



# THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA

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## JUDGMENT in the name of the Republic of Latvia

Riga, March 24, 2000

in case No. 04-07(99)

The Constitutional Court of the Republic of Latvia in the body of the Chairman of the Court session A.Endziņš, the justices A.Lepse and I.Skultāne, with the secretary of the Court session L.Vīnkalna

in the presence of the sworn advocate V.Reinholds and P.Salkazanovs- the authorised representative of the applicant i.e. twenty six deputies of the 7<sup>th</sup>. Saeima, namely: P.Salkazanovs, A.Kalniņš, J.Čevers, V.Lāzo, O.Zvejsalnieks, E.Baldzēns, J.Leja, L.Bojārs, L.Stašs, R.Labanovskis, J.Ādamsons, I.Burvis, J.Stalidzāne, A.Bērziņš, R.Pauls, I.Ūdre, I.Stirāns, A.Barča, J.Jurkāns, J.Pliners, M.Lujāns, A.Klementjevs, O.Tolmačova, O.Deņisova, M.Mitrofanovs, J.Sokolovskis

and the representative of the Cabinet of Ministers – the institution that issued the act which is disputed – the sworn advocate A.Osmane,

under Article 85 set by the Satversme (Constitution) as well as Item 4 of Article 16 and Article 17 ( the second Part, Item 3) of the Constitutional Court Law

in a public hearing on March 10, 2000 reviewed the case

**” On Conformity of Item 1 of the Cabinet of Ministers November 30,1999 Resolution (Protocol 67, Paragraph 38) ”On Protection of Foreign Investments Earmarked for Entrepreneurial Activity of the Limited Liability Association ”WINDAU” at the Bauska Co-generation Station” with the Satversme of the Republic of Latvia, Chapter 3 of the Law ”On the Structure of the Cabinet of Ministers”, the First Part of Article 1 of the Law ”On Foreign Investment in the Republic of Latvia”, Article 41 of the ”Power Industry Law”, the First and the Fourth Parts of Article 8 of the**

**Law "On Privatisation of the State and Municipal Property" and Article 49 of the Law "On Joint Stock Companies"**

The Constitutional Court **established:**

On November 30, 1999 the Cabinet of Ministers, referring to the fourth Part of Article 8 of the Law "On Foreign Investment in the Republic of Latvia", adopted the Resolution (Protocol 67, Paragraph 38). Its first Item assigned the non-profit company – the State Stock Company "The Privatisation Agency" (henceforth- the Privatisation Agency) with the task of ensuring conclusion of an agreement between the State Stock Company "Latvenergo" (henceforth-"Latvenergo") and the limited liability association "WINDAU" (henceforth- "WINDAU") on purchasing surplus electrical power, which corresponds with the parameters for electric power determined within the state, generated at the Bauska co-generating station, for use by the state network for a price which equals double average sales tariffs during 8 years from the beginning of the use of the corresponding electrical station.

**The applicant** in his submission requests the Constitutional Court to declare the first Item of November 30,1999 Cabinet of Ministers Resolution "On Protection of Foreign Investment Earmarked for the Limited Liability Association "WINDAU" for Entrepreneurial Activity at the Bauska Co-generating Station" (henceforth- the first Item of the disputable act) as null and void from the moment of its acceptance.

The applicant holds that the first Item of the disputable act does not comply with:

- 1) the principle of separation of the executive and judicial power, fixed by the Satversme, as well as with Article 61 of the Satversme, which determines the authority of the Cabinet of Ministers, because the issue on commercial relationships - a civil controversy between "Latvenergo" and "WINDAU", which is within the jurisdiction of a district court or a regional court - has been solved by the government;
- 2) Article 41 of the "Power Industry Law", which obligated the Cabinet of Ministers to determine a common procedure for purchasing electrical power from co-generating stations, the exploitation of which has been started;
- 3) the first Part of Article 1 of the Law "On Foreign Investment in the Republic of Latvia" which determines that foreign investors in the Republic of Latvia are guaranteed the rights and obligations of the national laws;

- 4) Chapter 3 of the Law "The Structure of the Cabinet of Ministers", as the Cabinet of Ministers has passed an Regulations on the issue, already regulated by Article 41 of the "Power Industry Law";
- 5) Article 49 of the Law "On Stock Companies", which establishes that the general meeting of shareholders is the highest governing body of the joint-stock company. The law does not authorise the Cabinet of Ministers with the right of creating, changing or otherwise influencing the decisions of the shareholders' meeting – even those referring to state stock companies.
- 6) the first and fourth Parts of Article 8 of the Law "On Privatisation of State and Local Authority Property", as the Article authorises the Privatisation Agency to oblige administrative institutions, supervising the state property objects to be privatised, to carry out feasible duties only if the issues are connected with privatisation of the objects. But it does neither give the Privatisation Agency the right of interfering with the financial activity of a company to be privatised nor to impose unprofitable commercial deals.

At the Court session the representative of the applicant P.Salkazanovs upheld the claim.

The sworn advocate V.Reinholds stressed that in accordance with the definition of the Law "On Foreign Investment in the Republic of Latvia", a foreign investment is an investment in the equity capital. "WINDAU" received a small foreign capital investment, which has not been used for entrepreneurial activity. To build the Bauska co-generation station not foreign investments but credits given by a bank registered in Latvia had been used. And one cannot regard the above credits as foreign investments.

The agreement between "Latvenergo" and "WINDAU" was signed on March 26, 1997. At that time January 10, 1997 Cabinet of Ministers Regulations No.23, passed under Article 81 of the Satversme, were in effect. The above Regulations repealed the procedure, envisaged by the Law, namely – that surplus electrical power, generated at the co-generative stations shall be purchased for double average rate. On May 7, 1997 the Constitutional Court declared the Regulations as null and void from the time of the announcement of the Decision but not from the moment of adoption of the Regulations.

The above circumstance makes "Latvenergo" question the viewpoint of "WINDAU" that surplus electrical power, produced in the Bauska co-generation station should be purchased for double sales tariffs.

The Law "On Foreign Investment in the Republic of Latvia" envisages that disputes on foreign investments shall be solved at the court, therefore Item 1 of the disputable act is not based on the above Law but contradicts it. The Cabinet

of Ministers is not supposed to impose solutions of specified administrative and financial issues on state stock companies.

At the Court session the representative of the applicant P.Salkazanovs stressed that the Ministry of Finance and the Ministry of Justice had expressed their viewpoint about the project of the disputable act. Namely, that Article 41 of the "Power Industry Law" assigns the Cabinet of Ministers with the task of determining a common procedure for purchasing surplus electrical energy, but does not envisage the right of determining an exceptional procedure with regard to some of the enterprises.

**The Cabinet of Ministers** in its reply points out that the submitted application is ungrounded as, by adopting Item 1 of the disputable act, it has not undertaken the task of solving a possible civil dispute between "Latvenergo" and "WINDAU", but has realised the policy of ensuring the stability of foreign investment and promotion of new foreign investments in Latvia.

Therefore, when discussing political issues on promoting foreign investments in Latvia, the Cabinet of Ministers has acted within the competence established in the fourth Part of the Satversme and in the Law "The Structure of the Cabinet of Ministers".

On November 30, 1999 when passing the disputable legal act at the Cabinet of Ministers meeting, the procedure of adopting protocol resolutions, established in normative acts, has been observed.

It is precisely pointed out in the Resolution that it has been adopted on the basis of the fourth Part of Article 8 of the Law "On Foreign Investment in the Republic of Latvia". It establishes that "if future laws worsen investment conditions, foreign investment is subject to the laws which were in effect on the date of such investment for a period of ten years. The above norm is to be considered a special legal norm as regards the general legal norm incorporated in the first Part of Article 1 of the same Law, which determines that foreign investments in Latvia are guaranteed the rights and obligations of the national laws.

Thus, in cases, when future legislative acts worsen the investment conditions, the special norm, as the norm with a higher legal force, shall be applied. The "Power Industry Law" reduced the purchase price, determined in Article 27 of the former Law "On Regulating Business Activity in the Energy Sector", which had to equal double average sales tariffs.

It is also pointed out in the written reply that in conformity with Article 7 of the Law "On the Privatisation of State and Local Authority Property", the

founder of the Privatisation Agency is the State, represented by the Cabinet of Ministers. In compliance with the first Part of Article 8 (Item 17) of the above Law, the Privatisation Agency fills also the duties, entrusted to it by other laws and regulations of the Cabinet of Ministers. In this sector the Law does not determine any limitations as to the contents of the regulations, passed by the Cabinet of Ministers.

As the Privatisation Agency –in accordance with the procedure stipulated by the law - had taken possession of "Latvenergo", then – in accordance with the first Part of Article 8 (Item 2) of the Law " On Privatisation of State and Local Authority Property", the Privatisation Agency was authorised to act and – in conformity with its competence –manage the object of the state property "Latvenergo" up to the moment of completing its privatisation.

In compliance with the second Part of Article 15 of the same Law, when managing the state property to be privatised, the Privatisation Agency - with regard to the state statutory company under its possession- carries out the duties of the shareholders' meeting. Therefore "Latvenergo" is allowed to conclude transactions only with the permission of the Privatisation Agency or under the procedure determined by the Agency.

Thus, when passing the disputable act, the Cabinet of Ministers has observed all the requirements of the law.

At the Court session the authorised representative of the Cabinet of Ministers- the sworn advocate A.Osmane upheld the viewpoint expressed in the written reply of the Cabinet of Ministers. Additionally she explained that the ninth and tenth Parts of Article 27 of the Law "Amendments to the Law "On Regulating Business Activity in the Energy Sector" determined that the purchase price of surplus power from the co-generating power stations should equal double average sales tariffs and remain valid for 8 years from the moment its exploitation has been started.

In compliance with the law, the procedure has been declared to have a retroactive force, and it was applied to all physical persons and legal entities, whose agreements with "Latvenergo" on purchase of electrical power from co-generating stations for use by the state network have taken effect up to May 31, 1997.

The basic agreement on building a co-generating station and purchasing surplus electrical energy concluded between "Latvenergo" and "WINDAU" on March 27, 1997 has not been questioned in accordance with the procedure stipulated by law. Therefore it shall be considered as being valid.

Foreign investment in the equity capital of "WINDAU" has been made on October 24, 1997, i.e. at the time when the legislator had determined double

average sales tariffs for purchase of surplus electrical energy, produced at the co-generating stations.

Investment conditions had been worsened by Article 41 of the Law "On Energy Sector" and Regulations of the Cabinet of Ministers No.425 "The Procedure of Purchasing Surplus Electrical Power Generated at the Co-generating Stations" adopted on the basis of the above Law on October 31,1998. The Regulations envisaged purchasing surplus electrical power not for double tariffs but for price, which equals 75% of the basic sales tariffs.

The Law "On Protection of Foreign Investment in the Republic of Latvia" envisages that in cases when the future legislative acts of the Republic of Latvia worsen the investment conditions, the foreign investment is subject to the laws which were in effect on the date of such investment.

When adopting Item 1 of the disputable act, the Cabinet of Ministers had not asked the Privatisation Agency to ensure conclusion of a new agreement between "Latvenergo" and "WINDAU". Its objective was to ensure conclusion of an additional agreement on the conditions about which the parties had not come to terms when concluding the basic agreement.

The Cabinet of Ministers had not established the purchase price of electrical energy, but administered the sector of energy in compliance with Article 76 of the "Power Industry Law".

**The Constitutional Court**, evaluating compliance of the disputable act with the Satversme and the laws

**concluded:**

1. In compliance with the law "On Privatisation of State and Local Authority Property", the Privatisation Agency was established with March 29, 1994 Cabinet of Ministers Directive No.149-r. Its Statute was confirmed by March 25, 1997 Cabinet of Ministers Regulations No.110. Items 1 and 4 of the Statute determine that the Privatisation Agency, founded by the State – which is represented by the Cabinet of Ministers - is a State Stock company, whose equity capital and all votes belong to the State.

Article 8 of the Law " On Privatisation of State and Local Authority Property" determines functions, rights and obligations of the Privatisation Agency.

The statement, expressed in the written reply of the Cabinet of Ministers, that - in conformity with the first Part, Item 17 of Article 8 of the Law "On

Privatisation of State and Local Authority Property”- the Cabinet of Ministers experiences the right to obligate the Privatisation Agency to perform any other functions not envisaged by law, is ungrounded. At the time of adoption of the disputable norm, Item 17, first Part of Article 8 of the above Law did not envisage the right of the Cabinet of Ministers to pass such acts. It determined that regulations, entrusting the Privatisation Agency with obligations not envisaged by laws, should be connected with the issues of ensuring privatisation of the state property. Thereby, even Item 4 of the Statute of the Privatisation Agency determines that the Privatisation Agency, in addition to trends of activities envisaged by the Statute, performs other activities and assignments, envisaged by laws and other normative acts, or commissioned by the Cabinet of Ministers. But they are to be considered in connection with conditions determined by the Law ”On Privatisation of State and Local Authority Property”, and it may not be interpreted in a broader sense.

Thus the Cabinet of Ministers experiences the right of assigning the Privatisation Agency to fulfil mandatory tasks, but only connected with the process of privatisation. And by Item 1 of the disputable act, the Cabinet of Ministers assigned the Privatisation Agency with the task of fulfilling indistinctive functions, not connected with privatisation and thus violating its competence determined by the law.

Item 10 of the Cabinet of Ministers April 30, 1996 Regulations No. 160 ”Rules of Internal Procedure and Performance of the Cabinet of Ministers” envisages that a resolution (a directive expressed in the minutes of the meeting) of the Cabinet of Ministers is an internal administrative legal act. It concerns the members of the Cabinet of Ministers, the State Chancellery or other state institutions and their officials. Besides, the Cabinet of Ministers had to observe the demand of Article 6, Part 5 of the Law ”The Procedure by Which Laws and Other Acts Adopted by the Saeima, State President and the Cabinet are Promulgated, Published, Take Effect and Become Valid”. It establishes that resolutions of the Cabinet of Ministers arranged in the form of an excerpt from the minutes of the meeting shall be published in ”Latvijas Vēstnesis”, excluding those resolutions where specially is stated that they shall not be published.

Thus the Cabinet of Ministers could assign the Privatisation Agency with the task by a resolution in the form of an excerpt of the minutes, but it had to comply with such principles as legitimacy and validity, which would legally and equitably balance the necessity and usefulness of the particular solution.

The Cabinet of Ministers justifies the task, assigned to the Privatisation Agency with Item 1 of the disputable act – to ensure concluding of the agreement between ”Latvenergo” and ”WINDAU” on purchasing surplus electrical power, generated at the Bauska co-generating station, for double average sales tariff during eight years after exploitation of it had started– with the fourth Part

of Article 8 of the Law "On Foreign Investment in Latvia". It determines that if future legislative acts of the Republic of Latvia worsen investment conditions, the foreign investment is subject to the laws, which were in effect on the date of such investment for a period of ten years.

To apply the above norm to a particular case, the Cabinet of Ministers had to substantiate, which future legislative acts had worsened the conditions of investment for the company "WINDAU" and how.

In accordance with the record by the Republic of Latvia Enterprise Register, the first WINDAU foreign investors had been registered on October 24, 1997.

At that time wording of the June 11, 1997 Law " On Regulating Business Activity in the Energy Sector" was in effect. The ninth and tenth Parts of Article 27 of the Law established that surplus electrical power from renewable energy resources (small hydroelectric stations of production capacity up to 2 megawatts and wind electric stations) as well as from co-generating stations of small production capacity (up to 12 megawatts), which corresponds to parameters for electric power determined within the state shall be purchased for use in the state network for increased – double sales tariffs.

The above norm referred to all physical and legal entities, whose agreements with "Latvenergo" on purchasing electrical energy from co-generating stations for use in the state network had become effective up to May 31, 1997.

Thus, an important precondition, also with regard to conditions of foreign investment, was that agreement concluded between "Latvenergo" and enterprises, into which foreign investment had been introduced, had had to become effective up to May 31, 1997.

As the first foreign investment was registered on October 24, 1997, the fourth Part of Article 4 of the Law "On Foreign Investment in the Republic of Latvia" may not be applied in this particular case. Neither "WINDAU" nor the subjective civil rights since the introduction of the investment have been violated by a future act, and the recent legislative acts do not worsen the investment conditions.

In compliance with Article 3 of the Civil Law of the Republic of Latvia, every civil law relationship shall be considered according to the laws in effect at the time when this relationship was created. The rights already obtained shall remain untouched.

As there exists a disagreement between the contracting parties on whether March 26, 1997 agreement concluded by "WINDAU" and "Latvenergo" is an agreement if we take into consideration the ninth Part of Article 27 of the Law "On Regulating Business Activity in the Energy Sector". The issue on the

validity of this agreement is a civil controversy to be solved by the court of general jurisdiction. The Law "On Foreign Investment in the Republic of Latvia" does not guarantee to foreign investors review of potential civil controversies under administrative procedure.

Thus, if any doubt about the possibility of controversy as regards the subject of the concluded agreement and its validity, the Cabinet of Ministers, by assigning the privatisation Agency with the task of ensuring conclusion of an agreement between "Latvenergo" and "WINDAU" on double average sales tariffs, has not observed legality and division of competence between the executive and juridical power.

2. The Satversme determines authority balance between allocation of competencies and functions of the executive power and juridical power.

In compliance with Article 13 of the Law "The Structure of the Cabinet of Ministers", the Cabinet of Ministers shall discuss or resolve all issues which, in compliance with the Satversme and law are within its competence. The Cabinet of Ministers is not authorised to take decisions on controversies in an administrative procedure. In compliance with Article 86 of the Satversme and the Law "On Judicial Power" civil disputes shall be reviewed only by courts.

Article 1 of the Civil Proceedings Law determines that any physical or legal person has the right to protection of its civil rights, which have been violated or questioned or to protection of its interests envisaged by law at the court. However, the Cabinet of Ministers, when adopting the disputable act, has in point of fact solved a civil controversy and acknowledged the subjective civil right of "WINDAU". Thus the disputable act has the same legal effect as the court decision.

The concept of the democratic republic, included in Article 1 of the Satversme, obligates all state institutions in their activities, especially when passing legal acts, to observe legality, separation of power and mutual control, taking into consideration subordination of public power to the law, i.e. supervision of the law as well as other principles of a legal state, including the principles of reasonability and trust in law.

Principles of a democratic and law- based state are based on the fact that there exists a balance between fundamental values and realisation of rights in the society. The decisions passed by the government should create trust that they have been adopted taking into consideration the principle of justice and thus decreasing the possibility of the conflict of interests. In a democratic and law- based state the state administration shall honestly, efficiently and justly realise the functions, entrusted to it by the society. Its activities shall be in

compliance with laws. The objective of introducing the system of "check and balance", based on the principle of division of power, is to prevent tendencies of usurping power by any of the three powers and to guarantee stability of the state legal institutions, as well as continuity of functioning of the state power.

Ch. L. Montesquieu has stressed that freedom may last only there, where no abuse of power exists. And it cannot exist, if the judicial power is not separated from the legislative and executive power (see Montesquieu Ch. L'Esprit des Lois. P., 1936.- Ch.XI – P.3 – 6).

The scientist in the sector of law R.Cipelius also points out that the typical task of the judicial power is the function of provision of rights. The administration, in its turn, experiences the right of implementing public assignments when it purposefully, efficiently and in compliance with the laws develops and regulates legal and real relationships (see Cipelius R. A General Course on the State. Riga: AGB, 1998, page 242).

Tasks to administrative institutions may be assigned in a different way, but their implementation with the help of legally permitted means and taking into consideration their usefulness, depends on the decision of the institutions themselves. However, the fact that the above institutions exercise the possibility of using discrete power, shall not serve as an excuse for wilful activities and disregard of general legal principles. Legitimacy is the combination of the principles of legality, usefulness and reasonability. Those, who are authorised to implement legitimacy, shall take into consideration that, when adopting decisions, one has to check whether the above principles have been observed, without violating the principle of separation of power, envisaged by the Satversme.

The Cabinet of Ministers, by adopting Item 1 of the disputable act has not observed the principle of separation of power and has limited the right of "Latvenergo" of appealing to court, which violates the Satversme norm.

On the basis of Articles 30-32 of the Constitutional Court Law

### **the Constitutional Court**

### **DECIDED**

To declare Item 1 of the Cabinet of Ministers November 30, 1999 Resolution "On Protection of Foreign Investment which Limited Liability Association "WINDAU" Invested in the Bauska Co-generating Station" (protocol No. 67, paragraph 38) **as not being in compliance** with Articles 1 and 86 of the Satversme, as well as with Article 8 (Part 1, Item 17, in the wording which was

effective up to December 14, 1999) **and null and void from the moment of its adoption.**

The Judgment takes effect from the moment of its announcement. The Judgment is final and allowing of no appeal.

The Judgment was announced in Riga on March 24, 2000.

Chairman of the Court session

A.Endziņš

Justice of the Constitutional Court

A.Lepse

Justice of the Constitutional Court

I.Skultāne