THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

JUDGEMENT
ON BEHALF OF THE REPUBLIC OF LATVIA
in Case No. 2012-01-01
December 6, 2012, Riga

The Constitutional Court of the Republic of Latvia, comprised of: chairperson of the court sitting Gunārs Kūtris, Justices Kaspars Balodis, Aija Branta, Kristīne Krūma, Uldis Ķinis and Sanita Osipova,

having regard to the application by the Department of Administrative Cases of the Supreme Court Senate on initiation of a case,

on the basis of Article 85 of the Satversme of the Republic of Latvia and Para 1 of Section 16, Para 9 of Section 17(1), as well as Section 19^1 and Section 28^1 of the Constitutional Court Law,

at the court sitting of 9 November 2012 examined in written procedure the case

"On Compliance of Para 12 of Transitional Provisions of the Waste Management Law, insofar as it Applies to Contracts Entered into not Applying the Regulatory Enactments Regarding Public Procurement or in Non-Compliance with the Regulatory Enactments Regarding Public Procurement, with Article 1 of the Satversme"

The Facts

1. On 28 October 2010 the Saeima adopted the Waste Management Law, which entered into force on 18 November 2010.

1.1. The aforementioned law replaced the Waste Management Law of 14 December 2000. One of the aims for adopting the new law was to harmonise the practice of local governments in concluding agreement on waste management, but one of the causes for its adoption – the need to implement the requirements of the European Parliament and the Council Directive of 19 November 2009 2008/98/EC (on waste and repealing certain directives).

To bring order into the waste management sector, the Cabinet of Ministers offered to define a transitional period, during which the local governments would have had to ensure that agreements on waste management were concluded in accordance with the regulatory enactments on public procurement. Therefore Para 12 of the Transitional Provisions in the draft Waste Management Law, elaborated by the Cabinet, envisaged: "If a local government and a municipal waste manager have concluded a contract on the collection, transport, reloading or storing of municipal waste, without applying the regulatory enactments on public procurement or in non-compliance with the regulatory enactments on public procurement, the said contract shall be expire within the term specified in the contract, but no later than on 31 December 2013."

1.2. While the draft law was being prepared for the second reading, the responsible Saeima committee – the Economic, Agricultural, Environmental and Regional Policy Committee – defined its own wording of Para 12 of the Transitional Provisions: "Until 26 July 2005 the contract entered into by and between a local government and a municipal waste manager regarding collection, transport, reloading and storage of municipal waste shall expire within the term specified in the contract. If after 26 July 2005 the local government and the municipal waste manager have entered into or extended the contract regarding collection, transport, reloading and storage of municipal waste, not applying the regulatory enactment regarding public procurement, the said contract shall be terminated no later than until 1 December 2013" (*see draft law No.1838/Lp9 "Waste Management Law" for the second reading, Proposal 83*).

The preparatory materials for this norm show that the change of wording of Para 12 of the Transitional Provisions in Waste Management Law was proposed by the Employers' Confederation of Latvia, by submitting its proposal and substantiation of it

to the Economic, Agricultural, Environmental and Regional Policy Committee (*see Letter by the Employers' Confederation of Latvia of 28 June 2010 No. 2-9/196, Case Materials, Vol. 1, pp. 114 –116).*

1.3. Now Para 12 of Transitional Provisions in Waste Management Law provides: "Until 26 July 2005 the contract entered into by and between a local government and a municipal waste manager regarding collection, transport, reloading and storage of municipal waste shall expire within the term specified in the contract. If after 26 July 2005 the local government and the municipal waste manager have entered into or extended the contract regarding collection, transport, reloading and storage of municipal waste, not applying the regulatory enactment regarding public procurement, the referred to contract shall be terminated not later than until 1 July 2013."

2. The Applicant – **the Department of Administrative Cases of the Supreme Court Senate** (hereinafter – the Applicant) – examining a cassation instance case having regard to an application by a limited liability company (hereinafter – Ltd.) "Lobbel" on the actual actions by the Riga City Council, decided to stay judicial proceedings and submit an application to the Constitutional Court regarding the compatibility of Para 12 of Transitional Provisions in the Waste Management Law, insofar it applied to such contracts between a local government and household waste managers regarding collection, transport, reloading and storage of municipal waste, which had been entered into without applying the regulatory enactment regarding public procurement or in non-compliance with the regulatory enactments on public procurement (hereinafter – the contested norm), with Article 1 of the Satversme of the Republic of Latvia (hereinafter – Satversme).

2.1. If the contested norm were recognised as being compatible with the Satversme, then Ltd. "Lobbel" would not have the right to demand that the Riga City Council were imposed the obligation to organise public procurement procedure or private public partnership procedure regarding the right to provide to the municipality and its inhabitants services of municipal waste collection, transport, reloading and storage. The Applicant holds that the dispute in the case under review can be solved only if the constitutionality of the contested norm is verified.

The Applicant expressed the opinion that the contested norm was incompatible with the principle of a judicial state, enshrined in Article 1 of the Satversme. Allegedly, it followed from the contested norm that the legal consequences and legal certainty of a contract concluded unlawfully (by non-complying with the laws that are in force in the State) should be respected. Such an aim of the contested norm cannot be recognised as being legitimate.

2.2. The Applicant notes that justice is an integral part of the principle of a judicial state. Within the framework of the case, which the Applicant is examining, third persons, who have concluded contracts without participating in procurement procedure, pursuant with the contested norm continue enjoying the rights that follow from these contracts, but Ltd. "Lobbel" has been denied these rights. Para 2 of Section 2 of the Public Procurement Law provides that the purpose of the law is to ensure free competition of suppliers, as well as equal and fair treatment thereof. Whereas the contested norm envisages that those suppliers, who have obtained the right to provide services contrary to law, retain it. Thus, Ltd. "Lobbel" is in unequal and unfair situation compared to third persons in the case that is being adjudicated by the Applicant. Until the terms of the concluded waste management contracts expire, Ltd. "Lobbel" will not have the possibility to demand equal and fair distribution of rights.

The contested norm allegedly protects the legal certainty of third persons, which have obtained their right to provide waste collection services to a local government in an unlawful way. Since the principle of legal certainty should not protect unlawfully obtained rights, the contested norm is allegedly incompatible with Article 1 of the Satversme.

3. The institution, which adopted the contested act, – **the Saeima** – holds that the contested norm complies with Article 1 of the Satversme.

The Saeima notes that the legislator, in adopting the contested norm, had assessed the circumstances and decided to protect the legal certainty of persons by the transitional provisions, envisaging a reasonable term for concluding contracts on waste management in compliance with Waste Management Law.

Firstly, persons have developed legal certainty that the particular rights, which they obtained in accordance with the contracts concluded prior the adoption of the

Waste Management Law, would be retained, i.e., the right to the legal relationship already entered into. Secondly, the legislator had assessed the balance between the protection of persons' legal certainty and ensuring the interests of society. Ensuring waste management in local governments is in the interests of society. Moreover, waste management is a complex type of business activities, demanding sizeable financial investment and the certainty of persons involved in business activities that they would be able to operate in the respective field for a sufficiently long period of time.

The Saeima emphasizes that situations are possible, when the retaining of the existing regulation is in the interests of some persons and the society in general, not fast transition to the new regulation, which might bee linked to a degree of uncertainty and the risk that the appropriate level of waste management might not be ensured.

Moreover, the Saeima notes that the contracts on waste management with some persons were concluded by local governments, which acted within the limits of competence delegated to them. The principle of self-government prohibits the legislator to interfere in the operations of local governments by imposing an imperative that the concluded contracts should be automatically terminated.

If the local government has entered into contracts in non-compliance with legal requirements, their validity should be assessed in accordance with legal requirements, contesting it in court, not by a general decision adopted by the legislator, affecting all contracts of the corresponding sector and local-governments.

4. The summoned person **– the Cabinet of Ministers –** holds that the contested norm is incompatible with Article 1 of the Satversme.

The Cabinet of Ministers notes that it had identified legal problems in a number of local governments in connection with contracts on waste management that had been concluded in non-compliance with law. Therefore the Cabinet of Ministers had proposed the solution that local governments within a set term (until 31 December 2013) introduced the necessary measures to conclude the agreements on waste management in compliance with the procedure set out in regulatory enactments.

Whereas the contested norm does not at all deal with the situation with contracts on waste management signed before 26 July 2005. Therefore the Cabinet of Ministers holds that the Applicant has grounds to point to the incompatibility of the

contested norm with Article 1 of the Satversme.

5. The summoned person – **the Procurement Monitoring Bureau** – upholds the Applicant's opinion that the contested norm is incompatible with the principle of judicial state included in Article 1 of the Satversme.

The Procurement Monitoring Bureau holds that only such contracts on waste management (*inter* alia, contracts that amend the initial terms of the contract) that have been concluded in compliance with the provisions of regulatory enactments regulating public procurement or public private partnership, which have been in force at the moment of entering into contract, should be considered as having been legally concluded.

The Procurement Monitoring Bureau notes that the contracts on waste management had to be concluded in accordance with the regulatory enactments on public procurement already since 1 January 2002, when the law "On Procurement for State and Local Government Needs" entered into force. Whereas the fact that the obligation to conduct procurement pursuant to the regulatory enactments on public procurement was included in the Waste Management Law only by amendments, which were made with the law of 22 June 2005 and entered into force on 26 July 2005, should be regarded only as improvements to the legal regulation.

The Procurement Monitoring Bureau emphasizes that the contested norm creates an unequal situation also with regard to the validity of those contracts, which were entered into before 26 July 2005 (and are in force within the term of the contract), without applying the regulatory enactments in the field of public procurement or in non-compliance with them, and those contracts, which were concluded after 26 July 2005 (and are valid until 1 July 2013).

Moreover, Para 16 of the Transitional Provisions in the Waste Management Law envisages that those contracts on waste management, which have been entered into by persons, who, in the meaning of regulatory enactments in the field of public procurement are the commissioning parties, and which have been concluded before the date of coming into force of this law, are valid within the term of the contract, but not longer than until 31 December 2015. Thus, also in this case the legislator had permitted that five more years after the law had come into force the contracts, which

had been concluded without applying the regulatory enactments in force in the field of public procurement or in non-compliance with them, might remain valid.

6. The summoned person – **the Competition Council** – notes that the contested norm, keeping valid the contracts concluded by local governments and waste management operators, which are non-compliant with the regulatory enactments on public procurement, retains the ungrounded advantages of those waste management operators, who have gained them unlawfully. Moreover, the contested norm allegedly excludes equal opportunities of the competitors to apply for the provision of the service to the particular local government as the result of public procurement, as well as restricts benefits (higher quality service for lower price), which the local government and its inhabitants would gain from the competition. This regulation should be perceived as obstructing competition, and thus as incompatible both with public interests and Article 1 of the Satversme.

7. The summoned person – **the Employer's Confederation of Latvia** (hereinafter – the Employer's Confederation) – holds that, to the extent possible, equal conditions should be ensured to all market participants and that it cannot support retaining of such advantages that have been gained by actions, which are non-compliant with the regulatory enactments, however, all those contracts, which have been concluded in compliance with the requirements of regulatory enactments that were in force at the moment of concluding the contract, should be respected.

The Employer's Confederation noted: if the Constitutional Court establishes that also prior to 26 July 2005 the requirements of the regulatory enactments regarding public procurement had to be taken into account when granting the right to provide waste collection services, then the arguments presented by the Employer's Confederation in the process of drafting and adopting the contested norm should be disregarded.

8. The summoned person – **Ltd. "L&T"** – holds that judicial proceedings in case No. 2012-01-01 should be terminated, since the dispute in the administrative case can be resolved by a court of general jurisdiction, applying the contested norm in

compliance with the Satversme. The contested norm allegedly protects only those contracts that were concluded in compliance with the legal regulation that was in force at the moment of concluding the contract.

At the same time Ltd. "L&T" notes that in assessing the constitutionality of the contested norm, it should be recognised as being compatible with Article 1 of the Satversme, insofar it applies to such contracts between local governments and waste management operators on collection, transport, reloading and storing of municipal waste, which have been concluded at the time, when the obligation to apply procurement procedure in concluding such contracts did not follow from the regulatory enforcements.

The contested norm allegedly safeguards waste management operators' legal certainty that that the concluded contracts may not be terminated early. Such certainty is legal, since, as Ltd. 'L&T" holds, at the moment of concluding the contract the law did not envisage the obligation to apply procurement procedure in concluding contracts on waste management.

The regulation, which envisages early termination of a legally concluded contract, as such could not be recognised as being compatible with public interests. The negative consequences of such regulation for society should also be taken into consideration. Early termination of a lawfully concluded contract would cause losses to the respective waste management operator, who, wishing to obtain compensation for them, could submit a claim against the local government. Amendments to the law, which envisage early termination of a contract, cannot be recognised as circumstances excluding the State's or the local government's liability for termination of contract. The recognition of the contested norm, insofar it applies to legally concluded contracts, as being incompatible with the Satversme, would cause significant losses to the budgets of local governments and also inhabitants. Moreover, it should be taken into consideration that the contested norm ensures continuity of waste management and appropriate level of service.

The Substantive Part

9. Para 12 of the Transitional Provisions in the Waste Management Law

consists of two sentences. The first sentence applies to those contracts on waste management, which have been concluded prior to 26 July 2005. Whereas the second sentence applies to those contracts on waste management that have been concluded or prolonged after 26 July 2005, without applying the regulatory enactments on public procurement. The contracts referred to in the second sentence are valid until 1 July 2013.

It follows from the description of the actual circumstances of the case and the legal substantiation included in the application that the Applicant is contesting only the first sentence of Para 12 of the Transitional Provisions in the Waste Management Law, insofar it applies to contracts that have been concluded without applying or inappropriately applying the regulatory enactments on public procurement, not the whole Para 12 (*see Para 12 of Application, Case Materials Vol. 1, p.5*). The case does not contain dispute regarding the second sentence of Para 12 of the Transitional Provisions.

Hence, the Constitutional Court will assess the first sentence of Para 12 of Transitional Provisions in the Waste Management Law, insofar it applies to contracts, which have been concluded without applying or applying inappropriately the regulatory enactments on public procurement.

10. Pursuant to Para 1 of Section 15 of the law "On Local Governments" organising of municipal waste management is an autonomous function of local governments. The execution of this function is regulated both by regulatory enactments on public procurement and on waste management.

In drafting the new Waste Management Law, the Cabinet took into consideration the fact that the practice of waste management differed in different local governments. I.e., in the majority of cases contracts on waste management had been concluded without applying the procurement procedure. Therefore the Cabinet proposed harmonising the practice and envisaged in the draft Waste Management Law (hereinafter – the Draft Law) a date, by which all local governments were to conclude contracts on waste management in compliance with regulatory enactments on public procurement. It was noted in the annotation appended to the Draft Law: "Para 12 of Transitional provisions sets a term for terminating contracts on municipal waste

management, which have been concluded without applying regulatory enactments on public procurement or in non-compliance with the regulatory enactments on public procurement. [..] Para 15 of Transitional Provisions provides that with respect to all those contracts, which are to be terminated in accordance with Para 12 of Transitional Provisions, the local governments must until 31 December 2013 select the municipal waste management operator, applying regulatory enactments on public procurement or public private partnership (*see Para 4 of Section I in the annotation to the draft law No.1838/Lp9 "Waste Management Law").*

The Cabinet, by offering this wording of the Transitional Provisions, admitted that there were such contracts on waste management that had been concluded without organising procurement procedure, *inter alia*, also such contracts that had been concluded already at the time, when legal provisions clearly required to select the waste management operator in procurement procedure (*see, the Opinion by the Cabinet of Ministers, Case Materials, Vol. 2, pp. 35 – 37).* Thus, the institution that was advancing the draft law – the Cabinet of Ministers – had studied the situation in the field of waste management and initially offered a transitional period for brining order into it, during this period all contracts would be concluded in compliance with regulatory enactments on public procurement.

11. The process of adopting the contested norm shows that the legislator decided to deviate from the solution that was initially offered by the Draft Law, i.e., that all those contracts on municipal waste management, which have been concluded without applying procurement procedure, within a set period of time become invalid.

The legislator chose the solution that the Transitional Provisions of the law protected the legal certainty of some persons and envisaged unspecified term for transition to the procedure established by law for concluding contracts on waste management. The contested norm envisages that those contracts, which were signed before 26 July 2005, remain valid until the contract expires.

Thus, the legislator has protected the legal certainty of some persons, by providing that the concluded contracts on waste management shall remain in force, even though they have been concluded without applying the procurement procedure.

12. It follows from the written reply by the Saeima that the decision to protect the legal relationships, which follows from the contracts signed prior to 26 July 2005, is substantiated by the fact that on this date the requirement to apply regulatory enactments on public procurement was *expresis verbis* included in the Waste Management Law. In adopting the contested norm the legislator's aim had been to protect those contracts, which had been concluded at the time, when the requirement to apply the procurement procedure had not been included in regulatory enactments (*see, written reply by the Saeima, Case Materials, Vol.1, p. 110).*

The Applicant contests such action by the legislator, noting that the requirement to apply the regulatory enactments on public procurement to the contracts on waste management was in force already before 2005.

Therefore the contracts, which have not been concluded in compliance with these regulatory enactments, should not be protected. The Cabinet of Ministers, the Procurement Monitoring Bureau, and the Competition Council express a similar opinion, noting that also prior to 26 July 2005 local governments could conclude contracts with private persons on granting the right to collect municipal waste only by organising public procurement or by granting concession.

Thus, first of all the date, as of which the requirement that the regulatory enactments on public procurement must be applied in concluding contracts on waste management had been in force, must be established.

13. The law "On Procurement for State and Local Government Needs" was in force from 1 January 2002 to 30 April 2006. This law imposed the obligation upon the commissioning parties to conduct public procurement with regard to supply of goods, performance of construction works or provision of services for the needs of the commissioning party. The Procurement Monitoring Bureau notes that "provision of services" comprised also waste management services (*see Opinion by the Procurement Monitoring Bureau, Case Materials, Vol.2, pp. 75 – 76).* The previous law "On State and Local Government Procurement" (in force from 1 January 1997 to 31 December 2001) set out the obligation to conduct procurement only if the supply of goods, construction works or provision of services was partially or fully paid for by State or

local government resources. In difference to this the new law "On Procurement for State or Local Government Needs" set out the obligation to conduct procurement according to the procedure established in law regarding supply of goods, construction works or provision of services, irrespectively of the party paying for the execution of contract (for example, in the case of waste management the payer can be both the commissioning party – the local government, and the holders or creators of waste within its territory). The said principle was abided by also in the Public Procurement Law, which entered into force on 1 May 2006.

On 14 April 2004 Annexes were added to the law "On Procurement for State and Local Government Needs (the law of 11 March 2004 "Amendments to the Law "On Procurement for State and Local Government Needs""), *inter alia*, Annex 2 "Services contract nomenclature", which classifies (divides into categories) services contracts as to the legal regulation applicable to the conclusion. It was noted in this Annex that Category 16 of services contracts comprises also waste disposal services. However, this does not mean that the regulation of this law had to be applied to the conclusion of contracts of waste management only starting with that moment. The amendments to the law set out that the provisions of the law regarding conducting procurement apply in full to the services (*inter alia*, waste management services) included in the categories included in Section A of Annex 2 (Categories l –16). Whereas the provisions of Section 4(4) of the law, allowing application of only some sections of the law in the procurement procedure, applied to the services included in categories of Section B in Annex 2 (Categories 17 – 27). Thus, the rules on public procurement of the law "On Procurement for State and Local Government Needs" were applicable to contracts on the provision of waste management services as of the date this law came into force – 1 January 2002.

Moreover, Section 33(4) of the Law "On Procurement for State and Local Government Needs" already from the moment of coming into force (1 January 2002) established restrictions to the terms of service contracts. Initially the commissioning parties had the right to conclude the service contracts only for the period of four years, but later – as provided by amendments to the law of 5 June 2003, which came into force on 10 July 2003 – the service contracts were concluded for a period of time not exceeding five years. Also Section 67(3) of the Public Procurement Law, since the

moment of coming into force (1 May 2006), provided that service contracts could be concluded for a period of time not exceeding five years (except public private partnership cases). The Waste Management Law also contained a similar regulation.

The fact that since 1 May 2004 the regulatory enactments of the European Union are binding upon Latvia must also be taken into consideration, *inter alia*, directives 89/665/EEC (with amendments introduced by directive 2007/66/EC), 92/13/EEC (with amendments introduced by directive 2007/66/EC), 2004/17/EC and 2004/l8/EC, the provisions of which have been transposed into Latvia's regulatory enactments on public procurement and public private partnership.

The Court of Justice of the European Union also has identified several deficiencies in the supervision of the public procurement provisions. The rulings by the Court of Justice of the European Union provide that member states must ensure effective and fast legal remedies to appeal against decisions by contracting authorities and contracting subjects on unlawful conclusion of contracts. Hence Directive 2007/66/EC of the European Parliament and the Council of 11 December 2007 amending Council Directives 89/665/EEC and 92/13/EEC with regard to improving the effectiveness of review procedures concerning the award of public contracts was elaborated. Citation 14 in the Preamble of Directive 2007/66/EC notes that ineffectiveness is the most effective way to restore competition and to create new business opportunities for those economic operators which have been deprived illegally of their opportunity to compete.

Special regulation on dealing with the issue of illegally concluded contracts (for example, by envisaging a sanction for the contracting parties) was not envisaged in Latvia's regulatory enactments on public procurement.

Such regulation was included in Latvia's regulatory enactments on public procurement only after directive 2007/66/EC came into force and the deadline for implementation was reached (20 December 2009), i.e., in adopting the new Waste Management Law.

Thus, the requirement to apply the regulatory enactments on public procurement in concluding contracts on waste management had to be complied

with already since 1 January 2002. Whereas the restriction to the term of procurement contracts follows from the requirement to apply procurement procedure with certain regularity.

14. The Applicant request assessing the compatibility of the contested norm with the principle of judicial state, enshrined in Article 1 of the Satversme.

Article 1 of the Satversme provides that Latvia is an independent democratic republic. The obligation of the Sate to abide by a number of fundamental principles of a judicial state follows from the concept of a democratic republic included in this Article, also the principle of proportionality and legal certainty *[see Judgement of 10 June 1998 by the Constitutional Court in Case No. 04-03(98), the Substantive Part and Judgement of 24 March 2000 in Case No. 04-07(99), Para 3 of the Substantive Part]*.

All judicial states recognise the principle of legal certainty. It provides that the state institutions must be consistent with regard to the regulatory enactments they have adopted and in their actions must comply with legal certainty, which persons might develop on the basis of a concrete regulatory enactment *[see Judgement of 10 June 1998 by the Constitutional Court in Case No. 10.04-03(98), the Substantive Part]*. However, the principle of legal certainty does not exclude the possibility for the State to amend the existing legal regulation (*see Judgement of 1 December 2010 by the Constitutional Court in Case No. 2010-21-01, Para 19*).

The main objective of the principle of legal certainty is to protect a person's rights in those cases, when due to amendments to legal regulation the legal status of private persons deteriorates or might deteriorate (*see Judgement of 8 November 2006 by the Constitutional Court in Case No. 2006-04-01, Para 21).*

The principle of legal certainty, *inter* alia, demands protecting the certainty that a person might develop regarding maintaining or exercising certain rights. It comprises the State's obligation to meet the commitments it has assumed *vis-à-vis* persons. However, the principle of legal certainty does not exclude the possibility for the State to amend the existing legal regulation. A contrary approach would lead to the State's inability to respond to change circumstances of life. When amending legal regulation the State must take into consideration those rights, with the regard to retaining or

exercising of which a person might have developed certainty. At the same time the principle of legal certainty also requires the State, in amending legal regulation, to set a reasonable balance between a person's certainty and the interests to be ensured by amending regulation (*see Judgement of 26 November 2009 by the Constitutional Court in Case No. 2009-08-01, Para 25).*

By adopting the contested norm the legislator protected persons certainty that particular right, which they enjoyed in accordance with the concluded contracts on waste management before the Waste Management Law was adopted, will be retained. Thus, the legislator has envisaged protection also to those persons, whose contracts were concluded in non-compliance with the procurement procedure (both because initially this requirement was not enshrined in law and because later, when concluding or extending contracts, persons did not comply with them). Moreover, this protection has been established for the whole term of such contracts. The legislator, by creating such regulation, essentially has tried to ensure certain stability in the field of waste management, since it envisaged legal protection to all waste management contracts, irrespectively of the fact whether these were concluded in compliance with the requirements of valid regulatory enactments.

15. The Constitutional Court has already noted before that the protection of legal certainty cannot be absolute and that prevention of violation of important public interests should be given priority over the protection of legal certainty. Upon identification of essential violations of public interests, state institutions have not only the right, but also the obligation to act (*see Judgement of 9 March 2004 by the Constitutional Court in Case No. 2003-16-05, Para 2 of the Substantive Part, and Judgement of 6 July 2009 in Case No. 2008-38-03, Para 13*). Thus, two opposite interests must be compared – on the one hand, safeguarding persons' legal certainty, on the other – the need to amend the concrete regulation in public interests – to conclude, whether reasonable balance has been abided by *(see Judgement of 26 November 2009 by the Constitutional Court in Case No. 2009-08-01, Para 25).*

Thus, the Constitutional Court must identify the legislator's aim in deciding to apply procurement procedure in the field of waste management.

The public procurement regulation applies to public contracts on construction,

supply or service concluded in the interests of commissioning parties complying with certain criteria (state institutions, local government, *et al*.) which exceed certain limits of contract price, and are not the exceptions envisaged by regulation. This allows achieving increased competitiveness, decrease of service costs and better quality service.

Public procurement facilitates effective use of state budget resources and economic development and is essential, since state procurement (expenditure) constitutes large part of the national economy. In the European Union the total sum of procurement contracts constitutes approximately 17 per cent of the gross domestic product in the European Union, but in Latvia it is slightly below 10 per cent (*see Procurement Monitoring Bureau, Survey of Statistical Report, accessible from:http://www.iub.gov.lv/files/upload/statistisko_parskatu_apkopojums_par_2011_PIL.pdf, accessed on 03.12.2012.).*

At the same time public procurement is connected with political issues and has an impact upon such processes as decreasing unemployment, improving labour conditions, dealing with environmental issues, tax collection, elimination of corruption, development of entrepreneurship, etc.

Therefore it is important to ensure free competition of suppliers for concluding a procurement contract, transparency of procedure and equal treatment of all candidates to select the most advantageous offer and to conclude a contract with the candidate, who is offering the most effective way for using taxpayers' money. Thus, the requirement to apply the procurement procedure regularly is necessary and justifiable in a democratic state, because application of procurement procedure ensures wellbeing of the whole society.

Thus, the requirement to apply procurement procedure has the aim of promoting competition, effective use of state and local government resources, decreasing the price for services provided to inhabitants and, as the final result, ensures wellbeing of the whole society.

16. The Saeima in its written reply notes that the legislator assessed the balance between persons' legal certainty and society's interests. The Saeima compared the public interest in ensuring waste management in the territory of local government and

the certainty of persons involved in the respective business activities that they would be able to operate in the respective field for a sufficiently long time, because waste management was complex business activity, requiring sizeable financial investments (*see Written Reply by the Saeima, Case Materials, Vol. 1, p. 112).* This is also proven by the case materials. However, it can also be concluded at the same time that during the process of adopting the contested norm the legislator did not pay sufficient attention to public interests in the field of public procurement. Moreover, the Cabinet of Ministers and other authorities had informed the legislator that the public procurement procedure was not implemented in the field of waste management (*see Appendices to the Opinion by the Procurement Monitoring Bureau, Case Materials, Vol. 2, pp. 78 – 81).*

Para 12 of Transitional Provisions in the Waste Management Law provides that the contracts, which have been concluded without applying or applying inappropriately the regulatory enactments on public procurement must be terminated no later than by 1 July 2013. However, the contested norm establishes exception with regard to those contracts, which have been concluded prior to 26 July 2005. Essentially, it protects the previously concluded contracts even if these have been entered into disregarding the regulatory enactments on public procurement. The legislator did not restrict the term of validity of these contracts (as it was done with regard to contracts concluded after 26 July 2005), but established that these contracts should be valid until the expiry of their terms.

The Constitutional Court has emphasized previously that a mitigating transition to the new regulation can manifest itself as establishment of reasonable term for transition or envisaging compensation (*see Judgement of 25 March 2003 by the Constitutional Court in Case No. 2002-12-01, Para 2 of the Substantial Part).* Whereas the establishment of mitigating transition is to be viewed as decreasing the consequences of the violation of persons' rights (*see Judgement of 26 November 2009 in Case No. 2009-08-01, Para 25).*

Thus, it must be established, whether the legislator, in protecting the legal certainty of concrete persons, established a reasonable term for the transition to the new legal regulation and achieved a balance between protecting the legal certainty of

persons and ensuring the interests of the whole society.

17. The Waste Management Law entered into force on 18 November 2010. The requirement to apply the procurement procedure to waste management services had been in force since 2002; moreover, in 2003 the legislator introduced the requirement to conclude fixed term contracts in the field of public services.

The contested norm creates a situation, in which the contracts on waste management, which have been concluded in non-compliance with the procurement procedure, can remain valid for a long period of time. For example, in Riga contracts on waste management have been concluded until 2020, in Liepāja – until 2020, in Jelgava – even up to 2029 *(see information on contracts concluded by local governments, Case Materials, Vol. 2, pp. 39 – 62)*. During the period of validity of these contracts free competition among the market participants and effective use of local government resources cannot be ensured. In these cases the principles of competition, aimed at setting the most advantageous market price for the consumer, i.e., interest in receiving the most qualitative services for appropriate price, do not function in the field of waste management.

Thus, the legislator's choice to establish unrestricted protection for contracts, which had been concluded prior to 26 July 2005 in non-compliance with the procurement procedure, creates unfounded advantages to one group of persons and significantly violates the interests of society. In this case the protection of interests important for society should be given priority compared to the principle of legal certainty.

The protection of the legal certainty of some persons for unlimited period of time is not proportional with the violation of public interests caused, since it distorts completion and prohibits receiving service of better quality for appropriate price.

Thus, the contested norm is incompatible with Article 1 of the Satversme.

18. Pursuant to Section 32(3) of the Constitutional Court Law, the norm, which has been recognised by the Constitutional Court as being incompatible with a norm of higher legal form, is to be held as being invalid as of the day when the Judgement by

the Constitutional Court is published, unless the Court has held otherwise.

Pursuant to Para 11 of Section 31 of the Constitutional Court Law, if the Constitutional Court recognizes a legal norm as being incompatible with a norm of higher legal force, it must set the data, as of which the norm becomes invalid. The Applicant in this case has not requested to recognise the contested norm as being invalid as of the date of its adoption.

The Constitutional Court, exercising the right granted to it by Section 32(3) of the Constitutional Court Law, to the extent possible, must see to it that the situation, which might arise as of the moment when the contested norm becomes invalid, should not cause violations of persons' fundamental rights guaranteed by the Satversme, as well as would not harm significantly the interests of the State or society (*see, for example, Judgement of 16 December 2005 by the Constitutional Court in Case No. 2005-12-0103, Para 25*).

Recognising the contested norm as being invalid as of the date of its adoption might create significant consequences in the field of waste management (*see the Opinion by the Cabinet of Ministers, Case Materials, Vol. 2, pp. 35 – 37).* I.e., if the Constitutional Court were to recognise the contested norm as being invalid as of the day of its adoption or the day when its Judgement comes into force, uncertainty would be caused in a field, which is of special importance in ensuring the welfare of society. Legal stability in this sector is in the interests of society. The legislator, attempting to achieve legal stability, has already established a transitional period, during which other contracts on waste management, which have been concluded or extended without applying or applying incorrectly the regulatory enactments on public procurement, become invalid. Therefore there are grounds to apply one transitional period to all contracts on waste management that have been concluded without applying or applying incorrectly the regulatory enactments on public procurement.

Thus, the contested norm becomes invalid as of 1 July 2013.

Pursuant to Section 30 – 32 of the Constitutional Court Law

the Constitutional Court

held:

to recognise the first sentence of Para 12 of Transitional Provisions in the Waste Management Law, insofar it applies to contracts, which have been concluded without applying or in on-compliance with the regulatory enactments on public procurement, as being incompatible with Article 1 of the Satversme of the Republic of Latvia and invalid as of 1 July 2013.

The Judgement is final and not subject to appeal

The Judgement enters into force on the day of its publication.

Chairperson of the court sitting G. Kūtris