JUDGE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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Judge of the Constitutional Court

Jautrīte Briede

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

2. I agree with the observations contained in the Judgment with regard to the necessity to monitor the mandatory procurement system and to recover unlawfully granted State aid. I also agree with the statement 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 for other merchants who have submitted their reports within the specified deadline.

3. However, I do not agree that the warning to be sent to the merchant in the event of late submission of the annual electricity report should be considered as a less restrictive measure, as specified by the applicant in the application and as analysed by the Constitutional Court in its judgment.

The revocation of the right to the mandatory procurement and the recovery of the State aid are the measures for achieving the legitimate objective. The warning only ensures more favourable administrative proceedings, possibly avoiding the measure to be applied for the violation if the person has not provided the necessary information due to forgetfulness.

4. However, I believe that, with regard to administrative proceedings, the Constitutional Court should examine only whether the procedural arrangements comply with the general principles of administrative proceedings. For example, whether the deadline for the submission of information is too short, whether such information has to be submitted the acquisition or preparation of which requires disproportionate resources, etc.

If a legal provision clearly defines the obligations of the addressee of an administrative act to be fulfilled by certain deadline and the consequences of failure to fulfil such obligations, the legislator may provide for the addressee to be

warned of such consequences prior to the issuance of the administrative; however, the warning should not be regarded as a general principle of administrative proceedings which should always be complied with when determining the procedural arrangements for monitoring. Such a principle is not included in the Administrative Procedure Law, nor has it been derived by the Court of Justice of the European Union (*see, for instance, The General Principles of EU Administrative Procedural Law. Available at: https://www.europarl.europa.eu/RegData/etudes/IDAN/2015/519224/IPOL_IDA%282015%29519224_EN.pdf*). Moreover, the Court of Justice of the European Union has recognised in a number of cases concerning the recovery of State aid that the applicant is solely responsible for the fulfilment of the requirements for granting the aid and that the authority has no obligation to remind it of the obligation to submit the relevant documents (*see Paragraph 39 of the judgment of the Court of Justice of the European Union of 26 May 2016 in Case C-273/15 'Ezernieki'*).

The European Court of Human Rights has also stated that, in general, the procedure must be such as to guarantee a fair and impartial decision and to prevent any abuse of the authorisation granted to the authorities (*cf. Paragraph 35 of the judgment of the European Court of Human Rights of 9 July 2002 in Podkolzina v. Latvia, application No. 46726/99*). Although the European Court of Human Rights has expressed this opinion in a case concerning the exclusion of a candidate from an electoral list, I believe that the principles contained therein are relatively applicable also to the regulation of administrative proceedings as assessed in the present case.

Hence, if the Constitutional Court does not recognise that the procedural arrangements established by the legislator violate the general principles of administrative proceedings, it should not assess any proposed more favourable procedural provision if it does not affect the measure to be applied for the violation. Otherwise, even if the contested norms provide for issuing a warning for late submission of the annual electricity report, the court might hypothetically have to

assess whether, for instance, a repeated warning could be regarded as an even less restrictive measure, etc.

Judge of the Constitutional Court Jautrīte Briede

The document has been signed with a secure electronic signature.