# JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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**Judge of the Constitutional Court**

**Anita Rodiņa**

**DISSENTING OPINION**

**Rīga, 24 October 2024**

**Case No. 2023-35-03**

**"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"**

**1.** On 10 October 2024, the Constitutional Court delivered a judgment in Case No. 2023-35-03 "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" (hereinafter – the Judgment) whereby it was declared that the contested norms conform to the first three sentences of Article 105 of the Constitution.

While arguing my opinion, I will use the abbreviations used in the Judgment.

**2.** I agree with the findings made in Paragraphs 13–16 of the Judgment that the contested norms restrict the fundamental rights of the applicant, that these norms have been adopted on the basis of the law, that they have a legitimate objective, and that they are appropriate for the achievement of the respective legitimate objective. I also agree, *inter alia*, that the Constitutional Court, taking into account the analysis already carried out in the previous cases related to mandatory procurement, for the first time in its case-law has not analysed whether the contested norms were adopted for the purpose of an additional legitimate objective which the Cabinet has only indicated but not justified, namely, for the purpose of the protection of the rights of other persons.

**However, I do not agree with the conclusions of the Constitutional Court that 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, and that the restriction on the fundamental rights of an individual provided for in the contested norms is proportionate. Therefore, I do not agree that the contested norms conform to the first three sentences of Article 105 of the Constitution.**

**3.** The Constitutional Court has departed from its case-law in the field of State aid and in the present case has failed, in substance, to take into consideration the purpose of the establishment of the State aid scheme. Namely, the Constitutional Court has recognised in another case that the State has wide discretion in terms of reviewing the State aid scheme. At the same time, when making changes to the conditions for the aid, the objectives for which the State aid was introduced in the first place must be taken into account (*see Paragraphs 36.2 and 40.4 of the judgment of the Constitutional Court of 27 October 2022 in Case No. 2021-31-0103*). Consequently, when assessing the constitutionality of conditions aimed at withdrawal of aid, it must be ascertained whether those conditions undermine the objectives of the aid scheme. State aid intended for the development of specific sectors is necessary for the country itself and for the

European Union to develop its policy objectives. These considerations are particularly important in the context of climate change, and the Renewable Energy Directive, which is relevant to this case, imposes binding obligations on Latvia, *inter alia*, to ensure the share of renewable energy resources.

The European Green Deal is one of the main political priorities of the European Union, the goal of which is to achieve climate neutrality by 2050. The European Commission has recognised that this objective also requires the promotion of renewable energy resources (*see Communication from the Commission, The European Green Deal (COM/2019/640) and Communication from the Commission, Guidelines on State aid for climate, environmental protection and energy 2022 (2022/C 80/01), point 1*). State aid scheme is one of the ways in which the use of renewable energy resources is promoted (*see Rusche T. M. EU Renewable Electricity Law and Policy. From National Targets to a Common Market. Cambridge University Press, 2015, pp. 3–4*). The Commission Decision also states that the objective of the aid scheme introduced in Latvia is to promote the deployment of renewable energy resources and high-efficiency cogeneration (*see Paragraph 4 of the Commission Decision*).

Hence, when considering the possible alternative measures for achieving the legitimate objective, as well as when assessing the compatibility of the restriction on fundamental right with the legitimate objective, the Judgment should have taken into account the goals for which the right to sell electricity generated from renewable energy resources within the scope of the mandatory procurement scheme was granted.

In order to assess whether the warning of a merchant about the possible revocation of the right to the mandatory procurement and reimbursement of the State aid is to be recognised as a measure equally effective in achieving the legitimate objective, but more lenient in respect of the fundamental rights of an individual, the Constitutional Court had to establish whether the submission of the annual electricity report by 1 March is of decisive importance for implementing the monitoring of the conformity of an electricity producer with the requirements of the mandatory procurement. Consequently, the Constitutional Court had to

examine whether, at the time when the contested norms were in force, there were any special circumstances which prevented the introduction of the legal framework which had previously been in force and is currently in force, providing for the warning of a merchant, as well as whether the warning of merchants does not require a disproportionate amount of the State and public resources.

It should be noted that the Judgment does not provide a reasoned reply to the response of the Cabinet that the currently applicable legal framework providing for the warning of a merchant about the possible revocation of the right to the mandatory procurement is related to the introduction of the uniform technological cycle defined in the Electricity Market Law and the necessity to introduce a new notification system for merchants. This is justified by the fact that, in order to assess whether a valid and less restrictive legal regulation of fundamental rights is to be considered as an alternative to achieve the legitimate objective of a pre-existing restriction of fundamental rights, it is irrelevant for what reasons the legal regulation was changed, which is now more favourable to the person. What is relevant is whether there were alternative measures by which fundamental rights could have been restricted in a more lenient manner, namely whether, at the time when the contested norms were in force, it was possible to introduce a legal framework which would have provided for the warning of merchants.

**4.** Assessing possible alternatives to the restriction of fundamental rights, Paragraph 17.2 of the Judgment states that "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."

However, the Judgment does not correctly assess the wide discretion of the State Construction Control Bureau in monitoring the mandatory procurement system that by no means is limited to the receipt of the annual electricity report.

In order to ascertain the conformity of an electricity producer with the mandatory procurement requirements, the State Construction Control Bureau is entitled to request the necessary information and access the power plant and the metering equipment thereof. Moreover, the Bureau may carry out both scheduled and unscheduled inspections of power plants (*see Paragraph 47 of Regulation No. 560*). In addition, the Bureau receives information from other sources, for instance, the following information from the public trader: information on the amount of electricity sold within the scope of the mandatory procurement and the amount of aid provided, the connection capacity, the biogas raw materials used by biogas plants, as well as possible violations that have come to the attention of the public trader *(see Paragraphs 37 and 45 of Regulation No. 560 and the opinion of the State Construction Control Bureau*). Depreciation of fixed assets for power plants is calculated in accordance with the laws and regulations regarding accounting requirements (*see Paragraph 11 of Regulation No. 560*), therefore this information can also be obtained from the annual report submitted by the merchant to the State Revenue Service, which, *inter alia*, includes information on depreciation of fixed assets (*see Sub-chapter 5.4 of Cabinet Regulation No. 775 of 22 December 2015, Regulations Regarding the Application of the Law on the Annual Financial Statements and Consolidated Financial Statements*). The information on the total amount of electricity generated, the heat and fuel accounting data must be stored on-site at the power plant by the producer (*see Paragraph 21.5 of Regulation No. 560*). If the Bureau, upon inspection of a power plant, establishes, for instance, that the metering equipment is not correctly installed or verified, this *per se* serves as grounds for the revocation of the right to the mandatory procurement after a warning has been sent to the producer (*see Paragraph 49.2 of Regulation No. 560*). Similarly, depreciation of fixed assets

constitutes an independent basis for the revocation of the right to the mandatory procurement (*see Paragraph 11.1 of Regulation No. 560*).

Hence, the annual electricity report is not the only source from which the State Construction Control Bureau obtains the necessary information on the operation of the power plant within the framework of the monitoring thereof. If the obligation of the Bureau to monitor the mandatory procurement system were limited to the receipt of the annual electricity report, it would have to be concluded that the requirement to submit the report is formal or that the Bureau is not entitled to monitor the mandatory procurement system without receiving the report. As appears from the aforementioned provisions of Regulation No. 560, while the annual electricity report undeniably contributes to the implementation of the monitoring of the mandatory procurement system, the receipt thereof *per se* is not a precondition for the Bureau to take the necessary decisions in cases where the producer has violated the legal norms. It also follows from the case-law of the Court of Justice of the European Union in Case *C-349/17 Eesti Pagar AS*, referenced in the Judgment, that the Bureau has the obligation to take appropriate decisions even when it itself, and not only from the annual electricity report, establishes that State aid should be recovered.

**5.** It is stated in Paragraph 17.2 of the Judgment that "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."

However, the Judgment does not assess whether the failure to submit the annual electricity report by the deadline of 1 March *per se* has negative effects on competition.

As can be concluded from the legal framework of Regulation No. 560 analysed in Paragraph 4 of the Dissenting Opinion, irrespective of the date of submission of the annual electricity report, the State Construction Control Bureau

may also visit the power plant without prior notice and inspect the information contained in the report and, if any violations are established at the power plant, decide on the revocation of the right to the mandatory procurement and reimbursement of the State aid received for the relevant period, provided that such legal consequences for the relevant violation are stipulated in the legal framework. Regulation No. 560 allows the Bureau to fully monitor the mandatory procurement system, identify possible violations, and decide on the revocation of the right to the mandatory procurement and reimbursement of the State aid at any time, regardless of the date of submission of the annual report.

The Judgment does not analyse and does not establish any special circumstances which, at the specific time when the contested norms were in force, would have required that, if a merchant missed the deadline for the submission of its annual electricity report, the right to the mandatory procurement thereof should be revoked without notice and the obligation to reimburse the State aid should be imposed. Also, the current wording of Paragraph 41 of Regulation No. 560, which provides for sending a warning, does not prevent the State Construction Control Bureau from fully monitoring merchants within the scope of the mandatory procurement system.

Thus, the specific date of submission of the annual electricity report, i.e. 1 March, *per se* was not of decisive importance for implementing the monitoring of the conformity of an electricity producer with the requirements of the mandatory procurement during the period of validity of the contested norms.

**6.** Paragraph 17.2 of the Judgment states: "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." As regards the situation of the applicant, the aforementioned paragraph of the Judgment states that "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."

I cannot disagree that a more lenient measure in respect of restricting fundamental rights can also be considered an advantage in general. That is why, in my opinion, sending a warning to a merchant may be considered a more lenient measure in respect of the fundamental rights of an individual, especially taking into account that the Constitutional Court has already recognised that: fundamental rights may be restricted in a more lenient manner if the fulfilment of a certain legal obligation is postponed or divided into time limits (*see Paragraph 14.2 of the judgment of the Constitutional Court of 17 February 2023 in Case No. 2022-05-01*) or if different procedural arrangements are established in respect of the right of an individual to obtain information (*see Paragraph 21 of the judgment of the Constitutional Court of 13 November 2021 in Case No. 2018-18-01*), or if the right of an individual to form a religious association is exercised in the shorter time limit (*see Paragraph 21.3.2 of the judgment of the Constitutional Court of 26 April 2018 in Case No. 2017-18-01*), or if a different procedure is laid down for taking a decision addressed to an individual, providing for an individual assessment on a case-by-case basis(*see, for instance, Paragraph 21 of the judgment of the Constitutional Court of 4 November 2021 in Case No. 2021-05-01*).

It should also be noted that the case file contains the letter of 28 April 2022 from the Ministry responsible for the sector at the time, the Ministry of Economics, sent to the Administrative Regional Court, in which the Ministry explains why the procedures according to which a merchant would first receive a warning for failure to submit the annual electricity report has been reinstated. The letter points out that the Ministry of Economics, in the course of drafting the amendments, has assessed the entire mechanism for monitoring the mandatory procurement system, taking into account the inter-coherence of the responsibilities applicable to violations of various degrees of severity. The Ministry concluded that the objectives of monitoring in relation to the failure to submit the annual report within the set deadline could be achieved by issuing a warning to a merchant for this type of

violation, while the decision on the revocation of the right to the mandatory procurement would be taken if the merchant fails to submit the annual report within two months after receipt of the warning (*see the case file, vol. 4, pp. 56–58*). Hence, also during the relevant period, the Ministry responsible attributed the renewal of the warning to the fact that the pre-existing arrangements were disproportionate compared to the consequences of other violations of Regulation No. 560 and that the monitoring of the mandatory procurement can be equally effective even if the report is submitted after the warning has been issued.

In particular, it should be noted that Regulation No. 560 provides in a number of cases, and also at the time when the contested norms were in force, that a warning about the possible revocation of the right to the mandatory procurement should be sent to merchants, for instance, in such cases if the installed capacity of the power plant connected to the network of the system operator does not correspond to the capacity specified in the contract with the public trader, if the deadlines for calibration or verification of the metering or measurement system installed in the power plant are missed by up to 10 days, if the operation of the power plant does not comply with the laws and regulations laying down requirements for the operation of power plants in the field of environmental protection or occupational safety *(see Paragraphs 43, 49, and 51 of Regulation No. 560 in the wording in force until 31 December 2020*). This means that at the time when the contested norms were in force, the system of sending a warning to monitor the exercise of the right to the mandatory procurement had already been established and was implemented in cases of various violations which, *inter alia*, may involve the misuse of State aid and the imposition of unjustified real costs on electricity end users.

Paragraph 41 of Regulation No. 560, in the current wording, provides for a warning to be sent to a merchant. The abstract of 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 to the Regulation) identifies a number of

challenges that the Amendments to the Regulation address, including the principle of the uniform technological cycle; preventing overcompensation of power plants; suspension of State aid or disbursement thereof; recovery of unjustified or unlawfully received State aid (*see https://tapportals.mk.gov.lv)*. As regards the suspension of State aid or disbursement thereof, the abstract points to the different legal consequences for different violations committed by merchants.

In view of the above, it is understandable that the renewed procedures, which provide for issuing a warning to a merchant if it has missed the deadline for the submission of the annual electricity report, is related to proportionality considerations made by the legislator. In particular, it was concluded that the monitoring of mandatory procurement can be equally effective if a merchant that has failed to submit its annual electricity report within the specified deadline is warned of the possible revocation of the right to the mandatory procurement and reimbursement of State aid.

Given that the country already had and has a system of sending warnings to monitor the exercise of the right to the mandatory procurement, it cannot be considered that sending a warning to a merchant that has failed to submit its annual electricity report within the deadline specified in Regulation No. 560 would require a disproportionate amount of the State and public resources, especially given that the warning system was extended to other violations that are not inherently incompatible with the mandatory procurement system.

**7.** I agree with the statement expressed in the Judgment that 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. However, it is important to note that a violation committed by a merchant within the scope of the mandatory procurement system may take different forms, i.e. it may be committed not only as a result of deliberately dishonest actions, but also due to negligence. Similarly, violations tend to vary depending on their impact on the calculation of the State aid subject to disbursement. A warning would allow a merchant to correct the error and submit its annual electricity report, but

a warning would not prevent the State Construction Control Bureau from carrying out the necessary inspections of the power plants and taking decisions in accordance with the results of such inspections. Moreover, if a merchant failed to submit its annual electricity report after receiving the warning, it would be subject to the same legal consequences as provided for in the contested norms, i.e. the merchant would lose its right to the mandatory procurement and would be required to reimburse the State aid received for the relevant period.

In view of all the above, I consider that a warning of the possible revocation of the right to the mandatory procurement and reimbursement of the State aid in case of failure to submit the annual electricity report within the deadline is an alternative measure to achieve the legitimate objective of the restriction of the fundamental right equally effectively, but with less restriction on the right to own property of the merchant.

**Consequently, the contested norms do not conform to the first three sentences of Article 105 of the Constitution.**

**8.** I disagree with the fact that the Judgment leaves the public interest in the climate sector, which is also served by the mandatory procurement system established to promote the use of renewable energy resources, out of the balance of balancing interests.

In balancing the interests of the public and a merchant, Paragraph 18 of the Judgment states that "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 and at the time when the European Commission assessed the compatibility with the internal market of the State aid scheme implemented by Latvia. The obligation to submit the annual electricity report is therefore not a new, unprecedented requirement to which the merchant would have to adapt."

However, at that time, the legal norms provided not only for the obligation of a merchant to submit the annual electricity report, but also for the warning of the merchant before the possible revocation of the right to the mandatory

procurement and the obligation to reimburse the State aid. The Judgment also fails to assess what has been pointed out by the invited party having issued the norms authorising the Cabinet, i.e. the *Saeima*, namely, that the contested norms were issued with a wrong understanding of the authorisation given by the legislator and that they were inconsistent with the pre-existing order which complied with the principle of good governance. The State must require the merchant to act as a diligent proprietor, but it must not forget that it must also respect the principle of good governance in its own dealings with the person, as this cooperation is also important for the long-term achievement of climate objectives in the context of this case.

Judge of the Constitutional Court Anita Rodiņa