

DIRITTI COMPARATI

Comparare i diritti fondamentali in Europa

SK 45/09 - POLISH SOLANGE II?

Posted on 5 Dicembre 2011 by [Katarzyna Granat](#)

On 16 November 2011, the Polish Constitutional Court (hereafter “the Court”) sitting as a full chamber handed down a unanimous judgement that will certainly be seen as a precedent. For the first time, the Court ruled on the compatibility of EU secondary law with the Polish Constitution. The Court did not hold that the EU regulation violated the constitutional right to be heard. Nevertheless, future constitutional complaints against a EU legal act will have to prove that the EU act lowers the level of rights and freedoms protection compared to the level guaranteed by the Polish Constitution.

As the Tribunal has 30 days following the judgment to submit the grounds for its decision the following case note is based on the press release.

Facts

In 2004, the Court of Appeal in Belgium condemned the applicant, Anna S., to the penalty of 12.500 euros. After two years, the District Court in Warsaw enforced the ruling issued by the Belgian court and applied Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. According to Article 41, second sentence of this regulation Anna S., as a debtor against whom the enforcement was sought, was not entitled to make any submissions on the application at

the stage of first instance proceedings. As a result, the applicant brought a complaint against the District Court judgment to the Court of Appeal in Warsaw. The complaint was dismissed. Having exhausted all available legal remedies, the applicant lodged a constitutional complaint in the Constitutional Court. The constitutional complaint concerned inter alia the compatibility of Article 41, second sentence of the Regulation No 44/2001 with Article 45 (1) of the Polish Constitution (the right to a fair and public hearing of her case, without undue delay, before a competent, impartial and independent court).

Concerns of the Court

The Court was faced with two main legal problems. Firstly the Court considered if it has jurisdiction to adjudicate the case. Here the Court stressed the difference between the role of the Court of Justice of the European Union (which takes final decisions on the compatibility of EU regulations with the Treaties) and its own role (final decisions on the compatibility of EU regulations with the Constitution). According to the Court its role was to act as guardian of the Constitution as provided for by Article 8 (1) of the Constitution. This provision declares the Polish Constitution the supreme law of Poland. Nonetheless, the Court also highlighted the need to employ due caution and restraint when reviewing acts of secondary EU legislation. In this context it invoked the principle of sincere cooperation, as expressed by Article 4 (3) of EU Treaty. The Court also underlined the need for to eliminate conflicts through an interpretation that would respect the relative autonomy of EU and national law. Finally, the Court pointed out that the consequence of an incompatibility of the secondary EU legislation with the Polish Constitution would be its inapplicability and depriving it of legal effects in Poland.

Secondly the Court explored if an EU regulation may be subject to judicial review before the Constitutional Court. It argued that the procedure of a constitutional complaint provided for in Article 79 (1) of the Constitution is an autonomous procedure and its main function is to safeguard the rights and freedoms of individuals. It would be unjust to narrow its scope to legal acts explicitly mentioned in the Constitution . Moreover, due to fact

that EU regulations are legally binding in their entirety and enjoy direct applicability (Article 288 II TFEU), they may be classified as a legal act within the meaning of the Polish Constitution. Consequently an EU regulation may contain norms which are the basis for a final decision of a court or organ of public administration affecting freedoms, rights or obligations specified in the Constitution, as required by Article 79 (1).

Decision of the Court

The Court found Article 41, second sentence of the said EU regulation compatible with the right to be heard provided for in Article 45 (1) of the Constitution. It pointed out that the aim of the proceedings regulated by the EU regulation is to achieve impartiality and reconcile the need to conceal the action from the debtor with its right to be heard. Moreover, as it was a secondary procedure at issue it can be assumed that the court in the Member State of origin of the judgment accorded the parties all necessary procedural rights. Finally, the Court recalled similar procedures in the Polish Civil Procedure Code.

Observations

In the final sentences of the press release, the Court referred to the jurisprudence of the German Federal Constitutional Court (*Solange II*) and the European Court of Human Rights (*Bosphorus case*) concerning the level of protection of fundamental rights. According to the Court a similar position may be followed in the present case, due to the special character of fundamental rights in the EU legal order, the constitutional principle of a favourable predisposition towards the process of European integration and the loyalty of Member States towards the EU. Hence any future constitutional complaint against EU legal act will have to prove that the act reduces the level of rights and freedoms protection compared to the level guaranteed by the Polish Constitution.

Comments

Without a doubt the constitutional complaint lodged in 2007 was a tough nut to crack for the Constitutional Court. For the first time it was faced with a possibility of assessing EU law in a concrete review. Previous cases

concerning the Accession Treaty and the Lisbon Treaty were adjudicated in the course of abstract review. Moreover, it is worth mentioning the opposition of some national institutions in the case. Whereas the Sejm supported the review of EU secondary legislation, the Attorney General and the Minister of Foreign Affairs claimed the constitutional complaint was inadmissible. Another question worth considering is whether the Constitutional Court was under an obligation to suspend the proceedings and make a preliminary reference to the Court of Justice. On the one hand, such a move would probably have been necessary if the Court was to declare the EU act contrary to the Constitution. On the other hand, a preliminary reference would have also undermined the self-perception of the Constitutional Court as a guardian of the Constitution. All things considered, we await with anticipation the official publication of the judgment with the justification and possible concurring opinions.