A case initiated with regard to norms that regulate the calculation of overcompensation and control of self-consumption for producers of electricity, who receive state support in the form of mandatory electricity procurement

On 9 August 2018, the 1st Panel of the Constitutional Court initiated the case "On Compliance of Para 91, Para 92, Para 98 and Para 99, and Para 2 of Annex 9 of the Cabinet Regulation of 10 March 2009 No. 221 "Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration" and of the last sentence of Para 63. 8, Para 106, Para 107, Para 113 and Para 114, and Para 2 of Annex 10 with Article 64 of the *Satversme* of the Republic of Latvia".

The Contested Norms

The Cabinet Regulation of 10 March 2009 No. 221 "Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration" (Hereinafter – the Regulation No. 221):

Para 91 provides that Para 28^{2} [1] of the Regulation No. 221 shall be applied from 1 June 2019.

Para 92 provides that Sub-para 29.4^{2} of the Regulation No. 221 shall be applied from 1 July 2019.

[1] Para 28^{2} of the Regulation No. 221 provides: "The merchant, who has acquired the right to sell electricity produced in cogeneration in the framework of mandatory electricity procurement, shall submit to the system operator, the trader and the Ministry the principal scheme of electric connection certified by the merchant referred to in Para 28^{1} of this Regulation. After the agreement referred to in Para 24 of this Regulation has entered into effect, the trader shall commence purchasing the electricity produced in cogeneration at the cogeneration plant if the merchant has submitted to the system operator, the trader and the Ministry the principal scheme of electric connection referred to in Para 28^{1} of this Regulation. If any changes have been made to the cogeneration plant, the merchant shall ensure that the principal scheme of electric connection which complies with the actual situation and is certified by the merchant has been submitted to the system operator, the trader and the Ministry."

[2] Sub-para 29.4. of the Regulation No. 221provides: "If the cogeneration power plant, which sells the produced electricity in the framework of mandatory electricity procurement, has several connections to the grid of the system operator, each hour the amount of electricity, which is constituted by the difference between the electricity fed into the grid of the system operator and the electricity received from the grid of the system operator

Para 98 provides: "The merchants, who by 1 June 2019 have started selling the electricity produced by cogeneration at the cogeneration power plant in the framework of mandatory procurement shall submit by 1 June 2019 to the system operator, the trader and the Ministry the principal scheme of electric connection referred to in Para 28[1] of this Regulation."

Para 99 provides that in case, if the merchants have not met the requirements referred to in Para 98 of this Regulation, the trader shall discontinue the purchase of the electricity produced in cogeneration in the framework of the mandatory procurement from 1 July 2019. The trader shall resume purchasing the electricity produced in cogeneration in the framework of the mandatory procurement beginning with the first date of the successive full calendar month after the principal scheme of electric connection referred to in Para 28[1] of this Regulation has been submitted to the system operator, the trader and the Ministry.

Para 2 of Annex 8 provides the formula for calculating the total internal rate of return of capital investment of a cogeneration power plant.

The Cabinet Regulation of 16 March 2010 No. 262 "Regulations Regarding the Production of Electricity Using Renewable Energy Sources and the Procedures for the Determination of the Price" (hereinafter – Regulation No. 262):

The last sentence of Para 63[8] provides that the moment as of which the producer has begun to exercise the right granted in accordance with Section 29 of the Electricity Market Law is to be considered the beginning of the support period.

Para 106 provides that Para 56[3][3] of the Regulation No. 262 shall be applied from 1 June 2019.

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in the framework of all connections of the system in accordance with the principal scheme of electric connection referred to in Para 28[1] of this Regulation, shall be calculated."

[3] Para 56[3] of Regulation 262 provides: "The merchant, who has acquired the right to sell electricity produced from renewable energy resources in the framework of mandatory electricity procurement, shall submit to the system operator, the public trader and the Ministry the principal scheme of connection certified by the merchant

Para 107 provides that Para 56^1 and Para 57^{14} of the Regulation shall be applied from 1 July 2019.

Para 113 provides: "The merchants, who by 1 June 2019 have started selling the electricity produced from renewable energy resources in the framework of mandatory procurement, shall submit by 1 June 2019 to the system operator, the public trader and the Ministry the principal scheme of connection referred to in Para 56^2 of this Regulation."

Para 114 provides that in case, if the merchants have not met the requirements referred to in Para 113 of this Regulation, the public trader shall discontinue the purchase of the electricity produced from the renewable energy resources in the framework of the mandatory procurement from 1 July 2019. The public trader shall resume purchasing the electricity produced from renewable energy resources in the framework of the mandatory procurement beginning with the first date of the successive full calendar month after the principal scheme of connection referred to in Para 56^2 of this Regulation has been submitted to the operator of the system, the public trader and the Ministry.

Para 2 of Annex 10 provides the formula for calculating the total internal rate of return of capital investment of a power plant.

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referred to in $56.^2$ punktā of this Regulation. After the agreement referred to in Para 56 of this Regulation has entered into effect, the public trader shall commence purchasing the electricity produced in cogeneration at the cogeneration plant if the merchant has submitted to the system operator, the public trader and the Ministry the principal scheme of connection referred to in Para 56^2 of this Regulation. If any changes have been made to the power plant, the merchant shall ensure that the principal scheme of connection which complies with the actual situation and is certified by the merchant referred to in Para 6^2 of this Regulation has been submitted to the system operator, the public trader and the Ministry."

[4] Para 56^1 of the Regulation No. 262 provides: "The public trader in the framework of the mandatory procurement shall purchase only the surplus of the produced electricity, which remains after using the electricity for ensuring the operation of the power plant in accordance with the principal scheme of connection referred to in Para $56.^2$ punktā of this Regulation. If the power plant has several connections to the grid of the system operator, the surplus of produced electricity, which has remained after using the electricity for ensuring the operations of the power plant, shall be calculated for each hour as the amount of electricity constituted by the difference between the electricity fed into the grid of the system operator and received from the grid of the system operator in the framework of all connections of the system in accordance with the principal scheme of connection referred to in Para 56^2 of this Regulation."

Para 57^1 of this Regulation, in turn, provides: "The merchant is allowed to consume and to purchase the electricity needed to ensure the operations of the power plant, by using the connections to the grid of the system operator."

The Norm of Higher Legal Force

Article 64 of the *Satversme:* "The *Saeima*, and also the people, have the right to legislate, in accordance with the procedures, and to the extent, provided for by this *Satversme*."

The Facts of the Case

The case has been initiated on the basis of an application by twenty members of the 12th convocation of the *Saeima* (hereinafter – the Applicant).

The contested norms apply to producers of electricity, who produce electricity from renewable energy resources, as well as those, who produce electricity in cogeneration and receive state support in the form of mandatory electricity procurement. It is alleged that the contested norms establish unfair and disproportional calculation of overcompensation that is incompatible with the purpose for which the norms were issued. I.e., the calculation of overcompensation does not take into account the total state support provided to the merchant, as well other income gained by the merchant. Whereas the norms that regulate control of self-consumption provide that it is possible to continue disregarding the principles of self-consumption, moreover, postponing the beginning of control over self-consumption for more than a year.

The Applicants hold that the contested norms are incompatible with Article 64 of the *Satversme*. They had been issued ultra *vires* because by them the Cabinet had decided on matters that fall within the competence of the *Saeima.* Likewise, proper discussions had not taken place before the adoption of the contested norms, taking into account the fact that they create a significant burden for the whole society of Latvia. At the same time, the Applicant notes that these norms are incompatible with the content and purpose of the authorising norms of laws and do not ensure that electricity is supplied to the users of electricity for justified prices.

Legal Proceedings

The Constitutional Court has requested the Cabinet to provide a reply on the facts of the case and legal substantiation by 9 October 2018.

The term for preparing the case is 9 January 2018. The Court shall decide upon the procedure and the date for hearing the case after the case has been prepared.

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