



THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT

on Behalf of the Republic of Latvia

in Riga on 4 December 2024

in Case No. 2024-03-03

The Constitutional Court, comprised of: chairperson of the court hearing Irēna Kucina, Judges Jānis Neimanis, Anita Rodiņa, Jautrīte Briede, Veronika Krūmiņa, and Mārtiņš Mits,

having regard to an application by the Riga City Court,

on the basis of Article 85 of the Constitution of the Republic of Latvia and Para 3 of Section 16, Para 9 of Section 17 (1), as well as Section 19¹ and Section 28¹ of Constitutional Court Law,

at the court hearing of 5 November 2024, examined in written procedure the case

“On Compliance of Para 113 of the Cabinet Regulation of 21 January 2014 No. 50 “Regulation on the Sale and Use of Electricity” with Article 64 and Article 105 of the Constitution of the Republic of Latvia and Section 32 (5) of Electricity Market Law”.

The Facts

1. Para 113 of the Cabinet Regulation of 21 January 2014 No. 50 “Regulation on the Sale and Use of Electricity” (hereafter – Regulation on Electricity), which was in effect until 9 November 2023 (hereafter – the contested provision) stipulated: “If the system operator detects tampering a commercial metering device, as confirmed by an expert opinion, or a connection to the front-of-the-meter circuits, and the interference could not be detected during a routine check of the commercial metering device, the system operator shall be entitled to recalculate the amount of electricity, system services, other services and mandatory purchase components for a period of up to one year, on the basis of the maximum 24-hour throughput of the connection, regardless of the results of previous checks.”

2. The applicant – the Riga City Court (hereafter – the Applicant) – holds that the contested provision is incompatible with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

The Applicant is reviewing a civil case, in which a distribution system operator, on the basis of the contested provision, had brought a claim against a user of the electricity system regarding debt collection. Allegedly, the contested provisions infringes upon the right to property of the user of the electricity system because it subjects them to a disproportionate payment that is punitive by nature.

In issuing the contested provision, the Cabinet had failed to comply with the authorisation, included in Electricity Market Law. Namely, the Cabinet had envisaged in the contested provision such derogations from the general civil law regulation, for the specification a of which authorisation had not been granted to it by the legislator in Electricity Market Law. Moreover, instead of determining itself how the amount of consumed electricity should be set in the case where the rules on electricity use had been violated, it had authorised the system operator to do it. Therefore, allegedly, the contested provision is incompatible with Article 64 of the Constitution and Section 32 (5) of Electricity Market Law.

It is contended that the contested provision is incompatible also with Article 105 of the Constitution because the method for calculating the amount of consumed unrecorded electricity, defined therein, is unfair and disproportionate. Allegedly, the contested provision does not ensure that, in such a case, the amount of consumed electricity is determined as close as possible to the actual consumption. I.e., it is determined not by considering the actual

consumption of the user of the electricity system, which is recorded by using a respective commercial electricity meter but on the basis of the maximum throughput ability, and, thus, the payment is calculated without any individualisation whatsoever.

Moreover, the determination of the payment for the consumed un-recorded electricity within the period up to one year on the basis of the maximum throughput ability, is said to be excessive compared to, e.g., the maximum amount of the contractual penalty – 10 per cent annually of the principal debt.

3. The Cabinet, the institution that issued the contested act, holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

Allegedly, the contested provision has been issued on the basis of authorisation, included in Section 32 (5) of Electricity Market Law, which envisages, *inter alia*, the Cabinet's right to determine the rights and obligations of traders, system operators, electricity producers, and customers. Thus, the restriction on fundamental rights, included in the contested provision, has been established on the basis of law. The legitimate aim of this restriction is to ensure that persons meet their contractual obligations and to prevent related losses caused by a violation of a contract with a system operator or, in the case where unauthorised connection had been established, to compensate for the system operator's losses caused by a person's unlawful actions.

It is contended that the method of recalculation, determined in the contested provision, is a suitable measure for reaching the legitimate aim of the restriction on fundamental rights as it is similar to the procedure of mutual payments between the operator of a distribution system and its clients, based on contractual relations. The said method, which envisages basing the calculation of the inflicted losses on the maximum throughput of the connection, is only one of the methods to be used for calculating losses, which has to be used only in those cases where it is impossible to establish the actual consumption of electricity. Moreover, the contested provision allows ensuring that the users of the electricity system pay for the services received, without prejudice to other users' right to receive them at reasonable prices.

The Cabinet notes, additionally, that the contested provision cannot be compared to the contested regulation, examined by the Constitutional Court's judgement of 14 October 2021 in Case No. 2021-03-03 (hereafter – case No. 2021-03-03). Namely, the possible contractual relationship with an operator of the distribution system within the electricity and natural gas market, as well as the obligations of the parties and related financial commitments in many cases can differ significantly and cannot be compared directly.

4. The summoned person – the *Saeima* – holds that the Cabinet, by determining, in the contested provision, the obligation of a user of the electricity system to compensate for the losses incurred by an operator of the distribution system, caused by the user by their unauthorised activities, has breached the authorisation, included in Section 32 (5) of Electricity Market Law.

Section 32 (5) of Electricity Market Law had authorised the Cabinet to determine “the rights and obligations of a system operator and the customer in the supply and use of electricity, as well as in payments for services received”. However, allegedly, this authorisation does not allow the Cabinet to issue such provisions regarding calculation and compensation for the losses caused by unauthorised activities that would differ from the general civil law regulation. The contested provision cannot be deemed to be a supportive measure for more detailed implementation of Section 32 (5) of Electricity Market Law but, actually, allows establishment of such a new legal relationship between the system operator and the user of an electricity system that the legislator had not envisaged in the authorising provision.

The *Saeima* upholds the statement made in the application that the findings made in case No. 2021-03-03 should be applicable to the present case. Section 107 (7) of Energy Law, which became invalid on 1 May 2023 and in which, in the Cabinet's opinion, authorisation for issuing the provisions that were contested in case No. 2021-03-03 had been included, was similar as to its content to the wording included in Section 32 (5) of Electricity Market Law.

Pursuant to the findings made in Case No. 2021-03-03, it can be concluded that Section 32 (5) of Electricity Market Law does not authorise the Cabinet to regulate the rights

and obligations of an operator of the distribution system and the user of the electricity system in way that would grant to an operator of the distribution system the right to recalculate the amount of electricity consumed due to unauthorised activities and determine the amount of losses to be compensated for.

Since the Cabinet had failed to abide by the limits of the authorisation, granted to it in Section 32 (5) of Electricity Market Law, the contested provision had not been established by a legal provision, adopted in due procedure. Hence, there are no grounds for examining, whether the restriction on fundamental rights, included in the contested provision, serves for reaching the legitimate aim and complies with the proportionality principle. If the Constitutional Court would hold, nevertheless, that the Cabinet, in issuing the contested provision, has acted in accordance with the authorisation, then it should be reviewed whether the legal effects, envisaged in the contested provision, are proportionate to the nature of the violation, committed by a user of the electricity system, whether the method for calculating the amount of payment, defined in this provision, does not permit unfounded and unfair profiting by the operator of the distribution system at the expense of the user of the electricity system and whether the payment is not punitive by nature. The *Saeima*, by granting authorisation to the Cabinet in Section 32 (5) of Electricity Market Law, did not want to have this authorisation implemented in a way that would obviously place disproportionate restrictions on the fundamental rights of a user of the electricity system, included in Article 105 of the Constitution.

5. The summoned person – the Ministry of Justice – holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

Allegedly, the Cabinet's right to regulate the procedural aspect of the matters dealt with in this provision follows from the words "determine the procedures", included in Section 32 (5) of Electricity Market Law. Whereas the words "the rights and obligations", used in the respective legal provision, should be examined more broadly and comprise also the right to issue provisions of substantial law, *inter alia*, with respect to supply and use of electricity, as well as to determine the procedure, in which payments for the received services should be made.

It is maintained that the authorisation, included in Section 32 (5) of Electricity Market Law, envisages the Cabinet's right to determine the consequences that set in for the user of the electricity system in the case where they have violated the rules on electricity use and has failed to respect their obligations, defined in Para 65 of Regulation on Electricity. Namely, the Cabinet could have determined the rights and obligations of persons, involved in stages of electricity supply, as well as the procedure of payment, *inter alia*, to define the legal effects that follow from the failure to respect mutual rights and obligations in the area of electricity trade. Hence, the Cabinet, in issuing the contested provision, has not exceeded the limits of authorisation, granted by the legislator and, by the contested provision, has performed the task set by the legislator.

The Ministry of Justice upholds the conclusions expressed in the Cabinet's written submission regarding the compliance of the contested provision with Article 105 of the Constitution and notes, in addition, that the application of the same recalculation for using electricity without recording in several objects, as in the case where an appropriate contract of the kinds had been concluded, should be deemed to be proportionate and it is not punitive by nature. Moreover, the contested provision is applied in cases where electricity is used unlawfully. In such cases, it is not "surcharge" that is made for the user of the electricity system but appropriate recalculation, as the one that had been in the case where electricity had been used unrecorded within the framework of an agreement.

6. The summoned person – the Ministry of Economics – holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

In addition to the statements made in its written submission, the Ministry of Economics points out that the method of calculation, included in the contested provision, should be commensurate to the actual losses incurred by the system operator. It is said to be inadmissible that, in all cases where the commercial meter of electricity had been tampered with to decrease the reading of electricity consumption or to obtain the possibility of using electricity without paying for it, the highest possible amount would be calculated and collected, without review. That would be contrary to the principle of legal equality of contracting parties, included in Consumer Rights Protection Law and, by placing the

consumer in a disadvantageous situation, would also contravene the principle of good faith. The restriction on the right to property, established by the contested provision, should be deemed to be proportionate as it envisages the maximum threshold as regards the amount and the term for the method of calculation. Moreover, it allows the system operator to calculate losses, by assessing individually each violation and adapting the method of calculation to the respective situation, thus ensuring that the recalculation is proportionate to the type of violation and the losses caused by it.

In those cases where a violation is established, in particular, if a person has connected without authorisation to the front-of-the-meter circuits, it is, actually, impossible to establish precisely the amount of consumed electricity because the connection has not been fitted with a commercial meter. In the civil case that the Applicant is reviewing, the user of the electricity system had committed a violation with the purpose of using electricity without paying for it, moreover, it is not known for how long this violation had lasted, and the respective period could exceed one year. Therefore, in this case, it can be concluded that the highest possible amount of losses inflicted had been calculated in accordance with the contested provision and that this provision is proportionate.

7. The summoned person – the Ministry of Climate and Energy – holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

Allegedly, the Cabinet’s right to determine the production of electricity, trade, ensuring additional services, recoding of the consumption and production of electricity, the load of electricity consumption and control over the consumption of reactive energy, the procedure for installing a connection follows from the wording “the rights and obligations”, included in the contested provision. Hence, the assertion that the contested provision is incompatible with Article 64 of the Constitution and Section 32 (5) of Electricity Market Law is said to be unfounded.

Likewise, the opinion that the provisions reviewed in case No. 2021-03-03 would be comparable with the contested provision is said to be unfounded. In the electricity and natural gas market, the possible contractual relationships of an operator of the distribution system, the parties’ commitments to cooperate and the related financial liabilities, envisaged in the

framework thereof, can differ significantly. The method for calculating losses, which might be deemed to be disproportionate in the natural gas market, could be absolutely appropriate in the electricity market.

The sector of natural gas and the electricity sector are characterised by substantially different meters for recording energy, as well as particularities of operation thereof. I.e., the operation of natural gas system envisages that the meters of natural gas consumption are predominantly located in the object of the user of natural gas, whereas the amount of meters installed within the circuit is small, and it does not permit, using control meters, physical measurements or calculations, to determine, with high precision, the amount of unlawfully consumed natural gas within a specific object. Moreover, the technical parameters of the pipelines in the connection are unable to ensure a credible notion of the actual consumption. The electricity system, however, is characterised by significantly broader use of measuring equipment, as well as the possibility to register, with very high precision, the data of electricity consumption and fluctuations in the technical parameters of supply. Moreover, in the electricity sector, the technical parameters of electrical equipment and electrotechnical materials can be used for calculations with high precision. Hence, operators of electricity circuits can identify electricity losses, observed within the circuit, cases of unlawful use of electricity and assess the economic costs, caused by them, with high precision.

The Ministry of Climate and Energy upholds the opinion and arguments expressed in the Cabinet's written submission regarding the compliance of the restriction on fundamental rights, included in the contested provision, with Article 105 of the Constitution. Allegedly, it follows from materials in the civil case, reviewed by the Applicant, that the calculations made by the system operator had been favourable to the user of the electricity system, had not been punitive as to their nature and the calculation of losses had not been aimed at recovering all possible ungained revenue of the system operator. The operator of the distribution system had found commensurate balance between its economic interests and the obligation to avoid unfounded restrictions on the rights of the user of the electricity system and had refrained from actions that would have been pronouncedly punitive by nature. Moreover, the regulation, included in the contested provisions, is primarily applicable to those users of the electricity system who are using electricity unlawfully. I.e., connection to the system is done by ignoring the technical rules, issued by the system operator, therefore, it is highly probable

that that actions, required to prevent the fire hazard risks, caused by an unlawful connection, as well as threats to third persons' rights, are not taken.

8. The summoned person – the Public Utilities Commission – holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

The purpose of the authorisation, included in Section 32 (5) of Electricity Market Law, is instructing the Cabinet to determine in detail the obligations and rights of all involved parties (traders, system operators, users) within the entire process of trading in and supplying of electricity, as well as in payments for the services received. The authorisation, included in the said legal provision, is said to comprise, *inter alia*, also the Cabinet's right to define the method for determining the amount of electricity consumed by the user of the electricity system and the amount of services received. However, it is not always possible to determine these data with the help of a commercial meter or in accordance with the agreement, referred to in Para 5 of Regulation on Electricity, which envisages calculation of the electricity supplied and services without installing a meter. Likewise, it should be taken into consideration that the legislator has not envisaged the rights of the users of the electricity system to receive and the obligation of the providers or services to ensure electricity and services related to the supply thereof without charge. Hence, there are grounds for considering that Section 32 (5) of Electricity Market Law includes the legislator's authorisation granted to the Cabinet to define also the procedure or the method, in accordance with which, in circumstances where the general procedure, set out in Regulation on Electricity, cannot be applied, the amount of electricity consumed by a user of the electricity system and the amount of services received can be determined. Actually, such authorisation applies to cases where the commercial meter had not functioned correctly or electricity had been used unlawfully without being recorded. Hence, the contested provision is said to comply with the purpose of Section 32 (5) of Electricity Market Law.

The restriction on fundamental rights, included in the contested provision, is said to have a legitimate aim and to be proportionate to this aim. In those instances where the violation, envisaged in the contested provision, has been committed, it is impossible to determine the average amount of electricity and services of the previous accounting period

because the commercial meter has not recorded this amount in full or has not recorded at all in the previous period. Application of the Civil Law regulation is not an alternative measure since it is impossible to determine either the value of electricity at the time when losses were caused or the period of unlawful use of electricity, as well as the amount of electricity used in this period and, hence, the amount of losses cannot be established. Whereas all criteria, included in the contested provision, are said to ensure such individualisation of the amount of electricity used and such economic equivalence that can be ensured in the particular circumstances, without unfounded infringement on the rights of the system operator, as well as other users of the electricity system.

9. The summoned person – the Consumer Rights Protection Centre – holds that the contested provision complies with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

In those cases where a commercial meter has not been installed in the object or connection to the front-of-the-meter the front-of-the-meter circuits has been created it is impossible to determine the concrete amount of consumed electricity. Likewise, in cases where a respective agreement has not been concluded between the service provider and the service recipient, including the planned amount of electricity consumption, or an agreement that would allow determining the current amount of electricity consumption and the habits of use, has not been concluded, a concrete method for calculating precisely the actual amount of consumed electricity cannot be used.

The contested provision envisages that consumed electricity is calculated for a period up to one year. However, this does not exclude the possibility, taking into account specific conditions and upon receiving from the user of the electricity system concrete evidence, of making even more precise recalculation, making it for a shorter period. Moreover, the materials annexed to the application allow concluding that in the civil case, reviewed by the Applicant, the calculation of losses, done by the system operator, has been individually assessed, substantiated by objective, provable costs and it, substantially, is not punitive by nature.

The Findings

10. The Applicant requests the Constitutional Court to review the compatibility of the contested provision with Article 64 and Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

If the compliance of a legal provision with several superior legal provisions is contested then the Constitutional Court, in view of the merits of the case, has to determine the most effective approach to the compatibility review (*see Judgement by the Constitutional Court of 15 December 2022 in Case No. 2021-41-01, Para 11*).

The Constitutional Court, in reviewing a case, on the basis of a court's application, reading the compatibility of a legal provision with Article 64 of the Constitution and another provision of fundamental rights, included in the Constitution, examines the constitutionality of the contested provision by verifying whether the restriction on fundamental rights, included therein, has been established by a legal provision, adopted in due procedure. In conducting this verification, the Constitutional Court must also assess whether the Cabinet has abided by the limits of the authorisation granted by the legislator; i.e., whether the provision of the Cabinet Regulation complies with the provision of the law, on the basis of which it has been issued (*compare, see Judgement by the Constitutional Court of 28 September 2020 in Case No. 2019-37-0103, Para 14.2. and Para 24.2.*).

Hence, in the present case, the Constitutional Court will establish whether the contested provision complies with Article 105 of the Constitution, verifying, *inter alia*, whether the alleged restriction on the fundamental rights, included in Article 105 of the Constitution, has been determined by a legal provision, adopted in due procedure, in compliance with Article 64 of the Constitution and Section 32 (5) of Electricity Market Law.

11. Article 105 of the Constitution stipulates: "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." In view of the fact that the present case does not pertain to expropriation of

property for public purposes, the contested provision must be examined within the scope of the first three sentences of Article 105 of the Constitution.

The Constitutional Court already has recognised that a person's monetary funds is an object of the right to property (*see Judgement by the Constitutional Court of 28 September 2020 in Case No. 2019-37-0103, Para 15.2.*). The contested provision establishes a system operator's right to recalculate the amount of electricity, system services, other services and the component of mandatory procurement for a period of up to one year according to the maximum throughput ability of the connection during the period of 24 hours, irrespective of the results of previous checks (hereafter –the payment envisaged in the contested provision) in the case where tampering with the commercial meter has been established, which is confirmed by an expert opinion, or a connection to the front-of-the-meter circuits and it had been impossible to detect such activities by conducting regular checks of the commercial meter (hereafter – violation of the rules on electricity use). Protection of person's monetary funds, to be used for making the payment envisaged in the contested provision, falls within the scope of the right to property.

Likewise, the Constitutional Court has recognised that the obligation to make a mandatory payment, established in regulatory enactments, always means a restriction on the right to property (*see Judgement by the Constitutional Court of 14 October 2021 in Case No. 2021-03-03, Para 17*). The obligation to make the payment, envisaged in the contested provision, in the case of violating the rules on electricity use, decreases the amount of a person's monetary funds.

Hence, the contested provision restricts the right of a user of an electricity system to property, included in the first three sentences of Article 105 of the Constitution.

12. In establishing whether the restriction on a person's right to property is justifiable, the Constitutional Court must verify whether it has been determined by a legal provision, adopted in procedure set out in regulatory enactments, *inter alia*, abiding by the principle of good legislative procedure (*see Judgement by the Constitutional Court of 21 March 2023 in Case No. 2022-06-03, Para 19*).

The Constitutional Court has concluded repeatedly that the right to property may be restricted also by the Cabinet's Regulation (*see, for example, Judgement by the*

Constitutional Court of 27 October 2022 in Case No. 2021-31-0103, Para 32, and Judgement of 21 December 2023 in Case No. 2022-28-03, Para 13.1.). However, the Cabinet's right to issue external regulatory enactments extends only insofar such authorisation has been granted to it in law.

The Applicant points out that the restriction on a person's right to property, included in the contested provision, had not been established by a legal provision, adopted in procedure set out in regulatory enactments, and that the contested provision is incompatible with Article 64 of the Constitution. I.e., allegedly, Electricity Market Law does not include authorisation for the Cabinet to determine special legal regulation with respect to the civil law liability in the case of violating the rules on electricity use. The *Saeima*, a person summoned in the case, also subscribes to this conclusion, made by the Applicant. The Cabinet, however, points out that, pursuant to the authorisation, included in Section 32 (5) of Electricity Market Law, the contested provision determines the rights and obligations of the system operator and the user of the electricity system in payments for the services received. The Ministry of Justice and the Public Utilities Commission also express similar considerations.

Pursuant to Article 64 of the Constitution, the right to legislate is vested in the *Saeima*, as well as in the people, in the procedure and scope defined by the Constitution. To ensure more effective exercise of the State's power, a derogation from the requirement that the legislator must decide on all matters itself is admissible. This effectiveness is attained by the legislator, in the legislative process, deciding on the most important matters and authorising the Cabinet to draft more detailed technical provisions, required to implement regulations and law (*see Judgement by the Constitutional Court of 28 September 2020 in Case No. 2019-37-0103, Para 25.3.1.*).

To examine the compliance of the contested provision with Article 64 of the Constitution, first and foremost, the content and purpose of the authorising provision must be established, and, secondly, it must be verified whether the Cabinet, in issuing the contested provision, has abided by the limits of the authorisation granted to it by law (*compare, see Judgement by the Constitutional Court of 18 October 2018 in Case No. 2017-33-03, Para 13.*).

12.1. The contested provision has been issued on the basis of Section 32 (5) of Electricity Market Law. The aforementioned provision sets out: “The Cabinet shall determine the procedures for supplying and discontinuing the supply of electricity to customers, the rights and obligations of traders, system operators, electricity producers, and customers in the supply, generation, and use of electricity, and also in payments for the services received, and the procedures for the change of traders.”

The legislator’s authorisation to the executive power should be understood not only as one specific brief legal provision but as the very substance and purposes of the law within the framework of the legal system. The purpose of the authorisation is what the legislator has intended to achieve or to attain, by granting to the Cabinet the right to regulate or specify a certain matter (*compare, see Judgement by the Constitutional Court of 19 December 2017 in Case No. 2017-02-03, Para 18.1.1.*).

Transmission, production, distribution and trade of electricity is regulated public utility in the energy sector (*see law “On Regulators of Public Utilities”, Para 1 of Section 2 (2), Para 11 of Section 1 of Energy Law, and Para 2 of Cabinet Regulation of 27 October 2009 No. 1227 “Regulations Regarding Types of Regulated Public Utilities”*). It follows from Section 1 and Para 1 of Section 2 (2) of the law “On Regulators of Public Utilities” that the State, with the aim of ensuring the possibility to receive continuous, safe and qualitative public utilities whose prices conform to economically substantiated costs, regulates the provision of public utilities as commercial activities in the energy sector, determining the procedures for the regulation of public utilities and the legal relations in the provision of public utilities. The Constitutional Court also has recognised that, in regulating public utilities, two interests must always be reckoned with – firstly, the supplier’s interest in ensuring the economic activities and development of its enterprise, and, secondly, consumers’ interest in receiving continuous, safe and qualitative public utilities for commensurate tariffs (*see Judgement by the Constitutional Court of 24 December 2002 in Case No. 2002-16-03, Para 5*). Electricity Market Law determines the main matters concerning the private legal relations between the parties to the legal relationship for the supply of electricity. Thus, this legal relationship is regulated not only by general civil law provisions but also by special legal provisions.

The sector of energy, *inter alia*, supply of electricity, is a sector where numerous issues of technical nature need to be regulated in accordance with the development level of infrastructure of the electricity supply and society's needs. Hence, due to the technical nature of the specific branch of law, the authorisation granted by the legislator may be broad and rather abstract (*compare, see Judgement by the Constitutional Court of 20 March 2020 in Case No. 2019-10-0103, Para 25.3.2., and Judgement of 28 September 2020 in Case No. 2019-37-0103, Para 18.3.2.*). I.e., in the interests of effective implementation of the State's power, it would not be reasonable to demand that the legislator itself would decide in full on the content of the rights and obligations of the parties to the legal relationship of electricity supply in the supply and use of electricity and in payments for the services received. However, even if the authorisation granted by the legislator, due to the technical nature of the specific branch of law, is broad or rather abstract, the executive power, in interpreting the authorising provision, must comply not only with the purposes, included in the law, and the values, for the protection of which the law has been adopted, but also the requirements that follow from the legal system (*compare, see Judgement by the Constitutional Court of 14 October 2015 in Case No. 2015-05-03, Para 13.3.*).

The Constitutional Court concludes that the legislator, in Section 32 (5) of Electricity Market Law, has authorised the Cabinet to specify some issues of the special legal regulation on the supply of electricity, included in this law, *inter alia*, to determine in detail the rights and obligations of the participants of electricity market in the entire process of trade in and supply of electricity, as well as in payments for the services received.

12.2. Regulation on Electricity provides that electricity is sold to the user in accordance with this Regulation and the agreement on the sale of electricity (*see Regulation on Electricity, Para 19 and Para 30*). The electricity trader has the obligation to conclude an agreement on the use of the system with the system operator who ensures supply of electricity to a user of the electricity system up to the boundary of ownership of the electrical installations - the contractually agreed boundary between the system operator and the electrical installations of the user or producer, or between the electrical installations of the user and those of the sub-user (*see Regulation on Electricity, Sub-para 2.12, Para 19 and Para 81*). The user of electricity system, in turn, has the obligation to provide information in accordance with the actual readings of a commercial meter, as well as pay for the received

system services timely and in the amount indicated in the bill (*see Regulation on Electricity, Para 48 and Sub-para 65.5.*). Thus, Regulation on Electricity envisages the system operator's obligation to supply electricity to the user of the electricity system and the user's obligation to pay for the electricity received and other system services.

However, cases where the user of the electricity system is using electricity unlawfully are possible, i.e., by violating the rules on electricity use and, as the result, the reading of the electricity consumption is decreased or the possibility to use electricity without paying for it is created. To ensure that the system operator receives payment for the electricity supplied, the cases where unlawful use of electricity has been detected, as well as the legal consequences of such a violation need to be regulated. One of the pre-conditions for ensuring the system operator's right to receive appropriate remuneration for the electricity supplied is establishing the amount of electricity consumed by the user of the electricity system and the amount of services received. However, not in all instances when the user of the electricity system has violated the rules on electricity use, it is possible to establish the actual amount of electricity consumed and the amount of services received.

Situations where energy is used unlawfully and it is impossible to determine the actual amount of consumed energy are possible also in the sectors of natural gas supply and heat supply. Until 8 March 2016 when the law of 11 February 2016 "Amendments to Energy Law" entered into effect, the legislator, in Section 42³ (1) of Energy Law, had directly authorised the Cabinet to determine the procedure for calculating the amount of actually consumed natural gas, as well as the amount of compensation and the procedure of calculation in the case where the energy supply merchant establishes that the user of energy has violated the Cabinet Regulation in the supply and use of natural gas or the agreement on the supply of natural gas and, as the result, the recorded amount of natural gas consumed by the user has been decreased or the possibility has been created to consume natural gas without paying for it. As regards the cases where the electricity supply merchant establishes that a user of electricity has violated the Cabinet Regulation on the supply and use of the heating supply system or the agreement on heating supply, Section 46¹ (3) of Energy Law still envisages the Cabinet's right to determine the amount of compensation and the procedure of calculation. Hence, the Cabinet continues to have the right to determine the cases where compensation must be calculated.

In the sector of electricity supply, such a special legal provision that would directly authorise the Cabinet to determine the procedure for calculating the actual amount of consumed electricity in the case where the rules on the use of electricity have been violated has never been adopted. Hence, it can be concluded that, in the sector of electricity, in difference to the sector of natural gas supply and heating supply, the legislator never had the intention to include such special authorisation in the regulation. Moreover, the practice, established in the electricity market, that the Cabinet, pursuant to Section 32 (5) of Electricity Market Law, is authorised to regulate the procedure for calculating the amount of electricity that has been consumed arbitrarily, exists since this law entered into effect on 8 June 2005.

Hence, there are grounds to conclude that Section 32 (5) of Electricity Market Law includes the legislator's authorisation to the Cabinet to regulate how the amount of electricity, consumed by the user of the electricity system, and of the services received should be determined. I.e., pursuant to the said legal provision, the Cabinet has the right to determine the legal consequences that set in for the user of the electricity system if they violate the rules on the use of electricity and disregard the obligations defined in Para 65 of Regulation on Electricity.

The contested provision stipulates that in the case where the user of the electricity system has committed a violation of the rules on the use of electricity – tampered with a commercial meter or connected to the front-of-the-meter circuits – and it had been impossible to detect such activities while conducting regular checks of the commercial meter, the system operator has the right to calculate the amount of consumed electricity in accordance with the recalculation. The Cabinet has determined the method of recalculation in the contested provision. Hence, it can be concluded that the Cabinet, in issuing the contested provision, has acted within the limits of authorisation, granted by the *Saeima*, as it has defined the legal consequences that follow from disregarding mutual rights and obligations in the process of trading in and supplying electricity.

The considerations made by the *Saeima* that the Cabinet, in issuing the contested provision, had exceeded the limits of authorisation granted to it are linked to the fact that the Cabinet had acted contrary to the general civil law regulation on the calculation of and compensation for damages caused by unauthorised actions. I.e., allegedly, the system operator, using the criteria for calculating the amount of arbitrarily consumed electricity,

included in the contested provision, is making these calculations without any individualisation of the specific case and this could lead to demanding disproportionate payment, not corresponding with the reality, from a user of the electricity system. However, the said considerations are linked to reviewing the constitutionality of the contested provision on its merits.

Whereas the fact that the contested provision envisages special regulation for calculating the amount of arbitrarily consumed electricity and the amount of system services, in difference to the general regulation on calculating losses, which is valid in civil law, does not mean that the Cabinet has exceeded the limits of the authorisation granted to it by the legislator because this authorisation includes the right to specify the rights and obligations of the participants of electricity market in the entire process of trading in and supplying electricity, as well as in payments for the services received.

The participants in the case have not expressed objections and neither does the Constitutional Court have doubts that the contested provision is accessible in accordance with statutory requirements and has been worded with sufficient clarity, allowing a person to understand the content of the rights and obligations following from it and to foresee the consequences of application thereof, and that it has been issued in procedure that complies with the principle of good legislation.

Hence, the restriction on fundamental rights, included in the contested provision, has been established by a legal provision, adopted in the procedure set out in regulatory enactments.

13. Any restriction on fundamental rights should be based on circumstances and arguments regarding its necessity, i.t., the restriction is established for the sake of important interests – a legitimate aim (*see Judgement by the Constitutional Court of 13 October 2015 in Case No. 2014-36-01, Para 18*).

It is noted in Para 1 and Para 2 of Section 2 of Electricity Market Law that the purpose in this law is, *inter alia*, to establish prerequisites for the operation of an efficiently functioning electricity market and to ensure that, taking into account the requirements of laws and regulations, all energy customers are provided with electricity in a safe and qualitative manner, in the most efficient possible way for justified prices.

The Constitutional Court has recognised previously that the legitimate aim of the restriction on the right to property of electricity users, i.e., the obligation to make a payment, calculated in accordance with certain criteria, in the case where the rules on the use of electricity have been violated, is the protection of public welfare. Such a restriction has been established in the society's interests to prevent interference in the functioning of the electricity supply system as the pre-requisite for providing utility of public importance (*compare, see Judgement by the Constitutional Court of 20 March 2020 in Case No. 2019-10-0103, Para 26, and Judgement of 28 September 2020 in Case No. 2019-37-0103, Para 19 and Para 27*).

Moreover, the Cabinet points out that the legitimate aim of the restriction on fundamental rights, included in the contested provision, is to ensure that the contractual commitments of the user of the electricity system are met and to prevent the related losses caused by a violation of the agreement with the system operation or, in the case an unwarranted connection is installed, to compensate for the losses caused by the user's unlawful actions to the system operator and society in general. Electricity losses, which include unlawfully consumed electricity, are attributed to the costs of the distribution system operator, which are taken into account in the calculation of the tariff for the service and, accordingly, affect the costs of the service for all users of a particular system operator (*see Decision by the Public Utilities Commission of 28 November 2022 No. 1.41 "Methodology for Calculating Tariffs for the Services of the Electricity Distribution System"*). The payment, envisaged in the contested provision, which has to be made in the case where the rules on the use of electricity had been violated, ensures remuneration to the system operator that can be used to cover the electricity losses and other losses caused to it. Hence, the payment, envisaged in the contested provisions, serves to protect also the system operator's right to property.

Hence, the legitimate aims of the restriction on fundamental rights, included in the contested provision, are the protection of public welfare and protection of other persons' rights.

14. In assessing the proportionality of a restriction on fundamental rights, the Constitutional Court must verify, first and foremost, whether the chosen measures are

suitable for reaching the legitimate aims, i.e., whether the legitimate aims can be reached by the chosen measures.

In those cases where a user of the electricity system has arbitrarily tampered with the commercial meter, the system operator can determine the amount of losses that is comparatively close to the actual losses caused, taking into account that the measuring equipment, used in the electricity system, is characterised by the possibility to register, with very high precision, the data of electricity consumption and fluctuations in the technical parameters of supply (*see Case Materials, Vol. 5, p. 93*). However, in those cases where a user of the electricity system has connected to the front-of-the-meter circuits, there are objective difficulties in determining the amount of consumed electricity and the amount of possible losses incurred by the electricity supply merchant. I.e., if a commercial meter of electricity has not been installed in the object or if a connection to the front-of-the-meter circuits has been created, circumventing a commercial meter, it is impossible to determine the exact amount of consumed electricity. Likewise, if a respective agreement has not been concluded between the provider and the recipient of the services that would envisage the planned amount of consumed electricity or an agreement that would allow establishing the previous amount of consumed electricity and habits of use has not been concluded then it is impossible to use specific methodology for calculating the exact amount of the actually consumed electricity (*see Case Materials, Vol. 5, p. 66*).

The obligation, defined in the contested provision, in the case where the rules on the use of electricity have been violated, to pay for the consumed electricity to the system operator in accordance with the recalculation, envisaged in the same provision, ensures to the system operation remuneration for the supplied electricity in those case where the actual amount is difficult to determine. I.e., the amount of consumed electricity within the electricity system for the user is calculated for the period up to one year in accordance with the maximum throughput of the connection within the period of 24 hours, irrespective of the results of previous checks. Thus, the amount of consumed electricity, to be determined in accordance with certain criteria, is presumed and the system operator is released from the obligation to prove the amount of losses it has incurred.

In view of the above, it should be recognised that the legal regulation, included in the contested provision, is aimed at continuous, safe and qualitative functioning of the electricity

supply system, as well as protection of the system operator's right to property, allowing the operator to use the remuneration received for the supplied electricity for the maintenance of the electricity supply system as a pre-requisite for provide utility of public importance, *inter alia*, complying with quality and safety requirements. Thus, the payment, envisaged in the contested provision, is a suitable measure for promoting public welfare and protecting other persons' rights.

Hence, the measure chosen by the Cabinet is suitable for reaching the legitimate aims of the restriction on fundamental rights, included in the contested provision.

15. In assessing the proportionality of a restriction on fundamental rights, the Constitutional Court must verify whether the chosen measures are necessary for reaching the legitimate aim, i.e., whether the legitimate aim could not be reached by other measures, restricting an individual's rights to a lesser extent, which would be equally effective. Moreover, a more lenient measure is only such measure that allows reaching the legitimate aim in, at least, the same quality (*see Judgement by the Constitutional Court of 12 February 2020 in Case No. 2019-05-01, Para 23*).

The Applicant notes that in the cases where a user of the electricity system has committed a violation of the rules on the use of electricity the general civil law regulation should be applied. The Cabinet, however, points out that the application of general regulation to the calculation of the amount of unlawfully consumed electricity is hindered by the fact that in the case, envisaged in the contested provision, when an unwarranted connection to the front-of-the-meter circuits has been created, it is impossible to record the actual electricity consumption because the connection has not been equipped with a commercial electricity meter. Thus, the general regulation applicable in civil law is not suitable for calculating losses and cannot be deemed to be an equally effective measure for reaching the legitimate aims of the restriction on fundamental rights, included in the contested provision.

In a general case, the aggrieved person who wishes to receive compensation for the losses caused is obliged to prove the actual unlawful actions or the failure to act of the infringer, the amount of losses, as well as the causality between the two respective factors. In the cases where a user of the electricity system has arbitrarily connected to the front-of-the-meter circuits, neither the price of electricity at the time when losses were caused, nor

the period of time when the electricity had been arbitrarily used and the amount of electricity consumed within the specific period can be determined and, thus, the amount of losses cannot be determined. Thus, by applying the general regulation of Civil Law, the legitimate aims of the restriction on fundamental rights, included in the contested provision, would not be reached in the same quality because, in the cases where there are objective difficulties in determining the amount of losses or it is even impossible to determine it, a system operator would have to prove the amount of losses incurred (*compare, see Judgement by the Constitutional Court of 20 March 2020 in Case No. 2019-10-0103, Para 29.1.1.*).

Hence, there are no other, more lenient measures that would allow reaching the legitimate aims of the restriction on fundamental rights, established in the contested provision, in the same quality.

16. Finally, in reviewing the proportionality of the restriction on fundamental rights, the Constitutional Court must verify its conformity, i.e., verify whether the adverse consequences caused to a person by the restriction on their fundamental rights do not outweigh the benefit that society in general gains from this restriction. In the present case, balance must be found between, on the one hand, the right to property of a person who has committed a violation of the rules on the use of electricity and, on the other hand, public welfare and other persons' rights, encompassed by the legitimate aims of the restriction on fundamental rights, established in the contested provision.

The Applicant points out that the method for calculating the amount of consumed electricity, included in the contested provision, is obviously disproportionate because it does not ensure that the amount of consumed electricity is determined as close as possible to the actual consumption. Allegedly, a system operator makes recalculation not by considering the actual consumption of the service recipient, recorded by a respective commercial meter, but rather by using the criteria, included in the contested provision, and, thus, the payment for the consumed but unrecorded electricity is calculated without any individualisation whatsoever. The Cabinet, however, holds that the restriction on fundamental rights, included in the contested provision, is proportionate and this is said to be proven by the materials submitted by the Applicant and appended to the case. I.e., they allow concluding that the calculation had been made in favour of the user of the electricity system and had not been

aimed at recovering all possible ungained revenue of the system operator. The system operator had found reasonable balance between its economic interests and the obligation to avoid unfounded restrictions on the right to property of a user of the electricity system and refrained from actions that would be pronouncedly punitive by nature.

16.1. In Regulation on Electricity, the Cabinet has differentiated between several ways in which a violation of the rules on the use of electricity could be manifested and has determined for each of them different methods for calculating the amount of consumed electricity.

One type of violations of the rules on the use of electricity is that a user of the electricity system has breached the agreement concluded with the system operator, i.e., has consumed electricity within the framework of the concluded agreement but has tampered with the commercial meter or damaged its seals. Thus, the requirements of Regulation on Electricity have been violated. Likewise, the Cabinet has separated a case where the user of the electricity system has consumed electricity within the framework of the concluded agreement, however, the terms of the agreement on connection do not envisage the use of commercial meters for payments and the violation is linked to arbitrary tampering with circuits of connections. A violation like this may influence the amount of services received to the extent that it no longer complies with the amount envisaged in the agreement concluded by the user of the electricity system and the system operator. In the aforementioned cases, the system operator has the right to calculate the amount of consumed electricity in accordance with Para 112 of Regulation on Electricity, which envisages recalculation of the amount of electricity, system services, other services and the component of mandatory procurement for the period of time from the date of the last inspection by the system operator of the commercial meter, installed with the user, until the date when the violation was detected. Moreover, in such a case, the recalculated amount of electricity, system services, other services and the component of mandatory procurement cannot exceed the one reached if the recalculation had been made on the basis of the maximum throughput of the connection within the period of 24 hours.

However, the contested provision is applicable only to such cases where a respective agreement has not been concluded between the user of the electricity system and the system operator but the user has intentionally tampered with the commercial meter or created a

connection to the front-of-the-meter circuits, planning to consume electricity without paying for the service and other related costs.

Thus, the method of recalculation, included in the contested provision, which envisages basing the calculation of the losses caused on the maximum throughput of the connection with the period of 24 hours for the period of up to one year is only one of the methods envisaged in Regulation on Electricity, which, moreover, is applicable only in some cases, i.e., when the system operator could not apply the requirements of Para 112 of Regulation on Electricity.

16.2. The method for determining the amount of consumed electricity, included in the contested provision, specifies the rights and obligations of the system operator and the user of the electricity system, defined in Electricity Market Law, in their private law relationships that arise in the case where the rules on the use of electricity are violated. Civil law is founded on the principle of equivalence, which is an element that specifies the principle of justice, derived from the basic norm of a democratic state governed by the rule of law, and means that none of the participants in legal relationships can unfoundedly profit at the expense of other participants in these legal relationships (*see: Torgāns K. (zin. red.), Kārklīņš J., Bitāns A. Līgumu un deliktu problēmas Eiropas Savienībā un Latvijā. Rīga: Tiesu namu aģentūra, 2017, 52. un 148. lpp.*). Thus, the method determined in the contested provision, also must be such that would ensure, pursuant to this principle of justice, economic equivalence of the participants of electricity market. Hence, the Constitutional Court must verify whether the method for calculation the amount of consumed electricity, determined in the contested provision, ensures, pursuant to the principle of justice, economic equivalence and compliance with the principle of individualisation.

The contested provision sets out that the amount of electricity, system services, other services and the component of mandatory procurement, in the case where the rules on the use of electricity have been violated, is recalculated for the period up to one year in accordance with the maximum throughput of connection within 24 hours, irrespective of the results of previous tests.

The maximum throughput of a connection is the maximum amount of electricity that can flow, within a certain period, through the connection, depending on the type thereof. Where an input protective device is installed in front of the electrical energy-consuming

equipment, the maximum capacity of the connection shall be characterised by the magnitude of the current of automatic circuit breaker, at which it sets into motion and the flow of electricity is interrupted. If, on the other hand, the automatic circuit breaker is not installed in the connection, the maximum capacity of the connection shall be characterised by the smallest cross-section of the wiring used in the connection. The maximum throughput of a connection is a technical criterion, which can be established by the system operator at the place and time when a violation is detected. Moreover, the maximum throughput varies from case to case depending on the technical implementation of the connection, including the cross-section of the connecting wires (*see Case Materials, Vol. 5, p. 75*). Thus, it can be concluded that, in all cases where a system operator detects a violation, it has the possibility to identify the maximum throughput of the particular connection, which will be different in each case of violation.

According to the contested provision, the maximum throughput is calculated for 24 hour period. Although the majority of electric equipment that consume electricity are not operated for the entire duration of 24 hours, in cases of violation of the rules on the use of electricity, envisaged in the contested provision, at the moment of detecting a violation, the system operator does not have the possibility to establish what electricity-consuming electric devices are connected to the connection and how long they have been used within the period of 24 hours.

The period of up to one year, in turn, is the maximum period with respect to which a system operator has the right to make recalculation. In the case of a violation of the rules on the use of electricity where the user of electricity has created a connection to the front-of-the-meter circuits, the system operator actually does not have the possibility to determine even an approximate duration of such a violation. It may happen that the user of the electricity system has consumed electricity unlawfully even for longer than one year. Thus, the requirement regarding one year, included in the contested provision, should be considered as factor that limits the period of calculation, not permitting making of calculations for a longer period of time even in the case where the system operator has detected a violation.

However, in those cases where the user of the electricity system has submitted to the system operator respective evidence or the system operator has at its disposal information that the user has consumed electricity illegally not for an entire year but for a shorter period,

the system operator has the possibility and, simultaneously, also an obligation to make calculation for a shorter period. Already since 2014, system operators are replacing the commercial meters of the previous generation with smart commercial meters, ensured with protection against various damages, and any tampering with the commercial meter with the aim of changing metrological parameters is identified and registered (*see Case Materials, Vol. 5, pp. 65 and 82*). Thus, in the cases where a user of the electricity system has arbitrarily tampered with a commercial meter, a system operator may determine the amount of losses that is comparatively close to the actual amount thereof.

Hence, the criterion, included in the contested provision, which provides for a system operator's right to make recalculation for a period up to one year, allows the party applying law to take into account the individual circumstances of each violation and decide on the most fair and proportionate payment for electricity that has been unlawfully consumed. Thus, it can be concluded that, in making the recalculation, envisaged in the contested provision, abiding by the principle of individualisation is ensured to the extent possible, as well as such economic equivalence that can be ensured in the particular circumstances, without infringing unfoundedly upon the rights of a system operator and other users of the electricity system, as well as not permit that the violator of the rules on the use of electricity profits from unlawful actions.

Moreover, the procedure for the settlement of payments between the system operator and users of the electricity system is similar to the procedure, based on contractual relationships. I.e., it envisages equivalent payment for the consumed electricity as in the case referred to in Para 5 of Regulation on Electricity, where the system operator agrees with the user of the electricity system on such type of connection that gives to the user the right to use the connection for a certain period of time without limiting the consumption of electricity. Likewise, the materials appended to the case, showing the recalculation made by the system operator in the case under the Applicant's review, prove that the decision had been taken in favour of the user of the electricity system and the calculation of losses had not been aimed at recovering all possible ungained revenue of the system operator.

Thus, the method, envisaged in the contested provision, for determining the amount of consumed electricity in the case where the rules on the use of electricity have been violated, i.e., the method that envisages calculation for a period up to one year according to

the maximum throughput of the connection within the period of 24 hours, ensures economic equivalence, compliance with the principle of individualisation and is proportionate. Thus, the benefit that society gains from the fact that the user of the electricity system who has committed a violation of the rules on the use of electricity, has the obligation to pay to the system operator for the unlawfully consumed electricity in accordance with the method of recalculation, included in the contested provision, outweighs the adverse consequences caused to the user of the electricity system by the restriction on their fundamental rights.

Hence, the restriction on fundamental rights, included in the contested provision, is proportionate and the contested provision complies with Article 64, the first three sentences of Article 105 of the Constitution, as well as Section 32 (5) of Electricity Market Law.

The Substantive Part

On the basis of Sections 30–32 of Constitutional Court Law, the Constitutional Court

held:

to recognise Para 113 of the Cabinet Regulation of 21 January 2014 No. 50 “Regulation on the Sale and Use of Electricity” as being compatible with Article 64 and the first three sentences of Article 105 of the Constitution of the Republic of Latvia and Section 32 (5) of Electricity Market Law.

The judgement is final and not subject to appeal.

The judgement enters into effect on the date of its publication.

Chairperson of the court hearing

Irēna Kucina