

Order No. 202/2016, of 13 December (Unofficial translation)

Reference number: 202/2016

Type: ORDER

Date of Approval: 13/12/2016

Chamber: Plenum

Registration Number: 4177-2016

Type of appeal: Question of unconstitutionality

TEXT OF THE DECISION

The Administrative Chamber of the Supreme Court lodged a question of unconstitutionality concerning different regulations of the Law 15/2012, of 27 December, on fiscal measures for energy sustainability. The judicial body considered the challenged regulations contrary to the principle of economic capacity in taxation as proclaimed in Article 31 of the Spanish Constitution.

ORDER

Grounds

1. The Administrative Chamber of the Supreme Court has lodged a question of unconstitutionality regarding Articles 1, 4.1, 6.1 and 8 of Law 15/2012, of 27 December on fiscal measures for energy sustainability. The judicial body maintain that these Articles infringe Article 31 of the Constitution as it proclaims the principle capacity in taxation. These contested provisions regulate the tax on energy production value. The General Prosecutor proposes the dismissal of the question.

2. According to Article 37.1 of the Organic Law of the Constitutional Court (in Spanish, *Ley Orgánica del Tribunal Constitucional*, hereinafter LOTC), this Court may, after hearing the General Public Prosecutor, issue Orders rejecting *in limine* those questions of unconstitutionality that have not complied the proceeding's requirements or can be considered notoriously unfunded.

The proceeding's requirements for submitting a question of unconstitutionality are established in Articles 163 of the Spanish Constitution and 35.1 and 35.2 LOTC. This provisions demand that the legal rule that the judicial body considers contrary to the Constitution must be applicable to

the pending case; moreover, the validity of that very rule must be decisive for the ruling to be pronounced. Moreover, the Order by which the question of unconstitutionality is lodged must justify precisely to which extent the ruling depends on the validity of the challenged legal rule. In view of this, questions of unconstitutionality must comply with the proceeding's requirements, because they are essential to prevent the risk of confusion between these proceedings and mechanisms for the abstract control of constitutionality. This could happen if the question was used to obtain decisions of this Court unnecessary or indifferent for the pending cases. See, among others, Judgments (in Spanish, *Sentencias del Tribunal Constitucional* [STC or SSTC hereinafter] SSTC 17/1981, of 1 June, Ground (in Spanish, *Fundamento Jurídico* [FJ hereinafter]) 4; 42/2013, of 14 February, FJ 2; 156/2014, of 25 September, FJ 2, y 79/2015, of 30 April, FJ 3, and Order (in Spanish, *Auto del Tribunal Constitucional* [ATC or AATC hereinafter]) 12/2016, of 19 January, FJ 2.

This Court, exercising its external power of external scrutiny of judicial resolutions lodging questions of constitutionality, may dismiss them when not consistent with the proceeding's requirements. Exercising such power, the Court avoids the aforementioned conversion of the question in a mechanism of abstract review of law regardless of the incidence in the pending procedures. See SSTC 6/2010, of 14 April, FJ 3; 151/2011, of 29 September, FJ 3; 84/2012, of 18 April, FJ 2; 146/2012, of 5 July, FJ 3, and 40/2014, of 11 Mars, FJ 2; AATC 155/2013, of 9 July, FJ 2, and 188/2015, of 5 November, FJ 2).

3. The consideration of the present question of unconstitutionality bearing in mind the case law of this Court leads necessarily to its rejection for not complying the proceeding's requirements. The Order of the judicial body maintain that although there could be a contradiction between the national Law 15/2012 and European Union Law, the resolution of that contradiction can be postponed. The Administrative Chamber of the Supreme Court advances that "this Chamber will examine that contradiction at the right time, once we have the response of the Constitutional Court."

As the question stands, we must refer to Order 168/2016, of 4 October, which has laid the foundations (reiterated in AATC 183/2016 y 185/2016, both of 15 November) applicable to the case. According to the grounds of that decision, we must not considered fulfilled the requirement relating the necessary application of the challenged rule of law to the pending case. Conceding that judicial bodies may have problems when they consider that a rule of law applicable to the pending case can be both contrary to the Spanish Constitution and to the European Law, Order 168/2016 states in Ground 4 the following:

“As for the lodging of a question of unconstitutionality prior to a preliminary ruling of Article 267 of the Treaty on the Functioning of the European Union (TFEU), the Court of Justice of the European Union rejects this possibility, except when its power to interpret the European Law is not impaired. See Judgments of 22 June 2010, *Melki vs. Abdeli*; 11 September 2014, *A vs. B and others* and 4 of June 2015, *Kernkraftwerke Lippe-Ems GmbH vs. Hauptzollamt Osnabrück*. According to the ECJ case law, domestic courts doubting about the compatibility of national regulations with European Law or with their domestic Constitutional Law, are authorised and, eventually, obliged to raise a preliminary ruling before the ECJ. This authorisation —eventually, obligation— does not disappear because of the pendency of a judicial review procedure before the national Constitutional Court. In short, the ECJ case law pursues to assert the European Law primacy preventing that domestic constitutional proceedings deter, restrict or delay the raising of a preliminary ruling *ex Article 267 TFEU*.

Following Articles 163 of the Spanish Constitution and 35.1 LOTC, the question of unconstitutionality must always be about a legal rule ‘applicable to the case’, but we must also understand that the preliminary ruling of Article 264 TFEU has to be raised first. The incompatibility of the domestic rule with the European Law results in the inapplicability of the former. Therefore, one of the requirements for the admission of a question of unconstitutionality would lack: the uncontested applicability of the challenged rule of law. The latter would only be admitted if the legal provision is not contrary to the EU Law.

Said it other way, from the Spanish point of view, a judicial body that has doubts about the constitutionality of a legal provision cannot raise a question of unconstitutionality before this Constitutional Court if at the same time considers that very legal provision contrary to the EU law, because he would be obliged by this latter not to apply it.

Whilst he has doubts about the compatibility of the domestic legal provision with the European Union Law, then he must first raise a preliminary ruling before the ECJ and once this Court has decided on its compatibility, may lodge a question of unconstitutionality. We settled similarly in STC 35/2016, of 3 Mars, FJ 6, by stating that ‘obviously, when the ECJ does not uphold a preliminary ruling, this does not stop the raising of a question of unconstitutionality before the Constitutional Court regarding the same legal rule. Because, each jurisdiction has different scopes (in all, STC 28/1991, of 14 February, FFJJ 4-6), neither it conditions this Court’s ruling on the question of unconstitutionality’.”

Indeed, once the ECJ has asserted the compatibility between a domestic regulation and the EU Law in a preliminary ruling, then there is no doubt about whether the rule can be applied to the case (Articles 163 of the Spanish Constitution and 35.1 LOTC). From this perspective, nothing hampers the judicial body to lodge a question of unconstitutionality.

In short, when a preliminary ruling is still pending on a legal rule, it is not possible to raise at the same time a question of unconstitutionality until the ECJ has issued its decision. The potential incompatibility of the domestic rule with the EU Law results in the inapplicability of the former. Therefore, the question of unconstitutionality would lack one of its admission requirements. Accordingly, the simultaneous of a preliminary ruling before the ECJ and a question of unconstitutionality determines the dismissal of the latter for not complying with all the proceeding's requirements (Article 37.1 LOTC).

The General Prosecutor warns that, as opposed to ATC 168/2016, this case is not about the simultaneous raising of the question of unconstitutionality and the preliminary ruling before the ECJ, but about a previous raising of the former over the latter. However, as the case law has shown, this question is dismissed because on the same grounds, given that when the judicial body raised the question of unconstitutionality, expounded its doubts about the compatibility of the Law 15/2012 with the EU Law. Therefore, it would be either banned from applying this Law, or obliged to, previously raise a preliminary ruling, and once discarded the possibility of being incompatible, only then would it be possible to raise the question of unconstitutionality. On the contrary, the judge has given priority to the question of unconstitutionality over the European preliminary ruling, when it is the truth that the incompatibility of the Law 15/2012 with the EU Law causes the dismissal of the question of unconstitutionality (Article 37.1 LOTC).

Accordingly, the Plenum

Has decided

To dismiss this unconstitutionality issue.

May this Judgment be published in the "Official State Gazette".

Madrid, 13th December 2016.