



Satversmes tiesa

Press release

Case No. 2022-06-03

22 March 2023

Norms providing establishing 10 years period for the right to participate in mandatory procurement comply with the Constitution

On 21 March 2023 the Constitutional Court adopted a judgement in Case No. 2022-06-03 “On Compliance of Clause 53.1 and the number and word “10 years” of Cabinet Regulation No. 221 (adopted on 10 March 2009) “Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration” and Clause 68 and the number and word “10 years” of Cabinet Regulation No. 561 (adopted 2 September 2020) “Regulations Regarding the Generation, Supervision, and Pricing of Electricity in Generation of Electricity in Cogeneration” with Section 105 of the Constitution of the Republic of Latvia”.

CONTESTED NORMS

Clause 53.1 of Cabinet Regulation No. 221 (adopted 10 March 2009) “Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration” (hereinafter – Regulation No. 221) established two alternative reference points, from the occurrence of which, for 10 years, the public trader shall procure electricity produced in cogeneration process from a merchant, which has received the right to sell the produced electricity within the framework of the mandatory procurement and the installed electrical capacity of the cogeneration unit of which or of individual cogeneration installation of such unit shall not exceed four megawatts.

Clause 68 of Cabinet Regulation No. 561, adopted 2 September 2020, “Regulations Regarding the Generation, Supervision, and Pricing of Electricity in Generation of Electricity in Cogeneration” (hereinafter – Regulation No. 561) also provides for a 10 years period for the procurement of electricity within the scope of the mandatory procurement.

RULE OF A HIGHER LEGAL FORCE

Section 105 of the Constitution of the Republic of Latvia (hereinafter referred to as – the Constitution): “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.”

FACTS OF THE CASE

The case was initiated based on an application of JSC (AS) “Sātiņi Energo LM” (hereinafter referred to as – the Applicant). The applicant owns a cogeneration plant and by the decision of the Ministry of Economics of 16 July 2009 it was granted the right to sell electricity within the scope of the mandatory procurement. The Applicant points out that pursuant to Clause 53.¹ of Cabinet Regulation No. 221 and Clause 68 of Cabinet Regulation No. 561 (hereinafter – the Contested norms) the right to sell electricity within the scope of the mandatory procurement has been established for a specific period of time, i.e., 10 years, and thus the right to property included in the first three sentences of Section 105 of the Constitution has been restricted.

The applicant has not relied on an indefinitely long period of State aid in the form of the mandatory procurement component, but it has relied on a period of support of at least 20 years, since the legal framework in force before the contested norms were adopted did not provide for a time limit for the implementation of the right to mandatory procurement at all.

CONCLUSIONS OF THE COURT

On the request of the Cabinet of Ministers to terminate the court proceedings.

The Cabinet of Ministers is of the opinion that the court proceedings in the case should be terminated on the basis of Section 29, Paragraph One, Clause 6 of the Constitutional Court Law, because the contested norms do not cause infringement of the fundamental rights of the Applicants contained in Section 105 of the Constitution. Consequently, the Constitutional Court first of all examined whether in the given case the contested norms

infringed the fundamental rights of the Applicant which fall within the scope of Section 105 of the Constitution. [15.]

On the scope of Section 105 of the Constitution and restriction of fundamental rights.

The Constitutional Court indicated that in the case under review determining whether the Contested norms had restricted the Applicant's rights that fall within the scope of the right to property included in the first three sentences of Section 105 of the Constitution, the principle of protection of legitimate expectations was also relevant. [17.]

The Constitutional Court concluded that at the time when the Applicant acquired the right to sell the produced electricity within the framework of the mandatory procurement, it could rely on the fact that this right was not limited by a specific term, since the term was not provided for in laws and regulation currently in force at that time, as well as it was not established in the administrative acts by which such right was granted to the Applicant. It should also be noted that State aid, the duration of which was not limited to a specific period, was subsequently declared compatible with the internal market by a decision of the European Commission. Thus, in the given circumstances, also the right of claim with regard to the sale of the produced electricity within the framework of the mandatory procurement, granted to the Applicant by administrative acts, shall be regarded as an object of property right within the meaning of the first three sentences of Section 105 of the Constitution. [18.]

By adopting the Contested norms, the Cabinet of Ministers has limited the above-mentioned rights, as it has set 10 years period for the right to sell the produced electricity within the framework of the mandatory procurement. Consequently, the Constitutional Court concluded that there were no grounds for termination of the court proceedings in the case. [18.]

On whether the restriction included in the Contested norms has been established by a duly adopted law.

The Constitutional Court established that by issuing the Contested norms, the Cabinet of Ministers had acted within the authorization established by law, that these regulations were available in accordance with the requirements of normative enactments and were sufficiently clearly formulated to enable a person to understand the content of the rights

and obligations arising from them and to foresee the consequences of their application. [19.1.]

On whether the restriction of fundamental rights included in the Contested norms has a legitimate purpose.

The Constitutional Court indicated that limiting the right to sell the produced electricity within the framework of the mandatory procurement with 10 years period was aimed at ensuring that the State aid was not economically unjustified and that the costs of end consumers were reduced, the State budget resources were saved, and the Latvian economy was generally strengthened. This limitation is also aimed at ensuring that, in the case of a specific term – 10 years – the merchant would be interested in increasing the efficiency of his activity and continuing his commercial activity even after the State aid has expired. The mentioned objectives are linked to the protection of public welfare. [20.]

Whether the mean chosen by the legislator allegedly is suitable to achieve the legitimate aim of the restriction of the fundamental right.

The Constitutional Court concluded that limiting the implementation of the right to the mandatory procurement to a specific period of time after that the State aid would no longer be granted, was an appropriate means to reduce the costs of electricity consumption for end consumers, to save the State budget funds and, in general, to promote the development of the Latvian economy. Likewise, setting the time frame for the implementation of the mandatory procurement right at 10 years may contribute to increasing the efficiency of the electricity producer. [21.]

On whether the restriction of fundamental rights included in the Contested norms is necessary.

The Constitutional Court took into account: 1) the wide discretion of the State in the field of State aid; 2) the fact that the Cabinet of Ministers, in exercising its discretion, has made the necessary considerations to decide on a specific time frame for the right to sell the produced electricity within the framework of the mandatory procurement; 3) the exclusive competence of the European Commission to declare State aid compatible with the internal market; 4) the fact that the European Commission has declared State aid compatible with the internal market, taking into account the observations submitted by Latvia, including the 10 years of State aid to a merchant owning a cogeneration plant with

a capacity not exceeding four megawatts. Taking all this into account, the Constitutional Court concludes that another, alternative term for the right to sell the produced electricity within the framework of the mandatory procurement cannot be recognized as a more lenient measure in the given circumstances, unless the chosen measure is contrary to the general principles of law and other norms of the Constitution. [22.]

The Constitutional Court also recognized that the alternatives indicated by the Applicant are related to the extension of the term of the right to sell the produced electricity within the framework of the mandatory procurement that in any case would require financial resources both from the State and from the society. Consequently, it cannot be established that the less restrictive measures of the fundamental rights of a person indicated by the Applicant would achieve the legitimate aim in the same quality. [22.]

On whether the adverse consequences incurred by the individual as a result of restriction of this right outweigh the benefit to society as a whole.

First of all, the Constitutional Court indicated that, when balancing the interests of electricity producers and the interests of society as a whole, the objective of State aid should also be taken into account and that it was in the interest of society as a whole to have a legal framework that provided only for granting State aid that is economically justified and complies with the principle of fairness. Thus, in so far as the 10 years period established in the contested norms achieves the objectives set in the specific area of State aid, the Constitutional Court has no grounds to doubt the validity of such a period of aid. [23.1.]

The Constitutional Court also emphasized that the principle of protection of legitimate expectations shall allow the State to amend the existing legal framework. Thus, the electricity producer cannot rely on the fact that the term of the State aid shall not be revised. [23.2]

The Constitutional Court also indicated that the merchants who chose to participate in the mandatory procurement in accordance with the provisions applicable to the electricity production upon production of electricity in cogeneration could not have had the legitimate expectations that the period for the implementation of the mandatory procurement right would be as long as that established in respect of the production of electricity from renewable resources. [23.2]

Finally, the Constitutional Court recognized that the determination of a specific time limit which would best correspond to the situation of a given State was within the competence of the State, where it had a wide margin of discretion. Thus, the fact that the legal framework of another State lays down a different time limit for State aid than the Contested norms cannot be a ground for finding that the restriction contained in the Contested norms is disproportionate. [23.2]

Consequently, the Constitutional Court concluded that the benefit which the society obtained from the restriction included in the Contested norms outweighed the harm caused to the rights and legitimate interests of a person. [23.2]

The Constitutional Court ruled the following:

to recognize Clause 53.¹ and the number and word “10 years” of Cabinet Regulation No. 221 (adopted on 10 March 2009) “Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration” and Clause 68 and the number and word “10 years” of Cabinet Regulation No. 561 (adopted 2 September 2020) “Regulations Regarding the Generation, Supervision, and Pricing of Electricity in Generation of Electricity in Cogeneration” as complying with Section 105 of the Constitution of the Republic of Latvia.

The Judgement is final and not subject to appeal, it enters into force on the day of its publication.

The text of the Judgement (in Latvian) is available on the website of the Constitutional Court: https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf

This press release has been prepared to inform the society on the work of the Constitutional Court. Further details on the latest developments, cases opened and examined by the Constitutional Court are available on the website of the Constitutional Court www.satv.tiesa.gov.lv. We invite you to follow the Court's activities on our Twitter account [@Satv_tiesa](https://twitter.com/Satv_tiesa) and our *YouTube* [channel](#).

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