

Judgment of 16<sup>th</sup> September 2003, [K 55/02](#)  
**BRIEF *VACATIO LEGIS* IN INTRODUCING THE REQUIREMENT  
 TO OBTAIN A LICENSE FOR CABLE NETWORK RETRANSMISSIONS**

<b>Type of proceedings:</b> <a href="#">Abstract review</a> <b>Initiator:</b> Commissioner for Citizens' Rights	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
<b>Legal provisions under review</b>		<b>Basis of review</b>
34-day period of <i>vacatio legis</i> in introducing the requirement of obtaining a license for cable network retransmissions [Copyright Act Amendment Act 2002: Article 1(11) (b)]		Rule of law [Constitution: Article 2]

Prior to 1<sup>st</sup> January 2003, radio and television cable network operators were permitted to retransmit programmes broadcast by Polish and foreign broadcasters without requiring a license agreement to do so, provided the programmes in question were available in the given area via traditional or satellite transmitters and the retransmission was simultaneous and unaltered in comparison with the original broadcast. The holders of distribution rights to such works were entitled to remuneration.

The aforementioned privilege of Polish cable network operators was abolished, as of 1<sup>st</sup> January 2003, by an amendment to the Copyright Act 1994, passed by the Parliament on 28<sup>th</sup> October 2002 and promulgated in the Journal of Laws on 27<sup>th</sup> November of that year. This change was effected as a result of harmonisation of Polish law with the *acquis communautaire* and entailed considerable difficulties for cable operators. A particular consequence of this was that, from the outset of 2003, Polish viewers were denied access to certain foreign television programmes that were previously retransmitted in cable networks. The operators claimed that this change came as a surprise to them and that the mere 34-day *vacatio legis* (the period between the promulgation of a statute and its entry into force) did not allow them to adjust their business activities to the new legal requirements.

Critics of the haste with which this change was introduced were supported by the Commissioner for Citizens' Rights, who brought an application before the Constitutional Tribunal alleging that the provision determining the date of entry into force of the amendment constituted an infringement by the legislator of Article 2 of the Constitution (the rule of law principle).

**RULING**

**The challenged amendment conforms to Article 2 of the Constitution.**

## PRINCIPAL REASONS FOR THE RULING

1. An important element in ensuring a proper course of the legislative process, which is one of the foundations of the democratic State governed by the rule of law, is allowing for an adequate period of *vacatio legis* when introducing new legal regulations. The “technical” requirement of providing an adequate *vacatio legis* period is a corollary of substantive requirements to be fulfilled by the legislator, such as protecting “interests in due course”, ensuring the predictability of State organs’ behaviour and avoiding surprising citizens with new legal regulations. A sufficient period of *vacatio legis* is of prime importance when new regulations burden addressees with new obligations entailing legal responsibility for non-compliance therewith.
2. The principle of protecting “interests in due course” may not be equated with a requirement that the law remain forever unchanged or with the perpetual existence of certain privileges. Rights to which no legally defined time limits have been ascribed may, in particular, be modified during the course of their existence. The protection of “interests in due course” must, however, be especially safeguarded in all situations where the legislator has established a specific period during which it was made possible to realize interests in accordance with predetermined principles or rules.
3. Where the Constitutional Tribunal finds that a given *vacatio legis* is excessively brief, it may (acting as a “negative legislator”) only declare unconstitutional the statutory provision prescribing this period. It may not, however, usurp the legislator’s role and decree a period which would, in its opinion, be sufficient. In the event of a finding of unconstitutionality, the Act would have to return to Parliament in order for a new date of its’ entry into force to be determined. Consequently, a long period of time would lapse between the date of entry into force originally planned by the legislator and the date on which the Act would actually acquire binding force. Where the substantive content of legal provisions and appropriateness of their adoption do not raise any doubts, such an excessive delay appears unjustified. Since the State strives to accomplish certain goals by enacting legislation (in this case: the undisputed aim of harmonising Polish law with EU standards), to deny the entry into force of an Act solely by reason of insufficient *vacatio legis* gives rise to serious doubts. This is all the more true when the challenged date of entry into force has already passed. In practice, many of the addressees of the new legal provisions have complied with them, often at the expense of considerable effort and cost. If the Constitutional Tribunal retroactively annulled the entry into force of the Act, this could be perceived by such persons as infringing their trust in the State and its’ laws. It would thereby become apparent that compliance with the law and diligence in adapting one’s business activities to legal requirements is not worthwhile, since those addressees of the legal norm who disregarded it would be in a better position. An appreciation of the aforementioned consequences of a ruling that a prescribed *vacatio legis* was insufficient, once that period has already passed and the Act in question has already entered into force, demands a cautious approach when assessing the constitutionality of the solution adopted by the legislator. Where the *vacatio legis* meets the requirements of Article 4(1) of the Act on the Promulgation of Normative Acts and Other Legal Acts 2000 (which states that an Act, in principle, enters into force 14 days following the date of its’ promulgation) then only in exceptionally flagrant cases may the Constitutional Tribunal establish a violation of Article 2 of the Constitution, since such a ruling

would entail the fictitious assumption that the Act had never become binding law and its' entry into force, in an unchanged substantive form, would be subject to a further parliamentary decision as to the *vacatio legis*.

4. In the period between July 2000 and December 2002 two provisions of the Copyright Act 1994 (Articles 21(4) and 24(3)) were concurrently in force. The substance and relationship between these articles was unclear. Article 21(4) permitted the cable network retransmission of works broadcast in radio and television programmes only on the basis of a license agreement concluded with the appropriate collecting society (responsible for administering copyright and other related rights). Article 24(3) established a so-called statutory license, allowing cable network operators to distribute works broadcast by other operators provided such works were “available in the given area” and the distribution was “simultaneous and unaltered in comparison with the original broadcast”. Those possessing rights to the works distributed in this manner were entitled to remuneration. The Constitutional Tribunal accepted the interpretation of these articles according to which, since the latter provision was *lex specialis* in relation to the former, it was permissible to retransmit without prior conclusion of a license agreement in the defined situations. This interpretation represents the basis for the Tribunal’s examination of the Commissioner for Citizens’ Rights’ claim that the challenged amendment, which abolished (in accordance with EU law) the aforementioned exception from the obligation to conclude a retransmission agreement, was introduced after an insufficient *vacatio legis*.
5. Acting in conformity with the Constitution, the legislator was entitled to abolish the aforementioned statutory license, provided his actions were predictable and did not represent a surprise for subjects possessing such a license. In the present case, it is unfounded to claim that the addressees of this law were surprised by the legislator’s actions. At the time of entry into force of the challenged provisions, Article 21(4) of the Act, permitting retransmission “only on the basis of an agreement concluded with the appropriate collecting society (responsible for administering copyright and other related rights)”, had been in force for over two years (since 22<sup>nd</sup> July 2000). It is, therefore, impossible to assume that abolition of the statutory license as of 1<sup>st</sup> January 2003 came as a surprise to the addressees of the Act. On the contrary – both in the light of Poland’s international obligations stemming from accession to the EU and from the perspective of Article 21(4) – all subjects conducting activity in the field of retransmission should have taken into account the imminence of the forthcoming definitive abolition of the statutory license. Such imminence was particularly obvious in light of the principle of freedom of economic activity, which is based on agreements concluded between economic actors, as opposed to statutory privileges awarded to specific groups of undertakings.
6. The principle of the rule of law, from which stems the duty to protect trust in the State and its’ laws, precludes adverse consequences being imposed on the addressees of legal norms who have utilised the rights granted to them by a duly adopted and promulgated Act, even where the Act is not free of certain legislative flaws.
7. Prior to the entry into force of the new Constitution of 1997, the rule that promulgation of a normative act is a condition precedent for the acquisition of binding force was inferred from the principle of a democratic State governed by the rule of law. Since the acquisition of binding force is now directly expressed in Article 88(1) of the

Constitution as conditional upon promulgation of the Act, there is no longer the need to revert to the rule of law principle (Article 2) as the basis of constitutional review of norms where the legislator grants legal provisions binding force prior to their promulgation.

#### Provisions of the Constitution

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

**Art. 88.** 1. The condition precedent for the coming into force of statutes, regulations and enactments of local law shall be the promulgation thereof.

2. The principles of and procedures for promulgation of normative acts shall be specified by statute.