

Constitutionally Justified Limitations of Freedom of the Economic Activity: The Case of Poland

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Abstract: In Poland, the principle of freedom of economic activity applies. Legal bases for limiting conduction of economic activity establish the possibility of limiting the constitutional principle of freedom of economic activity because of an important public interest, including the protection of values highly appreciated. The Constitution of the Republic of Poland indicates that values highly appreciated are: security of a state, public order, protection of the natural environment, protection of health or public morals and protection of freedoms and rights of other persons. The primary source of limitation of freedom of economic activity contained in Constitution is the prerequisite of an important public interest. This is a very capacious concept, containing the need to protect different values.

The second pillar of the socio-economic system in Poland is the principle of equal treatment and non-discrimination. It can be inferred from the constitutional principles that there is a duty to conduct economy activity on the basis of fair competition and respect for good customs and legitimate consumer interests. However, it should be noted that there is a possibility of derogations from the equal treatment order of similar entities. There are legal regulations that impose the choice of the legal form of organization of economic activity for the purpose of carrying out specific tasks which are public tasks. The application of transparent rules of entrusting public tasks without favoring any entities favors the competitiveness and the innovativeness of entrepreneurs.

Keywords: Economic activity; Freedom; Equal treatment, Limitations of the economic activity; Public interest; Values highly appreciated; The Constitution of the Republic of Poland.

1. INTRODUCTION

In Poland, the principle of freedom of economic activity applies. Freedom of economic activity, as one of the constitutional principles, is not unlimited and does not mean arbitrariness in its conduct.

There are different legal bases for limiting conduction of economic activity. They establish the possibility of limiting the constitutional principle of freedom of economic activity because of the protection of values highly appreciated. The introduction of the limitations is based on the assumption that there are other – than freedom of economic activity – values that need to be protected. In this context, these values outweigh freedom of economic, thereby justifying its limitation.

The purpose of this article is to identify and explain legal regulations which constitute the basis of the socio-economic system in Poland and which introduce a justified limitation of freedom of economic activity. They limit this freedom because of the need to protect values highly appreciated. Also the regulations which impose the choice of the legal form of organization of economic activity for the purpose of carrying out public tasks will be considered. On the basis of the

above findings, a legal analysis of the impact of role of the state is, which is fulfil the constitutionally guaranteed freedom of economic activity, will be carried out.

In order to achieve the aims set out above, the constitutional basis for conducting economic activity and the admissibility of its limitations should be examined firstly. Then there must be a direct reference to values protected by the Constitution. After the above analysis is conducted, one should consider how those constitutional conditions limitations are implemented in practice. A good example here is the imposition of legal forms of organization of conducting activity in some strictly defined cases.

2. CONSTITUTIONAL BASIS OF CONDUCTING THE ECONOMIC ACTIVITY

According to the article 32 item 1 of Constitution of the Republic of Poland [1] the taking up, conducting and ending economic activity is free for everyone on equal terms, subject to the conditions laid down by law. The postulate of basing the free market economy on free competition results from the essence of the principle of social market economy regulated in article 20 of Constitution. Free competition will consist primarily of non-discriminatory and non-favored treatment of private and public entities conducting economic activity [2].

The next principle concerns the obligation of equal treatment of entrepreneurs in economic turnover. This principle should be reflected first and foremost in legal regulations ensuring non-discriminatory treatment of all market participants, both from the private and public sectors [3].

It follows from the above rules that the taking up, conducting and ending economic activity is free for everyone on equal terms, subject to the conditions laid down by the law. In addition, it can be inferred from the constitutional principles that there is a duty to conduct economy activity on the basis of fair competition and respect for good customs and legitimate consumer interests. The entrepreneur is obliged to comply with the provisions of the law on the conditions of conducting economic activity, in particular concerning the protection against the threat of life, human health and morals, as well as the protection of the environment. It is worth adding that the main statute regulating the above constitutional requirements is the Act on Freedom of Economic Activity [4].

However, it should be noted that there is a possibility of derogations from the equal treatment order of similar entities. It is assumed that derogations to this rule are admissible if:

- they are of a relevant nature and therefore remain in direct connection with the purpose and the essential content of the provisions in which the controlled norm is contained and they serve the purpose and content of the regulation. The variations introduced must be reasonably justified. They must not be done according to an arbitrary criterion [5],
- the prerequisites for differentiation must be proportionate, so the importance of the interest, due to which the situation of addressees of the norm is to be differentiated, must remain in proportion to the importance of the interests that will be violated by the unequal treatment of similar entities [6],
- the prerequisites must remain in some way related to other values, principles or constitutional norms, that justify different treatment of similar entities [7].

Conducting economic activity by public entities such as the state or local self-government units is controversial. In the light of the case law of the Constitutional Tribunal of the Republic of Poland, the principle of freedom of economic activity does not extend to the public economic sector [8]. The above exclusion does not mean that entities from the public economic sector cannot conduct economic activity. On contrary, conducting the economic activity by these entities is admissible but under some circumstances – meaning that the economic activity conducted by public entities should be unique and serve the realization of constitutional values such as the social character of the national economy, sustainable development respecting the principle of free competition, in forms and on terms appropriate to the market [9]. Apart from that, the organizational form of such activity is imposed by the law, which will be discussed further in the section IV.

3. THE ADMISSIBILITY OF LIMITATIONS OF CONDUCTING ECONOMIC ACTIVITY

The term of the limitation of economic activity has not been defined. The basic rule permitting its limitation, i.e. article 22 of the Constitution, provides that the limitations upon freedom of economic activity may be imposed only by means of

statute and only for important public interest. The term "important public interest" is a general clause, an indeterminate term [10]. The importance and scope of the term has been a subject of research interest for a long time [11], drawing attention to the various implications for shaping public policy, sometimes even treating the theory of public interest as anachronism [12].

Article 31 item 3 of the Constitution states that 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 freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights.

When looking for protected values, article 22 of the Constitution should be analyzed first. This article allows for the limitation of freedom of economic activity because of an important public interest. Thus an important public interest is the first and most important of the values highly appreciated, in a sense "consuming", forming the basis for legal protection of other values. Furthermore, it should be concluded that any of the values already legally protected is dictated by an important public interest, and that other values that do not fulfill the requirements of an important public interest may indeed be worthy of legal protection but cannot constitute a prerequisite for the limitation of freedom of economic activity. During introducing new limitations of economic activity in turn, the state must be guided by an important public interest [13].

The Constitutional Tribunal of the Republic of Poland underlines the importance of the possibility of limiting economic activity because of an important public interest, stating that in the case of constitutional protection of the principle of freedom of conducting economic activity, there is a wide catalog of the constitutional prerequisites that allow the legislature to intervene, i.e. to limit the above principle. Article 22 of Constitution contains the prohibition of the limitation of freedom of economic activity in a manner contrary to it or incompatible with the conditions set out therein. The case-law of the Constitutional Tribunal has referred to the widening of the depth of interference in the constitutional freedom of conducting economic activity in conjunction with the relation of article 22 of Constitution to article 31 item 3 of Constitution. Article 3 item 3 of Constitution includes a general and well-developed catalog of the prerequisites which justify interference in all constitutional rights and freedoms [14].

4. THE IMPOSITION OF THE LEGAL FORM OG ORGANIZATION OF CONDUCTED ACTIVITY

In principle, entrusting realization of public tasks, i.e. services that should meet common needs such as road and motorway construction, public transport, waste management, should be based on the principles of competitiveness and transparency of the procedures of their entrusting.

In practice, the preference of public entities means the restriction by local self-government units to transform the budgetary establishments into one-man municipal companies due to concerns about private entities.

Undoubtedly, competing forms of commissioning public or municipal tasks should include the selection of the entity on the basis of public selection of contractor, partner, investor, operator. It should be noted, however, that in addition to competing forms of selecting entities carrying out public tasks, exceptions to this rule are also envisaged. That means that it is acceptable to provide communal services by municipal companies without public procurement procedure.

The essence of constitutional freedom of economic activity includes freedom of entrepreneurs to choose the legal form of organization in which the economic activity will be conducted. However, from this principle, the legislative makes exceptions by explicitly regulating in what legal form of organization economic activity can be conducted. As to local self-government units, the legislative in various legal acts clearly states in which forms they can conduct economic activity [9].

Local self-government units conduct municipal economy to accomplish their own tasks through organizational units (article 9 item 1 of act on self-government of municipality [15], article 6 item 1 of act on self-government of poviats [16], article 8 item 1 of act on self-government of voivodeship [17]). Local self-government units may carry out their own tasks (e.g. housing, roads, streets, water supply, maintenance of cleanliness and order, communal greenery and trees, physical culture and sport) in the form of self-government budgetary establishments. In addition, public entities may conduct economic activity in the form of cooperatives, state-owned enterprises, mutual societies, state-owned banks, associations, foundations.

5. DISCUSSION AND CONCLUSION

The above considerations lead to the following conclusions. Freedom of economic activity is the basis of the socio-economic system in Poland and is constitutionally guaranteed. But there is also a legal justification for limiting the freedom of conducting economic activity, which has its origins in Constitution and is concretized in a practical manner by several statutes.

The primary source of limitation of freedom of economic activity contained in Constitution is the prerequisite of an important public interest. This is a very capacious concept, containing the need to protect different values. Some of them are defined directly by Constitution, while others are the result of the Constitutional Tribunal's jurisprudence. However, there is no complete listing of the attachment of individual legally protected goods into a particular "interest" directory. The unambiguous designation of goods whose protection constitutes an "important public interest", in the form of a closed catalog, is unlikely to be possible and does not appear to be a deliberate attempt.

The second pillar of the socio-economic system in Poland is the principle of equal treatment and non-discrimination. Economic activity may be conducted by public entities included in entities of public finance sector in various forms prescribed by law. However, it should be stressed that these forms are strictly limited to commercial law entities and imposed by the state at the same time. The above may have an impact on the competitive behavior of these entities on the market because they are on the one hand in a privileged position relative to other entrepreneurs, and on the other hand, the need to conduct economic activity in a specific legal form of organization entails constraints resulting from conducting activity in a form specified by law. In the case of public entities conducting economic activity, the competitive behavior of these entities should be carefully scrutinized. However, this will not be in conflict with the principle of freedom of economic activity.

The role of the state is to realize the constitutionally guaranteed freedom of economic activity. One of the forms of this realization should be to increase the competitiveness and the innovativeness of entrepreneurs by creating conditions of conducting activity and stimulating the development of innovative economy. The legislative essentially creates the conditions for ensuring non-discriminatory treatment of public and private entities. Even if there are limitations of freedom of economic activity, they are essentially equal for everyone and the values that cause those limitations are the ones whose protection is not and cannot be challenged. There are also derogations from the principle of equal treatment. But the differentiation of entities is dictated by the principle of public interest, the need to protect constitutional values such as security of a state, public order, protection of the natural environment, protection of health or public morals and protection of freedoms and rights of other persons. What need to be emphasized is that the application of transparent rules of entrusting public tasks without favoring any entities favors the competitiveness and the innovativeness of entrepreneurs.

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REFERENCES

- [1] The Constitution of the Republic of Poland of 2 April, 1997 (Journal of Laws of 1997 No 78, item 483, with further amendments), further referred to as: Constitution.
- [2] See: Judgment of the **Constitutional Tribunal** of 7 May 2001, K 19/00, OTK ZU no 4/2001, item 82; Judgment of the **Constitutional Tribunal** of 9 January 200, P 5/05, OTK-A 2007/1/1.
- [3] Judgment of the **Constitutional Tribunal** of 7 May 2001, K 19/00, OTK ZU no 4/2001, item 82.
- [4] See: Adjudication of the **Constitutional Tribunal** of 13 September 1990, U 4/90, OTK 1990, item 10; Adjudication of the **Constitutional Tribunal** of 9 March 1988, U 7/87, OTK 1988, item 1; Adjudication of the **Constitutional Tribunal** of 26 April 1995, K 11/94, OTK 1995, item 12.
- [5] Act of 2 July 2004 on freedom of economic activity (Journal of Laws of 2004 item 1829, with further amendments).

- [6] See: Judgment of the **Constitutional Tribunal** of 12 December 1994, K 3/94, OTK 1994, item 42.
- [7] See: Judgment of the **Constitutional Tribunal** of 3 September 1996, K 10/96, OTK 1996 No 4, item 33.
- [8] See: Judgment of the **Constitutional Tribunal** of 23 October 1995, K 4/95, OTK 1995 No 2, item 11.
- [9] Judgment of the **Constitutional Tribunal** of 7 May 2001, K 19/00, OTK ZU no 4/2001, item 82.
- [10] D. Sylwestrzak, "Preferowanie podmiotów publicznych w niektórych rodzajach działalności gospodarczej" ("Preference of public entities in certain types of economic activity") [in:] A. Brzezińska-Rawa i D. Sylwestrzak (eds), "Węzłowe problemy oddziaływania państwa na konkurencyjność i innowacyjność gospodarki z perspektywy różnych dziedzin prawa" ("Essential problems of state influence on the competitiveness and innovativeness of the economy from the perspective of different areas of law"), Toruń 2015, pp. 24 – 42.
- [11] Introduction of Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market (OJ L 376, 27.12.2006, p. 36) referred to the notion of "overriding public interest" and summarized the jurisprudence of the European Court of Justice (further referred to as: ECJ), but it also pointed out that the notion itself may be further developed. It was assumed that the "overriding public interest" - as interpreted by ECJ - includes at least the following: public policy (covers the protection against a genuine and sufficiently serious threat affecting one of the fundamental interests of society and may include, in particular, issues relating to human dignity, the protection of minors and vulnerable adults and animal welfare), public security (includes issues of public safety), public health (...); the maintenance of order in society; social policy objectives; the protection of the recipients of services; consumer protection; the protection of workers, including the social protection of workers; animal welfare; the preservation of the financial balance of the social security system; the prevention of fraud; the prevention of unfair competition; the protection of the environment and the urban environment, including town and country planning; the protection of creditors; safeguarding the sound administration of justice; road safety; the protection of intellectual property; cultural policy objectives, including safeguarding the freedom of expression of various elements, in particular social, cultural, religious and philosophical values of society; the need to ensure a high level of education, the maintenance of press diversity and the promotion of the national language; the preservation of national historical and artistic heritage; and veterinary policy – point 40 and 41 of Introduction of Directive 2006/123/EC of the European Parliament and of the Council on services in the internal market; see for further reading: J. Chmielewski, "Pojęcie nadrzędnego interesu publicznego w prawie administracyjnym" ("Concept of overriding public interest in administrative law"), Warszawa 2015.
- [12] V. Held, "The Public Interest and Individual Interests", *Journal of Philosophy* 69 (7):192-202 (1972); B.M. Barry, "The Public Interest", *Proceedings of the Aristotelian Society Supplementary Volume* 38: 1-18 (1964); D. R. Kiewiet & M. S. Lewis-Beck, "No Man is an Island: Self-Interest, the Public Interest, and Sociotropic Voting", *Critical Review*, vol. 23 (3):303-319 (2011); E. Modliński, "Pojęcie interesu publicznego w prawie administracyjnym" ("Concept of public interest in administrative law"), Warszawa 1932; M. Wyrzykowski, "Pojęcie interesu społecznego w prawie administracyjnym" ("Concept of social interest in administrative law"), Warszawa 1986; A. Wróbel, "Interes publiczny w postępowaniu administracyjnym" ("Public interest in administrative proceedings") [in:] "Administracja publiczna u progu XXI wieku. Prace dedykowane prof. zw. dr. hab. Janowi Szreniawskiemu z okazji Jubileuszu 45-lecia pracy naukowej" ("Public administration on the threshold of the 21st century. Works dedicated to Professor Jan Szreniawski on the occasion of the 45th anniversary of scientific work"), Przemysł 2000, pp. 701-702; A. Żurawik, "Klauzula interesu publicznego w prawie gospodarczym krajowym i unijnym" ("Public interest clause in national and EU economic law"), *Europejski Przegląd Sądowy* 2012, no 12, p. 25.
- [13] B. Bozeman, "Public Values and Public Interest: Counterbalancing Economic Individualism", Georgetown 2007, p. 2.
- [14] "**Ochrona wartości wysoko cenionych w działalności gospodarczej** (Protection of values highly appreciated in economic activity)" [in:] A. Brzezińska-Rawa i D. Sylwestrzak (eds), "Węzłowe problemy oddziaływania państwa na konkurencyjność i innowacyjność gospodarki z perspektywy różnych dziedzin prawa" ("Essential problems of state influence on the competitiveness and innovativeness of the economy from the perspective of different areas of law"), Toruń 2015, p. 23.

- [15] Judgment of the **Constitutional Tribunal** of 5 April 2011, P 26/09, OTK-A 2011/3/18 (Journal of Laws of 2011 No 81, item 449); see: A. Brzezińska-Rawa, "Wolność działalności gospodarczej i jej ograniczenia oraz metody i środki prawne wpływu państwa na gospodarkę jako punkt wyjścia do rozważań nad konkurencyjnością i innowacyjnością przedsiębiorców" ("Freedom of economic activity and its limitations and methods and legal means of state influence on the economy as a starting point for considering the competitiveness and innovativeness of entrepreneurs") [in:] "Rola państwa w procesach podnoszenia konkurencyjności i innowacyjności przedsiębiorstw. Diagnoza istniejących uwarunkowań i barier prawnych – perspektywy rozwoju" ("Role of the state in the processes of increasing the competitiveness and innovativeness of enterprises. Diagnosis of existing conditions and legal barriers – prospects of development"), A. Brzezińska-Rawa (ed.), Warszawa 2015, pp. 3 – 4.
- [16] Act of 8 March 1990 on self-government of municipality (Journal of Laws of 2016 item 446, with further amendments).
- [17] Act of 5 June 1998 on self-government of powiat (Journal of Laws of 2016 item 814, with further amendments).
- [18] Act of 5 June 1998 on self-government of voivodeship (Journal of Laws of 2016 item 486, with further amendments).