

**The Judgment of the Constitutional Tribunal of 16 November 2011,
Ref. No. SK 45/09 concerning the exclusion of a debtor from
proceedings before the court of first instance, in the case
of proceedings regarding the enforceability of a ruling issued by
a court from another EU Member State***

The Constitutional Tribunal adjudicated that Article 41, second sentence, of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters was consistent with Article 45(1), as well as Article 32(1) in conjunction with Article 45(1), of the Constitution of the Republic of Poland. (Moreover, pursuant to Article 39(1)(1)-(2) of the Constitutional Tribunal Act of 1 August 1997, the Tribunal decided to discontinue the proceedings as to the remainder of the case.)

Due to the special character of the legal act whose constitutionality was challenged, the Constitutional Tribunal began by examining whether legal acts enacted by EU institutions might constitute the subject of review proceedings commenced by way of constitutional complaint as specified in Article 79(1) of the Polish Constitution. The Tribunal stated that the *ratione materiae* scope of normative acts – i.e. those which might be subject to a review of their conformity to the Constitution in proceedings commenced by way of constitutional complaint – had been set out in Article 79(1) of the Polish Constitution autonomously and independently from Article 188(1)-(3). The examination of constitutional complaints constitutes a separate type of proceeding. Arguments in favour of this position are twofold.

Within the meaning of Article 79(1) of the Constitution, a constitutional complaint may concern a statute or another normative act. According to the Constitutional Tribunal, a normative act, within the meaning of Article 79(1) of the Constitution, may be not only a normative act issued by one of the organs of the Polish state, but also – after fulfilling further requirements – a legal act issued by an organ of an international organisation, provided that the Republic of Poland is a member thereof. This primarily concerns those acts of EU law which have been enacted by the institutions of that organisation. Such legal acts constitute part of the current Polish legal system.

Pursuant to Article 288, second paragraph, of the Treaty on the Functioning of the European Union, a regulation shall have general application, and it shall

* The decision of the Constitutional Tribunal is available at http://www.trybunal.gov.pl/eng/summaries/documents/SK_45_09_EN.pdf (in English)

be binding in its entirety and directly applicable in all Member States. The norms of a regulation are general and abstract in character. The addressees of the norms of a regulation are not only the Member States and the organs of those States, but also individuals (private parties). The Constitutional Tribunal stated that an EU regulation bears the characteristics of a normative act within the meaning of Article 79(1) of the Polish Constitution.

The Constitutional Tribunal also concluded that EU regulations might contain norms which constitute the basis for a court or organ of public administration to make a final decision on the freedoms, rights, or obligations of individuals or legal entities, as specified in the Constitution. The regulations may constitute a legal basis of administrative decisions and court rulings in the Member States, including Poland. When participating in proceedings before national courts, individuals may rely on the norms of EU regulations and derive their rights therefrom.

For these reasons, the Tribunal adjudicated that an EU regulation might be the subject of review proceedings commenced by way of constitutional complaint, as specified in Article 79(1) of the Constitution. However, the fact that an EU regulation is an act of EU law, even though it also constitutes part of the Polish legal system, affects the character of the review of its conformity to the Constitution conducted by the Constitutional Tribunal.

The Constitutional Tribunal stated that EU regulations are legal acts whose position in the Polish constitutional system is indicated in Article 91(3) of the Constitution. One of the systemic principles of EU law is the principle of the primacy of the EU law (formerly Community law) over the national law of the Member States. It follows from Article 91(3) of the Constitution that the norms of EU regulations take precedence in the event of their nonconformity with statutes. By contrast, the Constitution retains its superiority and precedence over all legal acts which are in force in the Polish legal system, including the acts of EU law. This position of the Constitution is enshrined in Article 8(1) of the Constitution, and has been confirmed by the previous jurisprudence of the Constitutional Tribunal. Due to the position of the Constitution as the supreme law of the Republic of Poland, it is therefore admissible for the Constitutional Tribunal to review the constitutionality of norms contained in EU regulations.

The Constitutional Tribunal pointed out that it was necessary to draw a distinction between an examination of the conformity of acts of EU secondary legislation to the EU Treaties, i.e. the EU primary law, on the one hand, and examining their conformity to the Polish Constitution on the other. The body that ultimately determines the conformity of EU regulations to the EU Treaties is the Court of Justice of the European Union, and as regards their conformity to the Polish national Constitution – the Polish Constitutional Tribunal. It is crucial to take into account the indicated differences between the roles of the European

Court of Justice and the Polish Constitutional Tribunal. In accordance with the jurisprudence of the Court of Justice, national courts have no jurisdiction to adjudicate as regards the invalidity of acts of EU secondary legislation.

In allowing for the possibility of examining the conformity of acts of the EU secondary legislation to the Polish Constitution, the Tribunal emphasised the need to maintain due caution and restraint in that regard. The EU law binds all Member States. One of the systemic principles of EU law is the principle of sincere cooperation, as referred to in Article 4(3) of the Treaty on the European Union (TEU). A grant of powers to particular Member States to decide upon the legally binding nature of norms of EU law would be difficult to reconcile with that principle. By contrast however, Article 4(2) of the TEU provides that the Union shall respect the national identities of the Member States, which are inherent in their fundamental political and constitutional structures.

In the opinion of the Tribunal, any contradictions should be eliminated by applying the interpretation that respects the relative autonomy of both EU law and national law. Moreover, said interpretation should be based on the assumption of mutual loyalty between the EU institutions and the Member States. This assumption gives rise to an obligation, on the part of the Court of Justice, to be favourably inclined towards national legal systems; whereas the Member States have the obligation to approach EU norms with the utmost respect.

Additionally, a review of the conformity of an EU regulation with the Polish Constitution, conducted by the Polish Constitutional Tribunal, should be regarded as independent, and also subsidiary, in relation to the jurisdiction of the Court of Justice. When acceding to the EU, the Republic of Poland accepted the division of powers within the system of the EU institutions. An element of that division is the jurisdiction of the Court of Justice to provide the final interpretation of EU law and to ensure that the interpretation is observed consistently in all Member States, as well as to have an exclusive power to determine the conformity of acts of the EU secondary legislation to the Treaties and to the general principles of EU law.

Also, the Polish Constitutional Tribunal considered the effects of a judgment issuing from it in the event of an adjudication that the norms of EU secondary legislation were inconsistent with the Polish Constitution. In the context of acts of Polish law, any such non-conformity would result in a declaration that the unconstitutional norms are no longer legally binding. With regard to acts of the EU secondary legislation, such a result would be impossible to implement, as it is not the organs of the Polish state that decide whether such acts are legally binding or not. Therefore, the consequence of such a ruling by the Constitutional Tribunal would be to rule out the possibility that the acts of the EU secondary legislation would be applied by the organs of the Polish state and would have any legal effects in Poland.

Undoubtedly, a ruling declaring the non-conformity of EU law to the Constitution should be a last resort and ought to appear only when other ways of resolving a conflict between the norms of different legal systems have failed. In its judgment concerning the Treaty of Accession, the Constitutional Tribunal indicated three possible reactions in Poland to the occurrence of a conflict between the Constitution and EU law: amending the Constitution; taking up measures aimed at amending the EU provisions, or taking a decision to withdraw from the EU. Such a decision should be made by the Polish sovereign, i.e. the Polish Nation, or the organ of the state which, in accordance with the Constitution, is entitled to represent the Nation.

Leaving aside the last solution, which should be reserved for exceptional cases of the most serious and irreconcilable conflicts between the constitutional orders of the Republic of Poland and EU law, following the issuance by the Constitutional Tribunal of a ruling declaring the non-conformity of particular norms of EU secondary legislation to the Polish Constitution, measures should be undertaken in order to eliminate the conflict. The constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration and the Treaty's principle of loyalty of the Member States towards the Union require that the effects of any such ruling by the Tribunal be deferred in time, pursuant to Article 190(3) of the Polish Constitution.

In examining the constitutionality of the challenged provisions of Council Regulation (EC) No 44/2001, the Tribunal stated that the complainant had made an allegation concerning the infringement of the right to a fair and public hearing in first instance proceedings in the Republic of Poland to determine the enforceability of a ruling of a foreign court issued against the complainant. In the end, as the subject of review in the present case, the Tribunal found that Article 41, second sentence, of Council Regulation (EC) No 44/2001, provided that a debtor against whom enforcement was sought should not, at the stage of first instance proceedings in Poland, be entitled to make any submissions on the application. In considering the higher-level norms for constitutional review indicated by the complainant, the Constitutional Tribunal recognised that it was admissible and justified to carry out the review of the challenged norm from the point of view of its conformity to Article 45(1) (the right to a fair trial) as well as Article 32(1) in conjunction with Article 45(1) of the Polish Constitution (the principle of equality in the context of the right to a fair trial). With regard to the other provisions indicated by the complainant, and also due to the withdrawal of part of the constitutional complaint, the Tribunal decided to discontinue the proceedings as to the remainder of the issues.

The Constitutional Tribunal stated that a fair judicial procedure should ensure that parties enjoy procedural rights which are relevant to the subject of the pending proceedings. The requirement of a fair trial implies that the principles of the trial are adjusted to the specific character of particular cases under examination. Constitutional guarantees related to the right to a fair trial may not be regarded as a requirement to provide – in every type of proceedings – the same set of procedural instruments which would uniformly specify the position of the parties to proceedings and the scope of procedural measures available to them.

In the view of the Tribunal, the proceedings regulated in the Council Regulation (EC) No 44/2001 aim at balancing the rights and conflicting interests of the applicant (creditor) and the debtor. In order to achieve that goal, the EU legislator provided for a two-stage procedure. The procedure reflects a general assumption that underlies proceedings to determine the enforceability in one Member State of a ruling issued by a court from another Member State, meant to reconcile the effect of a debtor's surprise, which is indispensable in the proceedings, with respect for his/her right to a hearing.

What is significant is the fact that proceedings to determine the enforceability of a ruling of a court from another Member State are secondary in character in relation to the court proceedings which ended with the issuance of the ruling in the Member State of origin. In proceedings to determine the enforceability of the ruling, there is a presumption that, in proceedings before the court of the Member State of origin, both parties were granted procedural rights which corresponded to the guarantees of a fair procedure. This presumption is based on mutual trust in the administration of justice in the EU Member States. The right to a fair trial is guaranteed in the constitutions and statutes of those States. Moreover, it also arises from Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The right to a fair trial is also guaranteed by Article 47 of the Charter of Fundamental Rights of the European Union. In addition it is a general principle which constitutes part of EU law.

The Constitutional Tribunal also noted that the legal construct of *ex parte* proceedings, i.e. proceedings without the participation of the other party – being analogical to the construct adopted in Article 41, second sentence, of the Council Regulation (EC) No 44/2001 at the first stage of proceedings to determine enforceability – occurs also in relation to some proceedings at a later stage, which are regulated in the Polish Code of Civil Procedure. Particular attention should be drawn to special proceedings aimed at the expedient examination of certain types of civil cases, i.e. injunction proceedings and proceedings concerning orders to pay. The character of proceedings without the participation of a defendant (debtor) is also shared, at the first stage, by proceedings concerning precautionary

measures and proceedings to issue an enforcement clause. The exclusion of defendants (debtors) at the first stage of the above-mentioned proceedings has not been challenged before the Constitutional Tribunal so far.

For the above reasons, the Tribunal stated that excluding the debtor from making a statement at the first stage of proceedings to determine the enforceability of a ruling of a foreign court pursuant to Article 41, second sentence, of the Council Regulation (EC) No 44/2001, was consistent with the above-mentioned significant goals, was not arbitrary in character, and did not infringe upon the right to a fair trial. On the one hand, the said procedural solution implements the principle of the free movement of judicial decisions within the EU and the principle of mutual trust in the administration of justice in the EU Member States, which also applies to rulings issued by Polish courts. On the other hand, it facilitates the effective enforcement of court rulings issued to applicants (creditors). Therefore, there are no grounds to conclude that the adopted model of proceedings employed to determine the enforceability of a ruling of a foreign court, together with the existing restrictions imposed on a debtor in first instance proceedings, infringe upon the right to a fair trial guaranteed by the Constitution.

As regards the alleged infringement of Article 32(1) in conjunction with Article 45(1) of the Constitution, the Tribunal concluded that – due to the special character of proceedings to determine the enforceability of a ruling of a foreign court where such proceedings are instigated by a creditor who had been awarded a ruling ordering compensation to him – it was admissible to differentiate between the procedural rights of one party and those of the other in first instance proceedings. In the view of the Tribunal, it does not follow from the content of Article 41, second sentence, of the Council Regulation (EC) No 44/2001 that the applicant (creditor) is excessively or unjustly privileged in comparison to the participant in the proceedings (the debtor).

Due to the precedential character of the case, the Constitutional Tribunal carried out a thorough analysis of the conformity of the challenged EU Regulation to the Polish Constitution. However, the Tribunal also deemed it desirable – for the future – to indicate a method for examining the conformity of the norms of EU law (the Treaties and the EU secondary legislation) to the Polish Constitution in the course of review proceedings commenced by way of constitutional complaint.

In that regard, the Tribunal made reference to the jurisprudence of the constitutional courts of other Member States, and concluded that direct reviews of the conformity of acts of EU secondary legislation to national constitutions had been conducted only in exceptional cases. This confirms the thesis that there is a certain caution in this area.

Likewise, in the jurisprudence of the European Court of Human Rights there is a presumption that EU law and the European Court of Justice ensure the protection of human rights at a level which is equivalent to the level of protection required by the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the actions of EU Member States are consistent with the Convention as long as the European Union protects human rights by applying, for that purpose, appropriate guarantees of protection as well as review and control mechanisms which are at least equivalent to those guaranteed by the Convention. What follows from the above is that the European Court of Human Rights is competent only in exceptional cases to assess whether actions, or the lack thereof, on the part of EU bodies and institutions are consistent with the Convention; namely when the presumption of equivalent legal protection is undermined, and the protection of human rights at the EU level is “manifestly deficient”. In the opinion of the Constitutional Tribunal, there are premises for adopting an analogical approach when examining the constitutionality of EU law in Poland.

The legal acts passed by the EU prior to Poland’s accession to the EU were incorporated, pursuant to the Treaty of Accession, into the Polish legal system on the day of the accession. Subsequent legal acts were issued when Poland was already a Member State of the EU, usually with the participation of representatives of the competent organs of the Polish state. The following arguments – previously alluded to – justify the Polish Constitutional Tribunal in taking an analogical approach to that taken by other courts: the great significance of fundamental rights in the EU legal order; the constitutional principle of favourable predisposition of the Republic of Poland towards the process of European integration; as well as the Treaty’s principle of loyalty of the Member States towards the Union.

The approach presented herein has procedural consequences. In the case of filing a constitutional complaint which challenges the conformity of an act of EU law to the Constitution, a given complainant should be required to present probable cause that the said legal act undermines the level of protection of rights and freedoms in comparison with the level of protection guaranteed by the Polish Constitution. This requirement arises from Article 79(1) of the Constitution. Requiring the complainant to prove that an act of EU law undermines the level of protection of rights and freedoms, in comparison with the level of protection guaranteed by the Constitution, is not an additional requirement, but rather a more specific rendering of the requirement to indicate in what manner given rights or freedoms have been infringed. The need for such a specific rendering is justified by the character of the acts of EU law, which come from legislative centres other than the organs of the Polish state.

The requirement to present probable cause that the level of protection of rights and freedoms has been undermined, in comparison with the level of protection guaranteed by the Constitution, also follows from the allocation of the burden of proof in review proceedings commenced by way of constitutional complaint. There must be more than a possible indication that there has been an infringement of the Constitution. In the absence of legally sufficient proof, the Tribunal may conclude that the constitutional and statutory requirements of a constitutional complaint have not been met and, consequently, may issue a decision in which it refuses to proceed with the constitutional complaint or in which it discontinues the proceedings.

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