to recall the Appeal of the Petition Committee of the European Parliament regarding the abolition of the duty or the proceedings instituted against Poland by the European Commission under Article 226 of the EC Treaty, on the one hand, and the stance of the Minister of Finance who in his communication to the CT presented the argumentation in favour of the conformity of excise duty to the Community law, on the other hand.

Given such state of affairs, for the purpose of putting the matters being the subject of the question of law referred by the RAC in Olsztyn in order, it is, above all, necessary to clarify the scope of meaning of Article 90 of the EC Treaty before the ECJ under the preliminary ruling procedure. Such an opportunity arises alongside the referral by the RAC in Warsaw of a question for a preliminary ruling, which also concerns the issues raised in the question of law referred by the RAC in Olsztyn. The date of delivery of a judgement by the ECJ in the case C-313/05, *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie*, has provisionally been fixed for 18th January 2007. Hence, at this stage, the decision of the referring court is not dependent upon the answer (judgement) delivered by the CT.

Thirdly, the fundamental issue relating to the case in question lies in the sphere of the application of law, as opposed to the binding force thereof. In the process of applying the law, judges shall completely be subject the Constitution and statutes (Article 178 paragraph 1 of the Constitution). This principle is connected with the “conflicting norm”, as expressed in Article 91 paragraph 2, imposing an obligation to refuse to apply statutes in the event of a conflict with an international agreement ratified by way of statute. The principle of precedence also applies to Community law (Article 91 paragraph 3 of the Constitution). Therefore – where no doubts arise regarding the contents of a Community law norm – a court ought to refuse to apply the statutory provision conflicting with Community law, and directly apply the provision of the latter (Community law) or, alternatively, if it is not possible to directly apply a Community law norm, the court should seek such interpretation of domestic law that it conforms to Community law. In the event of interpretational doubts regarding Community law, the national court should refer a question to the ECJ for a preliminary ruling to resolve the doubts.

The very fact that a given provision of a domestic act will not be applied does not prejudice the necessity to repeal the act, even though it may “express” a strong demand that the legislator amend such provision. This need not, however, be an absolute rule. In each case it depends on the nature of the provision, the scope thereof, and the character of the collision (with Community law). Expectation that the CT eliminates such statutory provisions would amount to the anticipation of ensuring the effectiveness of the realisation of Community law by the Tribunal. And this is the field relating to the application of law. The Tribunal is not competent to decide upon individual matters concerning the application of law, including the Community law. Neither was it established – in the context of the diverse jurisprudence of RACs – to shape a uniform line thereof in relation to Community law.

To conclude, it finally needs to be pointed out that of decisive importance in the context of the institution of the question of law is Article 193 of the Constitution. According to that provision, referring a question of law to the Constitutional Tribunal shall be admissible only in case where the answer to such question of law will determine an issue currently pending before a court referring the question. The acknowledgement that in the event of a conflict between a domestic law norm and a Community law norm, the precedence shall be given to the latter, leads to the conclusion that in the analysed case the condition required by Article 193 of the Constitution does not occur. The court applying the law shall decide upon the solution to such a collision on its own, and, where interpretational doubts arise regarding the contents of Community law – the court should seek assistance of the ECJ obtained in accordance with the procedure of a preliminary ruling.

The absence of the element of relevance of the question of law pertaining to the case pending before the court regarding the alleged non-conformity of a Polish law norm to a Community law norm justifies the discontinuation of proceedings before the Constitutional Tribunal, pursuant to Article 39 paragraph 1 point 1 of the CT Act, given its inadmissibility.

The above-presented synthetic overview of fundamental arguments in favour of the adopted procedural decision necessitates, however, further elaboration of some of the problems arising in the case at issue.

III

1. Subject and bases of review. Fundamental procedural problems.

The subject of review, put forward by the referring court, concerns Article 80 of the Act of 23rd January 2004 on excise duty (Journal of Laws – Dz. U. No. 29, item 257 with

amendments; hereinafter referred to as: the 2004 Act), whereas the bases of review include Article 90 sentence 1 of the Treaty establishing the European Community (Appendix 2; Journal of Laws – Dz. U. of 2004 No. 90, item 864; hereinafter referred to as: the EC Treaty, or the Treaty), as well as Article 91 of the Constitution.

From the perspective of the adopted formula behind the decision, both the mutual relationship between the indicated bases of review, and the context in which they have been referred are of crucial significance. Both the manner in which the *petitum* of the question of law has been formulated, as well as the argumentation contained in the reasoning thereof, indicate that, in the opinion of the referring court, Article 90 of the EC Treaty is of prime importance here, while it seems that the referral to Article 91 of the Constitution (in fact, to paragraph 2 thereof) is supposed to fulfil a double function. First – the provision is to create a *sui generis* “bond” between domestic and Community law. Second – it is to comprise the basis for the recognition of the superiority of an international agreement norm over a statutory one and, consequently – where content incompatibility between the two norms has been found – constitute the basis for the CT to adjudicate upon the loss of binding force of the statutory norm.

Accordingly, the present case does not deal with a “typical” case of the constitutional review, consisting in the evaluation of relations between two norms of domestic law, possessing different positions in the hierarchical structure of the legal system. The objective of the referring court is, obviously, the review of conformity of a domestic law norm to a norm of the primary Community law. The referring court itself states in its reasoning that “the present case does not concern the interpretation of Community law, but deals with the assessment of conformity of domestic law to the provisions of the EC Treaty”. Therefore, the priority over the merited, should be given to the procedural issue of purposefulness or admissibility of review by the CT of relations between the indicated norms. This issue needs to be considered in a wider context of relations between Polish and Community law, as well as mutual relations as regards the competencies of domestic and Community organs of legal protection.

2. Article 80 of the 2004 Act from the systematic perspective.

The excise duty is regulated by both the 2004 Act and the Regulation of the Minister of Finance (hereinafter referred to as: the MF) of 22nd April 2004 on lowering excise duty rates (Journal of Laws – Dz. U. No. 87, item 825 with amendments).

In the light of the challenged Article 80 paragraph 1 of the 2004 Act, excise duty shall be levied on passenger cars not registered in the territory of Poland in accordance with road traffic regulations (the Act of 20th June 1997 – Road Traffic Law; Journal of Laws – Dz. U. of

2005, No. 108, item 908). Article 80 paragraph 2 of the 2004 Act stipulates that the following shall be the payers of the excise duty on passenger cars: persons effecting any sale of passenger cars before their initial registration in the territory of Poland; importers and persons effecting intra-Community acquisitions. The excise duty shall arise: in the case of a sale – as of the date of issuing of an invoice, no later than 7 days from the day of the product delivery; in the case of import – as of the date on which the customs debt arises, within the meaning of the provisions of customs law; in the case of intra-Community acquisition – as of the date of the acquisition of the right to use a passenger car as an owner, no later than on the date of registration thereof in the territory of Poland in accordance with the road traffic regulations. Regarding the last case, the amount that the purchaser is obliged to pay (for the vehicle) shall constitute the tax base (Article 82 paragraph 3 of the 2004 Act). Additionally, the persons effecting intra-Community acquisition shall be obliged, following the import into the territory of Poland, to submit a simplified declaration to the relevant head of the customs office within 5 days as of the date of the intra-Community acquisition, and, subsequently, pay the excise duty no later than on the date of the vehicle's registration.

By way of the Regulation of the Minister of Finance of 10th November 2006 (Journal of Laws – Dz. U. No. 210, item 1551), amending the Regulation of 22nd April 2004, referred to above, the rate of excise duty imposed on second-hand cars imported to Poland from EU Member States has been lowered. The previous rate, calculated on the basis of a special formula, could amount to 65% of the tax base provided for in Article 10 of the 2004 Act. As of the moment of entry into force of the Regulation of 10th November 2006, i.e. from 1st December 2006, the excise duty shall be equal to the rate of tax levied on new vehicles, *ergo* – shall depend on the engine displacement: for vehicles with an engine displacement not exceeding 2000 cm³ the duty shall amount to 3.1%, while for those exceeding 2000 cm³ it shall be equal to 13.6%. In relation to situations from before entry into force of the amendment, § 2 of the Regulation at issue shall apply. The provision states that in the event where tax obligation in the form of excise duty arose before 1st December 2006 (the situation concerns the case pending before the court referring the question of law), previous tax rates shall apply accordingly.

3. The issue of relation between Polish and Community law. The provision of Article 91 of the Constitution and the status of Community law in the domestic legal order, as well as ways of eliminating conflicts arising between Polish and Community law.

The issue of relation between Polish and Community law – considered strictly from the material-legal perspective – was the subject of the Tribunal’s deliberations in the case Ref. No. K 18/04, concerning the conformity of the Accession Treaty to the Constitution, and decided upon by way of Judgement of 11th May 2005 (Official Collection of the Constitutional Tribunal’s Decisions – OTK ZU No. 5/A/2005, item 49). The above-mentioned judgement remains the most elaborate and amply justified statement delivered by the CT in relation to this matter.

The provision of Article 91 of the Constitution, as invoked by the referring court, specifies the position of international agreements and the law established by international organisations (including the Community law) in the domestic legal order, and defines the prerequisites for the consideration of legal acts enacted outside the system of authority of the Republic of Poland. From the perspective of the bases of constitutional review cited in the present case, paragraph 2 of Article 91 of the Constitution is of fundamental importance here. Ratified international agreements that, pursuant to paragraph 1 thereof, have become part of the domestic legal order, shall not change into normative acts of the State (domestic law), but shall remain, in their nature – and by virtue of their origin – the acts of international law (see: A. Wasilkowski, *Prawo krajowe – prawo wspólnotowe – prawo międzynarodowe. Zagadnienia wstępne [Domestic law – Community law – international law. Introduction.]*, [in:] *Prawo międzynarodowe i wspólnotowe [International and Community law]*, p. 11; K. Działocha, komentarz do art. 91 [*A commentary to Article 91*], [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz [The Constitution of the Republic of Poland. A commentary]*, Vol. I, Warszawa 1989, p. 2).

The fulfilment of prerequisites of “entry” of an international agreement into the domestic legal order shall result in the direct application thereof (Article 91 paragraph 1 of the Constitution). Such norms shall have precedence over statutes if such statutes cannot be reconciled with the agreement. In the light of Article 91 of the Constitution, the issue of relations of norms belonging to the domestic legal order and originating from various legislative authorities, lies (above all) in the context of the precedence of applying the international norm over a non-conforming domestic statutory norm. Compliance with the principle of precedence shall be guaranteed by the statutorily specified procedures of control regarding the observance of law in the process of the application thereof, which primarily includes court control. Article 91 paragraph 2 of the Constitution comprises – besides the specification of the position of the international agreement within the hierarchical structure of domestic legal order – the basic mechanism for the elimination of potential conflicts with domestic law norms. The above thesis may be exemplified by referring to the formulation of the submitted question of law since, in

fact, the alleged non-conformity of Article 80 of the 2004 Act to Article 90 of the EC Treaty does not “accordingly” indicate the non-conformity thereof to Article 91 paragraph 2 of the Constitution. On the contrary, the legal environment evaluated by the court referring the question of law fulfils the hypothesis of Article 91 paragraph 2 of the Constitution, authorising the court adjudicating upon the case to refuse to apply the statutory norm.

By placing international agreements in the position of hierarchical superiority over statutes, the legislator created a field for review of legality of statutory provisions from the perspective of their conformity to the ratified international agreements, whose ratification required a prior consent granted by statute (Article 188 point 2 of the Constitution). Making use of such competence may, however, be justified only in the absence of any other means of eliminating the conflict (e.g. if an international agreement norm does not possess the character of a directly applicable norm) or where an important element relating to the legal certainty weights in favour thereof (e.g. if the scope of binding force of an international norm fully overlaps with the scope of binding force of a statutory norm, resulting in the latter becoming “empty” from the normative perspective).

In principle, preference should be given to the elimination of conflicts between domestic and international norms at the level of applying the law. Leaving purely doctrinal considerations aside, the mechanism for the elimination of conflict of norms at the level of applying the law is more efficient and flexible than the review of legality undertaken by the CT, and from the perspective of the structure – justified by the fact that, generally, an international law norm will have a narrower scope of binding force than a domestic statutory norm – be it in temporal, objective or subjective aspect. According to the principle of precedence, the application of an international norm neither repeals, breaches nor invalidates the domestic law norm, but only limits the scope of application thereof. Changes in the contents or loss of binding force of an international norm will alter the scope of application of a statutory norm, without a need to undertake any actions on the part of the national legislator.

In the opinion of the CT, the above indicated findings remain relevant also in the present case. The solution to the conflict between the contents of Article 80 of the 2004 Act to Article 90 of the EC Treaty, as alleged by the referring court, ought to be sought at the level of applying the law. Based solely on the above finding the adjudication by the CT on the merits of the case seems superfluous.

4. The autonomy of the Community judicial system and the principles of judicial cooperation with national courts.

4.1. Functions of the ECJ and the status thereof in relation to the national judicial system.

The European Court of Justice shall constitute one of the major organs of the Community. From the perspective of the case at issue, attention should be drawn to the institution of the preliminary ruling, among other powers of the Court.

Adjudicating by the ECJ within the preliminary ruling procedure constitutes an interlocutory action, which stays main proceedings before a national court, the latter being solely responsible for the delivery of a decision in the matter pending before it. The sole competence of the ECJ in such a case is to elucidate the Community law provision or adjudicate upon the binding force thereof (cf. *Orzecznictwo Europejskiego Trybunału Sprawiedliwości [The Jurisprudence of the European Court of Justice]*, R. Skubisz, ed., Warszawa 2003, p. 15). The aim of the preliminary ruling procedure is to ensure uniform application of Community law by national courts of all Member States.

The Court of Justice shall have jurisdiction to give preliminary rulings (Article 234 of the EC Treaty) concerning: the interpretation of the EC Treaty; the validity and interpretation of acts of the institutions of the Community and the European Central Bank; the interpretation of the statutes of bodies established by an act of the Council, where those statutes so provide.

Article 234 of the EC Treaty regulates the procedure of the preliminary ruling. The procedure constitutes a fundamental mechanism of legal cooperation between national courts and the Court of Justice. The mechanism, which is based on a subtle difference between the interpretation and the application of law, vests the interpretation of law in the Community court, while the application thereof – in a national court.

The ECJ contributes to the settlement of a dispute, yet does not adjudicate in a particular case. The Court of Justice has often emphasised that the procedure is a form of “judicial cooperation”, by means of which the national court and the ECJ, in accordance with the competencies vested in either of them, directly and mutually contribute to reaching a particular decision (see: Judgement of the ECJ in the case: *Schwarze v. Einfuhr und Vorratsstelle für Getreide und Futtermittel*, 16/65).

One has to, however, bear in mind that, pursuant to the principle of loyalty, as expressed in Article 10 of the EC Treaty, the preliminary ruling shall be binding for the referring court, and it shall be the obligation of that court to take the ruling into account while considering the case on the merits. Furthermore, the failure to include the ruling by the court referring questions for a preliminary ruling shall amount to the infringement of Community law, and shall constitute the basis for the Commission to initiate the infringement procedure

against the State on the grounds of Article 226 of the EC Treaty. Following the crucial decision of the ECJ of 30th September 2003 in the case: *Köbler v. Austria*, C-224/01, in a situation where a decision of a national court has been delivered with an apparent infringement of the ECJ jurisprudence, the State shall incur liability for damage (cf. T. T. Koncewicz, *Wyroki Trybunału w Luksemburgu: czy to już precedens, czy jeszcze nie [Judgements of the Court in Luxembourg: already a precedence, or not yet]*, „Rzeczpospolita”, 21st November 2006).

The division of competencies between national courts and the ECJ within the scope of the interpretation and application of Community law shall, therefore, be as follows: the interpretation shall be vested in the ECJ, while the application – understood as the application of a Community law norm to facts of a case determined by a court – shall be entrusted to a national court, which, in a given case, shall be bound by the ECJ jurisprudence (cf. *Orzecznictwo...[The Jurisprudence of ...]*, *op.cit.*, p. 15-16). Although at present the ECJ more strongly emphasises that it may interfere with the assessment of the moment of referral of questions for a preliminary ruling, where it perceives no real connection thereof with the pending case, and it may even criticise the mere referral deemed groundless. This, however, shall not eliminate the division of jurisdiction competencies, but rather shall ensure an “effective judicial dialogue” (cf. T. T. Koncewicz, *Pytania wstępne, czyli wspólnotowy dialog sądowy [Preliminary rulings as a Community judicial dialogue]*, „Rzeczpospolita”, 1st December 2006).

4.2. National courts and the application of Community law norms in the context of Article 9 and Article 91 paragraph 2 of the Constitution, as well as Article 10 of the EC Treaty.

The fundamental issue, from the perspective of the present case, lies at the level of the application of law. National courts – which is obvious – shall be obliged to directly apply the domestic law norms. A judge of a national court shall, additionally, be obliged to examine whether given facts of the case are subject to the norms of Community regulation which is directly applicable in the territory of each Member State (see: Judgement of the ECJ of 19th May 1990 in the case: *The Queen v. Secretary of State for Transport/ ex parte Factortame Ltd. and others*, 213/98). Pursuant to Article 9 of the Constitution, the Republic of Poland shall respect international law binding upon it, which, *mutatis mutandis*, also relates to the legal system of the Community, which is autonomous, yet derived from the international law. In turn, in accordance with Article 10 sentence 1 and 2 of the EC Treaty, Member States shall take all appropriate measures, whether general or particular, to ensure fulfilment of the obligations arising out of the Treaty or resulting from actions taken by the institutions of the

Community. They shall facilitate the achievement of the Community's tasks. The manner of realisation of this general obligation to observe the provisions of international and Community law has been specified – in relation to the judiciary – in the conflicting norm stemming from Article 91 paragraph 2 of the Constitution (see: point 3 of the Reasoning). Accordingly, contrary to the stance presented by the court referring the question of law, national courts shall not only be authorised, but also obliged to refuse to apply a domestic law norm, where such norm remains in conflict with Community law norms. National court shall not, in such case, adjudicate upon the repeal of a domestic law norm, but shall only refuse to apply the norm to the extent that is required to give precedence to the Community law norm. The legal act in question shall not be deemed invalid, and shall remain in force within the scope that is not encompassed by the objective and temporal binding force of the Community regulation. However, where any doubts as regards the relation between a domestic law and Community law norm arise, it is necessary to refer a question for a preliminary ruling to the ECJ, which is the competent organ as regards the interpretation of the Treaty, as well as derivative law norms, and which shall, in the functional sense, thus be incorporated into the judicial system of a given Member State.

On the basis of the above findings, it should be acknowledged that there is no necessity to refer questions of law regarding the conformity of domestic law to Community law to the CT – even in situations, where the referring court intends to refuse to apply a domestic statute. The issue of solving conflicts in relation to domestic statutes falls outside the scope of jurisdiction of the CT, since the decisions of whether a statute remains in conflict with Community law, shall be delivered by the Supreme Court, administrative courts and common courts, while the interpretation of Community law norms shall be provided by the ECJ by way of a preliminary ruling (see: L. Garlicki, *Członkostwo Polski w Unii Europejskiej a sądy [The Membership of Poland in the European Union and Courts]* [in:] *Konstytucja dla rozszerzającej się Europy [The Constitution for the expanding Europe]*, E. Popławska, ed., Warszawa 2000, p. 215; see also: the Judgement of the Federal Constitutional Court of Germany of 31st May 1990, 2 BvL 12, 13/88, 2 BvR 1436/87, as well as the Judgement of the Constitutional Court of Italy of 5th June 1984, in the case: *Granital SpA v. Amministrazione delle Finanze dello Stato*, 170/1984). The above finding does not signify that the verb “may”, as used in Article 193 of the Constitution, expresses the facultative nature concerning the referral of questions of law to the CT. The verb “may” indicates the competence of a court to initiate proceedings before the CT, and the Tribunal firmly holds the view that, in each situation, where a court questions the conformity of a statute to the Constitution, there is no other possibility of finding

the potential unconstitutionality thereof than on the basis of a judgement delivered by the CT (cf. the following Judgements: of 4th October 2000, Ref. No. P. 8/00, Official Collection of the Constitutional Tribunal's Decisions – OTK ZU No. 6/2000, item 189; of 31st January 2001, Ref. No. P. 4/99, OTK ZU No. 1/A/2001, item 5). However, in certain situations relating to the conflict of a statute with Community law, the competence of a court to refer a question of law becomes, in a sense, limited by virtue of both the conflicting rule contained in Article 91 paragraph 2 of the Constitution, and the principles of applying Community law, in particular, the principle of direct application of Community law in the event of a conflict with a statute.

For the above reasons the Constitutional Tribunal decided as in the introduction.

Translated by *Marek Łukasik*