

Procedural decision of 28<sup>th</sup> January 2004, Tw 74/02  
**EMPLOYERS' ORGANISATIONS AND THE ABSTRACT  
REVIEW OF NORMS**

<b>Type of proceedings:</b> Preliminary consideration of an application <b>Initiator:</b> Polish Confederation of Private Employers	<b>Composition of Tribunal:</b> Plenary session	<b>Dissenting opinion:</b> 1
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The Polish Confederation of Private Employers submitted an application to the Constitutional Tribunal for the [abstract review](#) of the provisions of a number of Acts and regulations governing the officially regulated prices of medicines, the manner of determining such prices and the list of medicines which were within the regime of officially regulated prices. In the reasoning of the application it was held that the challenged provisions “set a level of attainable profit on the trade in medical materials and therefore had a direct impact on the economic activities conducted by the members of the Confederation.”

In accordance with Article 191(1) of the Constitution “national authorities of employers’ organisations”, as one of the subjects mentioned in points 3-5 of this provision, may initiate the abstract review of legal norms only when “the normative act [in question] relates to matters relevant to the scope of their activities”.

On the 7<sup>th</sup> of July, the Constitutional Tribunal sitting as a one-judge panel pronounced a procedural decision (reference number as above) refusing to proceed further with the application. In its reasoning, the Tribunal found that the applicant lacked the necessary *locus standi* to initiate constitutional review of the provisions in question, since they do not regulate matters of employers as such, but rather the manner of conducting economic activities which are not directly related to the hiring of employees.

The Polish Confederation of Private Employers lodged a complaint against this procedural decision. Complaints of this kind are usually examined by the Constitutional Tribunal sitting as a panel of three judges. In this case, however, the complaint was examined by a plenary session of the Tribunal. This indicates the Tribunal’s desire to consolidate its jurisprudence on the fundamental matter dealt with by this procedural decision.

The decision was adopted by the majority of votes. *Judge Mirosław Wyrzykowski* presented a dissenting opinion concerning both the ruling and the principal reasons for the ruling.

#### RULING

**The Tribunal refused to admit the complaint of the Polish Confederation of Private Employers against the preceding procedural decision refusing to proceed further with the application.**

## PRINCIPAL REASONS FOR THE RULING

1. It is inadmissible for the Constitutional Tribunal to examine the merits of an application for the abstract review of legal norms where such an application has been submitted by a subject falling outside the scope of Article 191 of the Constitution nor when, although the application has been submitted by one of the subjects listed in Article 191(1) points 3-5, such an application concerns legal provisions dealing with matters falling outside the scope of activities of that subject (cf. Article 191(2)).
2. The present Constitution of 1997 substantially broadened the category of subjects entitled to initiate proceedings before the Constitutional Tribunal. This is indicated both by the creation of a new mechanism called “constitutional complaint” and by the decision to vest all courts with the right to refer questions of law to the Tribunal. Accordingly, there is no need to broaden the category of subjects entitled to institute the abstract review of norms by taking an expansive interpretation of the notion of “matters relevant to the scope of their activities”, as described in Article 191(2) of the Constitution. The fact, that the challenged provision may have some impact on the applicant, or has already had such an impact, is not, therefore, sufficient to confirm the applicant’s *locus standi*. It is necessary to determine whether the relevant provision governs activities constituting the purposes of the applicant as defined in the Constitution, by statute or, in the case of private-law entities, by their articles of incorporation. The right to initiate proceedings before the Tribunal, vested in the subjects described in Article 191(1) points 3-5 of the Constitution, is an exceptional right granted in consequence of the special nature of the tasks assigned to the given subject by binding constitutional and statutory provisions. An expansive interpretation of the scope of this right is inadmissible.
3. The constitutional notion of employers’ organisations (Article 191(1) point 4) should be interpreted primarily in light of the meaning of “employer”. A literal interpretation of this notion, which is also supported by legal definitions contained in various statutes (e.g. Article 3 of the Labour Code and Article 1(2) of the Employers’ Organisations Act 1991) compels us to assume that an employer is a natural person or an organisational unit, even without legal personality, which employs employees.
4. The determination as to whether a particular body belongs to the constitutional category of “employers’ organisations” may not be made solely on the basis of formal criteria i.e. the fact that the body in question functions on the basis of the Employers’ Organisations Act 1991, but must also take into account material criteria such as the fact that a particular body possesses certain necessary features implied by a literal and systematic interpretation of the text of the Constitution. The constitutional notion discussed herein should, therefore, be treated, to a certain degree, autonomously in relation to the same notion as defined by the Employers Organisations Act 1991. In interpreting the “scope of activities” of employers’ organisations, within the meaning of Article 191(2), read in conjunction with Article 191(1) point 4, of the Constitution, it must be taken into account that the right of such associations to submit applications to the Constitutional Tribunal was granted by the same provision which deals with the right of trade unions and occupational organisations (Article 191(1) point 4) and that the issue of associating in employers’ organisations and trade unions, as well as the basic competencies of such bodies, was regulated in a single article of the Constitution (Article 59). This indicates the need to ensure a uniform approach in determining the

“scope of activities” of trade unions and employers’ organisations as a criterion which is decisive in permitting such bodies to challenge statutory provisions in proceedings before the Constitutional Tribunal. Of crucial importance here is the fact that the Constitution, in Article 191(1) point 4 uses the term “employer” instead of “person conducting economic activity” or “entrepreneur”. A rational legislator wishing to provide special protection of economic interests, as would arise from the possibility of submitting applications to the Constitutional Tribunal, would grant such a right to organisations created to represent the interests of their members (e.g. chambers of commerce).

5. The provisions examined in the current application of the Polish Confederation of Private Employers concern the economic interests of the members of the Confederation, as opposed to the legal interests of its members in their capacity as employers. Therefore the Confederation may not initiate an abstract review of these provisions on the basis of Article 191 of the Constitution.
6. In accordance with Article 31(1) of the Constitutional Tribunal Act, proceedings before the Tribunal are instituted by an application, a question of law or a constitutional complaint, provided that such application, question of law or complaint is submitted by an “entitled subject”. The enumeration of subjects entitled to submit applications for the abstract review of norms in cases referred to in Article 188 of the Constitution is contained in Article 191(1) of the Constitution. As regards the subjects indicated in Article 191(1) points 3-5 of the Constitution, the constitutional legislator introduced a so-called limited capacity to initiate proceedings (i.e. special *locus standi*), requiring proof that the challenged provisions relate to matters within the scope of the given subject’s activities. An application filed by such a subject should, therefore, not only comply with requirements referring to procedural letters [i.e. all official documentation submitted during court proceedings] and contain the data specified in Article 32(1) points 1-4 of the Constitutional Tribunal Act, but should moreover contain reference to a legal provision or private statute (e.g. articles of association) indicating that the challenged provisions relate to matters within the scope of activities of that body or organisation (Article 32(2) of the Constitutional Tribunal Act).
7. It is necessary, at every stage of proceedings before the Constitutional Tribunal, including the preliminary consideration of the admissibility of an application or a constitutional complaint (Article 36, read in conjunction with Article 46(2), of the Constitutional Tribunal Act), to consider whether any of the negative prerequisites are fulfilled that would preclude the pronouncement of a judgment and result in the obligation to discontinue proceedings, such as a lack of *locus standi* to initiate constitutional review of a particular provision or normative act. The question as to whether the provisions referred to in the application relate to matters within the applicant’s scope of activities may, and must, be examined primarily at the stage of preliminary consideration of the admissibility of an application, since this stage is aimed at preventing the Tribunal from proceeding further with applications which, when examined on their merits, would be subject to obligatory discontinuation on the basis that the Tribunal could not pronounce judgment on the merits of the case, by virtue of Article 39(1) point 1 of the Constitutional Tribunal Act, because the referring subject lacked the appropriate *locus standi*.

## MAIN ARGUMENTS OF THE DISSENTING OPINION

- There is no causal link between the broadening of the sphere of subjects entitled to initiate proceeding before the Constitutional Tribunal, which took place in the Constitution of 1997, and the need to avoid an expansive interpretation of Article 191(1) points 3-5 such as referred to in the Tribunal's ruling.
- It has not been proved that the right to submit applications to the Constitutional Tribunal granted to the subjects enumerated in Article 191(1) points 3-5 of the Constitution should be viewed as having an "exceptional" character, as the Tribunal suggests. The differentiation of the nature of the rights of different subjects listed in Article 191(1) of the Constitution is obvious, but it is not possible to infer from this that the initiation rights of subjects listed in Article 191(1) points 3-5 is of an "exceptional" character when compared to the subjects specified in Article 191(1) points 1-2 and point 6 of the Constitution. On the contrary, the right of the subjects specified in Article 191(1) points 3-5 is an "ordinary" constitutional right, albeit subject to additional conditions. The mere fact that the Constitution specifies further conditions for these entities to enjoy the right to initiate proceedings before the Constitutional Tribunal is an insufficient basis on which to draw the conclusion that such a right has an "exceptional" character.
- There are no grounds for excluding from the scope of the notion of "employer" those structural elements which, for a majority of employers, constitute the very essence of being an employer. Namely, such employers hire employees in order to achieve an economic purpose. The employment of employees is an important element of the economic activities conducted by an employer, but it is not the only one. In a functional approach, an employer should be treated as an entrepreneur, whose rights and interests are characterized by a permanent connection with the constitutionally guaranteed right to freely pursue economic activity (Article 20 and Article 22).
- The effect of the interpretation adopted by the Constitutional Tribunal in the present case is to remove the right to initiate review of the constitutionality of economic legislation from those subjects which are the most competent; namely employers pursuing economic activity. The Constitutional Tribunal has narrowed its scope of jurisdiction in matters relating to the constitutional principles of freedom to pursue economic activity, free competition and social market economy. By rejecting the principle of *in dubio pro actione* (i.e. when in doubt, rule in favour of the action), the Tribunal has, at the same time, prevented application of the principle of *in dubio pro libertate economiae* (i.e. when in doubt, rule in favour of economic freedom).

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

#### 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. 59.** 1. The freedom of association in trades unions, socio-occupational organizations of farmers, and in employers' organizations shall be ensured.

2. Trade unions and employers and their organizations shall have the right to bargain, particularly for the purpose of resolving collective disputes, and to conclude collective labour agreements and other arrangements.

3. Trade unions shall have the right to organize workers' strikes or other forms of protest subject to limitations specified by statute. For protection of the public interest, statutes may limit or forbid the conduct of strikes by specified categories of employees or in specific fields.

4. The scope of freedom of association in trade unions and in employers' organizations may only be subject to such statutory limitations as are permissible in accordance with international agreements to which the Republic of Poland is a party.

**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, as specified in Article 79, para. 1.

**Art. 191.** 1. The following may make application to the Constitutional Tribunal regarding matters specified in Article 188:

- 1) the President of the Republic, the Marshal of the Sejm, the Marshal of the Senate, the Prime Minister, 50 Deputies, 30 Senators, the First President of the Supreme Court, the President of the Supreme Administrative Court, the Public Prosecutor-General, the President of the Supreme Chamber of Control and the Commissioner for Citizens' Rights,

- 2) the National Council of the Judiciary, to the extent specified in Article 186, para. 2;
  - 3) the constitutive organs of units of local self-government;
  - 4) the national organs of trade unions as well as the national authorities of employers' organizations and occupational organizations;
  - 5) churches and religious organizations;
  - 6) the subjects referred to in Article 79 to the extent specified therein.
2. The subjects referred to in para. 1 subparas. 3-5, above, may make such application if the normative act relates to matters relevant to the scope of their activity.

#### CT Act

**Art. 31.** 1. Institution of proceedings before the Tribunal shall take place on the basis of an application, question of law or complaint concerning constitutional infringements by a subject entitled thereto.

2. An applicant may, by the time the hearing has commenced, withdraw the application, question of law or complaint.

**Art. 32.** 1. The application or question of law shall comply with requirements referring to procedural letters and shall, in addition, include:

- 1) identification of the organ which enacted the normative act in question;
- 2) a precise identification of the normative act, or a part thereof, called in question;
- 3) formulation of the claim alleging the non-conformity of the normative act called in question to the Constitution, ratified international agreement or statutes;
- 4) reasons for the claim containing indication of supporting evidence.

2. The application submitted by the organ or organisation specified in Article 191 paragraph 1, subparagraphs 3-5 of the Constitution shall also include reference to the provision of law or by-laws, indicating that the statute or another normative act called in question relates to matters relevant to the scope of their activity.

3. The question of law shall also indicate the scope within which an answer to the question may influence settlement of the case in relation to which the question has been asked and, additionally, it shall indicate the organ before which the proceedings are pending as well as the designation of the case.

**Art. 36.** 1. The President of the Tribunal shall direct the application specified in Article 32, paragraph 2 to a judge of the Tribunal, designated by him/her, for preliminary consideration at proceedings in camera.

2. Where the application fails to satisfy the formal requirements, the judge of the Tribunal shall order the defects therein to be repaired within a period of seven days from the date of notification thereof.

3. Where the application is evidently groundless or its defects have not been repaired within the specified period of time, the judge of the Tribunal shall refuse to proceed with further action.

4. The person submitting the application shall, with respect to the decision concerning refusal to proceed with further action, be entitled to lodge a complaint to the Tribunal within a period of seven days from the date of delivery of the said decision.

5. The Tribunal, sitting in camera, shall decide not to proceed with consideration of the complaint filed after the expiry of the period specified in paragraph 4.

6. The President of the Tribunal shall, having found that the complaint has been filed in due time, refer the same for consideration of the Tribunal at proceedings in camera and shall determine the date for consideration thereof.

7. The Tribunal shall, having admitted the complaint, refer the case for consideration at a hearing. The decision concerning non-admittance of the complaint shall not be subject to appellate proceedings.

**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.

**Art. 46.** [...] 2. The Tribunal shall consider a complaint on the principles and in accordance with the procedure provided for the consideration of an application for the confirmation of conformity of statutes to the Constitution and of other normative acts to the Constitutions and statutes.