



The norms that defined the compensation and the procedure for calculating the amount of used natural gas and the compensation paid by the user of energy in the case of a violation are incompatible with Article 64 and Article 105 of the *Satversme*

On 28 September, the Constitutional Court delivered the judgement in the case No. 2019-37-0103 “On Compliance of Section 42³ (1) of Energy Law (in the wording that was in force until 7 March 2016) with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia and compliance of Para 98, Sub-para 99.2. and Para 100 of the Cabinet Regulation of 9 February 2016 No. 85 “Regulation on the Supply and Use of Natural Gas” with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia and Section 42³(1) of the Energy Law (in the wording that was in force until 7 March 2016)”.

Eight cases, initiated on the applications submitted by several courts, have been joined into one.

The Contested Norms

Section 42³ (1) of Energy Law (here and hereafter – in the wording that was in force until 7 March 2016):

“If the energy supply merchant detects that the user of energy has violated the Cabinet Regulation on the supply and use of natural gas or the agreement on the supply of natural gas and as the result the amount of consumed natural gas reading has been decreased or the possibility has been created to consume natural gas free of charge the user of energy shall pay to the energy supply operator for the natural gas consumed and compensation. The procedure, in which the energy supply merchant determines the amount of actually consumed natural gas as well as the amount of compensation, shall be established by the Cabinet.”

Para 98 of the Cabinet Regulation of 9 February 2016 No. 85 “Regulation on the Supply and Use of Natural Gas” (hereafter – Regulation No. 85):

“If the system operator detects and proves to the degree of credible legal evidence a violation of this Regulation, an agreement on supplying natural gas or agreement on system services that has occurred due to the user’s actions or failure to act and due to which the amount of consumed natural gas reading has been decreased or the possibility has been created to use natural gas free of charge, the user shall pay compensation for the used natural gas to the system operator as well as compensation in accordance with a claim issued by the system operation regarding fulfilment of the contractual obligations. The user shall have the obligation to settle the accounts with the system operator timely and in full.”

Para 99 of Regulation No. 85:

“The system operator shall calculate the amount of natural gas consumed due to violation referred to in Para 98 of this Regulation as follows:

99.1. for a user, who is not a household user, – by taking into account the natural gas consumed in similar circumstances in a similar period of time or on the basis of the maximum consumption of natural gas per hour, permitted to the user, or the maximum possible consumption on natural gas by the user’s natural gas equipment, if it exceeds the maximum permitted consumption of natural gas per hour for the user;

99.2. for a household user – by taking into account the maximum possible consumption of natural gas per hour of the user’s natural gas equipment or by taking into account the differentiated norms of natural gas consumption in the procedure of settling accounts approved by the system operator.”

Para 100 of Regulation No. 85:

“The system operator shall determine the compensation referred to in Para 98 of this Regulation by multiplying the amount of used natural gas, calculated in the procedure established in Para 99 of this Regulation, by the trade tariff of natural gas in double amount”.

Norms of Higher Legal Force

Article 64 of the *Satversme* of the Republic of Latvia (hereinafter – 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 Constitution.”

Article 105 of the *Satversme*: “Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation.

Section 42³ (1) of Energy Law (*quoted above*)

The Facts

The Applicants hold that the norms that regulate payment for natural gas in cases where the energy user has violates the rules on the supply and use of natural gas or the agreement on the supply of natural gas (hereafter – rules on the use of natural gas) as well as norms regarding the compensation that the energy users pays to the system operators in such cases are incompatible with the *Satversme*.

The Applicants hold that the authorisation to the Cabinet, included in Section 42³ (1) of the Energy Law (hereafter – the contested norm of the law), is not sufficiently clear therefore this norm is incompatible with Article 64 and Article 105 of the *Satversme*. Moreover, also Sub-para 99.2 of Regulation No. 85 is said to be incompatible with

Article 64 and Article 105 of the *Satversme* because, by the contested norm of the law, the Cabinet had been authorized to establish the procedure, in which, in the case of a violation, the merchant of energy supply, determines the amount of consumed natural gas. Substantially, by the said norm of the Regulation, the Cabinet had re-delegated this task to the system operator. Thus, the Cabinet had exceeded the limits of its authorization, established in the law.

The Applicants note that the compensation, which is envisaged in the contested norm of the law as well as Para 85, Para 98 and Para 100 of the Regulation No. 85 (hereafter jointly with Para 99 of Regulation No. 85 – the contested norms of the Regulation) is punishment for a violation committed by the energy user. By establishing this punishment, the Cabinet has breached the authorisation granted by the legislator. Moreover, the restriction on fundamental rights, envisaged in the contested norms, is said to be disproportional.

The Court' s Findings

On terminating the legal proceedings and the most effective approach to reviewing the case

The Applicants in Case No. 2019-37-0103 submitted a claim with respect to the contested norm of the law, which has already been adjudicated in Case No. 2019-10-0103. Hence, in the present case, the Constitutional Court decided to terminate legal proceedings in the part of the case regarding the compliance of the contested norm of the law, insofar it applied to a household user, with Article 64 and Article 105 of the *Satversme*, and to continue the proceedings in the rest of the case. [13.]

The Constitutional Court decided, first and foremost, to examine the compliance of the contested norm of the law with Article 105 of the *Satversme*, verifying, *inter alia*, whether the possible restriction on fundamental rights, included therein, had been established by a law, adopted in due procedure, including compliance with Article 64 of the *Satversme*. [14.]

On the restriction of rights, included in Article 105 of the *Satversme*

The Constitutional Court recognised that the protection of a person's financial means, which were to be used for making the payments, established by the contested norm of the law, fell within the scope of the right to property, included in Article 105 of the *Satversme*. Thus, the contested norms restricted the fundamental rights, included in Article 105 of the *Satversme*, of a person – the user of energy. [16., 25.]

On the constitutionality of the contested norm of the law

On whether the restriction on fundamental rights has been established by law, adopted in due procedure, and whether it has a legitimate aim

The restriction on fundamental rights, included in the contested norm of the law was established by a law, adopted in due procedure. The Constitutional Court recognised, *inter alia*, that, in the particular case, the legislator not only had decided itself on how to regulate the legal relationship, in the framework of which the energy user had violated the rules on using the natural gas, but also had clearly indicated which of the legal relationships, regulated by the legislator, the Cabinet could specify. I.e., even if due to the technical nature of the particular legal area the authorisation granted by the legislator is broad or relatively abstract, in interpreting the authorising norm of the law, the

executive power must comply with the purposes included in the law and the values, for the protection of which the law had been adopted. [18.]

The restriction on the energy user's right to property was linked to ensuring the continuity of energy supply and promoting equality in the legal relationship of these users and the energy supply merchant in monopoly position. Hence, the restriction on fundamental rights, included in the contested norm of the law, had legitimate aims – protection of other persons' rights and public welfare. [19.]

On whether the restriction on fundamental rights complies with the principle of proportionality

The Constitutional Court recognised that the obligation to pay for the consumed natural gas, established in the contested norm of the law, was aimed at continuous, secure, and qualitative functioning of the energy supply system. Moreover, it provided incentives to energy users for abiding by the rules on using natural gas and the agreement on the supply of natural gas as well as promoted prevention of violation of the rules on the use of natural gas. Thus, this obligation was a suitable measure for protecting the rights of an energy user and for promoting the public welfare. [21.]

In the conditions of monopoly, application of the general regulation of the Civil Law or punishments, applicable in accordance with the Latvian Administrative Violations Code, could not be deemed to be an alternative to the obligation of the energy user, established in the contested norm of the law, to pay for the consumed natural gas and to pay compensation. Hence, there were no other, more lenient means that would allow reaching the legitimate aims of the restriction on fundamental rights at least in the same quality. [22.]

The Constitutional Court found that violations of the rules on the use of natural gas could cause not only irresponsible consumption of natural gas, i.e., a limited resource, and increase in the tariffs, caused by this, but also to functional interference into the natural gas supply system. Hence, the restriction on the fundamental rights of an energy user was proportional. Therefore, the contested norm of the law was compatible with Article 64 and Article 105 of the *Satversme*. [23.]

On the constitutionality of the contested norms of the Regulation

The Constitutional Court reviewed the contested norms of the Regulation as a united legal regulation and recognised that they regulated in greater detail the application of the contested norm of the law in the case of a violation of the rules on the use of natural gas and did not create new legal relationships that did not follow from the Energy Law. However, the Constitutional Court recognised that the method for determining the amount of consumed natural gas in the case where the rules on using natural gas had been violated, which was envisaged in the contested norms of the Regulation and which used the differential norms of consumption, defined in the procedure for settling accounts, approved by the system operator, was not constitutional. I.e., the Cabinet has included in the content of the contested norms of the Regulation as a united legal regulation a provision, which is established by a private person without democratic legitimisation, therefore the limits of the authorisation, granted by the legislator, had been exceeded. [24., 26.4.]

The contested norms of the Regulation provided for several methods for establishing the amount of the consumed natural gas. The Constitutional Court underscored that these were constitutional only if, in accordance with the principle of justice, they ensured the economic equivalence of the parties of the legal relationship of energy supply and that the amount of the consumed natural gas was determined as close as possible to the

actual consumption. Only the method for determining the amount of consumed natural gas, which uses the actual amount of consumed natural gas in a similar period of time and in similar conditions, ensured the economic equivalence. In general, the amount of consumed natural gas, determined by other methods, exceeds the actual consumption of natural gas. [29., 29.1.1., 29.1.2.]

The Constitutional Court recognised that the compensation, envisaged in the contested norms of the Regulation, should be set in such amount that would promote prevention of violation of the rules on the use of natural gas and the agreement regarding the supply of natural gas. This means that the amount of compensation as a payment that can be equalled to a contractual penalty must be adjustable to the circumstances of the possible violation. However, the Constitutional Court could not ascertain that the method for calculating the amount of compensation was linked to such circumstances. Moreover, determining the method for calculating the amount of compensation in a generally binding way, there are no grounds for linking the amount of compensation with such possible losses of the energy supply merchant, the determination of the amount of which, in the case of a violation of the rules on the use of natural gas, is not objectively hindered. In a situation like this, the method for calculating the amount of compensation, in accordance with which it is set in double amount of the trade tariff of natural gas with respect to the amount of natural gas, determined in the procedure set out in the contested norms of the Regulation, is obviously disproportional and unfair. [29.2.]

On the date, as of which the contested norms of the Regulation become void

The Constitutional Court ruled that, with respect to persons, to whom the contested norms of the Regulation were applied or should be applied in court, they shall be recognised as being void as of the moment of their adoption. [30.1., 30.2.]

The Constitutional Court held:

1) to terminate legal proceedings in the part of the case with respect to compliance of Section 42³ (1) of the Energy Law, (in the wording that was in force from 4 July 2008 until 7 March 2008), insofar it applied to a household user, with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia.

2) to recognise Section 42³ (1) of the Energy Law, (in the wording that was in force from 4 July 2008 until 7 March 2008), insofar it applied to an energy user who is not a household user, as being compatible with Article 64 and Article 105 of the Energy Law;

3) to recognise Para 98, Para 99 and Para 100 of the Cabinet Regulation of 9 February 2016 No. 85 “Regulation on the Supply and Use of Natural Gas”, insofar they provided that the amount of consumed natural gas had to be determined on the basis of the amount of natural gas consumed in similar circumstances in a similar period of time, as being compatible with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia and Section 42³ (1) of the Energy Law, (in the wording that was in force from 4 July 2008 until 7 March 2008);

4) to recognise Para 98, Para 99 and Para 100 of the Cabinet Regulation of 9 February 2016 No. 85 “Regulation on the Supply and Use of Natural Gas”, insofar they provided that the amount of natural gas consumed had to be determined on the basis of the maximum permitted consumption of natural gas per hour for the user or the maximum possible hourly consumption of natural gas by the energy user’s equipment, or the differential consumption norms, defined in the procedure for settling accounts, approved by the energy supply merchant, as being incompatible with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia and Section 42³ (1) of the Energy Law, (in the wording that was in force from 4 July 2008 until 7 March 2008); and with respect to

persons, to whom it had been applied or had to be applied in court, as being void as of the moment they entered into force;

5) to recognise Para 98, Para 99. and Para 100 of the Cabinet Regulation of 9 February 2016 No. 85 “Regulation on the Supply and Use of Natural Gas”, insofar the amount of compensation had to be determined, by multiplying the amount of consumed natural gas, determined in the procedure set out therein, by the doubled tariff of the trade tariff of natural gas, as being incompatible with Article 64 and Article 105 of the *Satversme* of the Republic of Latvia and Section 42³ (1) of the Energy Law, (in the wording that was in force from 4 July 2008 until 7 March 2008) and with respect to persons, to whom it had been applied or had to be applied in court, as being void as of the moment they entered into force.

The Constitutional Court’ s judgement is final and not subject to appeal, it shall enter into force on the date it is published in the official journal “Latvijas Vēstnesis” , within the term set in Section 33 (1) of the Constitutional Court Law.

The text of the Judgement is available on the homepage of the Constitutional Court:
https://www.satv.tiesa.gov.lv/wp-content/uploads/2019/12/2019-37-0103_Spriedums.pdf

The press release was prepared with the aim to facilitate understanding of cases heard by the Constitutional Court. It shall not be regarded as part of the judgement and is not binding to the Constitutional Court. The judgements, decisions and other information regarding the Constitutional Court are available at the homepage of the Constitutional Court www.satv.tiesa.gov.lv.

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