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A ‘Secret Garden’ of Conforming Interpretation – European Union Law in Polish Courts Five Years after Accession

Abstract: *The cooperation process between national courts and the European Court of Justice aims at attaining uniformity in the interpretation of Community law. Therefore, Polish courts must first of all accept the necessity of applying norms that do not belong to the national legal system, and moreover, unconditionally accept the method of sympathetic interpretation, which results from the principle of the supremacy of Community law over the national legal order. Therefore, decision making on issues related to interpretation (in terms of ensuring the uniform interpretation of Community law) and validity of norms (in terms of ensuring the effectiveness of Community law) have constituted the most frequent challenges for Polish judicial practice since the date of accession five years ago.*

Introduction

From the moment of accession Community law and rules became binding in Poland, in relation to certain matters. These matters are not enumerated in the Polish Constitution, which simply states that competences of organs of State authority may be delegated to international institutions or organs in certain matters.¹ In consequence, there are two autonomous legal systems

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¹ Judgment of the Constitutional Tribunal of 11.05.2005 (K 18/04): ‘Consequently, the Communities and their institutions may only operate within the scope envisaged by the provisions of the Treaties. The Member States maintain the right to assess whether or not, in issuing par-

operating as one – Polish and Community. This does not, however, preclude their interactions or collisions.² In case of collision, Community law should be treated by Polish courts as a part of the Polish legal system, which is presumed to be in legal conformity with Community norms. This obligation is known as the directive of conforming interpretation (*consistent interpretation, indirect effect*) or *in dubio pro communitate*.³ For the purpose of this article the notion of *conforming interpretation* and *in dubio pro communitate* will be used synonymously, because both of them have their roots in the principle of solidarity, and are strictly bound with the supremacy, efficiency or procedural autonomy principles.⁴

ticular legal provisions, the Community (Union) legislative organs acted within their delegated competences and in accordance with the principles of subsidiarity and proportionality. Should the adoption of provisions infringe these frameworks, the principle of precedence of Community law fails to apply with respect to such provisions. The interpretation of Community law performed by the ECJ should fall within the scope of functions and competences delegated to the Communities by its Member States. It should also remain in correlation with the principle of subsidiarity. Furthermore, this interpretation should be based upon the assumption of mutual loyalty between the Community institutions and the Member States. This assumption generates a duty for the ECJ to be sympathetically disposed towards the national legal systems and a duty for the Member States to show the highest standard of respect for Community norms.

² Judgment of the Constitutional Tribunal of 11.05.2005 (K 18/04): ‘Such a collision would occur in the event that an irreconcilable inconsistency appeared between a constitutional norm and a Community norm, such as could not be eliminated by means of applying an interpretation which respects the mutual autonomy of European law and national law. Such a collision may in no event be resolved by assuming the supremacy of a Community norm over a constitutional norm. Furthermore, it may not lead to a situation whereby a constitutional norm loses its binding force and is substituted by a Community norm, nor may it lead to an application of the constitutional norm restricted to areas beyond the scope of Community law regulation. In such an event the Nation as the sovereign, or a State authority organ authorized by the Constitution to represent the Nation, would need to decide on: amending the Constitution; causing modifications within the Community provisions; or, ultimately, on Poland’s withdrawal from the European Union’.

³ See: R. Juha, *The Principle of Legal Certainty in EC Law*, Dordrecht 2003, p. 111; D. Chalmers, Ch. Hadjiemmanuil, G. Monti, A. Tomkins, *European Union Law*, Cambridge 2006, p. 381–90; A. Arnall, *The European Union and its Court of Justice*, Oxford 1999, p. 153; A.C. Geddes, *Protection of Individual Rights under EC Law*, London 1995; G. Betlam, *The Doctrine of Consistent Interpretation: Managing Legal Uncertainty*, “Oxford Journal of Legal Studies” No. 22/2002, p. 399.

⁴ See cases: 8/81 Becker v. Finanzamt Münster-Innenstadt [1982] ECR 53; 53/81 Levin D.M. v. Staatssecretaris van Justitie [1982] ECR 1035; see: C. Gulman, *Methods of interpretation of the European Court of Justice*, “Scandinavian Studies in Law” No. 24/1980, p. 201; A. Kutscher, *Methods of interpretation as seen by a judge of the Court of Justice*, Lecture at the Court of Justice’s Judicial and Academic Conference, Luxembourg, 1976, p. 41.

On the other hand, according to legal theory, conforming interpretation is not a norm of implicit obligation and forms a '*normative perspective; there is no explicit duty to interpret Polish law in conformity with Community rules*'⁵. This means that the principle of conforming interpretation has some limitations, taking into account that it should usually be used in the form of a *secundum legem* interpretation; that is an interpretation that conforms to '*Polish legal system canon and rules of interpretation of law*'.⁶ and in Warsaw of 26.11.2008 (III SA/Wa 1277/08). Polish courts are obliged to issue rulings on the basis of Community law, to interpret Polish law in conformity with Community law, and in case of conflict, if necessary to disregard the application of norms of Polish law. In case of doubt regarding the interpretation of Community law or the validity of secondary Community law, Polish courts are 'authorised' by the Polish Constitution to make a preliminary reference (and 'obliged' under Art. 234 TEC in most instances).

1. Constitutional provisions

In contrast to the constitutions of some Member States of the European Community (especially those following the German model), the Polish Constitution of 2 April 1997 does not contain any provisions directly concerning membership in the European Union. It seems that the legislature has left this an open question to be resolved. Nevertheless, the mechanism for Poland's accession to the European Union finds its grounds in constitutional norms and the validity and efficacy of accession are dependent upon compliance with the constitutional principles governing the integration procedure, including the procedure for delegating competences.

Poland's accession to the European Union did not undermine the supremacy of the Constitution over the internal legal order. Constitutional norms, as the supreme acts expressing the Nation's will, cannot lose their binding force or change their content by the mere fact of an irreconcilable inconsistency between these norms and any existing Community provision. In such

⁵ A. Łazowski, *Proeuropejska wykładnia prawa przez polskie sądy i organy administracji, jako mechanizm dostosowania systemu prawnego do *acquis communautaire**. (Pro-european Interpretation In the Polish Courts and Administrative Institutions as a Mechanism of Adapting the Polish Legal System to the *acquis communautaire*) in: *Prawo polskie a prawo Unii Europejskiej (Polish Law and European Union Law)*, ed. E. Piontek, Warszawa 2003, p. 187.

⁶ M. Szuniewicz, *Metody wykładni prawa wspólnotowego (Methods of Interpretation of Community law)*, „*Studia Prawnicze*” No. 1/2006; L. Morawski, *Zasady wykładni prawa (The Principles of Legal Interpretation)*, Toruń 2006, p. 127. See also: judgments of the Provincial Administrative Court in Wrocław of 08.12.2008 (I SA/Wr 881/08).

a situation, the autonomous decision as to the appropriate manner of resolving that inconsistency, including the expediency of a revision of the Constitution, belongs to the Polish constitutional legislator.

Membership of the European Union is connected with the delegation of powers from the Member States to Community institutions. The possibility to delegate some competences in relation to certain matters to Community organs is written into the Polish Constitution in Article 90. According to this provision, containing a direct reference to international law matters, Poland may, by virtue of international agreements, delegate to an international organisation or international institution the competence of organs of State authority in relation to certain matters. According to the legal literature, this delegation of competencies is inferred from the basic constitutional principles in such a way that it *'may concern the powers of all the categories of agencies of State authorities mentioned in Art. 10 of the Constitution⁷ and also agencies of local government or others forms of self-government'*.⁸ Accordingly, Poland is still capable of executing its own competencies in the so-called 'reserved sphere' ('control gap'). Delegation of competencies is contained in a general provision in the Constitution; it does not specify what kind of powers may be transferred to international organs or organisations. Some limitations could be derived on the basis of general and introductory provisions, which determine the state system,⁹ its basic rules,¹⁰ the organisation of the State,¹¹ and its fundamental freedoms.¹²

The provisions of Article 91 of the Polish Constitution specify the position of international agreements and the law established by international organisations (including Community law) in the domestic legal order. This Article also defines the prerequisites for the domestic recognition of legal acts enacted by the outside (international) systems of authority. The Constitution

⁷ Art. 10 (1) *The system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers.*

(2) *Legislative power shall be vested in the Sejm (Chamber of Representatives) and the Senate, executive power shall be vested in the President of the Republic of Poland and the Council of Ministers, and the judicial power shall be vested in courts and tribunals.*

⁸ S. Biernat, *Constitutional Aspects of Poland's Future Membership in the European Union*, "Archiv des Völkerrechts", 1998, p. 402.

⁹ Art. 1 *Republic of Poland shall be the common good of all its citizens.*

¹⁰ Art. 2 *The Republic of Poland shall be a democratic state ruled by law and implementing the principles of social justice.*

¹¹ Art. 3 *The Republic of Poland shall be a unitary State.*

¹² Art. 5 *The Republic of Poland shall safeguard the independence and integrity of its territory and ensure the freedoms and rights of persons and citizens, the security of the citizens, safeguard the national heritage and shall ensure the protection of the natural environment pursuant to the principles of sustainable development.*

provides that an international agreement which has been ratified on the basis of prior consent shall take precedence over a national statute if the statute in question cannot be interpreted in accordance with the agreement; if the agreement, ratified by the Republic of Poland, establishes an international organisation and provides that the law settled by such an organisation shall apply directly and shall have precedence in the event of a collision with national statutes. Ratified international agreements that have become part of the domestic legal order shall not be transposed into normative acts of the State (domestic law), but shall remain, in their nature – and by virtue of their origin – acts of international law.¹³ This Article, especially paragraph 2, aims at fulfilling a double function: creating a *sui generis* ‘bond’ between domestic and Community law and laying down the basis for recognition of the supremacy of an international norm over a statutory one. Consequently, where a conflict between the two norms has been exposed, it constitutes a basis for the Constitutional Tribunal to adjudicate the validity of the statutory norm. The binding force of an international agreement in the domestic legal order shall result in the direct application thereof (Article 91 (1) of the Constitution). Such norms shall constitute part of the domestic legal order and have precedence over statutes if such statutes cannot be reconciled with the agreement. 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. 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 of laws.

The list of sources of Polish law¹⁴ is referred to as a ‘closed catalogue’, which is a consequence of the principle of the rule of law (*Rechtsstaat*). There is no place for a new source of law such as the *acquis communautaire*. It is commonly acknowledged in European legal literature that the law created under the EC Treaty (TEC) as an independent source of law, cannot, because

¹³ A. Wasilkowski, *Prawo krajowe – prawo wspólnotowe – prawo międzynarodowe. Zagadnienia wstępne* (Domestic law–Community law–International law. An 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.

¹⁴ Art. 87 (1) *The sources of universally binding law of the Republic of Poland shall be: the Constitution, statutes, ratified international agreements, and regulations.*

(2) *Enactments of local law issued by the operation of organs shall be a source of universally binding law of the Republic of Poland in the territory of the organ issuing such enactments.*

of its very nature, be overridden by rules of national law, however framed, without being deprived of its character as Community law.¹⁵

Article 91 (2) of the Constitution, besides laying down the hierarchy of the international agreement within the structure of domestic legal order, constitutes the basic mechanism for the elimination of potential conflicts between international agreements and domestic legal acts. By placing international agreements in a position of hierarchical superiority over statutes, the legislator created a field for review of the legality of statutory provisions from the perspective of their conformity to ratified international agreements. (Article 188 point 2 of the Constitution).

The Polish Constitutional Tribunal (CT) safeguards the Constitution.¹⁶ A legal environment which recognises the competence of both the ECJ and the CT in relation to identical legal situations would present a threat in the form of a double line of adjudication upon the same legal provisions. However, the Constitutional Tribunal has emphasised that the ECJ and the CT must not be positioned as competing courts. In relation to fundamental issues regarding the constitutional system of the State, the CT shall therefore retain its status of *'the court of final say'*.¹⁷

Although Poland's membership in European Union structures is a precondition for the transposition of the Community legal system with all its principles, (especially the principles of the separation of powers, precedence over national law, efficiency, unanimity and legal certainty), the principle of judges' independence retains the highest priority. According to Article 178 of the Polish Constitution *'judges are independent in holding their office and are only subordinate to the Constitution and the law'*. However, through Article 178, formulated as it is, the Polish judge is subordinated both to international, European, and Polish law because *'it would seem that in spite of the lack of such wording judges should take into account international treaties, together with Community law. This obligation results from*

¹⁵ Art. 91 does not proclaim the principle of the precedence of Community law over the Constitution of Poland. The question thus arises as to whether we should speak of a condition of precedence of the Constitution over Community law, see: S. Biernat, op.cit, p.419.

¹⁶ Art. 188 *The Constitutional Tribunal shall adjudicate regarding the following matters:*

1. *The conformity of statutes and international agreements to the Constitution;*
2. *The conformity of a statute to ratified international agreements whose ratification required prior consent granted by statute;*
3. *The conformity of legal provisions issued by central State organs to the Constitution, ratified international agreements, and statutes;*
4. *The conformity to the Constitution of the purposes or activities of political parties;*
5. *Complaints concerning constitutional infringements, (...)*

¹⁷ Procedural Decision No 176/11/A/2006, 19.12.2006.

the fact that judges are subordinated to the Constitution and thereby to Article 90 (2)'.¹⁸ Through the fact that the Polish judge is subordinated only to the Constitution – which provides, among other things, for the observance of binding international law and acknowledges it as part of national law – he thereby assumes the obligation of accepting the Community legal system and accordingly also accepts a conforming interpretation of internal legal acts. This principle corresponds with Article 91 (2), imposing an obligation to refuse to apply national law in case of conflict with a ratified international agreement; as such, this principle also applies to Community law (Article 91 (3) of the Constitution). Therefore, where no doubts arise regarding the Community law in question, a national court ought to refuse to apply a national statutory provision conflicting with Community law, and directly apply the latter. If it is not possible to directly apply a norm of Community law, the court should seek a sympathetic interpretation of domestic law in the light of Community law. In the event of interpretational doubts regarding Community law, in most instances the national court should refer a request to the ECJ for a preliminary ruling to resolve the doubt.

2. Cases with 'Community aspects' and the principle of Pro-European interpretation

As underscored by the Polish Constitutional Tribunal, the existence of the relative autonomy of both (national and Community) legal orders necessitates compliance with the constitutional principle of conforming interpretation in the light of both international law as well as Community law.¹⁹

Since the specific character of the Community legal system is based on its original, multilingual and supranational character, the European Court of Justice has created its own system of interpretation²⁰, the so-called '*interpretation in a European way*'.²¹

¹⁸ See: S. Biernat, *op.cit.*, p. 419.

¹⁹ Judgment of the Constitutional Tribunal of 11.05.2005 (K 18/04), see also: Resolution of the Supreme Court of 19.02.2003 (I KZP 47/02).

²⁰ See cases: C-84/94 United Kingdom v. Commission [1996] ECR I-795; 95/81 Commission v. Italy [1981] ECR 2187; 30/77 Regina v. Pierre Bouchereau [1977] ECR 1999; C-116/91 Foster and Others v. British Gas [1992] ECR I-4071; C-335/94 Mrozek and Jaeger [1996] ECR I-4071; C-321/96 W. Macklenburg v. Kreis-Pinneberg-Der Landrat [1998] ECR I-3809; 120/86 Mulder [1988] ECR 2321; 170/86 von Deetzen [1988] ECR 2355; C-189/89 Spagl [1990] ECR I-4539; C-85/90 Dowling [1992] ECR I-5305.

²¹ T. Tridimas, *The Court of Justice and Judicial Activism*, "European Law Review" No. 21/1996 p. 210.

In determining a definition of inappropriate implementation of Community acts, the essential role is played not only by the Community legal acts themselves, but the judicial activity of the ECJ as well,²² which has been demonstrated and confirmed several times in Polish court judgments.²³ Therefore, the national law and some legal concepts will be interpreted in light of the entire *acquis communautaire*, as well as in the context of national judicial activity. In other words, a 'reconstruction' of the normative bases for judgment will be settled upon by the court regarding the proper application of Community law.

The obligation to interpret Polish law in accordance with the norms of Community law is derived not only from the supremacy principle, but also indirectly from Constitution.²⁴ In case of a conflict between those two systems, national and Community, on the one hand the supremacy principle²⁵ in the implementation of Community law will be applied, and on the other hand the principle of priority of the Constitution, which is legally binding. At the same time, national courts are obliged to use interpretative methods favorably inclined towards Community law,²⁶ 'as far as only it is possible'.²⁷ The supremacy and direct applicability of international agreements (Art. 91 (1) of the Constitution), which applies to any Community act, implicitly ac-

²² Judgment of the Provincial Administrative Court in Warsaw of 14.02.2007 (IVSA/Wa 1447/2006).

²³ Judgments of the Supreme Court of 23.02.2007 (I PK 242/06); of 08.11.2005 (I CK 207/05); of 18.12.2006 (II PK 17/06); of 05.12.2006 (II PK 18/06) and of 07.03.2007 (II CSK 428/06).

²⁴ See: S. Biernat, *The Impact of European Integration on the Organisation and Functioning of Poland's Legislative and Executive Authorities*, "European Review of Private Law" Vol. 9/4/1997; S. Biernat, *Constitutional Aspects of Poland's Future Membership in the European Union* op.cit, p. 398–424.

²⁵ See cases: 6/64 Flaminio Costa v. ENEL [1964] ECR 585; 314/85 Foto-Frost v. Hauptzollamt Lübeck-Ost [1987] ECR 4199; 14/68 Walt Wilhelm and others v. Bundeskartellamt [1969] ECR I-14; 80/77 and 81/77 SARL Les fils de Henri Ramel v. Receveur des douanes [1978] ECR I-309.

²⁶ See: 14/83 von Colson [1984] ECR 1891, cited e.g. in Judgment of the Constitutional Tribunal of 28.01.2003 (K 2/02) and of 27.09.1997 (K 15/97); Judgment of the Supreme Court of 17.07.2007 (P 16/06).

²⁷ A. Stone Sweet, *Constitutional Dialogues in the European Community* in: ed. A.M. Slaughter, A. Stone Sweet, J. Snyder, *The European Court and the National Courts: Doctrine and Jurisprudence, Legal Change in its Social Context*, Oxford 2003, p. 307; T. Tridimas, op.cit. p. 210; T. Tesaro, *The effectiveness of judicial protection and co-operation between the Court of Justice and national courts*, Copenhagen 1994; S. Prechal, *Community Law in National Courts: The Lessons from Van Schijndel*, "Common Market Law Review" No. 35/1998; W. van Gerven, *Of Rights, Remedies and Procedures*, "Common Market Law Review" No. 37/2000; T. Lang, *Community Constitutional Law: Art. 5 EEC Treaty*, "Common Market Law Review" No 5/1990; T. Lang, *The Duties of Cooperation of National Authorities and Courts under Art. 10 EC: two more reflections* (F.I.D.E XIX Congress, Helsinki, 1-3.06.2000); T. Lang, *The Duties of National Courts under Community Constitutional law* "European Law Review" Vol. 22/1997.

knowledges the constitutional control exercised by the Constitutional Tribunal. In cases where several interpretations are possible, it is advisable to select the one which is the closest to the view of the *acquis communautaire*, (taking into account the boundaries of interpretation)²⁸.

As judicial practice reveals, the most frequent instances of conflicts between Polish national law and Community law are those cases involving a conflict between both legal systems based on a defective implementation of directives.²⁹ In the case of a conflict between Polish legislation and a directive, the main objective for a Polish court is to evaluate whether the provisions of the directive are binding in a particular case.³⁰

In order to eliminate such a conflict, (in which a court is faced with a possible conflict between the national law and the Community law, for example a treaty, an international act signed by Community, a directive or a framework decision, or a preliminary question to ECJ), the following categories have been distinguished:

A. Interpretation in conformity with European Union law

- a. **Refusal to apply national law:** acceptance of a norm derived directly from the Community law (substituting the appropriate regulations of Community law)³¹;

²⁸ See: Judgment of the Constitutional Tribunal of 11.05.2005 (K 18/04) '*The principle of interpreting domestic law in a manner 'sympathetic to European law', as formulated within the Constitutional Tribunal's jurisprudence, has its limits. In no event may it lead to results contradicting the explicit wording of constitutional norms or being irreconcilable with the minimum guarantee functions in the Constitution. In particular, the norms of the Constitution within the field of individual rights and freedoms indicate a minimum and unsurpassable threshold which may not be lowered or questioned as a result of the implementation of Community provisions*'.

²⁹ See further: Judgment of the Supreme Court of 04.01.2008 (I UK 182/2007) in a case concerning Council Directive 79/7/EEC of 19.12.1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security; Judgment of the Supreme Court of 22.02.2007 (I PK 242/2006) in a case including the rules of European law; Judgment of the Supreme Court of 18.12.2006 (II PK 17/2006) in a case involving Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer; Judgment of the Supreme Court of 20.02.2008 (III SK 23/2007) in a case considering Directive 2002/21/EC of the European Parliament and of the Council of 07.03.2002 on a common regulatory framework for electronic communications networks and services (the framework Directive).

³⁰ On the duty to comply with the *effet utile* doctrine, see the Judgment of the Provincial Administrative Court in Wrocław of 04.04.2007 (I SA/Wr 1852/2006).

³¹ D. Chalmers, Ch. Hadjiemmanuil, G. Monti, A. Tomkins, *op.cit.*, p. 365–381; P. Pescatore, *The doctrine of 'direct effect': an infant disease of Community law*, "European Law Review" Vol. 10/1982, p. 176–177; H. Rasmussen, *On Law and Policy in the European Court of Justice*, Dordrecht 1986, p. 441; C.W.A. Timmermans, *Directives: Their Effect within National Legal Systems*, "Common Market Law Review" No. 16/1979, p. 533.

- b. **Applying the norms of the national law with indirect effect:**³² through the conforming interpretation with Community law by:
- quoting the Community law side by side;
 - application *ex officio* of the Community law.

B. Non-application of Community law: despite it being invoked by a party on the basis of other arguments:

- a. for the reason that there is not enough justification for the European Union arguments quoted by a party;
- b. Community law is irrelevant to the case.

In cases where application of the national law is deemed inappropriate, the court (or any other authority) ‘replaces’ the norms of national law which are incompatible with Community norms, or creates a new norm in light of the Community directive.

A dilemma in executing Community law appears in cases where the subject encompasses and refers to the implementation of Community law, or a national court has to apply Community law to reconstruct the interpretation of a normative statement.³³

Initially therefore, an issue which has to be considered by a court is whether the community law applies or refers to the interpretation of Polish law which has been enacted in order to introduce EU directives into the Polish legal system. Examples of such proceedings include:

³² G. Betlem, *The Doctrine of Consistent Interpretation; Managing Legal Uncertainty in: Direct Effect. Rethinking a Classic of EC Legal Doctrine*, ed. J.M. Prinssen, A. Schrauin, Groningen 2002, p. 79; T.C. Hartley, *The Foundation of European Community Law*, Oxford 1998, p. 222.

³³ J. Bengoetxea, *The legal reasoning of the European Court of Justice. Towards a European jurisprudence*, Oxford 1993; R. Dehousse, *The European Court of Justice. The Politics of Judicial Integration*, London 1998; K. Alter, *The European Court and National Courts: Doctrine and Jurisprudence: Legal Change in its Social Context. Explaining National Courts' Acceptance of European Court Jurisprudence: A Critical Evaluation of Theories of Legal Integration*, EUI Working Paper RSC No. 95/27; A. Arnall, *Judicial architecture or judicial folly? The challenge facing the European Union*, “European Law Review” Vol. 24/1999; *Legal Reasoning and Judicial Interpretation of European Law. Essays in Honour of Lord Mackenzie Stuart*, ed. A.J.L. Campbell, M. Voyatzi, Trenton Publishing 1996; Z. Bankowski, A. Scott: *The European Union and its Order. The Legal Theory of European Integration*, Blackwell Publishers Ltd 2000; *The European Court and National Courts – Doctrine and Jurisprudence. Legal change in Its Social Context*, ed. A.M. Slaughter et al., Oxford 1998; N. MacCormick *Questioning Sovereignty. Law, State, and Nation in the European Commonwealth*, Oxford 1999.

- a. transnational elements³⁴ concerned with the four freedoms in the context of the common market,³⁵ competition law,³⁶ or EU citizenship;³⁷
- b. legal claims or charges derived from articles of community law with direct effect;
- c. application of national law implementing EU secondary law;³⁸
- d. reverse discrimination;³⁹
- e. cases referring to Community law;
- f. lack of necessity to make a preliminary reference to the ECJ;
- g. cases not included in specific domestic situations.

In the decisions of the Polish Supreme Court the concept of community element' has been established, together with a sequence of procedures to be undertaken by a judicial authority in order to declare a proper jurisdiction for such cases and:

- a. To declare the conformity of Polish regulations and the norms of Community law and/or;
- b. To present a conforming interpretation of Polish regulations or;
- c. To make a preliminary reference to the European Court of Justice according to Art. 234 TEC.⁴⁰

Taking into account the above-mentioned elements of the 'community element' of the case is the first step in the process of conforming interpretation. After having decided that there is a 'community element', the Court may apply its conclusions in two ways: by interpreting Polish law in conformity with Community law or by directly applying the Community law.

³⁴ See Judgments of the Supreme Court of 4.02.2000 (II CZ 78/99); of 17.01.2007 (I UK 225/06), of 24.10.2006; (II UK 98/06) and of 22.06.2006 (I UK 356/05). The number of cases with trans-border elements in judgments of the Supreme Court, Supreme Administrative Court and Provincial Administrative Court is insignificant in comparison with the cases without this element.

³⁵ Judgment of the Supreme Court of 10.02.2006 (III CSK 112/05).

³⁶ Judgment Supreme Court of 09.08.2007 (III SK 06/2006).

³⁷ Judgment of the Regional Court in Koszalin of 13.11.2006 (IV U 1660/06).

³⁸ As in the Decision of the Supreme Court of 20.07.2008 (III SK 23/07).

³⁹ As in Judgments of the Supreme Court of 04.01.2008 (I UK 182/07) and of 06.12.2007 (III SK 20/2007).

⁴⁰ Resolution of the Supreme Court of 13.07.2006 (III SZP 3/2006).

3. Refusal to apply norms of national law in European cases

The competence norm articulated in Article 91 (2) of the Constitution indicates that a court – unless there are some uncertainties in terms of the community law norms and their content – must refuse to apply national regulations which are in conflict with Community law and must therefore rely directly on the Community law in question. Another option is to find a sympathetic interpretation of the national law in accordance with the Community law.⁴¹

In consequence this has a number of ramifications. The Constitutional Tribunal highlighted that the fact that a particular provision of the national act will not be executed does not determine the necessity of repealing the act. This however may often result in a clear demand directed at the legislator to amend such a statute. The Court indicated that, subsequently, a national court is to use the following procedures: conforming interpretation of the national law and application of directly effective Community law, while at the same time refusing to apply the contradictory norm of national law. Therefore, the national courts have the right and duty to refuse the application of a national norm if it is in contradiction with the norms of Community law.⁴²

According to the principles of supremacy and direct effect, the Constitutional Tribunal has proclaimed that the national courts are obliged to rely on Community law, particularly when granting subjective rights to European Union citizens. Community laws should be respected instantly and directly by the courts of the Member States, even if they are in contradiction to the national legal order established in accordance with the Constitution, and without regard to whether the national regulation has been passed before or after the Community norm took effect.⁴³ The Provincial Administrative Court based its judgment on the rich ECJ case law (e.g. the Marleasing case). In this judg-

⁴¹ D. Curtin, K. Mortelmans, *Application and enforcement of Community law by the member states: Actors in search of a third generation script*, in: *Institutional Dynamics of European Integration. Essays in Honour of Henry S. Schermes*, vol. II, ed. D. Curtin, T. Heukels, Dordrecht 1994; S. Prechal, *Directives in EC Law. A study of Directives and their enforcement in national courts*, Oxford 1995; R. Mastroiani, *On the distinction between vertical and horizontal direct effects of the Community Directives: What Role for the Principle of Equity?*, "European Public Law" Vol. 1/5/1999, p. 429–30; S. Weatherill, S. Beaumont, *European Community Law. The Essential Guide to the Legal Workings of the European Community*, Penguin Books 1995, p. 356.

⁴² This principle is defined in the judgment of ECJ in case 106/77 Simmenthal [1978] ECR 629.

⁴³ This principle is defined in the judgment of ECJ in case C-106/89 Marleasing [1990] ECR I-4135.

ment, the Administrative Court annulled the interpretation of the Finance Minister of a law relating to the goods and services tax.⁴⁴

Another judgment given by an administrative court has also attracted attention in this regard. In the case before it, the court invalidated a decision made by the Minister of Health. The court declared that the Ministry, which declared the invalidity of the decision, had not investigated the complainant's arguments in the light of the applicable Community law regulations.⁴⁵

One of the first judgments which obligated the Supreme Court to apply Community law was a cassation appeal case related to the inappropriate implementation of a directive.⁴⁶ In this case, the Supreme Court, after having undertaken a comparative analysis of the legal solutions in other Member States, gave judgment on the basis of the directive.⁴⁷

In a subsequent case, after extensively reviewing ECJ case law related to Community law implementation,⁴⁸ the Supreme Court stated that the implementation of European law regulations on social security and their potential exclusion from the Polish legal order may constitute a legislative problem.⁴⁹

⁴⁴ Judgment of the Provincial Administrative Court in Poznan of 04.06.2009 (I SA/Po 36/09); in Białystok of 21.01.2009 (I SA/Bk 516/08); and in Warsaw of 29.08.2008 (III SA/Wa 984/08).

⁴⁵ Judgment of the Provincial Administrative Court in Warsaw of 10.12.2007 (VII SA/Wa 1638/07): 'The subject application was sent on 10.12.2004, when Poland was already a Member State of the European Union and was obliged to apply European law, therefore the legal interest of the applicant should be viewed in the light of the obligatory norms at the moment of proving this interest'.

⁴⁶ Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents; OJ L 382, 31.12.1986 p. 17–21.

⁴⁷ Judgment of the Supreme Court of 8.11.2005 (ICK 207/2005), where it is also stated that the assessment of obligation to receive a preliminary ruling on the basis of Article 234 TEC (now 267 TFEU) belongs only to the national courts, which face the conflict and which are responsible for such an adjudication, being able to pass a judgment.

⁴⁸ Judgments of ECJ in cases: 166/73 *Rheinmühlen-Düsseldorf v. Einfuhr-und Vorratsstelle für Getreide und Futtermittel* [1974] ECR 33; C-430/93 and C-431/93 *Joroen van Schijndel and Johannes Nicolaas van Veen v. Stichting Pensioenfonds voor Fysiotherapeuten* [1995] ECR I-4705; C-224/01 *Gerhard Köbler v. Austria* [2003] ECR I-651; C-173/03 *Traghetti del Mediterraneo SpA v. Italy* [2004] ECR I-513; 29/62 and 30/62 *Da Costa en Schaake NV, Jacob Meijer NV, Hoechst-Holland NV v. Netherlands* [1963] ECR 63; 283/81 *Srl CILFIT i Lanificio di Gavardo SpA v. Ministero della Sanita* [1982] ECR.3051; C-495/03 *Intermodal Transports BV v. Staatssecretaris van Financiën* [2005] ECR I-8151; C-461/03 *Gaston Schul Douane-expediteur BV v. Minister van Landbouw, Natuur en Voedselkwaliteit* [2005] ECR I-10513.

⁴⁹ Concerning the Council Regulation (EEC) No 1408/71 of 14.06.1971 on the application of social security schemes to employed persons, to self-employed persons, and to members of their family moving within the Community; OJ L 149, 05.07.1971, p. 2; last amended by Regulation (EC) No 631/2004 of the European Parliament and of the Council; OJ L 100, 6.4.2004, p. 1. See: Judgment of the Supreme Court of 23.08.2007 (I UK 68/2007).

Without finding a requirement to refer a preliminary question to the ECJ (regarding the interpretation of the concept of worker, which has been defined by the ECJ on several occasions)⁵⁰, the Supreme Court excluded the application of Polish legislation relating to social insurance.

In its subsequent case law the Supreme Court referred straight away to the norms derived directly from the Treaty and the principles developed in the ECJ case law.⁵¹ One such case considered the status of male orchestra conductors in light of the Polish pension law.⁵²

One of the first judgments of the administrative courts⁵³ confirming the principle of refusal to apply Polish law and the obligation to substitute it with another norm to replace the incorrectly transposed directive was been given in relation to the analysis of the 6th Directive of the Council.⁵⁴ The court stated that in the case before it all conditions defined in the ECJ case law as requiring direct application of a Community directive were fulfilled.⁵⁵

As settled by a Provincial Administrative Court, national tax authorities were deemed to be under the obligation to apply domestic and EU law, and in case of discrepancies between the two, the authorities were required to set aside Polish law and give priority to EU law.⁵⁶ In this particular case, the plaintiff had imported a second-hand car from another EU Member State. Under the VAT Act of 2004 he had an obligation to pay an excise duty as part of the car registration procedure. The plaintiff paid the duty, but requested a refund afterwards. He argued that Polish law was contrary to EC law as it led to tax discrimination prohibited by Article 90 of the EC Treaty. His application was rejected by the Director of the Customs Office, whose decision

⁵⁰ Judgments of the ECJ in cases: 66/85 *Deborah Lawrie-Blum v. Land Baden-Württemberg* [1986] ECR 2121; 344/87 *I. Bettray v. Staatssecretaris van Justitie* [1989] ECR 1621; 53/81 *D.M. Levin v. Staatssecretaris van Justitie* [1982] ECR 35.

⁵¹ Judgments of the Supreme Court in the cases of 10.02.2006 (III CSK 112/2005); of 19.03.2008 (I PK 219/07) and of 09.02.2008 (II CSK 363/07).

⁵² See: Judgment of the Supreme Court in the case of 04.01.2008 (I UK 182/07).

⁵³ Judgment of the Provincial Administrative Court in Warsaw of 12.10.2005 (III SA/Wa 2219/2005); see also: Judgment of the Provincial Administrative Court in Warsaw of 09.02.2006 (III SA/Wa 3203/05).

⁵⁴ The Sixth Council Directive of 17.05.1977 on the harmonisation of the laws of the Member States relating to turnover taxes – Common system of value added tax: uniform basis of assessment; OJ L 145, 13.06.1977, p. 1, last amended by Directive 2004/66/EC; OJ L 168, 01.05.2004, p. 35.

⁵⁵ Judgment of the Provincial Administrative Court in Warsaw of 28.05.2007 (III SA/Wa 389/07); Judgment of the Provincial Administrative Court in Łódź of 11.07.2006 (I SA/Łd 322/06) and Judgment of the Provincial Administrative Court in Gdansk of 06.03.2007 (I SA/Go 1126/06).

⁵⁶ Judgment of the Provincial Administrative Court in Białystok of 07.02.2007 (I SA/Bk 411/06).

was in turn upheld by the Director of the Customs Chamber. The authorities argued that the decision was based on Polish law and that they had no power to verify the conformity of Polish law with EC law. The Administrative Court, which was charged with the dispute, first looked at the principle of supremacy of EC law and examined related jurisprudence of the European Court of Justice. The Administrative Court then confirmed that all state authorities, including administrative and tax authorities, had the obligation to apply the principle of supremacy of EU legislation, and if need be, to set aside domestic law that was contrary to EC legislation. The Court held that Polish excise duty law fell within the ambit of the prohibition of tax discrimination enshrined in Article 90 of the TEC. The Court confirmed that neither Article 25 TEC nor Article 28 TEC applied to the case. In support of its decision, the Court referred to a very similar ECJ case, C-313/05 *Maciej Brzeziński v. Dyrektor Izby Celnej w Warszawie*. In this case, the ECJ had held that, insofar as the Polish excise duty legislation led to discrimination in the importation of second-hand cars, it was contrary to Article 90 TEC. Since the same legislation was applicable to the case at hand, the Court held that the decisions of the custom authorities were contrary to Article 90 TEC.

The Provincial Administrative Court in Wrocław was also faced with the consequences of the incorrect transposition of a directive into national law. This court found that the national law was in conflict with EC law and, taking into consideration the close connection between the principle of direct effect and primacy of Community law, refused to implement the national legal provision which it considered contrary to the directive. The court highlighted that lacuna remains and has to be filled, either by the direct substitution of the Community legal order norm into the unimplemented norm of national law, or with other norms of the national legal order, which need to be constructed by the legislature in the light of Community law.⁵⁷

4. Applying norms of national law with indirect effect

In the case law of the Supreme Court and the administrative courts there are a number of cases in which parties have referred to regulations enacted

⁵⁷ Judgments of the Provincial Administrative Court in Wrocław of 4.04.2007 (I SA/Wr 1852/2006); in Gdansk of 14.08.2007 (I SA/Gd 185/07) and in Szczecin of 20.12.2007 (I SA/Sz 592/07).

⁵⁸ Judgment of the Provincial Administrative Court in Warsaw of 12.10.2005 (III SA/Wa 2219/05), where the appellant relied on judgments of the ECJ in cases where the Court has formulated the principle of direct effect of directives, therefore the Administrative Court included these arguments in its judgment.

on the basis of Community law or ECJ case law⁵⁸ in order to provide additional arguments in justification of their presented positions.⁵⁹

The issue of application of Community law has been discussed at length by the Supreme Court, supported by the rich case law of the European Court of Justice.⁶⁰ The Court also indicated that the adaptation of national law to Community law occurs through the particular legislative modifications of national law. The Supreme Court underlined that Polish law should be interpreted in such a manner so as to eliminate the procedural differences in the application of national law and Community law (the principle of procedural autonomy of Community law).⁶¹

In its jurisprudence, the Polish Supreme Court has confronted situations and legislative acts from the period preceding Polish accession. The Court refused to grant these proceedings the status of 'a community case'. However, the Supreme Court underlined that it is still its responsibility to consider cases and review legislative questions concerned with Community law.⁶² Referring to the fact that the regulations referred to in the legislative arena have been introduced to adapt Polish law to Community law, the Court thought it worth noting that their interpretation has to be constructed considering the provisions and objectives of the implemented directives. The acceptance of the *acquis communautaire* is based on previous case law, outlining that Polish law is to be interpreted in the light of Community legislation. This approach also covers cases dating from the period before Poland's accession to the EU.⁶³ This corresponds with the position held by the Supreme Court of Administration which, in cases adjudicated after 1 May 2004, has quoted the provisions of TEC and ECJ judgments.⁶⁴

In accordance with commonly accepted ECJ judicial practice, national rules of procedure are to be consistent with the principles of effectiveness.⁶⁵

⁵⁹ As for instance adjudication of the cassation appeal, based on the community prerequisites. See the Judgment of the Supreme Court of 10.02.2006 (III CSK 112/2005).

⁶⁰ e.g. the Supreme Court recognized the problem concerned with a consistent interpretation of the regulations on direct doctor's time work.

⁶¹ Resolution of the Supreme Court of 13.03.2008 (I PZP 11/2007).

⁶² Resolution of the Supreme Court of 13.07.2006 (III SZP 3/2006).

⁶³ Judgments of the Supreme Court of 8.01.2003 (III RN 239/200 and III RN 240/2001), of 17.02.2004 (I PK 386/2003) and of 12.08.2004 (III PK 38/2004).

⁶⁴ Judgments of the Supreme Administrative Court of 8.06.2005 (II GSK 74/2005); of 29.06.2005 (II GSK 92/2005) and of 15.02.2006 (II GSK 388/2005).

⁶⁵ Judgments in cases C-231/96 Edis [1998] ECR I-4951; C-453/99 Courage and Crehan I-6297; C-30/02 Recheio-Cash & Carry [2002] ECR I-6051; C-290/05 and C-333/05 Nádassdi i Németh [1986] ECR I-10115.

They should be used as a ‘test’ which can be evaluated against the court’s rights to judge a case *ex officio*.⁶⁶ Should the national procedural law grant the opportunity to consider charges *ex officio*, the principle of equivalence requires that this opportunity is to be extended to charges based on Community law as well. Under the principle of solidarity and effectiveness, it is necessary for the national court to protect individual rights based on Community law.⁶⁷

As a result of Polish Supreme Court jurisprudence – and since Polish legislation introduces provisions of European law into the national legal system – the opportunity to give conforming interpretations has to be considered. It is a routine matter to refer to European law and the interpretation given to it by the European Court of Justice.⁶⁸ However, a problem occurs if parties do not raise the issue of incompatibility of Polish law with Community law. Here, a court which recognises a special appeal cannot adjudicate on the infringement of regulations that have been declared in a complaint which at the same time refers to the regulations of European law.⁶⁹ In addition, there is no obligation placed on national courts to make a preliminary ruling to the ECJ.⁷⁰

Following ECJ case law,⁷¹ the Supreme Court acknowledged that, insofar as its own jurisdiction is concerned, there is no obligation to consider a potential infringement of Community law provisions if a party did not indicate this infringement as the basis of the appeal.⁷²

However, in cases where both Community law and the national law provisions cover the same subject area, the Court may directly apply the Community act as well as interpret the national law in accordance with Community law.⁷³ In cases where appellants argue the incorrect interpretation of national law, the appeal court must consider the applicable provisions of Community law and the interpretation given to them by the European Court of

⁶⁶ Judgments in cases C-87/90 and C-89/90 Verholen [1991] ECR I-3757; C-315/01 Gesellschaft für Abfallentsorgungs-Technik GmbH (GAT) [2002] ECR I-6351.

⁶⁷ Opinion of the Advocate General Poiares Maduro of 1.03.2007 in joined cases C-222/05 and C-225/05 College van Beroep voor het bedrijfsleven [2007] ECR I-10115.

⁶⁸ Judgments of the Supreme Court of 18.12.2006 (II PK 17/2006); of 5.12.2006 (II PK 18/06) and of 23.08.2007 (I UK 68/07).

⁶⁹ The Supreme Court review of a cassation appeal is limited to its grounds (art. 398 [13] § 1 Code of Civil Procedure).

⁷⁰ According to Art. 234 TEC, courts against whose judgments there is no appeal at the national level must refer questions of EU law to the ECJ; according to ECJ case law, other courts must also refer, unless CILFIT/ Foto Frost exceptions apply, see case 314/85 Foto-Frost [1987] ECR 4199

⁷¹ Case C-430/93 and C-431/93 Joroen van Schijndel [1995] ECR I-2433.

⁷² Art. 398 [13] § 1 kpc (Code of Civil Procedure).

⁷³ Judgment of the Supreme Court of 04.01.2008 (I UK 182/07).

Justice. In a case of inappropriate interpretation of the national regulation, it should be determined whether there is a conflict with the directly applicable Community law. In practice, the interpretation and implementation of the regulation, whose non-compliance was indicated during the appeal procedure, requires interpretation on the basis of other regulations as well (in this case those of European law). The Supreme Court, being responsible for this task, provides for the uniform interpretation of national law in order to protect the public interest;⁷⁴ it has thereby recognised a jurisdiction on the basis of Community law.

Following this, in a subsequent decision the Supreme Court referred straight away to the norms derived directly from the Treaty and the principles developed in ECJ case law.⁷⁵ Supreme Court case law that refers to ECJ case law and other legal proceedings (for example in Article 226 TEC in which the ECJ presents the correct interpretation of Community law while at the same time settling a conflict between national and Community law, are worthy of note. As has been highlighted by the Supreme Court, from a practical point of view these cases play an important role. In particular, account must be taken of the fact that ECJ case law is not as veiled as preliminary rulings, in which the ECJ can only indirectly attempt to solve conflicts between national and Community law.⁷⁶

However, national courts are obliged to interpret national law in the light of EC directives, particularly in cases where the national provisions were introduced with the aim to implement the directive. The interpretation of these regulations has to be uniform across all Member States; otherwise the aim of the harmonious interpretation of EC Law in all individual Member States will not be attained.⁷⁷

In terms of administrative courts, their jurisdiction, as well as legal doctrine, is formed in a similar manner. Administrative courts are not concerned with jurisdictional limits to the appeal. This means they have first of all the right and even the responsibility to consider all contraventions of law which should have been brought forward in the case, no matter what requirements and claims are included in the appeal. They also should evaluate the compatibility of the challenged administrative act with the law, even if such a claim has not been raised.⁷⁸

⁷⁴ Judgment of the Supreme Court of 4.02.2000 (II CZ 78/99).

⁷⁵ Judgments of the Supreme Court in the cases of 10.02.2006 (III CSK 112/2005); of 19.03.2008 (I PK 219/07) and of 09.01.2008 (II CSK 363/07).

⁷⁶ Judgment of the Supreme Court of 11.10.2007 (III SK 19/07).

⁷⁷ Judgment of the Supreme Court of 09.07.2008 (I PK 315/2007).

⁷⁸ Judgment of the Provincial Administrative Court of 25.02.2004 (III SA 1456/02).

5. Refusal to apply Community law

National courts are obliged to implement the intention of the state in interpreting EC directives. This means they have to interpret the internal legal order, insofar as possible, in the light of the objectives set out in the directive.⁷⁹ However, the duty of sympathetic interpretation does not extend to cases in which such an interpretation may lead to a *contra legem*⁸⁰ (I SA/Wr 881/08). interpretation or invalidation of the law in question. This was also the view taken by the Voivod Administrative Court of Warsaw in a case before it. There, the court indicated the limits of sympathetic interpretation, stating that any such interpretation may not result in a prohibited *contra legem*⁸¹ interpretation.

In the analysis of cases decided by the Supreme Court, particular attention should be paid to a case which stressed that there is no need to directly quote the directive. There is also no need to construct an interpretation of the internal legal order in light of the provisions of the European Union directives; this however does not apply to Polish regulations transposing the directive in question.

The term ‘*a Community case*’ has been used for the first time in Polish legal commentary in the context of a case analysed by the Supreme Court.⁸² The Court considered whether there was a need to take into account the Community legal order and whether there was a necessity to make a preliminary reference to the European Court of Justice in the first place. This case has now been resolved. Considering the differing actual state of law and the wide range of possible interpretations (over marketing services) in both the Polish and the legal orders of other Member States ‘*there is no need to construct an interpretation of the act in accordance with a Council Directive on the co-ordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities. If there are any objection to direct application of the directive or any doubts, a preliminary question should be put to the ECJ concerning the meaning of that directive*’.⁸³

⁷⁹ Judgment in case C-106/89 Marleasing SA [1990] ECR I-4135.

⁸¹ Judgment of the Provincial Administrative Court in Wrocław of 08.12.2008.

⁸¹ Judgment of the Provincial Administrative Court in Warsaw of 26.11.2008 (III SA/Wa 1277/08).

⁸² In light of the interpretation of Council Directive 89/552/EEC on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the pursuit of television broadcasting activities, as amended by Directive 97/36/EC of the European Parliament and of the Council; OJ L 202, 30.7.1977, p. 60. See also: Judgment of the Supreme Court of 12.10.2006 (I CNP 41/2006).

⁸³ Decision of the Supreme Court of 9.04.2008 (V CSK 419/2007).

In cases where the court determined that former, non-binding legal acts were invoked by the parties⁸⁴, the appeals were dismissed. The Court stated that arguments based on non-binding legal acts are an offence against the material law. In these cases, the Supreme Court refused *expressis verbis* to consider their relation to Community law. It justified this decision with reference to the actual *status quo* in Poland before Poland's accession to the EU, when Polish appellate courts were not under the obligation, based on Article 10 TEC, to provide for the effectiveness of Community law provisions, in particular through conforming interpretations of national rules.⁸⁵

As far as procedural matters are concerned, attention should be given to decisions by the Supreme Administrative Court, starting with a legislative proposal to suspend legal proceedings in cases when (in the same legal situation) another Polish court makes a preliminary reference to the ECJ.⁸⁶

First of all, the Supreme Administrative Court was certain, as far as the interpretation of the term 'legal proceeding' is concerned, that this also includes proceedings before the judicial institutions of the European Union, such as the European Court of Justice in Luxembourg. Subsequently, the Court stressed that the interpretation applied in this case has implications for the matter under investigation, inasmuch as it relates to the institutions involving additional tax duties.⁸⁷

However, in an analogous case no sufficient circumstances were found by the court to exist for the suspension of the proceedings. The reason given for the finding was that while the legal problem was still the subject of the complaint in the case, the issue of the right of the individual to receive some extra tax duty had only a side-effect nature. The context of the main subject

⁸⁴ Judgment of the Supreme Court of 08.01.2009 (I CSK 239/08).

⁸⁵ Judgment of the Supreme Court of 6.12.2007 (III SK 16/2007); and Judgment of the Competition and Consumer Protection Court of 12.11.2008 (XVII AmA 109/07) or Judgment of the Supreme Court of 03.10.2008 (I CSK 70/08). There is no duty to conform interpretations of the Protection of Competition and Consumers Act, because the norms of this Act concerning rules of competition – contrary to norms concerning protection of common interests of the consumers (Resolution of the Supreme Court of 13.07.2006, III SZP 3/2006) – do not implement the Community directives into Polish law. Therefore, the judgments of the ECJ and decisions of the Commission concerning some articles of this Act in cases which have no impact on the trade between Member States are the origin of intellectual inspiration and an example of legal thinking and understanding of some ideas which could be useful in interpretation of Polish law owing to the fact that the internal market and free competition and legal norms concerned have existed in Poland since 1990 (Judgment of the Supreme Court of 9.08.2006, III SK 6/2006).

⁸⁶ Judgment of 31.07.2007 (I FSK 1062/06).

⁸⁷ Decision of the Provincial Administrative Court of 17.01.2008 (I FZ 596/07).

of the argument was the interpretation of a Tax Act provision referring to the goods and services tax and the appropriateness of settlement by the appealing company. Thus it was decided that the jurisprudence of the European Court of Justice had neither direct nor decisive impact on the resolution of the matter under consideration.⁸⁸

Conclusions

The distribution of competencies between the courts of Member States and the European Court of Justice, in terms of the interpretation and execution of Community law, implies that the interpretation of EU law belongs to the ECJ, and the legal execution – understood as the application of Community law norms to the specific cases – belongs to the courts of the Member State.

Therefore, where no doubts arise regarding the contents of a Community law norm, a court ought to refuse to apply a 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 an interpretation of domestic law that 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.

However, Community law still remains a ‘secret garden’, not just for Polish judges but for all judges in the Member States.⁸⁹ This is no doubt a consequence of the particular nature of Community law, but also of the national legal traditions and deep-rooted principles of judicial independence and state sovereignty. Polish judges are confronted with entirely new problems and principles, unknown to Polish law, involving the legal validity of Community acts. Nevertheless, the Polish judicial system becomes part of the Community judiciary, founded on principles of multicultural pro-European interpretation.⁹⁰

⁸⁸ Decision of the Provincial Administrative Court of 14.12.2007 (I FZ/513/07).

⁸⁹ Compare S. Biernat, *Constitutional Aspects of Poland's Future Membership in the European Union*, op.cit. 12/1998, p. 416.

⁹⁰ C-240/98 and C-244/98 *Océano Grupo Editorial SA v. Rocio Murciano Quintero*, *Salvat Editores SA v. Jose M. Sanchez Alcon Prades*, *Jose Luis Copano Badillo*, *Mohammed Berroane*, *Emilio Vinas Feliu* [2000] ECR I-4941.

As demonstrated, Polish courts generally rule on the basis of the Community legal order, often falling back upon the case law of the European Court of Justice.⁹¹ According to the Polish Supreme Court, upon accession each Polish Court became a Community court in a functional sense, dealing with cases characterised as community cases.⁹²

⁹¹ Decision of the Supreme Administrative Court of 31.07.2007 (I FSK 1062/06); of 08.07.2008 (II FSK 591/07); of the Provincial Administrative Court of 22.07.2007 (I FSK 1062/06); of the Provincial Administrative Court of 20.03.2006 (I FSK 1089/05) and of the Provincial Administrative Court of 22.12.2006 (I SA 1238/06).

⁹² Resolution of the Supreme Court of 13.07.2006 (III SZP 3/2006).