CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGMENT

on behalf of the Republic of Latvia

Rīga, 10 October 2024

Case No. 2023-35-03

The Constitutional Court composed of the chairperson of the court Irēna Kucina, judges Jānis Neimanis, Anita Rodiņa, Jautrīte Briede, Veronika Krūmiņa, and Mārtiņš Mits,

pursuant to the constitutional complaint submitted by *sabiedrība ar ierobežotu atbildību* [limited liability company] "GA 21",

on the basis of Article 85 of the Constitution of the Republic of Latvia and Section 16, Clause 3, Section 17, Paragraph one, Clause 11, as well as Section 19.^{2} and Section 28.^{1} of the Constitutional Court Law,

on 10 September 2024, in the written procedure, examined the following case:

"On conformity of Paragraph 41 and Sub-paragraph 60.2 of Cabinet Regulation No. 560 of 2 September 2020, Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the Procedures for Price Determination and Monitoring, (in the wording in force until 31 March 2022) with the first three sentences of Article 105 of the Constitution of the Republic of Latvia".

Establishing Part

1. On 2 September 2020, the Cabinet of Ministers (hereinafter – the Cabinet) issued Regulation No. 560, Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the Procedures for Price Determination and Monitoring, (hereinafter – Regulation No. 560) which entered into force on 11 September 2020. Paragraph 41 of the Regulation stipulated the following: "If the merchant fails to submit the annual report referred to in Paragraph 38 of this Regulation by 1 March, the [State Construction Control] Bureau shall, within month, take the decision to revoke the right to the mandatory procurement granted to the merchant."

However, Sub-paragraph 60.2 of Regulation No. 560 stipulated that "the [State Construction Control] Bureau [..] shall immediately take the decision by which the merchant is required, within one month, to reimburse to the public trader the State aid received without justification:

[..]

60.2. in the case referred to in Paragraph 39 or 41 of this Regulation, the State aid for the sale of electricity within the scope of the mandatory procurement disbursed by the public trader for the period starting from the first day of the period for which the annual report referred to in Paragraph 38 of this Regulation has been submitted".

Paragraph 41 and Sub-paragraph 60.2 of Regulation No. 560 in the abovementioned wording (hereinafter also – the contested norms) were in force until 31 March 2022. By Cabinet Regulation No. 177 of 8 March 2022, Amendments to Cabinet Regulation No. 560 of 2 September 2020, Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the Procedures for Price Determination and Monitoring, (hereinafter – the Amendments) which entered into force on 1 April 2022, the contested norms were reworded.

2. The applicant, i.e. *sabiedrība ar ierobežotu atbildību* [limited liability company] "GA 21", (hereinafter – the applicant), considers that the contested

norms fail to conform to the first three sentences of Article 105 of the Constitution of the Republic of Latvia (hereinafter – the Constitution).

The applicant has missed the deadline for the submission of the annual report referred to in Paragraph 38 of Regulation No. 560 (hereinafter – the annual electricity report) for 2020, therefore, on the basis of the contested norms, the State Construction Control Bureau has revoked the right granted to the applicant to sell the generated electricity within the scope of the mandatory procurement, as well as has imposed the obligation on the applicant to reimburse the State aid received from the beginning of the relevant period within one month. Consequently, the applicant has been deprived of the right to own property provided for in the first three sentences of Article 105 of the Constitution.

The applicant does not dispute that the restriction of fundamental rights has a legitimate objective, i.e. to control the justification for the receipt of State aid and the use of State funds. Nevertheless, the respective legitimate objective can be achieved by other measures which are less restrictive of the fundamental rights of individuals. The current wording of Paragraph 41 of Regulation No. 560 provides for a more favourable legal framework for the merchant, i.e. a warning is sent to the merchant in the event of delayed submission of the annual electricity report. Only in the event of a failure to comply with the deadline for the submission of the annual electricity report that is specified in the warning, the right to the mandatory procurement granted to the merchant is revoked and the merchant is required to reimburse the State aid received from the beginning of the relevant period. Similarly, other measures which are less restrictive of the fundamental rights of individuals but would allow achieving the legitimate objective in the same way would be a proportional contractual penalty or similar sanctions for late submission of the annual electricity report.

The failure to submit the annual electricity report within the deadline specified in the contested norms is a formal infringement, since the report only summarises information which is already at the disposal of the public trader. Hydroelectric power plants operate in automatic mode, and electricity metering also operates in this mode. Moreover, the contested norms do not provide for an

individual assessment of each situation and, accordingly, for the determination of the amount of State aid subject to reimbursement. The requirement to immediately reimburse State aid is excessive and punitive rather than compensatory.

The public benefit from the restriction of fundamental rights contained in the contested norms does not outweigh the harm caused to the rights of individuals. The late submission of the annual electricity report does not cause immediate damage to the company, but it does result in the loss of the right to participate in the mandatory procurement. It is the revocation of the right to the mandatory procurement that is detrimental to the public interest, as this right promotes the generation of renewable electricity, which is essential for preventing climate change and ensuring energy independence of Latvia.

3. The authority which issued the contested act, i.e. the *Saeima*, believes that the contested norms conform to the first three sentences of Article 105 of the Constitution.

State aid payments affecting the formation of the electricity price may be granted only insofar as they ensure the achievement of the State aid objectives, i.e. to promote electricity generation from renewable energy resources, to reduce Latvia's dependency on imported fossil energy resources, and to increase the share of renewable energy in final energy consumption. According to the Commission Decision in the State Aid Case SA.43140 (2015/NN) of 24 April 2017, 'Aid to Renewable Energy and CHP' (hereinafter – the Commission Decision), State aid can only be granted until the plant has been fully depreciated and can include a fair return on the capital invested. The annual electricity report is essential for monitoring compliance with this condition. If the merchant has not submitted the annual electricity report, the supervisory authority cannot verify the amount of electricity generated and consumed at the power plant, the efficient use of heat energy, and the compliance of the power plant with the requirements of laws and regulations. The revocation of State aid for non-compliance with the obligation ensures fair and equitable treatment of beneficiaries of State aid who comply with

the deadline for the submission of the annual electricity report, as well as of those merchants who do not receive State aid.

The Cabinet agrees that the contested norms deprive the merchant of the right to own property provided for in the first three sentences of Article 105 of the Constitution, but this restriction is established by a duly adopted legal norm, has a legitimate objective, and complies with the principle of proportionality. The contested norms were issued within the scope of the authorisation granted by the legislator provided for in Section 31.^{2}, Paragraph three of the Electricity Market Law to the Cabinet to determine the violations for which the rights granted to State aid should be revoked and also the procedures for revoking such rights.

The legitimate objectives of the restriction of fundamental rights contained in the contested norms is both public welfare and protection of the rights of other persons. The contested norms are aimed at making the system of receiving State aid more efficient, preventing unjustified receipt of State aid, including in cases of failure to fulfil the requirements for exercising the right to the mandatory procurement, and ensuring that, in the public interest, State aid payments are made only to those producers who use the energy they generate efficiently. This will reduce costs for end consumers, while eliminating mismanagement and dishonest behaviour in the sector and strengthening the Latvian economy.

The restriction on fundamental rights is appropriate to achieve the legitimate objectives, as it prevents distortions of competition and unlimited increase of the mandatory procurement component. In view of the Cabinet, there are no less restrictive measures for achieving the legitimate objectives of the restriction to the same degree. The State has wide discretion in terms of deciding how the objectives of the State aid scheme are to be achieved. The contested norms do not impose a new obligation on the merchant, since the submission of the annual electricity report has been an annual process since the commencement of electricity generation within the scope of the mandatory procurement. There is therefore no need to remind them of this obligation. It should also be borne in mind that electricity generation is a regulated sector which imposes certain obligations on the merchant in order to be able to maintain the granted rights. The public

benefit, i.e. electricity generation from renewable energy resources and sale thereof at a reasonable price, outweighs the loss to the merchant, since revocation of the right to sell the generated electricity within the scope of the mandatory procurement ensures that State aid is not paid unduly.

In the additional explanatory notes, the Cabinet points out that the current legal framework provides for the notification of a merchant for the late submission of the annual electricity report, as the Amendments introduce the principle of the uniform technological cycle, which requires individual merchants to merge with each other and re-establish the reporting system. The warning allows these merchants to set up a new system for preparing and submitting their annual electricity reports. The additional explanations also indicate that, according to the Cabinet, the contested norms comply with Article 6 of Directive (EU) 2018/2001 of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (hereinafter – the Renewable Energy Directive), as they do not impose new obligations, but rather a sanction for non-compliance with an already existing regulation. Thus, neither the right of the merchant to sell electricity within the scope of the mandatory procurement is adversely affected, nor the economic viability of the already supported projects is jeopardised.

4. The *Saeima*, i.e. invited party, considers that the Cabinet has complied with the authorisation granted by the legislator insofar as it has determined that the failure to submit the annual electricity report within the specified deadline is one of the violations for which the rights to State aid granted to electricity producers shall be revoked, and has established the procedures for the revocation of such right and reimbursement of the received aid. However, the will of the legislator should not be interpreted as the right of the Cabinet to establish such procedural arrangements which would provide for the revocation of the rights to State aid without prior warning and would be contrary to the previously valid procedural arrangements contained in Cabinet Regulation No. 262 of 16 March 2010, Regulations Regarding the Generation of Electricity Using Renewable Energy

Resources and the Procedures for Price Determination, (hereinafter – Regulation No. 262).

The contested norms were issued on the basis of the authorisation provided for in Section 29, Paragraph four and Section 31.[2], Paragraph three of the Electricity Market Law granted to the Cabinet to develop the procedures for monitoring the exercise of the right to the mandatory procurement, including determination of violations for which such right should be revoked, as well as the procedures for revoking such right and the procedures for reimbursement of unjustified or unlawfully received State aid. The authorisation to monitor the exercise of the right to the mandatory procurement also covers monitoring compliance with the obligation to submit the annual electricity report.

However, failure to submit the annual electricity report within the deadline should not be considered as a case for an immediate decision on the revocation of the rights to State aid. Such a violation can be prevented by sending the relevant warning to the merchant. The Cabinet, in accordance with the authorisation granted by the *Saeima*, should develop the procedural arrangements for monitoring the exercise of the right to the mandatory procurement in accordance with the principles of good governance, respect for the rights of private individuals, and proportionality. A warning sent to an electricity producer for failure to submit the annual electricity report within the specified deadline is an instrument which, in a way, expresses the essence of the principles. The waiver of the warning is contrary to those principles and restricts the fundamental rights of individuals.

5. The Ministry of Climate and Energy, i.e. invited party, points out that the submission of the annual electricity report is not merely a formal requirement, but an essential tool for monitoring compliance with State aid conditions. The Ministry does not agree that all the information to be provided in the annual electricity report is already available to the public trader. The public trader only has access to information on electricity sold within the scope of the mandatory procurement and, in some cases, information on the purchased electricity. However, the annual electricity report also includes information that is not

available to the public trader and that the State Construction Control Bureau can obtain from the annual electricity report or through an on-site inspection. Such information is, for example, information on the depreciation of the fixed assets of the power plant, which is relevant because once the depreciation has been fully completed, the merchant is no longer entitled to State aid.

The Ministry shares the view of the Cabinet that the preparation and submission of the annual electricity report is an annual obligation which is already known to the merchants and that the Amendments restored the warning system as they introduced the principle of the uniform technological cycle. The Ministry also agrees that the contested norms comply with Article 6 of the Renewable Energy Directive, as they do not impose new obligations.

There were no measures which are less restrictive of the fundamental rights of individuals that would allow achieving the legitimate objective of the restriction to the same degree, i.e. to provide electricity at an affordable price to the society and the economy as a whole, reducing the impact of the mandatory procurement component on the overall final price of electricity, as well as by improving the electricity generation sector and eliminating non-compliance with the legal provisions.

6. The Ministry of Finance, i.e. invited party, points out that the requirements included in the contested norms regarding the submission of the annual electricity report do not derive from the mandatory requirements laid down by European Union law, the purpose of which is to ensure the compatibility of the granted State aid with the internal market of the European Union in accordance with the Commission Decision. Therefore, the legal consequences laid down in the contested norms are not equivalent to the recovery of unlawful and/or incompatible commercial aid. However, it should be borne in mind that European Union law does not restrict the introduction of control mechanisms necessary to ensure the fulfilment of the requirement to avoid overcompensation of the relevant power plants and the recovery of unduly received State aid. Moreover, the contested norms do not introduce any changes to an existing State aid measure which in any

way alter its substance and should therefore be notified to the European Commission.

7. The Ministry of Justice, i.e. invited party, considers that the State Construction Control Bureau, when deciding on the revocation of the right to the mandatory procurement, assesses the circumstances of the particular situation. In atypical cases, having assessed the considerations of expediency and proportionality of the decision to be taken, the State Construction Control Bureau may not apply the legal consequences provided for in the contested norms and may not revoke the right to the mandatory procurement granted to the merchant.

The Ministry has not established any European Union law which would directly or indirectly preclude a legal regulation of the kind provided for in the contested norms. Member States have wide discretionary powers in terms of implementing aid schemes in the field of renewable energy. Although the legal framework in force at the time when the European Commission assessed the compatibility of the State aid scheme with the internal market provided for the possibility to extend the deadline for the submission of the annual electricity report, this alone does not mean that this was an essential part of the agreed State aid scheme. In particular, although the timely submission of the annual electricity report is inextricably linked to the control of the legality of the use of State aid, a procedural norm providing for the possibility to extend the deadline for the submission of the annual electricity report might not be an essential part of the harmonised State aid scheme.

8. The State Construction Control Bureau, i.e. invited party, considers that the legislator has envisaged special procedures for electricity generation, as well as for price determination and monitoring, as any State aid payment within the scope of the mandatory procurement increases the payment burden for electricity end users. One of such monitoring tools is the obligation to submit the annual electricity report within a particular deadline which is not a formal obligation but a key tool for monitoring the operation of power plants. The annual

electricity report contains essential information on the operation of the power plant and the indicators of the electricity produced that determine the compliance of the power plant with the mandatory procurement requirements. The information provided in the annual electricity report could serve as basis for the identification of possible violations by the merchant, which may lead to the revocation of the right to the mandatory procurement granted to the merchant.

For example, in order to verify whether the merchant complies with the condition that only the electricity left over after the operation of the power plant is to be sold in the mandatory procurement, information on the total amount of electricity generated by the power plant is required, but this information is available only to the merchant itself. Moreover, the information provided in the annual electricity report is the only way in which the State Construction Control Bureau can be informed that the fixed assets of the power plant have reached full depreciation, which precludes further State aid. The opinion of the applicant that the information on the performance indicators of the power plant to be provided in the annual electricity report is already at the disposal of the public trader cannot be accepted.

It is important for the State Construction Control Bureau to receive the annual electricity report as soon as possible so that irregularities or violations can be detected in due time. Given that the costs of the State aid mechanism are borne by all Latvian electricity end users, it is in the public interest to identify non-compliances as soon as possible and to take appropriate measures.

9. ***Sabiedrība ar ierobežotu atbildību*** **[limited liability company] "Enerģijas publiskais tirgotājs", i.e. the invited party,** (hereinafter – the public trader) points out that the annual electricity report also contains information that is not available to the public trader. For example, the public trader does not have complete information on the amount of electricity generated by hydroelectric power plants, as the public trader only receives information on the amount of electricity transferred to the network that it has purchased. If the amount of electricity generated and transferred to the network exceeds the maximum amount

of electricity to be sold within the scope of the mandatory procurement in the respective year, the merchant has the right to sell it also to another purchaser of electricity, not only to the public trader.

According to the public trader, it is important that the annual electricity report is received by the State Construction Control Bureau as soon as possible in order to detect any irregularities or violations in the actions of the merchant. In particular, it is essential to prevent as soon as possible the continuation of unlawful State aid.

Two months is sufficient time for the merchant to plan and implement the entry and submission of the annual electricity accounts data to the electronic annual electricity report system. Paragraph 21 of Regulation No. 560, in the wording in force until 31 March 2022, provided for the obligation to equip the power plant with metering devices for metering the electricity generated and the commercial metering devices for metering the electricity transferred to and received from the network, as well as to ensure metering of the electricity generated at least once a day. This way, the owner of the hydroelectric power plant already has the information needed for the annual electricity reports at the beginning of the year. Data from the system operator on the amount of electricity transferred to the network in December of the previous year should also be available by 10 January. In addition, hydroelectric power plants are not required to attach to their annual electricity report the report of an independent accredited auditor, the obtaining of which could take additional time.

10. The association Latvian Renewable Energy Federation, i.e. the invited party, considers that the contested norms fail to conform to Article 105 of the Constitution, because they disproportionately restrict the right of a merchant to own property.

The information to be provided in the annual electricity report is already available to the supervisory authority or can be freely obtained from other sources. For example, data on electricity transferred to the distribution network and electricity purchased from the distribution network are remotely recorded and

stored in the data systems of the distribution network operator in real time, while data on depreciation of fixed assets are included in publicly available accounting reports. According to Regulation No/ 560, the State Construction Control Bureau has the obligation to verify and assess all this data itself, which also means obtaining it from primary sources, including through the right to carry out prompt on-site inspections of power plants. The importance of the annual electricity report for the monitoring of beneficiaries of State aid should therefore not be overemphasised.

According to the association, there are several other measures that are less restrictive of the fundamental rights of the merchant. One of them is the legal framework in force before the contested norms and currently in force, which provides that in case of failure to submit the annual electricity report, a warning should be sent about the possibility of losing the right to participate in the mandatory procurement. Alternative remedies include suspension of the payment or calculation of State aid until elimination of the violation. Both of these mechanisms are contained in several other provisions of Regulation No. 560. In addition, the suspension of the payment or calculation of State aid could be combined with the current legal framework for sending a warning.

The contested norms infringe Article 6(1) of the Renewable Energy Directive, according to which the conditions attached to aid must not be reviewed in such a way as to adversely affect the rights already granted. For a long time, the legal framework was unchanged, but then, without any objectively identifiable reasons, it was suddenly changed, first to the detriment of merchants, and then back to the previous legal framework. As a result of these changes, the right to the mandatory procurement previously granted to the applicant has been permanently revoked.

The legal consequences of the restriction on fundamental rights provided for in the contested norms are not proportionate, since the applicant has to reimburse all the aid received not only for the year 2020, to which the annual electricity report not submitted on time refers, but also for the first three months of

the year 2021. The adverse legal consequences thus extend beyond the period of the alleged violation.

11. Assistant Professor of the Faculty of Law at the University of Latvia, *Mg. iur.* Zane Norenberga, i.e. the invited party, considers that the contested norms fail to conform to the legal framework of the European Union in the field of State aid, as they do not provide for the assessment of compliance of State aid with the conditions for the receipt thereof, nor is the amount of State aid to be recovered assessed individually.

The State aid disbursed to the applicant does not constitute unlawful aid, since the State aid scheme for mandatory procurement is not itself called into question, i.e. the State aid was not implemented in breach of Article 108(3) of the Treaty on the Functioning of the European Union (hereinafter – the TFEU). The contested norms were adopted in order to prevent misuse of the granted State aid. Misused State aid is aid which has been approved in advance by the European Commission and, therefore, not the initial granting of the aid but its subsequent use infringes the terms of the authorised aid scheme, namely, the provisions of national law governing that scheme or the additional conditions which the Member State has committed to comply with so that the European Commission would approve that scheme. Misused State aid is also subject to recovery, as is unlawful aid. The legal framework of Latvia defines misused State aid as unjustified State aid and equates it with unlawful State aid.

The principle of the rule of law, enshrined in European Union law, requires that in order to recover the disbursed State aid, it must first be established that it is unlawful. In particular, the State Construction Control Bureau should establish which legal norms governing the relevant aid scheme have been violated in such a way that the beneficiary, due to the violation, is no longer entitled to receive the aid already granted thereto. Moreover, it is necessary to establish that there has been a violation not of any legal norm, but of the legal norm which precludes the receipt of State aid. Although the information to be provided in the annual electricity report is relevant for the assessment of the compatibility of the State aid,

the fact that the deadline for the submission of the report was missed does not in itself prove non-compliance with the conditions for receiving State aid. The revocation of State aid cannot be a sanction for the violation of legal norms which has not been followed by a finding of non-compliance with the conditions for receiving State aid.

The amount of aid to be recovered should be determined individually, but the contested norms preclude this. If, however, State aid has been unlawfully granted, the person who has received it and has thereby obtained an undue advantage is also liable to pay interest on the use of the relevant funds. Consequently, in respect of this aspect the contested norms fail to conform to Article 107 of the TFEU.

As regards the Renewable Energy Directive, the invited party points out that Article 6(1) of the Directive is not applicable for the purposes of assessing the compatibility of the contested norms with fundamental rights. This norm limits the ability of a Member State to modify the conditions of a legal State aid, making the granted rights ineffective or uneconomic, but the contested norms provide for the revocation of the State aid.

Concluding Part

12. The applicant requests the Constitutional Court to assess the conformity of several legal norms with the first three sentences of Article 105 of the Constitution.

If the conformity of several legal norms with the legal norm of higher legal force is contested, then the court, considering the nature of the case under consideration, must determine the most effective approach to assessing this conformity (*see, for example, Paragraph 13 of the judgement of the Constitutional Court of 15 May 2020 in Case No. 2019-17-05*).

12.1. The contested Paragraph 41 of Regulation No. 560 (hereafter – in the wording in force until 31 March 2022) provided that in case of failure to submit the annual electricity report by the merchant, the Bureau shall revoke the right to

the mandatory procurement granted to the merchant. However, the contested Sub-paragraph 60.2 of Regulation No. 560 provided that in such a case the merchant is required to reimburse the State aid received for the period for which the annual electricity report has not been submitted. The applicant missed the deadline for the submission of the annual electricity report laid down in Paragraph 38 of Regulation No. 560. For this violation, in accordance with the contested norms, the right to the mandatory procurement of the applicant was revoked and the obligation to reimburse the State aid received for the period for which the annual electricity report had not been submitted was imposed.

Consequently, in the case subject to examination it is necessary to assess whether the contested norms, as a uniform legal framework, which provides for the revocation of the right granted to sell the generated electricity within the scope of the mandatory procurement, as well as to impose the obligation to reimburse the received State aid in the event that the annual electricity report is not submitted within the specified deadline, conform to the Constitution.

12.2. The applicant qualifies as the producer of electricity which uses hydropower. However, both contested norms applied not only to merchants which use hydropower to generate electricity, but also to merchants which use other renewable energy resources for the same purpose, i.e. biogas, biomass, and wind energy (*see Paragraph 3 of Regulation No. 560*). On the other hand, the contested Sub-paragraph 60.2 of Regulation No. 560 was formulated in such a way that it applied to various violations committed by electricity producers.

Since the contested norms regulate different situations, it is necessary to specify to what extent the constitutionality of the contested norms should be assessed (*see Paragraph 15 of the judgment of the Constitutional Court of 23 May 2024 in Case No. 2023-34-01*).

12.2.1. In accordance with Paragraph 38 of and Annex 4 to Regulation No. 560, the annual electricity report included information on the amount of electricity generated and consumed, as well as other information describing the operation of the power plant, depending on the type of electricity generation selected by the producer. Thus, producers using different technologies had to

provide different information in their annual electricity report. However, the contested norms provided for the same legal consequences for all electricity producers using renewable energy resources within the mandatory procurement system, which occurred upon failure to submit the annual electricity report within the specified deadline. The Constitutional Court recognises that by assessing the impact of the contested norms on all merchants, regardless of the renewable energy resources they use to generate electricity, it can be ensured that the regulation which fails to conform to the Constitution is eliminated as widely as possible. Moreover, in the given case, the materials contained in the case file, including the observations included in the response of the Cabinet, are sufficient to assess the constitutionality of the contested norms with regard to all merchants generating electricity from renewable energy resources.

Consequently, the Constitutional Court will assess the constitutionality of the contested norms with regard to the merchants that use any of the renewable energy resources specified in Paragraph 3 of Regulation No. 560 for the generation of electricity.

12.2.2. The contested Sub-paragraph 60.2 of Regulation No. 560 provided for the obligation to reimburse the received State aid in cases of the violations referred to in Paragraphs 39 and 41 of this Regulation. Paragraph 39 of Regulation No. 560 applied to cases where the merchant whose right to participate in the mandatory procurement has been revoked or expired has submitted its final annual electricity report and it has revealed violations for which the right to the mandatory procurement of the merchant should have been revoked earlier. On the other hand, the contested Paragraph 41 of Regulation No. 560 applied to cases where the merchant has not submitted the annual electricity annual report within the deadline provided for in this Regulation, as happened in the present case of the applicant.

Taking into account the situation of the applicant and the arguments provided in the case, the Constitutional Court will assess the constitutionality of Paragraph 60.2 of Regulation No. 560 insofar as it relates to Paragraph 41 of this Regulation.

13. The first three sentences of Article 105 of the Constitution state the following: “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.”

For the purposes of Article 105 of the Constitution, the right to own property shall be understood as all rights pertaining to property, which a person may exercise on his or her own behalf and use at his or her own discretion, as well as various economic interests of a person related to carrying out commercial activities (*see Paragraph 17.1 of the judgment of the Constitutional Court of 12 February 2020 in Case No. 2019-05-01*). The right to own property also includes contractual rights with economic value (*see Paragraph 8.2 of the decision of the Constitutional Court of 20 April 2010 on the termination of proceedings in Case No. 2009-100-03*).

The Constitutional Court has already recognised that the right to own property is protected by the right granted by an administrative act issued by the Ministry of Economics and by a contract concluded with a public trader to sell the generated electricity at an increased price within the scope of the mandatory procurement. In such cases, the object of the right to own property is the right acquired by the merchant to sell the generated electricity within the scope of the mandatory procurement (*cf. Paragraph 13.1 of the decision of the Constitutional Court of 28 May 2021 on the termination of proceedings in Case No. 2020-52-01 and Paragraph 20 of the judgment of the Constitutional Court of 27 October 2022 in Case No. 2021-31-0103*).

It follows from the materials of the case that the applicant generates electricity in hydroelectric power plants owned thereby. On the basis of the decisions of the Ministry of Economics the applicant has acquired the right to sell the generated electricity in the form of the amount of electricity subject to mandatory procurement. Thus, the right granted to the applicant by the administrative acts to sell the generated electricity within the scope of the mandatory procurement falls within the scope of the right to own property.

The contested norms restrict the abovementioned right, since in the event that the merchant has not submitted the annual electricity report by 1 March of the current year, they provide for both the revocation of the right to the mandatory procurement and the obligation to reimburse the State aid for the period starting from the first day of the period for which the annual electricity report should have been submitted.

Consequently, the contested norms restrict the right of the applicant to own property included in the first three sentences of Article 105 of the Constitution.

14. When ascertaining whether the restriction of the individual of the right to own property is justified, the Constitutional Court must examine whether it has been established by a legal norm adopted according to the procedures provided for in laws and regulations, including by complying with the principle of good legislation (*see Paragraph 19 of the judgment of the Constitutional Court of 21 March 2023 in Case No. 2022-06-03*).

The Constitutional Court has repeatedly concluded that the right to own property may also be restricted by the Cabinet regulations (*see Paragraph 32 of the judgment of the Constitutional Court of 27 October 2022 in Case No. 2021-31-0103 and Paragraph 13.1 of the judgment of 21 December 2023 in Case No. 2022-28-03*). However, the authorisation of the Cabinet to issue external legal acts extends only to the extent that the law grants such authorisation to the Cabinet.

The *Saeima*, i.e. the invited party, states the following: The Cabinet was entitled to determine that the failure to submit the annual electricity report within the specified deadline is one of the violations for which the rights to State aid granted to electricity producers shall be revoked; however, the will of the legislator should not be interpreted as the right of the Cabinet to establish such procedural arrangements which would provide for the revocation of the rights to State aid without prior warning.

The contested norms have been issued, *inter alia*, on the basis of Section 29, Paragraph four and Section 31.^{2}, Paragraph three of the Electricity Market Law.

These norms stipulate that the Cabinet shall determine the procedures for monitoring the mandatory procurement and the violations for which the right to the mandatory procurement shall be revoked, as well as the procedures for revoking such right. The Constitutional Court has already concluded that the *Saeima* has regulated the most important matters in respect of the right of merchants to sell the generated electricity in the form of the amount of electricity subject to mandatory procurement. However, the authorisation granted to the Cabinet does not prescribe specific criteria for obtaining, exercising, or revoking the right to the mandatory procurement. The Cabinet, acting within the scope of the authorisation, may establish these criteria itself (*see Paragraph 32.1 of the judgment of the Constitutional Court of 27 October 2022 in Case No. 2021-31-0103*). The contested norms establish one of the cases where the right to participate in the mandatory procurement shall be revoked and the State aid received shall be reimbursed. Thus, the contested norms have been issued on the basis of the authorisation provided for in Section 29, Paragraph four and Section 31.^{2}, Paragraph three of the Electricity Market Law.

The parties to the case have not raised any objections and the Constitutional Court has no doubts that the contested norms are available in accordance with the requirements of laws and regulations and are sufficiently clearly formulated to enable a person to understand the content of the rights and obligations arising therefrom and to foresee the consequences of the application thereof, as well as they have been issued according to the procedure which complies with the principle of good legislation.

Therefore, the restriction on fundamental rights provided for in the contested norms is prescribed by law.

15. Any restriction of fundamental rights must be based on circumstances and arguments explaining the necessity thereof, namely, the restriction is imposed for the sake of important interests, i.e. the legitimate objective (*see, for example, Paragraph 9 of the judgment of the Constitutional Court of 22 December 2005 in Case No. 2005-19-01*).

The Cabinet points out that the legitimate objectives of the restriction of fundamental rights provided for in the contested norms is both public welfare and protection of the rights of other persons. The contested norms make the State aid scheme more effective by preventing unjustified receipt of State aid. This will reduce costs for end consumers, while eliminating mismanagement and dishonest behaviour in the sector and strengthening the Latvian economy. The applicant also agrees that the restriction of fundamental rights has a legitimate objective, i.e. to monitor the justification for the receipt of State aid and the use of State funds.

Any State aid scheme is designed and granted for a specific purpose. State aid for energy in the European Union is an important instrument for moving towards climate neutrality (*see Schöning F., Ziegler C. What is State Aid. In: Hancher L., de Hauteclocque A., Salerno F. M. (Eds.) State Aid and The Energy Sector. Oxford: Hart, 2018, p. 4*). Therefore, the objective of the aid scheme introduced in Latvia, i.e. the mandatory procurement system, is also to promote the deployment of renewable energy resources and high-efficiency cogeneration (*see Paragraph 4 of the Commission Decision*).

The State aid provides an advantage to merchants to operate in the relevant sector of commercial activity. It is therefore in the interest of the public welfare that State aid is targeted and granted only to merchants who conform to the requirements of the legal norms and whose activities contribute to achieving the objective of State aid. Accordingly, the State has the obligation to monitor the use of State aid and ensure that a competitive market is maintained and that disproportionate and unjustified market distortion is prevented *(cf. Paragraph 13 of the judgment of the Constitutional Court of 18 April 2019 in Case No. 2018-16-03 and Paragraph 22 of the judgment of 21 March 2023 in Case No. 2022-06-03*). In addition, the monitoring of the State aid scheme must be such as to allow responding as promptly as possible in the event of any violations by beneficiaries of State aid.

The monitoring of the exercise of the right of the mandatory procurement in Latvia is carried out, *inter alia*, through the annual electricity report, from which the State Construction Control Bureau obtains aggregated information on the

operation of the power plant in the previous year. The revocation of the right to the mandatory procurement in case of failure to submit the annual electricity report within the deadline and the reimbursement of the aid received from the beginning of the relevant period are aimed at ensuring that State aid is not received when the State Construction Control Bureau is prevented from verifying the compliance of the State aid received with the mandatory procurement requirements. The contested norms thus ensure the monitoring of the use of the State aid scheme and protect the general public interest in the targeted granting of advantages ensured by the right to the mandatory procurement.

Consequently, the restriction on fundamental rights provided for in the contested norms has a legitimate objective, i.e. the protection of public welfare.

16. When assessing the proportionality of the restriction on fundamental rights, the Constitutional Court must first examine whether the selected measures are appropriate for achieving the legitimate objective, i.e. whether the selected measures ensure the achievement of the legitimate objective.

The applicant has no objections in this regard and the Cabinet has also indicated in its response that the contested norms are suitable for achieving the legitimate objective of the restriction on fundamental rights, as they help to prevent unjustified distortions of competition in the electricity market, which in turn affects the final price of electricity.

In the case of all electricity producers participating in the mandatory procurement, the annual electricity report shall, *inter alia*, provide the information necessary for the calculation of the internal rate of return and the assessment of the depreciation of the fixed assets of the power plant. In the case of producers which generate electricity through cogeneration, the annual electricity report shall provide initial information on the efficiency of the generated thermal energy and the efficiency of the cogeneration plant (*see Paragraph 38 of Regulation No. 560 and the opinion of the State Construction Control Bureau*).

The capping of the internal rate of return to prevent overcompensation of the electricity producer was a precondition for declaring the State aid scheme of Latvia compatible with the internal market of the European Union (*see Paragraphs 75 to 77 of the Commission Decision*). It is recognised in the Commission Decision (*see Paragraphs 14 and 78 of the Commission Decision*) and reinforced in Paragraph 11 of Regulation No. 560 that State aid may be granted only up to the full depreciation of the fixed assets of the power plant. Otherwise, there is a risk that the State aid could be excessive and consequently affect the interests of the final consumers and alongside the interests of the society as a whole (*see Paragraph 23.1 of the judgment of the Constitutional Court of 21 March 2023 in Case No. 2022-06-03*). Conversely, promotion of the efficiency of power plants, including the efficient use of thermal energy, is one of the objectives of the mandatory procurement scheme (*see Paragraph 5 of the Commission Decision*).

The information provided in the annual electricity report helps the State Construction Control Bureau to determine whether State aid payments should be continued, reduced, or suspended entirely. The State can prevent unjustified market distortions by revoking the right to the mandatory procurement and imposing the obligation to reimburse the State aid received for the relevant period in case the merchant fails to submit the annual electricity report within the specified deadline. In particular, the restriction on fundamental rights provided for in the contested norms ensures that the electricity producer does not receive State aid and reimburses the State aid received if the State Construction Control Bureau is prevented from obtaining aggregate information on the operation of the power plant in the previous year in order to verify the compliance of the State aid received with the mandatory procurement requirements.

Thus, the revocation of the right to the mandatory procurement and the recovery of the disbursed State aid in the event of failure to submit the annual electricity report within the specified deadline is an appropriate measure to protect public welfare.

Therefore, the selected measure is suitable for achieving the legitimate objective of the restriction on fundamental rights.

17. When assessing the proportionality of the restriction of fundamental rights, the Constitutional Court must also examine whether the selected measures are necessary for achieving the legitimate objective. The restriction on fundamental rights provided for in the contested norms is necessary in cases where there are no other measures which would be equally effective and the selection of which would be less restrictive of the fundamental rights of individuals. Moreover, a more lenient measure is not any other measure but only the measure whereby the legitimate objective can be achieved at least to the same degree (*see Paragraph 20 of the judgement of the Constitutional Court of 15 February 2024 in Case No. 2023-04-0106*).

The applicant considers that the legitimate objective of the restriction on fundamental rights can be achieved by a measure which would be less restrictive of the rights of individuals that was previously included and is currently included in the legal norms, i.e. a warning to be sent to the merchant in the event of late submission of the annual electricity report. The applicant has also indicated that other, more proportionate sanctions for its violation are possible, for instance, the imposition of a contractual penalty.

The Cabinet, on the other hand, points out that there are no other equally effective measures which would be less restrictive of the fundamental rights of individuals. The State has wide discretion in terms of deciding how the objectives of the State aid scheme are to be achieved. A responsible and diligent merchant is aware of the obligations imposed thereon as part of the mandatory procurement scheme, including the submission of the annual electricity report within the specified deadline, and therefore no further reminders of these obligations are necessary. It is important to receive the annual electricity report as soon as possible in order to establish violations in the actions of the merchant and, if necessary, to decide on the revocation of the right to the mandatory procurement.

In view of the above, the Constitutional Court must first of all establish whether the substitution of the legal consequences provided for in the contested norms, i.e. revocation of the right to participate in the mandatory procurement and

reimbursement of State aid, for more lenient sanctions should be recognised as an alternative measure for protecting public welfare. Consequently, the Constitutional Court must examine whether the procedures for taking a decision which would provide for individual warning of the merchant before taking the relevant decision should be recognised as an alternative measure.

17.1. A sanction for the violation of a legal norm as such is a punitive measure. The application expresses the opinion that the legal consequences provided for in the contested norms are also of a punitive nature. Therefore, according to the applicant, it is possible to replace these legal consequences with, for instance, a contractual penalty as a more proportionate sanction.

The State aid in accordance with Article 107 of the TFEU distorts or threatens to distort competition by favouring certain undertakings and affecting trade between Member States (*see also Paragraph 31 of the judgment of the Court of Justice of the European Union of 12 January 2023 in Joined Cases C-702/20, C-17/21 "GM"*). In order to ensure that the impact of aid on competition is proportionate, it is important to ensure that State aid is granted only to those merchants who comply with all provisions related to State aid. Therefore, where aid has been unlawfully or unjustifiably received, the recovery procedure must result in the actual repayment of all wrongly received sums (*cf. Paragraph 44 of the judgment of the Court of Justice of the European Union of 12 May 2005 in Case C-415/03 Commission v Greece*).

It follows from the long-standing and consistent case-law of the Court of Justice of the European Union that recovery of unlawful or unjustified State aid is not a sanction, but logical consequences of depriving a merchant of an undue advantage (*see Paragraph 35 of the judgment of the Court of Justice of the European Union of 15 November 2018 in Case T-207/10 Deutsche Telekom AG and the case-law specified therein*). In this regard, the decision to recover the already granted State aid is equivalent to the decision refusing to grant further the already granted State aid. In particular, the obligation to reimburse State aid for the relevant period and the revocation of the right to the mandatory procurement are not aimed at penalising the merchant, but at restoring the previous legal situation

in the interests of public welfare, which prevents undue advantages, either past or future, from being granted to the merchant which fails to comply with the provisions related to State aid. Consequently, the legal consequences provided for in the contested norms are not of a punitive nature and are not comparable to sanctions. Therefore, the legitimate objective of the restriction on fundamental rights cannot be achieved by any other sanction, for instance, a contractual penalty.

17.2. In order to assess whether the individual warning of the merchant, as a procedural step in the monitoring of the mandatory procurement system, could be considered as a measure which is less restrictive of the fundamental rights which achieves the legitimate objective equally effectively, the importance of the annual electricity report and the deadline for the submission thereof for the implementation of such monitoring must be taken into account.

Article 108(3) of the TFEU imposes the obligation on the authorities of a Member State to recover unlawfully and unlawfully granted State aid on their own initiative (*cf. Paragraphs 92 to 95 of the judgment of the Court of Justice of the European Union of 5 March 2019 in Case C-349/17 Eesti Pagar AS*). Thus, the State Construction Control Bureau, as the responsible authority, has to ensure that merchants conform to all the requirements laid down in the laws and regulations regarding the mandatory procurement system. In order to be able to carry out this task, the Bureau needs an appropriate legal framework to effectively monitor the functioning of the mandatory procurement system and to react as quickly as possible to violations committed by merchants.

As mentioned above, the annual electricity report summarises the information necessary for the monitoring of the mandatory procurement system. The Constitutional Court draws attention to the fact that the obligation of the State Construction Control Bureau to monitor the use of State aid is not limited to receiving the information included in the annual electricity report. According to Paragraph 47 of Regulation No. 560, the State Construction Control Bureau has the obligation to verify the conformity of the power plant with the requirements of laws and regulations and the reliability of the information submitted. Therefore, other provisions of Regulation No. 560 also authorise the Bureau to obtain

information from other sources and carry out inspections at power plants when monitoring the mandatory procurement system (*see Paragraphs 37, 45, and 47 of Regulation No. 560 and the opinion of the State Construction Control Bureau*). Thus, the legal framework included in Regulation No. 560 is generally aimed at ensuring that the information provided in the annual electricity report is verified by the State Construction Control Bureau, and in case of non-compliance, for instance, due to incorrect installation of the meter, it is possible to decide on the revocation of the aid.

The annual electricity report is therefore an important tool as such, enabling the State Construction Control Bureau to monitor the functioning of the mandatory procurement system and to prevent cases of undue State aid. Given the impact of State aid on competition, it is particularly important to prevent unjustified State aid as soon as possible. Therefore, failure to submit the annual electricity report cannot be considered as a formal infringement and compliance with the reporting deadline is important for the effective monitoring of the mandatory procurement system.

According to the Constitutional Court, the applicant requests to provide for different procedural arrangements or advantage in the case when a violation of the provisions on the monitoring of the mandatory procurement system has been committed. In fact, it wants to ensure that if the merchant, for whatever reason, fails to comply with the deadline for the submission of the electricity report, the consequences clearly laid down in the legal norms, i.e. revocation of the right to participate in the mandatory procurement and the obligation to reimburse State aid, do not apply, but the merchant is reminded of the necessity to comply with the obligation laid down in the legal norms and is individually warned of the consequences that are already clearly laid down in the legal norms.

A legal framework that would provide for a warning to the merchant would not change the legal consequences that would apply to the merchant if the annual electricity report had not been submitted at all or if other violations are established in the actions of the merchant. In particular, in both these cases, even after the warning, the right to the mandatory procurement of the merchant would be revoked

and the merchant would be required to reimburse the State aid for the relevant period. Thus, a warning in these cases would effectively give the merchant an advantage, i.e. the possibility to participate in the mandatory procurement for a further period of time, and would only delay the legal consequences that would be attributable to the merchant which fails to conform to the requirements laid down in Regulation No. 560.

If the merchant submits its annual electricity report after receiving the warning and no other violations are established, the warning would give the relevant merchant an advantage. In particular, in such a case, the warning would allow the merchant to receive State aid even after the violation of the monitoring provisions of the mandatory procurement system and would give it more time to prepare and submit its annual electricity report than other merchants who have submitted their reports within the specified deadline.

In view of the necessity to effectively monitor the mandatory procurement system and to terminate and recover unlawfully granted State aid as soon as possible, the warning of the merchant cannot be regarded as a measure for achieving the legitimate objective of the restriction on fundamental rights at least to the same degree.

Therefore there are no other, more lenient measures by which the legitimate objective of the restriction on fundamental rights could be achieved at least to the same degree.

18. When assessing whether the restriction on fundamental rights complies with the legitimate objective, it must be ascertained whether the adverse consequences that the individual incurs as a result of the restriction on his or her fundamental rights are outweighed by the benefit that society as a whole derives from this restriction (*see Paragraph 25 of the judgment of the Constitutional Court of 7 March 2017 in Case No. 2016-07-01*). Thus, the Constitutional Court must ascertain the interests to be balanced and determine which of those interests should be given priority. In the present case, the interests of the merchant who wishes to receive State aid, on the one hand, and the interests of public welfare covered by

the legitimate objective of the restriction on fundamental rights laid down in the contested norms, on the other hand, must be balanced.

All merchants receiving State aid must be careful and responsible in the exercise of the rights granted to them and comply with all the obligations laid down in the legal norms. The obligation to be careful and responsible is particularly important in view of the fact that, at the time when the contested norms were in force, the final consumers of electricity also paid for the State aid.

Moreover, the obligation to submit the annual electricity report existed both at the time when the applicant was granted the right to sell the electricity generated in hydroelectric power plants within the scope of the mandatory procurement (*see Paragraph 39 of Cabinet Regulation No. 198 of 24 February 2009, Regulations Regarding the Generation of Electricity Using Renewable Energy Resources and the Procedures for Price Determination*) and at the time when the European Commission assessed the compatibility with the internal market of the State aid scheme implemented by Latvia (*see Paragraph 60 of Regulation No. 262*). The obligation to submit the annual electricity report is therefore not a new, unprecedented requirement to which the merchant would have to adapt.

The total period for the preparation and submission of the annual electricity accounts, i.e. the first three months of the year, is sufficient to comply with this obligation within the deadline provided for in legal norms and without the need for a specific reminder. In the present case, the public trader has pointed out that in the first half of January, the merchants already have the data necessary for the preparation of the report on the amount of electricity transferred to the network in December of the previous year.

Moreover, if the merchant does not fulfil the requirements provided for in legal norms, it cannot rely on the State to continue granting aid, without requiring to reimburse the aid already received for the relevant period. Moreover, in each case when the State Construction Control Bureau decides on the revocation of the right to the mandatory procurement, an individual assessment is provided in accordance with the procedures laid down in the Administrative Procedure Law (*cf. Paragraph 42 of the judgment of the Constitutional Court of 27 October 2022*

in Case No. 2021-31-0103). Also in the case of the applicant, prior to the application of the legal consequences included in the contested norms, i.e. the revocation of the right to the mandatory procurement and the obligation to reimburse the State aid received in the relevant period, an individual assessment has been made of the reasons and circumstances for which the annual electricity report was not submitted within the deadline established by the legal norms.

Thus, the Constitutional Court concluded that the Cabinet, by establishing the restriction of the fundamental rights provided for in the contested norms, had taken care of the interests of the society as a whole, so that only those merchants who fulfilled the requirements related to the mandatory procurement system would receive State aid, and had balanced these interests with the restriction of the fundamental rights of individuals. Consequently, the benefit that society gains from the revocation of the right to the mandatory procurement of the merchant which has failed to submit the annual electricity report within the deadline established by the legal norms outweighs the adverse consequences faced by the merchant resulting from the restriction on its fundamental rights.

Thus, the restriction on the fundamental rights of an individual provided for in the contested norm is proportionate and the contested norm therefore conforms to the first three sentences of Article 105 of the Constitution.

Substantive Part

Pursuant to Sections 30 to 32 of the Constitutional Court Law, the Constitutional Court

decided as follows:

It is hereby declared that Paragraph 41 and Sub-paragraph 60.2 of Cabinet Regulation No. 560 of 2 September 2020, Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the

Procedures for Price Determination and Monitoring, insofar as it relates to Paragraph 41 of this Regulation (in the wording in force until 31 March 2022) conforms to the first three sentences of Article 105 of the Constitution of the Republic of Latvia.

The judgement is final and not subject to appeal.

The judgement shall enter into force as of the date of its publication.

Chairperson of the court hearing Irēna Kucina