

Judgment of 21st April 2004, [K 33/03](#)
BIO-COMPONENTS IN GASOLINE AND DIESEL

| | | |
|--|--|----------------------------------|
| Type of proceedings: Abstract review Initiator: Commissioner for Citizens' Rights | Composition of Tribunal: 5-judge panel | Dissenting opinions: 0 |
|--|--|----------------------------------|

| Legal provisions under review | Basis of review |
|--|---|
| Obligation for fuel manufacturers to add bio-components in quantities prescribed in the appropriate Council of Ministers' Regulation [Bio-components Used in Liquid Fuels and Liquid Bio-fuels Act 2003: Article 12(1) and (6)] | Freedom of economic activity Freedom of the individual Principle of proportionality [Constitution: Articles 20, 22 and 31(3)] |
| Exclusion of liquid fuels distributors from the obligation to indicate the percentage level of bio-components [<i>Ibidem</i> : Article 14(1)] | Principle of proportionality Freedom to acquire information Protection of consumers [Constitution: Articles 31(3), 54(1) and 76] |
| Fiscal penalties for undertakings failing to market bio-components or marketing them in lower quantities than prescribed in the appropriate Regulation [<i>Ibidem</i> : Article 17(1) point 3] | Freedom of economic activity Principle of proportionality [Constitution: Articles 20, 22 and 31(3)] |

The Bio-components Used in Liquid Fuels and Liquid Bio-fuels Act 2003, adopted on the basis of a government proposal, represents the Polish legislator's second attempt to introduce and regulate a system of inducing producers and distributors of liquid fuels to manufacture and offer gasoline and diesel containing additives of biological origin (bio-components), obtained by processing rape-seed, cereal grain or other agricultural resources. It entered into force on 1st January 2004. The previous Act of a similar nature, adopted on 19th December 2002, did not enter into force because of a successful presidential veto. The problem of using bio-components and the means of transposing EC Directives in this field were, from the outset, the subject of political debates and controversy amongst various experts.

The stated rationale for the solutions adopted in the Act was primarily the objective to create new jobs in agriculture and agribusiness, to increase farmers' incomes by stimulating demand for non-foodstuff agricultural products and to improve the quality of the environment.

General references to "bio-fuels" often mean all liquid fuels containing substances obtained by processing bio-mass (bio-components). It must be noted, however, that the Polish Act recognises three types of fuel to be used in vehicle engines: "liquid fuels", having defined minimum and maximum levels of bio-components; "bio-fuels", having a prescribed minimum bio-component level (higher than "liquid fuels") but no

maximum level; and “pure bio-component fuels”, containing no mineral hydro-carbons and consisting solely of bio-mass.

The Commissioner for Citizens’ Rights did not challenge the entire Act but, rather, three individual provisions thereof which, in his opinion, constituted substantial restrictions on economic freedom or were unfavourable from the perspective of consumer protection.

Article 12(1) made it obligatory for manufacturers to market in any given year the amount of bio-components specified in a Council of Ministers’ Regulation issued yearly under section 6 of that Article. Bio-components could be introduced in three different forms: as a component of “normal” liquid fuels; as a component of liquid bio-fuels; or as pure engine fuel (pure bio-ethanol, pure VOME bio-diesel).

According to Article 14(1) of the Act, “normal” liquid fuels with bio-component additives could be sold through unmarked pumps. The obligation to sell from separate pumps, marked in such a manner so as to enable identification of the bio-component content, related only to bio-fuels in the strict sense (Article 14(2) of the Act, which was not challenged in the present proceedings).

Finally, the challenged Article 17(1) point 3 prescribed an administrative fiscal penalty for undertakings failing to market bio-components or marketing them in lower quantities than those prescribed by the aforementioned Regulation. The penalty would amount to 50% of the value of marketed liquid fuels, bio-fuels and pure bio-components.

The Commissioner for Citizens’ Rights considered that encumbering producers with an obligation to market bio-components restricted freedom of economic activity in contravention of Article 22 of the Constitution, since it was not justified on the basis of protecting an important public interest and the conditions laid down in Article 31(3) (principle of proportionality) were not fulfilled.

The applicant also challenged the obligation imposed on consumers to purchase fuels containing bio-components, in the absence of any choice, as being incompatible with the principle of consumer protection stemming from Article 76 of the Constitution. The Commissioner emphasised the fact that consumers purchasing “normal” liquid fuels (i.e. non bio-fuels) are denied information as to their bio-component content and therefore do not possess basic knowledge about the product they are purchasing. The applicant alleged that this constituted a breach of the consumers’ right to information regarding the subject matter of the transaction.

All of the provisions challenged in the present proceedings lost binding force on the date that the judgment was published in the Journal of Laws (i.e. on 12th May 2004). The remainder of the Act remains in force. Another important provision in this field is § 12(1) of the Regulation of the Minister of Finance of 26th April 2004 on excise duty exemptions. By virtue of this provision, bio-components used in liquid fuels or liquid bio-fuels and fulfilling specified criteria are exempt from excise duty, whilst liquid fuels containing bio-component additives are partially exempt.

RULING

1. Article 12(1) and (6) of the Act does not conform to Articles 20 and 22, read in conjunction with Article 31(3) and does not conform to Article 31(1) and (2), of the Constitution.

2. Article 14(1) of the Act does not conform to Article 54(1), read in conjunction with Article 31(3) and Article 76, of the Constitution.

3. Article 17 of the Act does not conform to Article 20 and 22, read in conjunction with Article 31(3), of the Constitution.

PRINCIPAL REASONS FOR THE RULING

1. The criterion of the “necessity” for imposing restrictions on constitutional rights and freedoms with regard to the values enshrined in Article 31(3) of the Constitution (State security, public order, protection of the environment, public health and morality, the protection of the rights and freedoms of others) is inherent in the principle of proportionality. It implies that the legislator should always choose the least burdensome measures in achieving the stated aims. If the aim may be achieved by means that are less restrictive on rights and freedoms, then the adoption of a more burdensome measure constitutes a breach of the requirement of necessity as contained in the aforementioned constitutional provision.
2. The principle of interpreting national law in a manner sympathetic to European law, based on Article 91(1) of the Constitution, relates in particular to interpretation of the constitutional basis of review performed by the Constitutional Tribunal (in this case – the principles of economic freedom and the protection of consumers).
3. The scope of the freedom enjoyed by the legislator in enacting regulations concerning restrictions on economic freedom, its delimitation and the interpretation of the notion of “important public reasons”, as contained in Article 22 of the Constitution, must be assessed in the light of Poland’s participation in the European Common Market. This has particular consequences in relation to the constitutional assessment of reverse discrimination – enacting restrictions on economic freedom which apply only to nationals, since their application to other EU citizens is prohibited by Community law. Whilst discrimination against national entities is irrelevant in the light of Community law, it is the constitutional duty of national authorities to protect against such discrimination.
4. The applicant’s challenges to Articles 12(1) and (6) and 17(1) point 3 should be reviewed jointly (cf. paragraphs 5-10 below). This follows from the fact that, by virtue of Article 12, the legislator placed certain obligations on undertakings and, by Article 17, imposed sanctions for non-compliance therewith.
5. The statutory authorisation in Article 12(6) is ambiguous and may be interpreted in two ways. According to one interpretation, every litre of fuel available at a petrol station must contain the amount of bio-component specified in the Regulation. According to the alternative interpretation, the specified levels relate to a given producer’s “global” or total

native interpretation, the specified levels relate to a given producer's "global" or total yearly production and the legislator does not require that all fuel placed on the market by that producer must contain a particular level of bio-components. In keeping with the concurring opinions of all the participants in this case, the Constitutional Tribunal adopted the second (more liberal) interpretation in assessing the reviewed provision. Even in the light of such an interpretation one is forced to conclude that, in obliging producers to add a certain proportion of bio-components to fuels placed on the market, the legislator compelled producers to either change or supplement their product range or to conclude certain civil-law contracts with bio-component manufacturers (cf. Article 12(3) of the Act). In doing so, the legislator arbitrarily made the commencement of manufacturing certain products completely independent of any market survey of consumer interests and thereby drastically limited producers' capability to take market-orientated decisions. Whilst aware of serious reservations regarding the practical qualities of fuels containing bio-components, the legislator chose to enforce demand for such fuels, in practice depriving consumers of their freedom of choice. The absence of choice results from the fact that surveys have shown a complete lack of demand for bio-fuels and bio-components. In order to comply with the legal requirements, producers will have to add the whole prescribed "share" of bio-components to "ordinary" liquid fuels. This in practice creates two coercive situations: on the part of producers – to place on the market (which is free, as a rule) a certain product and, on the part of consumers – to buy this product, even against their will.

6. The primary purpose of Directive 2003/30/EC, adopted by the European Parliament and Council on 8th May 2003, on the Promotion of the use of bio-fuels and other renewable fuels for transport, with which the reviewed Polish Act is concerned, is readily apparent from its title: it aims to promote the use of bio-fuels in transport, rather than to enforce such usage. An analysis of the Directive's provisions also leads to the conclusion that its implementation does not allow for the possibility to enact national provisions making the use of bio-fuels compulsory. It may not be assumed that alteration of the Directive's aim – from promotion to imposition of an obligation – constitutes the "detailing" of the Directive within the internal legal order, falling within the scope of the State's freedom to choose the form and methods of implementation. Such reasoning is, firstly, incompatible with the principles of implementation into the internal legal order of Directives, as a source of Community law, and, secondly, contrary to the substance of the Directive itself, which clearly states that internal State policy promoting the use of bio-fuels may not hinder the free movement of fuels.
7. Applying the challenged provisions to all manufacturers (sellers) – not only national, but also foreign, including those established in other EU Member States – would constitute a restriction on the free movement of goods between Member States in contravention of European Community law. From the perspective of Community law, such a situation would be treated as an example of the national legislator imposing restrictions by means of "a measure having equivalent effect" to quantitative restrictions on imports, which is expressly forbidden by Article 28 of the Treaty establishing the European Community. Although such restrictions are allowed in exceptional circumstances, they are only per-

missible for reasons laid down in Article 30 of the EC Treaty. Employing this possibility, which requires a special procedure for establishing the derogation, may not amount to arbitrary discrimination or disguised restrictions on trade. In light of the jurisprudence of the Court of Justice of the European Communities, it is unlawful to enact restrictions in the internal legal order which hinder access to the national market of goods failing to comply with qualities or contents specified in national legislation for protectionist purposes. Conversely, limiting the applicability of the reviewed provisions to Polish manufacturers (sellers) – since legislators in other EU Member States have not imposed similar obligations – would lead to reverse discrimination (see paragraph 3 above). Since it is impossible for the reviewed provisions to apply to fuels produced abroad and placed on the Polish market, by reason of the country of origin (a consequence of Articles 28 and 30 of the EC Treaty), it is impossible to deem the obligations imposed thereby as consistent with the “important public reasons” referred to in Article 22 of the Constitution.

8. The creation of jobs must constitute an element of State policy, as provided for by Article 65(5) of the Constitution. There is no constitutional subjective individual right to employment, however, which would justify, on the grounds of the principle of proportionality, the restriction of manufacturers’ and consumers’ rights as necessary to “protect the rights and freedom of others”. Furthermore, in the light of Article 65(5), State policy must not lead to a decrease in the number of jobs as a result of excessive restraints on economic activity and the hindrance of flexible employment in the private sector.
9. Ensuring all citizens, and farmers in particular, a sufficiently high level of income which they consider to be satisfactory is not one of the constitutional duties of the State.
10. For the reasons discussed in paragraphs 8 and 9 above it may not be alleged that the provisions currently under examination, which restrict the freedom of economic activity, are necessary in a democratic State for the protection of the rights of others within the meaning of Article 31(3) of the Constitution.
11. The Constitutional Tribunal is not competent to deliver a verdict in the dispute as to the effect of the production and use of bio-components on the natural environment. Having regard, however, to the fact that a variety of opinions have been expressed on this unclear issue, it is impossible to conclude that the restrictions on the freedom of economic activity imposed by the reviewed provisions are necessary in a democratic State in order to protect the environment.
12. Whilst Article 76 does not in itself give rise to a subjective individual right, it does impose specific duties on the State that must be implemented by way of ordinary legislation.
13. Among the founding principles of the modern protection of consumers, implemented within the framework of the European Common Market, are: transparency; openness; the availability of clear, full and comprehensible product information. Consumers need not seek the necessary information in any particular way – it must, rather, be made available to them. A cornerstone of the consumer’s constitutional right to be informed is Article 54(1) of the Constitution. It would be wrong to limit this provision, especially as regards the scope of “obtaining information”, to the traditionally perceived right to be involved in

political discourse. Individuals occupy a variety of social roles in any given society and one of these is the role of consumer. From this perspective, Article 54 of the Constitution is a guarantee of the realisation of Article 76 of the Constitution in the scope of protecting consumers from unfair market practices.

14. The fact that Article 14(1) of the Act permits trade in liquid fuels without any indication of the levels of bio-components therein – unlike the case with respect to bio-fuels (cf. section 2 of the same Article) – means that it is only in the latter case that consumers would be aware of the level of bio-components in the fuel being offered. Such knowledge would not be available to purchasers of liquid fuels, which in practice would represent the majority of vehicle fuels consumers. Since producers have no intention to offer bio-fuels in the immediate future, the whole “share” of bio-fuels imposed on them would need to be added to liquid fuels and the preferential treatment of bio-components in excise duty provisions will encourage producers to exceed the minimum levels prescribed by the Act. In light of the aforementioned standards of consumer protection, the application to declare the non-conformity of Article 14(1) of the Act with the basis of review cited in point 2 of the ruling is justified.
15. This judgment does not, as such, resolve the idea of promoting the use of fuels with bio-component additives (blended bio-fuels). The possibility or rationality of producing and trading in such fuels may not be ruled out. For constitutional reasons this may not, however, be effected in the form of compulsory production or compulsory purchasing.

Provisions of the Polish Constitution and the Treaty establishing the European Community

Constitution

Art. 20. A social market economy, based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, shall be the basis of the economic system of the Republic of Poland.

Art. 22. Limitations upon the freedom of economic activity may be imposed only by means of statute and only for important public reasons.

Art. 31. 1. Freedom of the person shall receive legal protection.

2. Everyone shall respect the freedoms and rights of others. No one shall be compelled to do that which is not required by law.

3. Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

Art. 54. 1. The freedom to express opinions, to acquire and to disseminate information shall be ensured to everyone.

2. Preventive censorship of the means of social communication and the licensing of the press shall be forbidden. Statutes may require the receipt of a permit for the operation of a radio or television station.

Art. 65. [...] 5. Public authorities shall pursue policies aiming at full, productive employment by implementing programmes to combat unemployment, including the organization of and support for occupational advice and training, as well as public works and economic intervention.

Art. 76. Public authorities shall protect consumers, customers, hirers or lessees against activities threatening their health, privacy and safety, as well as against dishonest market practices. The scope of such protection shall be specified by statute

Art. 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 enactment of a statute.

2. 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.

3. If an agreement, ratified by the Republic of Poland, establishing an international organization so provides, the laws established by it shall be applied directly and have precedence in the event of a conflict of laws.

EC Treaty

Art. 28. Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between Member States.

Art. 30. The provisions of Articles 28 and 29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.