

Poland

Constitutional Tribunal on the Preliminary Ruling Procedure and the Division of Competences Between National Courts and the Court of Justice

Order of 19 December 2006

Adam Łazowski*

INTRODUCTION

On 19 December 2006 the Polish Constitutional Tribunal delivered an interesting ruling on the division of powers between national courts and the Court of Justice in the interpretation of EU law.¹ The Tribunal declined jurisdiction to answer a question on the conformity of the Polish law on excise duty with Article 90 EC and ruled that the issue at stake was the interpretation of EC law, thus falling within the jurisdiction of the Court of Justice. At the same time, however, the Constitutional Tribunal reserved its jurisdiction to handle EU-related matters with constitutional implications. This development fits nicely into the growing list of the Tribunal's decisions touching upon important legal issues linked to Poland's membership in the European Union.² When put on one shelf with the

* Senior Lecturer in Law, School of Law, University of Westminster, London. The author is grateful to Anna Łabędzka, Maciej Taborowski and the reviewers for comments to earlier drafts of this paper. The usual disclaimer applies.

¹ Order of 19 Dec. 2006 in the case P 37/05 [Postanowienie Trybunału Konstytucyjnego z dnia 19 grudnia 2006 r. Sygn. akt P 37/05, OTK Z.U. 2006/11A, item 176. The English translation of the judgment is available in [2007] 3 C.M.L.R. 48. For a commentary see A. Wyrozumska, *Stosowanie prawa wspólnotowego a art. 91, 188 ust. 2 i 193 Konstytucji RP – glosa do postanowienia Trybunału Konstytucyjnego z 19.12.2006 r. (P 37/05)* [The Application of EC Law and Articles 91, 188.2 and 193 of the Polish Constitution – A Commentary on the Order of the Constitutional Tribunal of 19.12.2006 in the case P 37/05] 3 *Europejski Przegląd Sądowy* (2007) p. 39.

² Judgment of 31 May 2004 in the case K 15/04 [Wyrok z dnia 31 maja 2004 r. Sygn. akt K 15/04] OTK Z.U. [Constitutional Tribunal Reports] 2004/4A, item 31; Judgment of 12 Jan. 2005 in the case K 24/04 [Wyrok z dnia 12 stycznia 2005 r. Sygn. akt K 24/04], OTK Z.U. 2005/1A, item 3; Judgment of 27 April 2005 in the case P 1/05 [Wyrok z dnia 27 kwietnia 2005 r. Sygn. akt P 1/05] OTK Z.U. 2005/4A, item 42, reported in [2006] 1 C.M.L.R. 36; Judgment of 11 May 2005 r.

previous judgments on the European Arrest Warrant and the conformity of the Accession Treaty with the Polish Constitution,³ this case seems to be of a lesser caliber. Nevertheless it merits academic attention, for a number of reasons outlined in this contribution. Our starting point shall be an overview of the factual background of the case, followed by an analysis of the decision and reasoning and some critical comments.

THE FACTUAL BACKGROUND

Taxation of second-hand imported cars has proved to be one of the main legal matters upon the accession to the European Union. Since the early days of membership there has been continuous debate on the conformity of the Excise Duty Act 2004⁴ with Article 90 EC (alternatively Article 25 EC).⁵ The issue led to a number of cases before national courts and the first ever preliminary reference from a Polish court, *Brzeziński*.⁶ Since this is closely connected to the decision at hand, a brief explanation of the legal background is in place.

The Excise Duty Act 2004 imposes a duty on every first registration of a car (irrespective of its origin). Such duty is in conformity with EC law since the taxation of cars by excise duty falls within non-harmonised areas. This however, does not preclude the application of the prohibition of tax discrimination set forth in

in the case K 18/04 [Wyrok z dnia 11 maja 2005 r. Sygn. akt K 18/04] OTK Z.U. 2005/5A, item 49; Judgment of 20 Feb. 2006 in the case K 9/05 [Wyrok z dnia 20 lutego 2006 r. Sygn. akt K 9/05] OTK Z.U. 2006/2A, item 17.

³ See on those cases, *inter alia*, K. Kowalik-Bańczyk, 'Shall We Polish It Up? The Polish Constitutional Tribunal and the Idea of Supremacy of EU Law', 6 *German Law Journal* (2005) p. 1355; A. Łazowski, 'Constitutional Tribunal on the Surrender of Polish Citizens Under the European Arrest Warrant. Decision of 27 April 2005', 1 *EuConst* (2005) p. 569; A. Łazowski, 'Constitutional Tribunal on the Conformity of the Accession Treaty with the Polish Constitution. Decision of 11 May 2005', 3 *EuConst* (2007) p. 148; A. Łazowski, 'The Polish Constitution, the European Constitutional Treaty and the principle of supremacy', in A. Albi, J. Ziller (eds.), *The European Constitution and National Constitutions* (The Hague, Kluwer Law International 2007) p. 171; A. Wyrozumska, 'Some Comments on the Judgments of the Polish Constitutional Tribunal on the EU Accession Treaty and on the Implementation of the European Arrest Warrant', 27 *Polish Yearbook of International Law* (2004-2005) p. 5; D. Leczykiewicz, Trybunał Konstytucyjny (Polish Constitutional Tribunal), Judgment of 27 April 2005, No. P 1/05, 43 *Common Market Law Review* (2006) p. 1108.

⁴ Excise Duty Act of 23rd Jan. 2004 [Ustawa z dnia 23 stycznia 2004 r. o podatku akcyzowym] Dziennik Ustaw [2004] No. 29, Item 257 (as amended).

⁵ Initially it was not clear whether the charge should be classified as a charge having equivalent effect to customs duty, prohibited by Art. 25 EC or tax discrimination falling under the ambit of Art. 90 EC, which prohibits tax discrimination. The ECJ in Case C-313/05 *Maciej Brzeziński v. Dyrektor Izby Skarbowej w Warszawie* clarified that the excise duty in question was a tax within the meaning of Art. 90 EC. See also P. Craig, G. de Búrca, *EU Law. Text, Cases and Materials*, 4th edn. (Oxford, Oxford University Press 2008), p. 660.

⁶ ECJ, Case C-313/05 *Maciej Brzeziński v. Dyrektor Izby Skarbowej*, ECR [2007] I-513.

Article 90 EC. It was not the tax itself that raised doubts, but the calculation method leading to discrimination of imported cars that were older than two years. Until the Court of Justice's judgment in *Brzeziński*, the case-law of Polish administrative courts had been inconsistent. Some courts entertained claims for the reimbursement of unduly levied tax,⁷ others rejected these claims as unjustified under the terms of the Polish law.⁸ While the Voivod Administrative Court in Warsaw decided to make a reference for a preliminary ruling to the Court of Justice, the Voivod Administrative Court in Olsztyn (hereinafter referred to as Olsztyn Administrative Court) preferred to proceed with a similar question to the Polish Constitutional Tribunal.⁹

The case before the Olsztyn Administrative Court¹⁰ arose in the course of a dispute between Stanisław Piórkowski and the Director of the Customs Office. The plaintiff had imported a second hand car from Germany and upon registration paid the excise duty. He immediately requested a reimbursement of what he claimed to be unduly levied tax. It was submitted that the Polish provisions in question were contrary to Article 90 EC. In its question to the Constitutional Tribunal the Voivod Court asked if Article 80 of the Excise Duty Act 2004 was in conformity with Article 90 EC, and by the same token, Article 91 of the Polish Constitution.¹¹ The latter gives international treaties, ratified by the President of Poland with the consent of the Polish Parliament, primacy over Acts of Parliament. It also deals with the status of law of international organisations, of which Poland is a member.

In the course of the procedure the Ministry of Finance, the Sejm as well as the Public Prosecutor-General all presented memoranda. The first concentrated on

⁷ See, *inter alia*, Judgment of Voivod Administrative Court in Łódź, Case I SA/Łd 980/05 *Anna X v. Dyrektor Izby Celnej w Łodzi*, n.y.r.

⁸ See, *inter alia*, Judgment of Voivod Administrative Court in Lublin, Case III SA/Lu 690/04 *X v. Dyrektor Izby Celnej w Białej Podlaskiej*, n.y.r.

⁹ For a critique of this decision see M. Taborowski, *Postanowienie Wojewódzkiego Sądu Administracyjnego w Olsztynie z dnia 16.11.2005 r. (I SA/OI 374/05) o przedstawieniu Trybunałowi Konstytucyjnemu pytania prawnego* [The Decision of Voivod Administrative Court in Olsztyn of 16.11.2005 (I SA/OI 374/05) on the submission of a legal question to the Constitutional Tribunal], *5 Europejski Przegląd Sądowy* (2006) p. 35.

¹⁰ Poland has a separate branch of administrative courts. The two-tier system is composed of sixteen Voivod Administrative Courts and the Supreme Administrative Court in Warsaw. The jurisdiction includes judicial review of administrative decisions as well as other acts adopted in course of administrative procedure. See A. Łazowski, *Reform of Administrative Courts in Poland*, [2004] Euro. C.L.Y., p. liv.

¹¹ The Constitution of the Republic of Poland of 2nd April 1997 [Konstytucja Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 roku] Dziennik Ustaw [1997] No. 78, Item 483 (hereinafter referred to as Constitution). The English translation of the Constitution is available in A. Pol, W. Odrowąż-Sypniewski (eds.), *Polish Constitutional Law. The Constitution and Selected Statutory Materials*, 2nd edn. (Warsaw, Chancellery of the Sejm 2000) p. 25-91.

financial issues surrounding the dispute, including potential implications for the state budget, should the Tribunal declare the contested legislation to be unconstitutional. In addition, the Ministry of Finance argued that there is no uniform position of the EU institutions on the potential conflict between the Polish law and Article 90 EC. It referred to *Brzeziński*, which was pending at that time, as well as to the infringement procedure initiated by the European Commission. The Marshall of the Sejm¹² and the Public Prosecutor-General argued that the case did not have to be decided, under reference to the same cases.

THE CONSTITUTIONAL TRIBUNAL'S DECISION

The Constitutional Tribunal started off with a set of three arguments for inadmissibility of the reference. Despite declaring the inadmissibility straightaway, the Tribunal decided to use this opportunity to elaborate further on the division of jurisdiction between national courts and the Court of Justice. Its point of departure was the requirement of the uniform interpretation of EC law. The Constitutional Tribunal emphasised that its decision on the merits of the request could have led to divergent interpretation of EC law. The Tribunal emphasised the position of the Court of Justice as the guarantor of the uniform interpretation of EC law. At the same time, the Constitutional Tribunal referred to Article 8 of the Polish Constitution, which says that the Constitution is the supreme law of the land, and made it clear that it will have the last word in cases with constitutional implications. It paid particular attention to the different roles of the Constitutional Tribunal and the Court of Justice. The second argument used by the Tribunal referred directly to the substance of the request. The judges rightly held that the question of the Voivod Court dealt with the interpretation of EC law, not the conformity of the Polish legislation with EC law and Polish Constitution (as suggested by the referring court). Thirdly and finally, the Constitutional Tribunal held that the reference itself dealt with the application of law to a particular set of facts, not general applicability. Accordingly, it fell outside the scope of the Tribunal's jurisdiction. The Tribunal emphasised that the referring court, if it did not doubt the correct interpretation of EC law, should set aside conflicting Polish law and decide the case directly on the basis of EC law. If a provision of EC law was not directly effective, the national court should proceed to interpret Polish law in accordance with EC legislation. Whenever there is a conflict between EC law and Polish legislation, national courts should adjudicate by themselves or submit a reference to the Court of Justice.

¹² The Speaker of the lower chamber of the Polish Parliament.

The relationship between the Polish Constitution and EU law

After these introductory, yet important considerations, the Constitutional Tribunal, in order to instruct the lower Polish courts, took the opportunity to provide an in-depth analysis of the relationship between EC law and Polish law, *inter alia*, in the light of Article 91 of the Polish Constitution 1997.¹³ This provision reads as follows:

Article 91

1. After promulgation thereof in the Journal of Laws of the Republic of Poland (Dziennik Ustaw), a ratified international agreement shall constitute part of the domestic legal order and shall be applied directly, unless its application depends on the adoption of an act of Parliament.
2. An international agreement ratified upon prior consent granted by an act of Parliament shall have precedence over an act of Parliament if such an agreement cannot be reconciled with the provisions of such an act.
3. If an agreement, ratified by the Republic of Poland, establishing an international organisation so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict with acts of Parliament.¹⁴

Ratified international treaties become sources of law in Poland upon their publication in the Journal of Laws. In cases of conflicts with Polish law, agreements ratified with a prior consent granted in an Act of Parliament will take precedence. The same principle applies to secondary law of international organisations, of which Poland is a member. The latter provision, although not containing an explicit reference to it, was tailored to accommodate secondary law of the European Union. From the outset, the Constitutional Tribunal acknowledged the specificity of the request submitted by the Voivod Administrative Court and the way in which it was drafted. The Tribunal held that not even the case at hand was governed by Article 91 of the Polish Constitution. That Article determines in general

¹³ See, *inter alia*, S. Biernat, 'Poland', in: A.E. Kellermann, J. Czuczaj, S. Blockmans, A. Albi, W. Th. Douma (eds.), *The Impact of EU Accession on the Legal Orders of New EU Member States and (Pre-) Candidate Countries. Hopes and Fears* (The Hague, T.M.C. Asser Press 2006) p. 419; J. Barcz, 'Membership of Poland in the European Union in the Light of the Constitution of 2 April 1997. Constitutional Act of Integration', 23 *Polish Yearbook of International Law* (1997-98) p. 21; S. Biernat, 'Constitutional Aspects of Poland's Future Membership in the European Union', 36 *Archiv des Völkerrechts* (1998) p. 398; C. Mik, 'Implementation of Primacy and Direct Effect Principles of Community Law in the Polish Constitutional System', 1-4 *Droit Polonais Contemporain – Polish Contemporary Law* (1998) p. 5; A. Łazowski, 'Poland' in A. Ott, K. Inglis (eds.), *Handbook on European Enlargement. A Commentary on the Enlargement Process* (The Hague, T.M.C. Asser Press 2002) p. 299.

¹⁴ Translation by the author.

terms the position of Polish law in cases of conflict with international law. As such it is not applicable to the dispute at hand, which deals with the interpretation of EC law. Subsequently, the Constitutional Tribunal compared its own jurisdiction to adjudicate cases of conflict between EU law and Polish legislation with that of the ordinary courts. It limited its own jurisdiction to two scenarios: first, when no other procedural means to tackle inconsistencies are available; and second, when legal certainty requires the Tribunal to step in. In all other cases, any inconsistencies between Polish and EU law should be addressed when the law is being applied to particular facts of a case. To put it differently, such cases should remain in the hands of the lower courts, which are empowered to apply Article 91.2-3 of the Polish Constitution of their own motion. This, according to the Constitutional Tribunal, is an efficient and flexible *modus operandi* that should have been followed by the referring court.

The relationship between the Court of Justice and national courts

The next issue addressed by the Constitutional Tribunal was the relationship between national courts and the Court of Justice. The Tribunal presented a rather general overview of the functions of the preliminary ruling procedure. It emphasised the binding nature of the Court's judgments and the obligations for national courts stemming from the principle of loyal co-operation enshrined in Article 10 EC. The Tribunal added that it would amount to a breach of EC law to ignore a judgment of the Court of Justice and that it might lead to infringement proceedings under Article 226 EC. The principle of state liability and the *Köbler* judgment¹⁵ were also mentioned in this context.

National courts and the principle of loyal co-operation

In the final part of the ruling, the Constitutional Tribunal looked once more to the obligations of national courts stemming from EC law. Article 91.2 Polish Constitution and Article 10 EC served as the background for the Tribunal's analysis. The Tribunal confirmed that Poland respects international law binding upon it (Article 9 Polish Constitution), which also covers the autonomous legal order of the European Communities. Polish courts have the right and obligation to set aside Polish law in cases of conflict with EC legislation. It was emphasized that there is no need for courts to refer questions on conformity to the Constitutional Tribunal. The Tribunal concluded by saying that the right of Polish courts to refer legal questions regarding EC/EU law to the Tribunal is limited by both Article 91.2 Polish Constitution and principles governing the application of EC law.

¹⁵ Case C-224/01 *Gerhard Köbler v. Republik Österreich*, ECR [2003] I-10239.

COMMENT

This ruling of the Constitutional Tribunal touches upon some important issues concerning membership in the European Union. As stated above, it is not of the same calibre as the earlier judgments on the European Arrest Warrant or the Accession Treaty, but it is worth a few comments. Once again, the Constitutional Tribunal gives proof of support for the process of European integration, but on its own terms, and bearing in mind its own function in the Polish constitutional framework. One can clearly detect a spirit of co-operation stemming from this decision. Judges made it clear that the Constitutional Tribunal and the Court of Justice should not be perceived as courts in competition as their roles and jurisdictions differ considerably. *Prima facie* it looks as if the Constitutional Tribunal surrendered its powers to the Court of Justice when it held that its participation in the interpretation of EU law could have led to a conflict with the Court of Justice. Interestingly, though, while giving the Court of Justice the lead, the Tribunal referred neither to Article 220 EC Treaty, nor to Court of Justice's case-law. Bearing in mind the (at that moment still forthcoming) judgment of the European Court in *Brzeziński*, the Constitutional Tribunal rightly held that it is the European Court's task to secure uniform interpretation of EC law, including Article 90 EC, and that the Court's judgments should serve as guidelines to Polish courts. From this perspective, the decision is in line with European orthodoxy; however, the devil is in the details. A careful examination of Tribunal's reasoning reveals several loopholes, surprising arguments and inconsistencies.

A first and rather general comment should concentrate on the Tribunal's approach to the three-pillar nature of the European Union. It is striking to note that the Tribunal focused solely on EC law. Having already experienced significant problems with the Framework Decision on the European Arrest Warrant,¹⁶ the Tribunal could have looked from a broader perspective at the relationship between national law and EU law, also covering the tricky details of the third pillar. Unfortunately, those issues are absent from the Tribunal's analysis. After the judgment in *Pupino* the situation is particularly complex, as the principle of indirect effect is now also applicable to framework decisions.¹⁷ To much regret, this important factor is missing in the Tribunals' analysis. It is particularly regrettable, as Polish courts have no jurisdiction to submit references on the basis of Article 35 EU.

¹⁶ Council Framework Decision 2002/584/JHA of 13 June 2002 on the European arrest warrant and the surrender procedures between member states, *OJ* [2002] L 190/1.

¹⁷ ECJ, Case C-105/03 Criminal proceedings against Maria Pupino, *ECR* [2005] I-5285. For a commentary *see, inter alia*, E. Spaventa, 'Opening Pandora's Box: Some Reflections on the Constitutional Effects of the Decision in *Pupino*', 3 *EuConst* (2007) p. 5; M. Fletcher, 'Extending "indirect effect" to the third pillar: the significance of *Pupino*', 30 *European Law Review* (2005) p. 862.

The second critical comment deals with the Tribunal's methodology. Not surprisingly, the centre of gravity was Polish constitutional law. However, if this ruling was meant to serve as the ultimate guideline for the division of jurisdiction between the Constitutional Tribunal and the Court of Justice, then the Tribunal should have taken into account the very rich case-law of that Court. When discussing the supremacy of EC law, the Tribunal refers only to the Articles 91.2-3 Polish Constitution, and it fails to examine judgments of such importance as *Costa v. E.N.E.L*¹⁸ or *Simmenthal*.¹⁹ The situation is just the same with the principles of direct effect, indirect effect and state liability. An equivalent approach is followed in the Court's analysis of the Polish case-law on the Excise Duty Act 2004. The Constitutional Tribunal limited itself to a mere description of the incoherent case-law of Polish courts, without a note on the Court of Justice's case-law on the interpretation of Article 90 EC.

The division of competences between the Tribunal and the Court of Justice is another issue. On the one hand, the Tribunal gives the lead to the European Court; on the other it reserves for itself the final word in matters of constitutional importance. Alas, it fails to define such matters, which makes the reservation vague and flexible. Moreover, in the main part of the judgment the Tribunal makes it clear that it is willing to exercise its jurisdiction should no other procedural possibilities exist or should legal certainty require the Tribunal to act. Again, it is a pure guess as to what the Tribunal has in mind. Would its approach be different had the act in question been a framework decision or another third-pillar instrument? What about pre-accession cases dealing with EU legislation? It is clear from the Court of Justice's judgment in *Ynos* that these references are considered to be inadmissible by that Court.²⁰ Would the Constitutional Tribunal step in under such circumstances? Regrettably, this is not clear from the judgment at hand. It can be argued that this way, the Tribunal potentially adds doubts as to its jurisdiction in similar cases. Ultimately, it leaves Polish courts with a continuous dilemma of 'to refer or not to refer' and if so, where to. It will be up to those courts to define whether particular matters fall within the ambit of categories outlined by the Tribunal.

¹⁸ ECJ, Case 6/64 *Flaminio Costa v. E.N.E.L*, ECR [1964] 585.

¹⁹ ECJ, Case 106/77 *Amministrazione delle Finanze dello Stato v. Simmenthal SpA*, ECR [1978] 629.

²⁰ ECJ, Case C-302/04 *Ynos kft v. János Varga*, ECR [2006] I-371; ECJ, Case C-261/05 *Lakép kft, Pár-Bau kft and Rottelma kft v. Komárom-Esztergom Megyei Közigazgatási Hivatal*, ECR [2006] I-20; ECJ, Case C-168/06 *Ceramika Paradyż sp. z oo v. Dyrektor Izby Skarbowej w Łodzi*, ECR [2007] I-29; ECJ, Case C-64/06 *Telefónica O2 Czech Republic a.s. v. Czech On Line a.s.*, ECR [2007] I-0000. For an academic appraisal of the early cases, see, *inter alia*, M. Bobek, A New Legal Order, or a Non-Existent One? Some (Early) Experiences in the Application of EU law in Central Europe, 2 *Croatian Yearbook of European Law and Policy* (2006) p. 265.

One of the Tribunal's conclusions is that in cases of doubt, national courts should proceed with references to the Court of Justice. It fails to acknowledge, however, the limitations stemming from Article 68 EC and Article 35 EU. In the first case, only national courts of last resort have the jurisdiction to refer,²¹ in the second Polish courts have no jurisdiction at all.²² This will remain so until Article 68 EC is revised,²³ Poland recognises the jurisdiction of the Court of Justice in the third pillar or the Treaty of Lisbon enters into force.²⁴ This means that if a scenario comparable to the case at hand arises that is covered by one of the two special preliminary ruling regimes, Polish courts will be left on their own with interpretation problems. It is not very clear whether the Tribunal would claim to have jurisdiction under such circumstances. The choice of methods for giving effect to EC law is another matter approached by the Tribunal, yet on a fairly general level. It comes as a surprise that judges seem to have given priority to the principles of supremacy and direct effect, treating the principle of indirect effect as the last resort. One could argue that this runs counter to reality, as in most cases, national courts attempt to secure uniformity by pro-European interpretation. The latter is generally considered to be a less radical tool and it is very often employed in the case-law of Polish courts.

Another element that deserves a critique is the Tribunal's conclusion on the methods of approaching discrepancies between Polish and EC law. According to the Tribunal, non-conformities should be addressed in the course of application of law by the Polish lower courts. It is far more flexible and operational to leave those problems in hands of these courts, which are empowered by the Constitution to set aside Polish law in case of conflicts with EC legislation. The Tribunal

²¹ The ECJ interprets the admissibility conditions in a very strict fashion, *see* ECJ, Case C-24/02 *Marseille Fret SA v. Seatrano Shipping Company Ltd.*, ECR [2002] I-3383; ECJ, Case C-51/03 *Nicoleta Maria Georgescu*, ECR [2004] I-3203; ECJ, Case C-555/03 *Magali Warbecq v. Ryanair Ltd.*, ECR [2004] I-6041.

²² Poland has not recognised the jurisdiction of the ECJ. Of the new member states only the Czech Republic, Hungary, Lithuania, Latvia and Slovenia have done so. *See* information concerning the declarations by the Republic of Hungary, the Republic of Latvia, the Republic of Lithuania and the Republic of Slovenia on their acceptance of the jurisdiction of the Court of Justice to give preliminary rulings on the acts referred to in Article 35 of the Treaty on the European Union, OJ [2008] C 69/1.

²³ *See* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the Court of Justice of the European communities – Adaptation of the provisions of Title IV of the Treaty establishing the European Community relating to the jurisdiction of the Court of Justice with a view to ensuring more effective judicial protection, COM (2006) 346 final.

²⁴ Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, OJ [2007] C 306/1.

added that this *modus operandi* should be employed by administrative courts handling claims related to the Excise Duty Act and Article 90 EC.

This argumentation, while correct in merits, is not very persuasive and must be criticised on a number of grounds. First and foremost, the Tribunal failed to mention that once the Court of Justice declares a provision of EC law to preclude a provision of national law, then the authorities of a particular member state have the obligation to revise domestic legislation.²⁵ It is the ultimate method of achieving harmony between national and EC law, though as long as such inconsistent legislation remains in force, domestic courts have to proceed as argued by the Tribunal.²⁶ Moreover, the Constitutional Tribunal makes a remarkable point about the benefits coming from such an empowerment of lower Polish courts. The Tribunal states that such a *modus operandi* is:

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.

It is striking that the Constitutional Tribunal fails to make a distinction between international law and the EC legal order and does not elaborate on the specificity of the latter. Read literally, the Tribunal's argument seems to imply that in cases of conflicts it is worth to take 'wait and see' approach and await a revision of international law. Such an approach is even more striking when one takes into account the legal context in which the judgment was delivered, that is the non-conformity of the Excise Duty Act with Article 90 EC. It looks as though the Tribunal is ready to compromise legal certainty, not to mention potentially breach the principle of loyal co-operation enshrined in Article 10 EC. Does it mean that the Constitutional Tribunal is suggesting not to revise Polish legislation whenever it conflicts with EC law and leave matters of compliance in the hands of domestic judges? At the same time in the following paragraph, the Constitutional Tribunal mentions that a failure to follow a Court of Justice decision delivered in a preliminary ruling

²⁵ See, *inter alia*, ECJ, Case C-201/02 *The Queen on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions*, ECR [2004] I 723; ECJ, Joined cases C-231/06 to C-233/06 *Office national des pensions v. Emilienne Jonkman* (C-231/06) and *Hélène Vercheval* (C-232/06) and *Noëlle Permesaen v. Office national des pensions* (C-233/06), ECR [2007] I-5149.

²⁶ There is a clear lack of consistency in the Tribunal's analysis. In the first part of the decision it reduced itself to a short comment that conflicts between Polish and EU law may lead to revision of national legislation. This is all missing in the main body of the decision.

procedure may lead to an enforcement action and state liability claims. Moreover, it also refers to Article 9 Polish Constitution, which guarantees the respect of public international law (and, as Tribunal adds, EC law). All this argumentation seems to be quite misleading and bit separated from the everyday functioning of the EC legal order.

CONCLUSIONS

Despite its drawbacks, the decision of the Constitutional Tribunal in Case P 37/05 remains an interesting development or, when one looks at its substance, an attempt to draw a competence line between the Tribunal and the Court of Justice in interpretation of EC law. The general approach taken by the Tribunal is pragmatic, yet based on solid substantive grounds. At the same time, sometimes the reasoning remains unclear and seems inconsistent and controversial. One can only hope for clarification in the not too distant future. It is almost paradoxical that what was meant to be a clarification requires clarification of its own.

