Satversmes tiesa

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Unconstitutionality of the norms which established the payment to be made by the energy user in the event of a infringement of the regulations on the use of natural gas

On 14 October 2021, the Constitutional Court adopted a judgement in Case No 2021-03-03 "On the Compliance of Paragraph 88 (in the wording that was in force until 12 August 2021) and Paragraph 89 (in the wording that was in force until 24 January 2020) of the Regulation of the Cabinet of Ministers No. 78 of 7 February 2017 “Regulations on Natural Gas Trade and Use” with Article 64 and Article 105 of the Satversme and Section 107, Paragraph Seven of the Energy Law of the Republic of Latvia".

The contested norms

- Paragraph 88 (henceforth – in the wording that was in force from 3 April 2017 until 12 August 2021) of the Cabinet of Ministers Regulation No. 78 of 7 February 2017 “Regulations on Trade and Use of Natural Gas” (hereinafter referred to as – Regulation No.78):

“Due to the infringement referred to in Paragraph 87 of this Regulation the system operator shall calculate the quantity of the consumed natural gas as follows:

> 88.1 in the case of a non-household consumer – on the basis of the permitted maximum load or the maximum possible load of natural gas appliance installations and appliances of the system user if it exceeds the permitted maximum load;
>
> 88.2 in the case of a household consumer – taking into account the differentiated consumption rates of natural gas for household needs and heating in residential and household buildings determined in accordance with the procedures for the settlement of payments approved by the system operator, or taking into account the maximum possible load of natural gas appliance installations and appliances of the system user if the system user uses natural gas in a gasified object for the purposes not

included in the differentiated consumption rates for household needs and heating in residential and household buildings."

- Paragraph 89 (henceforth – in the wording that was in force from 3 April 2017 until 24 January 2020) of the Regulation No. 78:

"In case the infringement referred to in Paragraph 87 of this Regulation has been committed, the distribution system operator shall re-calculate double the used natural gas and distribution system services in accordance with Paragraph 88 of this Regulation, by deducting the quantity of natural gas recorded with a commercial meter in the period in which the recorded quantity of the consumed natural gas has been reduced, and by determining the price of natural gas in the amount of the price for the supply of last resort in the month when the infringement was established. On the basis of the re-calculated consumption of natural gas, the system operator shall issue an invoice to the user in which the re-calculation of the consumed natural gas and time period for payment shall be indicated. The user has an obligation to settle payments with the distribution system operator in due time and in full amount."

Norms with a higher legal force

- Article 64 of the Satversme of the Republic of Latvia (hereinafter referred to as — 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."

- 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 107, Paragraph Seven of the Energy Law:

"The Cabinet shall determine the procedures by which natural gas shall be supplied to customers and by which the supply shall be discontinued, safe operation requirements for a natural gas system, the rights and obligations of a trader, public trader, system operator, customer, and owner of a gasified object in the supply and use of natural gas, the procedures for the settlement of accounts for the services received, the amount of interest on late payments, the procedures for the change of traders and supply of customers in case of disturbances in the natural gas supply, and also the procedures for providing a liquefied natural gas service."

The facts of the case

Thirteen cases initiated upon the courts' applications have been merged within this case. Records of the courts in question contain civil cases in which the distribution system operator Joint-Stock Company "Gaso" has brought an action for debt recovery against energy users on the basis of the contested norms. The dispute is related to the fact that the energy user has arbitrarily installed a connection before installation of a commercial metering device or uses natural gas without a commercial metering device, or the commercial metering device or seal is defective, and any of the aforementioned actions has resulted in reduced reading of natural gas consumption or the possibility of using natural gas free of charge has been provided (hereinafter referred to as – the "infringement of the regulations on use of natural gas").

The applicants are of the opinion that, insofar as they provide for the obligation of a household user to pay for the consumed natural gas in accordance with the differentiated norms of natural gas consumption established in the procedures for the settlement of payments approved by the distribution system operator, are incompatible with Article 64 of the Satversme and Section 107, Paragraph Seven of the Energy Law. The Cabinet of Ministers has allegedly violated the authorisation granted by the legislator, because the procedure for determination of the aforementioned consumption norms has been re-delegated to the distribution system operator.

According to the applicants, the contested norms are also incompatible with the right to own property contained in Article 105 of the Satversme. The methods for determination of the quantity of natural gas consumed and the double amount of payment are allegedly disproportionate.

Conclusions of the Court

On termination of the proceedings

First of all, the Constitutional Court assessed whether the proceedings in the case should be terminated, since the contested norms had been substantively amended and therefore become invalid. [14, 14.1]

Taking into account the fact that in order to resolve the civil cases on which the applicants had applied to the Constitutional Court, it was necessary to recognise the contested norms invalid from a certain moment in the past, the Constitutional Court concluded that the proceedings in the case should be continued and it was necessary to assess compliance of the contested norms with norms of higher legal force. [14, 14.2]

As to how the constitutionality of the contested norms should be assessed

The contested norms stipulated how the recalculation for the consumed natural gas and distribution system services should be performed in the event of a infringement on the use of natural gas; therefore, they are closely interrelated and should be assessed as a single legal framework. [15.1]

The Constitutional Court recognised that it would ascertain in the present case whether the contested norms comply with Article 105 of the Satversme, inter alia, by examining whether the possible restriction on the fundamental right included in Article 105 of the Satversme has been established by a duly adopted legal norm, including in accordance with Article 64 of the Satversme and Section 107, Paragraph Seven of the Energy Law. [15.2]

On the scope of Article 105 of the Satversme

The Constitutional Court concluded that the protection of a person's funds to be used to make a payment provided for in the contested norms fell within the scope of the right to own property established in the first three sentences of Article 105 of the Satversme. [16.2]

As to whether the contested norms restrict the right of energy users to own property contained in Article 105 of the Satversme

The obligation to make the payment provided for in the contested norms in the event of infringement of the regulations on the use of natural gas infringes a person's property, i.e., it reduces the amount of his/her funds, and thus the contested norms contain a restriction on the right to own property within the meaning of Article 105 of the Satversme. [17]

As to whether the restriction on fundamental rights contained in the contested norms is stipulated by law

The Constitutional Court concluded that Section 107, Paragraph Seven of the Energy Law was indicated in Regulation No. 78 as the basis for issue of the contested norms. Regulation No. 78 was been published and made public in accordance with the requirements of the laws and regulations, and it is sufficiently clear. [20]

The Constitutional Court also had to assess whether the procedure of authorisation had been complied with, namely, it had to ascertain the content and purpose of the authorising norms and to examine whether the Cabinet of Ministers, by issuing the contested norms, had complied with the limits of the authorisation stipulated by law. [21]

On the content and purpose of the authorising norms

The legislator has authorised the Cabinet of Ministers in Section 107, Paragraph Seven of the Energy Law to elaborate certain issues of the special legal framework of natural gas supply included in this Law. [22.1]

The Constitutional Court established that, by the amendments of 11 February 2016 to the Energy Law, Paragraph One of Section 42^3, which explicitly referred to the authorisation to the Cabinet of Ministers to detail the legal consequences in the event of infringement of the regulations on the use of natural gas, was excluded from the Law. Consequently, the Energy Law no longer contains such an authorising norm, which would explicitly refer to the Cabinet of Ministers' authorisation to regulate the legal consequences of infringement of the regulations on the use of natural gas. [22.2]

The Constitutional Court concluded that the Law currently provides for an abstract authorisation to the Cabinet of Ministers to establish procedure for the sale and use of natural gas, procedures for payments for the received services, the rights and obligations of the distribution system operator and the user in the supply and use of natural gas, and other matters contained in the authorising norms. [22.2]

Consequently, the Constitutional Court had to examine in the present case, whether the Cabinet of Ministers was entitled to regulate the legal consequences of infringement of the regulations on the use of natural gas on the basis of this abstract authorisation. [22.3]

As to whether the Cabinet of Ministers has complied with the limits of the authorisation set by the legislator

The Constitutional Court indicated that civil legal relations existed between the participants to legal relations on natural gas supply. Under the general framework of civil law, the infringed party seeking compensation for damages must prove the wrongful act or omission of the infringer, the amount of the damage, and the causal link between the two aforementioned factors. [23.1]

However, in the event of infringement of the regulations on the use of natural gas, the contested norms exempt the distribution system operator from the obligation to prove the amount of damages, as this is presumed according to certain criteria. The distribution system operator is also exempt from the burden to prove that it is the energy user who should be blamed on the unlawful act and not, for example, a third party. Thus, the contested norms contain a special legal framework which differs from the general civil law regulation. [23.1]

The Constitutional Court concluded that the Cabinet of Ministers, based of the legislator's authorisation, could regulate the issue of compensation for damages incurred by a distribution system operator differently from the general procedure. Consequently, the Constitutional Court had to examine whether the

Cabinet of Ministers had stipulated the special legal framework within the limits of the authorisation. [23.1, 23.2]

By the amendments to the Energy Law of 11 February 2016, which resulted in the liberalisation of the Latvian natural gas market and the development of competition, structure of this market was changed significantly. Its legal framework also changed substantially, including the authorising norms which ordered the Cabinet of Ministers to issue new regulation governing the sale and use of natural gas. These amendments, inter alia, excluded Paragraph One of Section 42^3 of the Energy Law, where the legislator had not only decided on the legal consequences of infringement of the regulations on the use of natural gas, but also expressly authorised the Cabinet of Ministers to specify them. [23.2]

Under such circumstances, the Cabinet could not rely on the scope of its mandate remaining unchanged. When drafting amendments to the Energy Law, the legislator had to decide whether, even in a liberalised natural gas market, the state should intervene in this market and regulate the legal consequences of infringement of the regulations on the use of natural gas. The legislator should also have stipulated a clear authority to the Cabinet of Ministers to detail the legal consequences in the event of infringement of the regulations on the use of natural gas. It is not permissible that the derogation from the regulation of general civil law (Civil Law) is implemented by the Regulation of the Cabinet of Ministers regulations rather than by law. [23.2]

Consequently, the contested norms create new legal relations which do not result from the Energy Law. Namely, the contested norms in the Regulations of the Cabinet of Ministers with regard to unlawful infringements of rights determine such derogations from the general civil law regulation, which the legislator has neither decided on nor included in the Energy Law a corresponding authorisation to the Cabinet of Ministers to elaborate on them. Thus, by issuing the contested norms, the Cabinet of Ministers has violated the limits of its authority stipulated in Section 107, Paragraph Seven of the Energy Law and has acted *ultra vires*. [23.2]

<u>As to why the contested norms do not regulate the procedures for the settlement of payments for the services received</u>

The parties to the case and several invited persons indicated that compliance of the contested norms with Article 64 of the Satversme should be assessed by verifying whether they stipulated the procedures for the settlement of payments for the services received. [24]

The Constitutional Court indicated that the concept of “procedures” indicated on the procedural nature of the Regulations of the Cabinet of Ministers, i.e., the authority to set the procedures. However, the contested norms, in which the Cabinet of Ministers has nevertheless stipulated derogations from the general civil law regulation, do not regulate the procedures in accordance with the

legislator's authorisation, but create new legal relations which do not arise from the Energy Law. [24]

The Constitutional Court also concluded that the contested norms did not regulate the settlement of payments for the services received. Service means a legal transaction, i.e., an activity performed in an authorised manner to establish a legal relations. However, in the event of infringement of the regulations on the use of natural gas, the energy user commits an unauthorised act which results in damage to the distribution system operator. Thus, the user's obligation to make the payment provided for in the contested norms arises on a different basis – an activity performed in an authorised manner. Thus, instead of paying for the service received, the energy user compensates the distribution system operator for the damage caused by the unauthorised activity. [24]

On extending the limits of a claim

The Constitutional Court concluded that even after the amendments, Paragraphs 88, 89, and 89^1 of the Regulation No. 78 continued to regulate the legal consequences in cases when the energy user had committed an infringement of the regulations on the use of natural gas. Therefore, their compatibility with the Satversme is closely related to the claim for compliance of the contested norms with norms of higher legal force, since all the aforementioned legal norms regulate the legal consequences of an infringement of the regulations on the use of natural gas. [25]

Consequently, the declaration of these norms as incompatible with Articles 64 and 105 of the Satversme and Section 107, Paragraph Seven of the Energy Law is possible within the framework of the same claim. Thus, from the viewpoint of the economy of the Constitutional Court proceedings, it is expedient to extend the limits of the claim in the present case. [25]

On the moment of expiry of the contested norms

The Constitutional Court stipulated that the contested norms were to be recognised as null and void as of the date of their issue in respect of persons to whom they had been applied or should have been applied in court. [26]

On the application of legal norms

The Constitutional Court indicated that, following this judgement, the obligation of the energy user to compensate the distribution system operator for the losses incurred remained. It follows from the principle of fairness and its element of concrete definition that it is not permissible for the parties to a civil legal relations to enrich themselves at the expense of the other parties to these relations, including enrichment of the energy user at the expense of the distribution system operator. [27]

When determining the obligation of the energy user to compensate the distribution system operator for the losses incurred as a result of the infringement of the regulations on the use of natural gas, Article 105 of the Satversme, the principle of fairness, the principle of economic equivalence and the general civil law framework of the Civil Law shall apply. [27]

The Constitutional Court held as follows:

1 To recognise Paragraph 88 (in the wording that was in force until 12 August 2021) and Paragraph 89 (in the wording that was in force until 24 January 2020) of the Regulation of the Cabinet of Ministers No. 78 of 7 February 2017 "Regulations on Natural Gas Trade and Use" as being incompatible with Articles 64 and 105 of the Satversme and Section 107, Paragraph Seven of the Energy Law of the Republic of Latvia and, with regard to persons to whom it has been or should be applied in court, as null and void from the date of issue.
2 To recognise Paragraph 88 and Paragraph 89 (in the wording that was in force from 25 January 2020 until 12 August 2021 and in the current wording), and Paragraph 89^1 (in the wording that was in force until 12 August 2021) of the Regulation of the Cabinet of Ministers No. 78 of 7 February 2017 "Regulations on Natural Gas Trade and Use" as being incompatible with Articles 64 and 105 of the Satversme and Section 107, Paragraph Seven of the Energy Law of the Republic of Latvia and, with regard to persons to whom it has been or should be applied in court, as null and void from the date of issue.

The Constitutional Court's judgement is final and not subject to appeal, it enters into force on the day of its publication.

Text of the Judgement is available on the website of the Constitutional Court: https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/01/2021-03-03_Spriedums.pdf

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