

Judgment of 31<sup>st</sup> January 2005, P 9/04  
**LIABILITY FOR CUSTOMS OFFENCES COMMITTED PRIOR  
 TO POLAND'S ACCESSION TO THE EUROPEAN UNION**

<b>Type of proceedings:</b> Question of law referred by a court <b>Initiator:</b> Regional Court in Toruń	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Continuing application of hitherto operative provisions to customs offences and petty offences committed prior to 1 <sup>st</sup> May 2004, following Poland's accession to the EU [Customs Act (Introductory Provisions) 2004: Article 22]	Rule of law <i>Nullum crimen sine lege</i> principle Principle of retroactivity of a more lenient criminal statute [Constitution: Articles 2 and 42(1); International Covenant on Civil and Political Rights: third sentence of Article 15(1)]

“Fiscal offences and petty offences regarding customs obligations and the principles of external goods and services traffic”, commonly referred to as customs offences and petty offences, are contained in Chapter 7 (Articles 85-96) of the Fiscal Criminal Code 1999. The latter provisions institute criminal sanctions for infringement of requirements and prohibitions, concerning foreign transactions, contained in provisions located outside the 1999 Code.

The aforementioned criminal provisions of the 1999 Code have generally not been amended since 1<sup>st</sup> May 2004, i.e. since Poland's accession to the European Union. However, the regulation of foreign transactions by provisions located outside the Code, but secured by sanctions contained within the Code, was subject to amendment. Poland's adherence to the EU customs area signifies, for example, that many activities concerning the import of goods to Poland from other EU Member States are currently not subject to restrictions, infringement of which constituted a customs offence prior to 1<sup>st</sup> May 2004.

Mr Witold F. was accused of having committed such an offence when, in May 2003, he imported a personal vehicle to Poland from an EU Member State, taking advantage of a customs exemption on the basis of a temporary customs clearance. The latter required such an importer to take the vehicle abroad anew or to declare to the customs authorities a change of the so-called customs designation of this vehicle (and pay the appropriate customs duty). Mr F. did not fulfil either of these conditions. Accordingly, the appropriate customs office accused him of having committed the offence stipulated in Article 88 § 1 of the Fiscal Criminal Code. (“Anyone, being entitled to take advantage of the procedure of temporary customs clearance of a good, with respect to which this procedure applies on the basis of a verbal declaration, does not take that good abroad anew or does not undertake actions aimed at assigning a new customs designation to this good, thereby resulting in a reduced level of customs dues, shall be subject to the penalty of a fine...”). Had Mr F. imported the vehicle following Poland's accession to the EU, the aforementioned restrictions and the criminal sanction related thereto, would simply not apply.

The District Court in B. issued judgment in Mr F.'s case on the basis of provisions operative prior to Poland's accession to the European Union. This was required by Article 15a of the Introductory Provisions to the Fiscal Criminal Code Act, demanding the application of "hitherto provisions" to customs offences and petty offences committed prior to Poland's membership of the EU. This provision was introduced by Article 22 of the 2004 Act (referred to in the table located at the outset of this summary), challenged in this case, and entering into force on 1<sup>st</sup> May 2004. The District Court found the accused guilty of committing the offence with which he was charged and, although it decided against the imposition of a penalty, the court ordered the forfeiture of the vehicle to the State Treasury (on the basis of Article 30 § 3 of the Fiscal Criminal Code).

Mr F. appealed against the aforementioned judgment to the Regional Court in Toruń. This court had doubts as to whether the inter-temporal regulation discussed above conformed to various provisions of the Constitution and the International Covenant on Civil and Political Rights, indicated in the table above. Accordingly, the Court referred a question of law to the Constitutional Tribunal.

## RULING

**The challenged provision does not conform to Article 2 of the Constitution, read in conjunction with the third sentence of Article 15(1) of the International Covenant on Civil and Political Rights, and conforms to Article 42(1) of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. Three principles are expressed in Article 15(1) of the International Covenant on Civil and Political Rights (ICCPR): the prohibition on penalising acts that did not constitute offences at the time when they were committed (first sentence); the prohibition on applying a heavier penalty than that applicable at the time the offence was committed (second sentence); and the requirement to impose a lighter penalty upon the perpetrator of the offence (third sentence).
2. The latter of the aforementioned principles (*lex retro agit in mitius, lex mitior retro agit*) may, on the basis of the Polish Constitution, primarily be derived from the principle of the democratic State governed by the rule of law (Article 2) – either directly or by reference to international legal regulations by which Poland remains bound, in particular the third sentence of Article 15(1) of the ICCPR. However, this principle does not stem from Article 42(1) of the Constitution, expressing a prohibition on the imposition of penalties whenever the statute operative at the time the offence was committed did not envisage this (*nullum crimen sine lege*).
3. The requirement of retroactivity *in mitius* within criminal law, construed in international law as an individual right (Article 15(1) of the ICCPR), may also be recognised as a general principle of Community law (cf. Article II-109 of the Charter of Fundamental Rights of the European Union, constituting Part II of the Treaty establishing the Constitution for Europe).

4. When Poland became a member of the European Union, certain activities were decriminalised which were hitherto subject to penalty as customs offences or petty offences on the basis of Articles 85-96 of the Fiscal Criminal Code. The legislator, however, did not quash these provisions, since such decriminalisation applies only in respect of transactions within the customs area of the European Union.
5. On the date of the entry into force of the present judgment, both Article 22 of the 2004 Act, challenged in this case, and – as a consequence – Article 15a of the Introductory Provisions to the Fiscal Criminal Code Act, introduced by the first provision, shall be eliminated.
6. Given the changes mentioned in points 4 and 5 above, two types of situations must be distinguished as regards acts committed prior to 1<sup>st</sup> May 2004. Firstly, where a fiscal-criminal case has not yet been validly concluded, no penalty may be imposed if the act is no longer subject to a penalty according to the provisions operative as of this date. Secondly, where a penalty or forfeiture has already been finally imposed on the basis of the unconstitutional provision, the possibility exists for the accused to re-open proceedings (Article 190(4) of the Constitution and Article 540 § 2 of the Criminal Procedure Code, read in conjunction with Article 113 § 1 of the Fiscal Criminal Code).
7. The fact that one of the bases of review (in the present case: Article 15(1) of the ICCPR) of a provision challenged before the Constitutional Tribunal was indicated by the initiator of the proceedings in the reasoning of the application, question of law or constitutional complaint, but omitted from the description of the challenge, does not constitute (on the grounds of Article 66 of the Constitutional Tribunal Act) an obstacle to the Tribunal applying this basis of review.

**Provisions of the Constitution of the Republic of Poland, the Constitutional Tribunal Act,  
the International Covenant on Civil and Political Rights and the Treaty establishing a Constitution for Europe**

**Polish Constitution**

**Art. 2.** The Republic of Poland shall be a democratic state governed by the rule of law and implementing the principles of social justice.

**Art. 42.** 1. Only a person who has committed an act prohibited by a statute in force at the moment of commission thereof, and which is subject to a penalty, shall be held criminally liable. This principle shall not prevent punishment of any act which, at the moment of its commission, constituted an offence within the meaning of international law.

**Art. 190.** 4. A judgment of the Constitutional Tribunal on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgment of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for re-opening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given proceedings.

**CT Act**

**Art. 66.** The Tribunal shall, while adjudicating, be bound by the limits of the application, question of law or complaint.

**International Covenant**

**Art. 15.** 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

**Constitutional Treaty**

**Art. II-109.** 1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed. Nor shall a heavier penalty be imposed than that which was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that penalty shall be applicable.