

Judgment of 25<sup>th</sup> July 2006, P 24/05  
**GOVERNING ENERGY ENTERPRISES' OBLIGATIONS  
 BY WAY OF A REGULATION**

<b>Type of proceedings:</b> Question of law referred by a court <b>Initiator:</b> Court of Appeal for Warsaw	<b>Composition of Tribunal:</b> 5-judge panel	<b>Dissenting opinions:</b> 0
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Legal provisions under review	Basis of review
Statutory authorisation for the Minister of Economy to issue a regulation inter alia obliging energy enterprises to purchase electricity and heat from unconventional and renewable energy sources  [Energy Law 1997: Article 9(3) (in the wording operative between 2000 and 2002)]	Prerequisites for the limitation of the freedom of economic activity Conditions for authorising the issuing of a regulation  [Constitution: Article 22 and Article 92(1)]

The Warsaw Court of Appeal considered appeals from a number of energy enterprises against judgments of the Warsaw Regional Court as Court for Competition and Consumer Protection upholding pecuniary penalties imposed on the said enterprises by the President of the Energy Regulatory Authority (*Urząd Regulacji Energetyki*). The penalties reflected a failure on the part of the said enterprises to heed the obligation that energy be purchased from specified sources, whose statutory basis was Article 9(3) of the Energy Law 1997. At the time the said penalties were imposed, that provision had the wording: “The Minister of Economy shall, by way of a regulation [where regulations are executive acts as under Article 92(1) of the Constitution], impose upon energy enterprises engaged in the trade in, or transmission and distribution of, electricity or heat an obligation to purchase electricity from unconventional and renewable energy sources, as well as electricity co-generated with heat, and heat from unconventional and renewable sources; and specify the detailed scope of this obligation, including, as regards the technology applied in energy generation, the size of the source and the method by which the costs of the purchase are to be reflected in tariffs.”

The Court of Appeal decided to stay the proceedings and refer to the Constitutional Tribunal a [question of law](#) regarding the constitutionality of the aforementioned statutory provision, as well as the 2000 Regulation of the Minister of Economy, issued on the basis thereof, concerning the obligation to purchase electricity and heat from unconventional and renewable sources and the scope of that obligation. Alleging infringement by the legislator of Articles 22 and 92(1) of the Constitution, the Court of Appeal emphasised that the imposition upon energy enterprises of an obligation to purchase energy (or heat) from specified sources, subject to severe pecuniary penalties, constitutes a restriction on the freedom of economic activity, since it narrows the scope of the said entities’ autonomy as regards economic decision-making. In the Court’s opinion, even where such interference may be deemed permissible in the public interest (i.e. in the name of the protection of the natural environment from pollution through reduced consumption of fossil fuels), it may not signify approval for the means of implementation of that obligation by

way of a regulation, as opposed to a statute (i.e. Act of Parliament). According to the Court of Appeal, the statute in this case (i.e. the Energy Law 1997) not only failed to specify in detail the contents of the obligation to be imposed upon economic entities, but also offered no guidelines or criteria which might be applied in specifying the scope thereof. In the Court's assessment, this infringes the requirement of exclusivity of statutes as regards the introduction of limitations upon the freedom of economic activity (Article 22 of the Constitution), as well as failing to fulfil constitutional conditions for the issuing of regulations (Article 92(1) of the Constitution).

## RULING

**The challenged statutory provision, insofar as it obliges the energy enterprises specified therein to purchase energy and heat from unconventional and renewable energy sources, conforms to Article 22 and Article 92(1) of the Constitution.**

*Furthermore, on the basis of Article 39(1) point 1 and Article 39(2) of the Constitutional Tribunal Act 1997, the Tribunal discontinued proceedings within the remaining scope (concerning the constitutionality of the 2000 Regulation of the Minister of Economy), given the superfluity of adjudication.*

## PRINCIPAL REASONS FOR THE RULING

1. Given its specific nature, the freedom of economic activity may be subject to greater limitations than freedoms and rights of an individual or political character. This is in particular true of the requirement that the limitation be imposed by way of statute (i.e. the principle of the exclusivity of statutes). The requirement contained in Article 22 of the Constitution, concerning the form of a statute imposing limitations upon the said freedom of economic activity, is similar – though not identical – in wording to Article 31(3) of the Constitution, which sets out general prerequisites for the limitation of rights and freedoms. The expression “by means of statute” (*w drodze ustawy*), within the meaning of Article 22 of the Constitution, implies that the limitation upon a freedom may be achieved using a statute, and therefore that the construction of the said limitation may not take place in the absence of such a statute. This means that only a statute may legitimise limitations introduced by way of a regulation issued thereunder. The expression “only by statute” (*tylko w ustawie*), within the meaning of Article 31(3) of the Constitution, represents the constitutional legislator's will that the full scope (outline) of the limitation upon a right or freedom be laid down directly in a statute.
2. The principle of proportionality (Article 31(3) of the Constitution) also refers to statutory limitations upon the freedom of economic activity. The legislator should, in particular, apply measures serving in the achievement of a goal that could not be attained by other means.
3. The energy industry is subject to the laws of the regulated market. Access to energy sources is of fundamental significance to the existence of society and individuals, as well as to the sovereignty and independence of the State and hence to the safeguarding of the freedoms and rights of persons and citizens. The possession of energy sources

constitutes a condition if the common good that is the Republic of Poland, referred to in Article 1 of the Constitution, is to be embodied. The field of energy management thus brings together a variety of constitutional values and principles that include: the freedom of economic activity (Article 22 of the Constitution), the security of citizens and the principle of sustainable development of the State (Article 5 of the Constitution) and the protection of the environment (Article 74(1) and (2) of the Constitution).

4. The reviewed legal provision is one element by which a public authority exerts an impact upon the energy industry with a view to the requirement of economic effectiveness being reconciled with constitutionally-legitimised needs as regards achievement of the common good. Both the specific nature of the energy market as a regulated one and the said constitutionally-legitimised needs justify limitations upon the freedom of economic activity in this sector of the economy.
5. As the necessary element underpinning statutory authorisation to issue a regulation, the “guidelines concerning the provisions of such act”, within the meaning of Article 92(1) of the Constitution, are, in the case of the authorising provision under review, the ones contained within Article 1(1) and (2) of the Energy Law 1997 (in the version relevant to the present case). Moreover, the legislator stated directly within the authorising statutory provision that the regulation shall include the technology of energy generation, the size of the source and the method by which the costs of purchase thereof are to be reflected in tariffs. Accordingly, the reviewed statutory authorisation fulfils the constitutional requirements.
6. A legal provision retains its binding force for as long as individual acts applying the law are, or may be, issued on the basis thereof. The loss of binding force as a prerequisite for discontinuing proceedings before the Constitutional Tribunal (Article 39(1) point 1 of the Constitutional Tribunal Act 1997) may only take place when such a provision may no longer be applied to any state of facts.
7. The Court referring the question of law in the present case assumed unconstitutionality of the Regulation issued on the basis of the challenged statutory authorisation by virtue of unconstitutionality of the authorisation itself. The recognition that the challenged statutory provision is consistent with the Constitution renders it superfluous for the Constitutional Tribunal – within the meaning of Article 39(1) point 1 of the Constitutional Tribunal Act 1997 – to adjudicate upon the constitutionality of the Regulation.

#### Provisions of the Constitution and the Constitutional Tribunal Act

##### Constitution

**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.

**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.** [...] 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. 74.** 1. Public authorities shall pursue policies ensuring the ecological security of current and future generations.  
2. Protection of the environment shall be the duty of public authorities.

**Art. 92.** 1. Regulations shall be issued on the basis of specific authorization contained in, and for the purpose of implementation of, statutes by the organs specified in the Constitution. The authorization shall specify the organ appropriate to issue a regulation and the scope of matters to be regulated as well as guidelines concerning the provisions of such act.

**CT Act**

**Art. 39.** 1. The Tribunal shall, at a sitting in camera, discontinue the proceedings:

- 1) if the pronouncement of a judicial decision is superfluous or inadmissible;
- 2) in consequence of the withdrawal of the application, question of law or complaint concerning constitutional infringements;
- 3) if the normative act has ceased to have effect to the extent challenged prior to the delivery of a judicial decision by the Tribunal.

2. If the circumstances referred to in paragraph 1 above shall come to light at the hearing, the Tribunal shall make a decision to discontinue the proceedings.