https://doi.org/10.22364/jull.17.09

State Aid to Electricity Producers: National and EU Law Aspects

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At European Union level, there is a detailed regulatory framework allowing Member States to introduce state aid. State aid is always granted for a specific purpose and helps Member States to achieve their common objectives. The energy sector is being moved towards reaching targets for both energy efficiency and climate neutrality, with a gradual withdrawal from fossil fuels. However, it is not always easy to align these targets at Member State level and to create the appropriate national regulatory framework. Therefore, this article in the light of the two most recent judgements of the Constitutional Court of the Republic of Latvia (hereinafter – Constitutional Court), analyses the importance of a fixed term of state aid for electricity production and some aspects of state aid for biogas cogeneration plants, including the development of EU law perspective. The article also examines the impact of the enforcement of the Constitutional Court's judgments in the area of state aid in Latvia and explains the emerging concept of environmental constitutionalism.

Keywords: state aid, feed-in tariff, waste heat, climate goals, high-efficiency cogeneration, cogeneration, legitimate expectations, environmental constitutionalism.

Contents

Introduction

The European Union (hereinafter – EU) is a pioneer in developing legislation to reorient energy production towards climate neutrality.[1] At the same time, achieving climate neutrality is closely linked to state aid conditions, as well as to technological challenges in the energy sector.[2] The unfolding climate crisis with heat waves and flooding across Europe, and the war in Ukraine[3] have, as never before, broached the question of state aid aimed at the use of renewable energy resources and the diversification of energy production.

In Member States, state aid intended for these purposes is mostly granted in the form of feed-in tariffs, and Latvia is no exception here. Nevertheless, this aid has historically had very little public support in Latvia, as it has been granted to a very wide range of beneficiaries, including cogeneration (hereinafter also – CHP) plants that produce energy with natural gas. Therefore, in recent years, the government and the parliament of Latvia has taken steps that reduce the state aid. Consequentially, the Constitutional Court (*Satversmes tiesa*) has also been involved in this dialogue and has recently examined two very important cases. The Constitutional Court has resolved issues of both the term of the state aid and the possibilities of equalizing the conditions for receiving the aid in relation to different electricity generation technologies. These cases provide valuable insights into the evolution of state aid regulation in line with climate goals and the need to use energy efficiently.

Therefore, this article offers an insight in the historical context of state aid in Latvia, as the country had to gradually adapt to the EU state aid rules by the time it joined the EU in 2004. Furthermore, the article analyses other aspects relating to determination of the duration of state aid for different beneficiaries and their guarantees of legitimate expectations. Another chapter explores the guarantees of legal certainty and legitimate expectations to producers using renewable energy resources that are included in Article 6.1 of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources[4] (hereinafter – Directive 2018/2001). As in one of the two cases the Constitutional Court found the challenged legal norms to be unconstitutional, execution of the judgments of the Constitutional Court and their role in the search for a more balanced legal framework is analysed. Finally, the authors discuss the new concept of environmental constitutionalism and its role in shaping other fields of law.

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[1] *Volchenko, N. et al*. Combating Climate Change Through the International Law Perspective: The Role of the EU in Environmental Diplomacy. European Energy and Environmental Law Review, 32(5), 2023, pp. 263–264.

[2] *Vuletic, D.* The Interaction between the EU's Climate Change Objectives and Its State Aid Regulation in the Area of Renewable Energy. Croatian Yearbook of European Law and Policy, Vol. 16, 2020, p. 351.

[3] *Cordova, J. G. L. et al.* Decentralized Energy Generation for Sustainable Energy Development in EU. European Energy and Environmental Law Review, 32(4), 2023, p. 174.

[4] Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources. Available: https://eur-lex.europa.eu/legal-content/LV/TXT/?uri=CELEX%3A02018L2001-20231120 [last viewed 11.04.2024].

1. Historical context of state aid schemes for electricity production in Latvia

In Latvia, state aid for electricity production with varying requirements has been granted historically since at least 1998.[5] However, a unified mandatory procurement system with a feed-in tariff was introduced in 2005 – a year after joining the EU.[6] The scheme was designed in such a way that different criteria and regulations were created for receiving state aid for the production of electricity in CHP plants and for the production of electricity from renewable energy resources.[7] The regulations for renewables described the technologies and resources to be used in the scheme (wind, solar, biogas, biomass, hydropower), while the regulations for CHP plants were more focused on high-efficiency cogeneration, as this process is aimed at maximising the heating and power output from combustion. Thus, participation in the mandatory procurement scheme was also available for producers using natural gas. Producers who fulfilled the criteria for receiving state aid for both using renewables and having a CHP plant by, for example, combusting wood chips, had to choose between one of the two mechanisms.[8]

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[5] Ministru kabineta 1998. gada 31. oktobra noteikumi Nr. 425 "Koģenerācijas stacijās saražotās elektroenerģijas pārpalikuma iepirkšanas kārtība" [Cabinet of Ministers Regulation No. 425 of 31.10.1998 "Procedure for purchasing excess electricity produced in cogeneration plants"]. Available: https://likumi.lv/ta/id/50507-kogeneracijas-stacijas-sarazotas-elektroenergijas-parpalikuma-iepirksanas-kartiba [last viewed 11.04.2024].

[6] Elektroenerģijas tirgus likums [Electricity Market Law]. (05.05.2005). Available: https://likumi.lv/ta/id/108834-elektroenergijas-tirgus-likums [last viewed: 11.04.2024].

[7] Historically were regulated by: Ministru kabineta 2006. gada 6. novembra noteikumi Nr. 921 "Noteikumi par elektroenerģijas ražošanu koģenerācijā" [Cabinet of Ministers Regulation No. 921 of 06.11.2006 "Regulations Regarding Electricity Production in Cogeneration"]. Available: https://likumi.lv/ta/id/147673-noteikumi-par-elektroenergijas-razosanu-kogeneracija [last viewed 11.04.2024] that transposed Directive 2004/8/EC of the European Parliament and of the Council of 11 February 2004 on the promotion of cogeneration based on a useful heat demand in the internal energy market and amending Directive 92/42/EEC; Ministru kabineta 2007. gada 24. jūlija noteikumi Nr. 503 Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus [Cabinet of Ministers Regulation No. 503 of 24.07.2007 "Regulations regarding Electricity Production from Renewable Energy Resources"]. Available: https://likumi.lv/ta/id/162007-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunojamos-energoresursus [last viewed 11.04.2024] that transposed Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market.
Currently are regulated by: Ministru kabineta 2020. gada 2. septembra noteikumi Nr. 561 "Noteikumi par elektroenerģijas ražošanu, uzraudzību un cenu noteikšanu, ražojot elektroenerģiju koģenerācijā" [Cabinet of Ministers Regulation No. 561 of 02.09.2020 "Regulations Regarding the Generation, Supervision, and Pricing of Electricity in Generation of Electricity in Cogeneration"]. Available: https://likumi.lv/ta/id/317216-noteikumi-par-elektroenergijas-razosanu-uzraudzibu-un-cenu-noteiksanu-razojot-elektroenergiju-kogeneracija [last viewed 11.04.2024]; Ministru kabineta 2020. gada 2. septembra noteikumi Nr. 560 "Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus, kā arī par cenu noteikšanas kārtību un uzraudzību" [Cabinet of Ministers Regulation No. 560 of 02.09.2020 "Regulations Regarding the Generation of Electricity Using Renewable Energy Resources, and also the Procedures for Price Determination and Monitoring"]. Available: https://likumi.lv/ta/id/317215-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunojamos-energoresursus-ka-ari-par-cenu-noteiksanas-kartibu-un-uzraudzibu [last viewed 11.04.2024].

[8] Producers eligible for participation in the mandatory procurement were determined by tendering. For a time, all producers using CHP plants were able to apply if they fulfilled certain technical requirements, however, the available licenses for producers using renewables were limited to the amount of "green" electricity necessary to produce according to our climate goals (the amount of electricity was calculated each year by the public energy trader in Latvia). Since 31 December 2012, no new licenses allowing to participate in the scheme have been issued.

According to Article 108 (3) of the Treaty of the Functioning of the European Union, the Member States must notify the European Commission (hereinafter – Commission), if they wish to introduce a state aid scheme.[9] Unfortunately, Latvia notified the Commission only in 2015, after the Commission had already received multiple complaints from private entities. During the assessment process, the Cabinet of Ministers introduced some notable amendments in the scheme, and, thus, in 2017 the Commission decided not to raise any further objections.[10] This might be at least partly explained by the fact that upon joining the EU Latvia amongst a few other new Member States (Estonia, Lithuania and Slovenia) did not conclude a transitional agreement regarding state aid rules and their compatibility with EU law.[11]

2. State aid – with or without a fixed term

One of the most important changes in the state aid conditions, which was introduced in Latvia in 2012, was the determination of a deadline for receiving state aid. A fixed term of a planned state aid is one of the core elements that allow the Commission to assess the compatibility of the aid with the internal market[12] – its potential impact on the achievement of the objectives of the EU and possible adverse effects on competition. Therefore, state aid must always have a fixed term for it to be considered compatible with the internal market.[13]

The Constitutional Court has had the opportunity to deliver a ruling on the duration of state aid. A legal entity producing electricity in a CHP plant challenged a clause in regulations that set a 10-year term for the state aid granted to them.[14] The applicant believed that they were entitled to the aid for a period of at least 20 years, because at the time when they received the decision granting the said aid, legal norms did not stipulate any such deadline. Moreover, other producers using renewable energy resources were granted state aid for a period of 20 years. In other words, the producer using a CHP plant claimed that they were eligible to receive state aid for the same amount of time as the producers using renewable resources.

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[9] Consolidated version of the Treaty on European Union and the Treaty on the Functioning of the European Union. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT [last viewed 11.04.2024].

[10] European Commission, State Aid SA.43140 (2015/NN) – Latvia. Support to renewable energy and CHP. Available: https://ec.europa.eu/competition/state_aid/cases/260648/260648_1896605_188_2.pdf [last viewed 11.04.2024].

[11] *Holscher, J. et al.* State Aid in the New EU Member States. Journal of Common Market Studies, 55(4), 2017, p. 782.

[12] The exclusive competence of the Commission to decide on state aid issues is stipulated in Article 108 of the Treaty on the Functioning of the European Union.

[13] Annex 1 of the Commission Regulation (EC) No. 794/2004 of 21 April 2004 implementing Council Regulation (EU) 2015/1589 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, stipulates that Member States must inform the Commission re the duration of the scheme and provide additional substantiation if the planned duration exceeds 6 years. Available: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32004R0794 [last viewed 11.04.2024].

[14] Decision of the 2nd panel of the Constitutional Court of the Republic of Latvia of 24 February 2022 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_lemums_par_ierosinasanu.pdf#search= [last viewed 11.04.2024].

The Constitutional court first explained that Article 105 of the *Satversme* [Constitution][15] does not guarantee a person the right to property in the form of state aid *per se*. The violation of property rights can be established, if the producer has received a specific promise from the state to receive the said aid. Therefore, to determine whether the contested norm affects such rights, which are considered to be the object of property rights, the principle of protection of legal expectations must be observed.[16] However, according to the jurisprudence of the European Court of Justice (hereinafter – CJEU), a producer cannot claim to have legitimate expectations or argue that there has been a breach of the principle of legal certainty on such state aid conditions that have not been deemed compatible with the internal market by the Commission.[17]

As there was some confusion between the participants of the case regarding this matter, the judge rapporteur requested the Commission to issue an opinion on its 2017 decision on declaring Latvia's state aid scheme compatible with the internal market.[18] The issue was that as early as 2011 the first complaints from private entities about the scheme in Latvia had reached the Commission. During the period between 2011 and 2017, until the Commission finally issued the decision regarding Latvia, the legislator had already made multiple changes in the scheme to avoid further disputes with the Commission. The Commission took these changes into account, when it declared that the scheme is compatible with the internal market, therefore, the wording of the said decision was in some parts diplomatic enough to be misunderstood by at least a few legal experts involved in the case. The question which had to be clarified was simple: was the specific state aid declared compatible with internal market for a maximum duration of 10 or 20 years? The answer from the Commission was clear – it was 10 years.[19] It means that the state aid scheme for electricity production in Latvia is deemed to be compatible with internal market for two different time periods: 10 years for producers who applied for state aid for the use of high-efficiency cogeneration and 20 years for producers who applied for state aid for the use of renewable resources.

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[15] Article 105 of the *Satversme* states: "Everyone has the right to own property. Property shall not be used contrary to the interests of the public. Property rights may be restricted only in accordance with law. Expropriation of property for public purposes shall be allowed only in exceptional cases on the basis of a specific law and in return for fair compensation." Latvijas Republikas Satversme [The Constitution of the Republic of Latvia] (15.02.1922). Available: http://saeima.lv/en/about-saeima/work-of-the-saeima/constitution/ [last viewed 11.04.2024].

[16] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[17] Judgment of CJEU of 20 March 1997 in case No. C-24/95 Land Rheinland-Pfalz v. Alcan Deutschland GmbH, para. 25. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A61995CJ0024 [last viewed 11.04.2024].

[18] Article 29(1) of Council Regulation (EU) 2015/1589of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union (codification) permits national courts of the Member States to ask the Commission to transmit to them information in its possession or its opinion on questions concerning the application of State aid rules. Available: https://eur-lex.europa.eu/eli/reg/2015/1589/oj/?locale=en [last viewed 11.04.2024].

[19] Reply from the Commission to the Request for Opinion from the Constitutional Court of the Republic of Latvia in case No. 2022-06-03. European Commission. 19.12.2022. Available: https://competition-policy.ec.europa.eu/system/files/2023-04/20220603_support_to_renewable_energy_and%20_CHP_opinion_en.pdf [last viewed 11.04.2024].

In this case the Constitutional Court considered several aspects to make a decision. First of all, the wide margin of discretion of the legislator in the field of state aid.[20] The Constitutional Court has previously held that the legislator has a wide margin of discretion in the field of state aid, but that this margin is limited: it cannot be exercised arbitrarily or contrary to, *inter alia,* EU law.[21] Therefore, the Cabinet of Ministers, using its discretionary powers, was entitled to decide on the necessary considerations in order to set a specific term of the state aid. The Court also considered the Commission's exclusive competence in recognizing state aid as compatible with the internal market. As it was explained before, the Commission had recognized the state aid as compatible with the internal market, including the 10 year term of state aid.[22] For these reasons, the Court concluded that producers who chose to participate in the mandatory procurement in accordance with the regulations relating to the production of electricity in cogeneration could not have had a legitimate expectation of such a term for the implementation of the mandatory procurement rights as was established for the production of electricity from renewable resources.[23] Therefore, in this case, the application was dismissed and the contested legal norms were found to be compatible with Article 105 of the *Satversme* (right to own property).

This judgement signifies the continuously increasing importance of renewable resources in the energy sector, as the state aid scheme favours producers using renewables and guarantees support for 10 more years compared to producers combusting natural gas. Such an approach is in line with the view that meeting climate targets requires not only state aid for renewable energy production, but also a review of existing state aid conditions and specific controls on those producers using fossil fuels.[24]

3. State aid for biogas cogeneration plants from the perspective of national and EU law

One of the landmark cases in recent years in the area of state aid is case No. 2021-31-0103 in which the Constitutional Court had to assess the imposition of specific technical requirements for electricity producers and the impact of these requirements on the amount of state aid received. The case was initiated based on the application submitted by several producers (legal entities) who considered the specific requirements to be in fact unfulfillable taken the technological process they used for electricity production: biogas CHP plants. If the requirements were not met, according to the disputed norms, the state aid would have been significantly reduced or even

[20] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[21] Judgement of the Constitutional Court of the Republic of Latvia of 18 April 2019 in case No. 2018-16-03, para. 15.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-16-03_Spriedums.pdf#search= [last viewed 11.04.2024].

[22] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 22. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[23] Judgement of the Constitutional Court of the Republic of Latvia of 21 March 2023 in case No. 2022-06-03, para. 23.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/02/2022-06-03_Spriedums.pdf#search=2022-06-03 [last viewed 06.04.2024].

[24] *Granat, A., Kozak, M.* The Implementation of the European Green Deal Tensions between Market-Based Approach and State Aid for Renewables. Yearbook of Antitrust and Regulatory Studies, Vol. 23, 2021, p. 98.

withdrawn. Therefore, the applicants claimed that the challenged legal norms are contrary to the Article 105 of the *Satversme* which guarantees the right to property, and breaches the principle of legitimate expectations.[25]

In this case, the Constitutional Court addressed several important issues – it both emphasised the importance of climate objectives and assessed the possibility of compliance with the obligations imposed on producers. The case also raises questions regarding EU law, and highlights the relationship between the legislator and the Constitutional Court in the context of the enforcement of judgments.

3.1. Climate goals – goals for the future

Environmental issues are topical in nearly all aspects of everyday life both nationally and worldwide. This is understandable, as mankind has come to the realisation that environment is a prerequisite for human existence. Aware of the various threats posed by pollution, namely, activity of people and governments, countries are even forced to react and find solutions to eliminate them. As a signatory to the Paris Agreement[26], the EU has introduced numerous policy documents[27] and legislation[28] aimed at decarbonization of the energy sector to combat climate change.

The *Saeima* and the Cabinet of Ministers justified the necessity of the disputed norms, in this case, among other things, with the need to reduce the costs of electricity for end consumers. In this aspect, it is important that at the time when the Constitutional Court considered the case, Russia had already started its invasion of Ukraine, which, naturally, caused an increase in energy prices throughout Europe. At that time, the gradual cancellation of the mandatory procurement system was politically announced in Latvia as an opportunity to reduce electricity bills. In order to help Member States fight the skyrocketing electricity prices in a coordinated way, the EU also took measures that allowed to soften the impact of the energy crisis on end consumers.[29] However, the peculiarity of the mandatory procurement system in Latvia is that the feed-in tariff was lower than the market price of electricity for a large part of the producers during the energy crisis and court proceedings.[30]

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[25] Decision of the 4th panel of the Constitutional Court of the Republic of Latvia of 30 June 2021 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_lemums_par_ierosinasanu.pdf#search= [last viewed 11.04.2024].

[26] Paris Agreement to the United Nations Framework Convention on Climate Change. 12 December 2015. Available: https://unfccc.int/sites/default/files/resource/parisagreement_publication.pdf [last viewed 11.04.2024].

[27] See, for example, Communication from the Commission, "A Clean Planet For All: A European Strategic Long-term Vision for a Prosperous, Modern, Competitive and Climate Neutral Economy", COM (2018) 773 final, 28 November 2018. Available: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0773 [last viewed 11.04.2024].

[28] Regulation 2018/2001 is a notable example of such legislative acts.

[29] For example, Council Regulation (EU) 2022/1854 of 6 October 2022 on an emergency intervention to address high energy prices Available: https://eur-lex.europa.eu/eli/reg/2022/1854/oj [last viewed 11.04.2024].

[30] State Construction Control Bureau periodically publishes the current data here: https://www.bvkb.gov.lv/lv/elektroenergijas-obligata-iepirkuma-mehanisma-uzraudziba-un-kontrole [last viewed 11.04.2024].
The authors can only speculate that the differences in the market price and feed-in tariff at the time served as the main encouragement for some producers to give up their rights to participate in the mandatory procurement scheme and receive state aid.
It is worth noting that CJEU has received a request for a preliminary ruling from the Council of State (*Consiglio di Stato*) in Italy regarding a similar issue where state aid in some cases is lower than the market price of electricity (case No. C514-23).

In solving this case, the Constitutional Court paid special attention to the fact that a state aid scheme is always created, and state aid is granted with a specific purpose. For in the EU, state aid in energy sector is an important tool for moving policy toward climate neutrality.[31] As the state aid granted to the applicants in the case was specifically intended for the promotion of renewable resources, the climate objectives also had to be taken into account when stricter aid requirements were made.

This is the reason why the Constitutional Court for the first time clearly indicated to the legislator that the climate goals of the EU, signatory of The Paris Agreement, are also the climate goals of Latvia as a Member State.[32] Although the adoption of rules limiting state aid may be justified by considerations of reducing state aid costs, they will always be related to the purpose of granting the aid.

The contribution of each technology to the achievement of climate goals and, among other things, to Latvia's energy independence is also worth evaluating. It should be noted that this is not the first case in which the Constitutional Court has drawn the legislator's attention to the importance of ensuring energy independence.[33] However, the war in Ukraine lends to this aspect an even greater importance.

The specifics of the technology of electricity production and the extent to which it helps to achieve climate goals compared to other technologies were also of great importance. Namely, the regulatory framework, if developed in accordance with scientific knowledge, could prevent producers from acting inefficiently and dishonestly, and, thus, reduce the number of cases where granting the state aid is unjustified, but still promote efficient use of energy and help achieve climate goals.[34] The Constitutional court found the disputed technical requirements for biogas CHP plants to be incompatible with Article 105 of the *Satversme* (right to property) due to the fact that there are other scientifically sound and less restrictive means to exercise control over electricity producers. Biogas CHP plants differ from natural gas CHP plants in a way that makes it impossible to directly apply high-efficiency cogeneration standards to these plants.

While acknowledging the two can and should go hand in hand, the judgement draws a distinction between legislation aimed at promoting high-efficiency cogeneration versus legislation aimed at climate goals in the sector. It also considers that the war in Europe has, as never before, highlighted the importance of diversification of energy production using renewable resources.

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[31] *Schöning, F., Ziegler, C.* What is State Aid? In: State Aid and The Energy Sector, *Hancher, L., de Hauteclocque, A., Salerno, F. M.* (eds). Oxford: Hart, 2018, pp. 3–4.

[32] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 36.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[33] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 19 April 2019 in case No. 2018-16-03, para. 10. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2018/08/2018-16-03_Spriedums.pdf#search= [last viewed 11.04.2024] or Judgement of the Constitutional Court of the Republic of Latvia of 25 March 2015 in case No. 2014-11-0103, para. 26. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2014/04/2014-11-0103_Spriedums_ENG.pdf#search= [last viewed 11.04.2024].

[34] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 40.4. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

3.2. High-efficiency cogeneration and the use of renewable resources

As noted above, state support for electricity production in Latvia was granted under different conditions, implementing EU directives related to the promotion of renewable energy (currently in force – Directive 2018/2001), and high-efficiency cogeneration (currently in force – Directive 2012/27/EU of The European Parliament and of The Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU, and repealing Directives 2004/8/EC and 2006/32/EC[35] (hereinafter – Directive 2012/27/EU)). The main objections of the applicants in the case No. 2021-36-0103 were essentially related to the high standards set for biogas CHP plants for the use of useful heat energy, which are characteristic in high-efficiency cogeneration. Useful heat is defined as the heat that satisfies an economically justified demand,[36] for example, by supplying it to a central heating system in a city, or by using thermal energy in production processes. The applicants stated that the new useful heat requirements cannot be met in biogas CHP plants and they have been introduced by incorrectly adopting the requirements of Directive 2012/27/EU, which should not be applied to renewable energy aid schemes at all. Firstly, in keeping with their goal of reducing emissions caused by agriculture, biogas CHP plants are built closer to raw materials (residual products) than to heat energy consumers. Secondly, biogas CHP plants cannot be subject to the same technical requirements as natural gas CHP plants due to different chemical and physical properties of the gas.

It should be pointed out, that the applicants were granted the right to state aid based on the provisions that applied only to the production of electricity using renewable energy resources and related to the provisions of the Directive 2018/2001, and not based on the provisions on the production of electricity in cogeneration, which, on the other hand, refer to the requirements of Directive 2012/27/EU. In addition, at the time when the applicants were granted the right to receive state aid, the feed-in tariff for producers using renewable energy resources did not depend on their useful heat energy indicators. However, for producers who had adapted their businesses to the regulations on electricity production in CHP plants, useful heat energy was already included in the tariff calculation. This situation, in which new requirements from Directive 2012/27/EU are applied to an existing state aid scheme related to the subject matter of Directive 2018/2001, raises the question of respect for legal certainty and legitimate expectations also from the perspective of EU law. [37]

Recital 77 of Directive 2018/2001[38] refers to a possible "synergy" of the mechanisms introduced by Directive 2018/2001 and Directive 2012/27/EU. This suggests that, in general, a Member State can introduce a state support mechanism that combines

[35] Directive 2012/27/EU of The European Parliament and of The Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC and 2006/32/EC. Available: https://eur-lex.europa.eu/eli/dir/2012/27/oj [last viewed 11.04.2024].

[36] Article (32)2 of Directive 2012/27/EU.

[37] To read more about the differences of the understanding of the principles of legal certainty and legitimate expectations in State aid law and Investment law, see: *Pinto, C. S.* The 'narrow' meaning of the legitimate expectation principle in state aid law versus the foreign investor's legitimate expectations: hopeless clash or an opportunity for convergence? European State Aid Law Quarterly (ESTAL), 15(2), 2016, pp. 277–278. and *Fahner, J. H.* Compensation or Competitive Advantage? Reconciling Investment Arbitration with EU State Aid Law. ICSID Review, Vol. 37, No. 3, 2022, pp. 678–679.

[38] It stipulates: "The potential synergies between an effort to increase the uptake of renewable heating and cooling and the existing schemes under Directive 2010/31/EU of the European Parliament and of the Council (14) and Directive 2012/27/EU should be emphasised. Member States should, to the extent possible, have the possibility to use existing administrative structures to implement such effort, in order to mitigate the administrative burden."

the requirements contained in Directive 2018/2001 and Directive 2012/27/EU, while at the same time applying them to CHP plants that use renewable energy resources and also produce heat energy as part of cogeneration. Furthermore, if the requirements of Directive 2012/27/EU could be applied to state aid schemes introduced in connection with Directive 2018/2001 or its predecessors, it could also be concluded that Member States could, therefore, in accordance with the second part of Article 1 of Directive 2012/27/EU introduce even stricter requirements for such CHP plants.[39] Nevertheless, it is unclear whether such changes in the national legal framework are compatible with the principle of legal certainty and the requirement for the stability of financial support set out in Article 6 of Directive 2018/2001. Namely, paragraphs 1 and 2 of Article 6 of the Directive stipulate:

1. *Without prejudice to adaptations necessary to comply with Articles 107 and 108 TFEU, Member States shall ensure that the level of, and the conditions attached to, the support granted to renewable energy projects are not revised in a way that negatively affects the rights conferred thereunder and undermines the economic viability of projects that already benefit from support.*

2. *Member States may adjust the level of support in accordance with objective criteria, provided that such criteria are established in the original design of the support scheme.*[40]

Thus, in the context of the specific case, at least two questions could be raised. Firstly, can new criteria that belong to the scope of issues regulated by Directive 2012/27/EU ("energy efficiency" directive) be introduced in previously implemented state aid schemes that exist in accordance with the regulations related to Directive 2018/2001 ("renewable energy resources" directive)? Secondly, does the provision in Article (2)6 of Directive 2018/2001 prevent the introduction of the requirement for useful heat energy, if there was no such requirement for biogas CHP plants in the original version of the state aid scheme that the Commission has deemed compatible with internal market?

The CJEU has held that when Member States adopt measures to implement EU law, they are required to respect the general principles of that law, including the principle of legal certainty.[41] The principle of legitimate expectations derives from the principle of legal certainty.[42] The right to rely on that principle is granted to any person to whom a national administrative body has given rise to a legitimate expectation

[39] Article (2)1 of the Directive 2012/27/ES stipulates that the requirements laid down in this Directive are minimum requirements and shall not prevent any Member State from maintaining or introducing more stringent measures.

[40] Article 6 of Directive 2018/2001.

[41] See, for example, Judgment of CJEU of 11 July 2019 in joined cases No. C-180/18, C-286/18 and C-287/18, Agrenergy Srl, para. 28. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1364756 [last viewed 11.04.2024]. Judgment of CJEU of 7 August 2018 in case No. C-120/17, Administratīvā rajona tiesa, para. 48. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=204742&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1365303 [last viewed 11.04.2024].

[42] See, for example, Judgment of CJEU of 11 July 2019 in joined cases No. C-180/18, C-286/18 and C-287/18, Agrenergy Srl, para. 29–30. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=216066&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1364756 [last viewed 11.04.2024].

based on specific promises, which it has made.[43] At the same time, the principles of legal certainty and the protection of legitimate expectations do not preclude national legislation which allows a Member State to reduce or abolish incentive tariffs previously established for energy produced from renewable energy sources.[44]

Thus, it could be concluded from the jurisprudence of the CJEU that the extension of the heat energy efficiency standards to cogeneration plants participating in the state aid scheme for renewable energy do not infringe upon the principles of legitimate expectations and legal certainty. However, this is questioned by Article 6(1) and (2) of Directive 2018/2001, on the content of which the CJEU has not yet expressed an opinion.

During the public hearings of the case in the Constitutional Court, considerations were also raised about the possibility of the court turning to the CJEU with a request for a preliminary ruling. However, the Constitutional Court did not do so in accordance with Article 267 of the Treaty on the Functioning of the European Union, because the court found the disputed norms to be unconstitutional, and, therefore, the solution of the case could not be changed by interpretation of EU law. Hence, it is in the hands of another court of a Member State, including Latvia, who could raise the aforementioned questions to the CJEU.

However, even though the Constitutional Court resolved this case without an input from the CJEU, this judgement touches the issue of legitimate expectations of producers who have invested in helping Latvia reach its climate goals. According to the Constitutional Court, the right to property in the area of State aid is in itself linked to legitimate expectations, since the granting of State aid by a regulatory act, decision or contract constitutes a promise by the State to the producer or an acquired right.[45] This judgment is, thus, a good example of investment protection in Latvia.

3.3. Execution of the Constitutional Court judgment and necessity to find a balance between interests

The legal relations between the Constitutional Court and the legislator are directly influenced by the way the judgments of the Constitutional Court are executed. Considering the *erga omnes* effect of a judgment, which follows also from Article 85 of the *Satversme*, it is presumed that the judgments of the Constitutional Court will always be executed. This typically means that a legal norm that has been declared unconstitutional loses its force, and the legislator adopts another legal regulation, that is compliant with the Constitution.

The execution of the judgment directly demonstrates the implementation of the principle of separation of powers and the principle of loyalty of constitutional bodies[46]. In a state governed by the rule of law, each institution should fulfil its functions with mutual respect and cooperation. If the Constitutional Court's judgments are ignored and not executed, the Court's role is diminishing. Consequently,

[43] See, for example, Judgment of CJEU of 9 July 2015 in case No. C-183/14, Salomie and Oltean, para. 44. Available: https://curia.europa.eu/juris/document/document.jsf?text=&docid=165649&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=1365820 [last viewed 11.04.2024].

[44] Ibid., para. 47.

[45] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 20 and 21. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[46] Decision of the Constitutional Court of the Republic of Latvia to terminate proceedings of 8 June 2012 in case No. 2011-18-01, para. 17. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2016/02/2011-18-01_Lemums_izbeigsana.pdf#search=2011-18-01 [last viewed 06.04.2024].

such a court would become weak or less authoritative. There is a presumption that a constitutional court is strong if its judgment is final and binding (*erga omnes*); it cannot be overruled by anyone except the court itself or by the constitutional legislator, if it amends the constitution.[47] Conversely, if a ruling of the Constitutional Court is overruled by the parliament, the position of the Constitutional Court is weakened and, therefore, constitutional review in such a country in general is weak.

Considering the respectful dialogue between the Constitutional Court and the legislator, the judgments of the Constitutional Court have been usually, with minor exceptions, executed.

Moreover, in Latvia, since 2017, the jurisprudence of the Constitutional Court has formulated the principle of good lawmaking. According to this principle, the legislator must, among other things, assess the draft law, considering the findings expressed in the judgments of the Constitutional Court. In particular, the judgments of the Constitutional Court in which the relevant issue has already been examined and the legal norm has been declared unconstitutional, should be taken into account. If this principle is violated, the court may declare that the law has been adopted contrary to the principle of good lawmaking, and, therefore, it is unconstitutional.[48]

It is unquestionable that the legislator, when executing its legislative powers arising from the *Satversme*, has the discretion to decide on its own, whether and what kind of laws should be adopted instead of the legal norms the Constitutional Court has declared unconstitutional. Moreover, the legislator may also decide not to regulate a particular matter at all. However, the legislator must consider whether such silence might contradict the Constitutional Court's judgment itself. Good cooperation of the Constitutional Court and the legislator can also be witnessed in the way parliament has executed judgement in case No. 2021-31-0103 analysed before.

To execute the aforementioned judgement[49], the Cabinet of Ministers was required to consider introducing a different framework for state aid, which would consider whether or not, and to what extent, biogas CHP plants are subject to the high-efficiency cogeneration requirements rooted in Directive 2012/27/EU. By amending the relevant regulations, the Cabinet of Ministers decided to control the efficient use of heat in biogas CHP plants, taking into account the technological particularities of these plants, and not to apply the high-efficiency cogeneration requirements to them.[50] At the same time, these requirements remain in place for electricity producers participating in the mandatory procurement for the use of renewable energy sources and combusting biomass (e.g. wood chips) in CHP plants.

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[47] *Chen, A. H. Y., Maduro, M. P.* The judiciary and constitutional review. In: Routledge Handbook of Constitutional Law, *Tushnet, M., Fleiner, T., Saunders, C.* (eds). London & New York, 2013, p. 102.

[48] Judgement of the Constitutional Court of the Republic of Latvia of 28 June 2023 in case No. 2021-45-01, para. 17.2.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/12/2021-45-01_Judgement.pdf#search= [last viewed 06.04.2024].

[49] In the annotation of the legal act it is precisely mentioned that the amendments are drafted to execute judgement of the Constitutional Court in case No. 2021-31-0103. See. Annotation (*ex ante*) of the draft act No. 23-TA-628. Available: https://tapportals.mk.gov.lv/annotation/dbefa790-a55c-4df2-9a8b-6f2ce4c893bb# [last viewed 06.04.2024].

[50] Ministru kabineta 2023. gada 6. jūnija noteikumi Nr. 278. Grozījumi Ministru kabineta 2020. gada 2. septembra noteikumos Nr. 560 "Noteikumi par elektroenerģijas ražošanu, izmantojot atjaunojamos energoresursus, kā arī par cenu noteikšanas kārtību un uzraudzību" [Regulations No. 278 of the Cabinet of Ministers of 6 June 2023. Amendments to the Regulations of the Cabinet of Ministers of 2 September 2020 No. 560 "Regulations on the Production of Electricity from Renewable Energy Sources and on the Procedure for Setting and Monitoring Prices"]. Available: https://likumi.lv/ta/id/342445-grozijumi-ministru-kabineta-2020-gada-2-septembra-noteikumos-nr-560-noteikumi-par-elektroenergijas-razosanu-izmantojot-atjaunoj [last viewed 06.04.2024].

Thus, the execution of this judgment has contributed to the development of the state aid rules that merge the requirements of Directive 2012/27/EU and Directive 2018/2001 in a way that, on the one hand, respects the investments made by investors for the use of renewable energy sources for electricity production and promotes their further use, and, on the other hand, requires these producers to comply with appropriate efficiency requirements. So far, no producer has appealed to the Constitutional Court against the newly introduced requirements. It is possible to conclude with some caution that, at least on this issue, Latvia has found a balance between achieving climate goals, the efficiency of electricity production and the protection of the right to property.

4. Environmental constitutionalism: theoretical or applicable concept

Nowadays environmental protection is very much connected with ideas of democracy, fundamental rights, and rule of law. To explain and stress the importance of environment in legal science, new legal mechanisms and concepts have emerged. Today, scholars and courts have developed a new concept – environmental constitutionalism, which means, *inter alia,* that legal provisions on a constitutional level deal with environmental issues, which may include references to environmental protection, ecology, nature.[51] Undoubtedly, it is a very broad concept and it touches both substantive and procedural law aspects.[52] It is also suggested that environmental constitutionalism can be treated as a constitutional value.[53] On a national level, environmental constitutionalism can be fulfilled through the application of constitutional law, international law, fundamental rights, and environmental law.[54] It is the complexity of environmental law and the related environmental constitutionalism as a new phenomenon, that demands a broad legal approach when dealing with these issues.

In the Latvian legal system, environmental constitutionalism is directly manifested in two ways. The first is *Satversme* with the "classical" catalogue of fundamental rights, which provides a specific fundamental right – the right of everyone to live in a benevolent environment, which is granted in the Article 115.[55] By applying this fundamental right, the Constitutional Court uses international law instruments, for example, Aarhus convention,[56] which has played an important role by developing *locus*

[51] *Hudson, B.* Structural environmental constitutionalism. Widener Law Review, 21(2), 2015, p. 201; *O'Gorman, R.* Environmental Constitutionalism: A Comparative Study. Transnational Environmental Law, 6(3), 2017, p. 438.

[52] See, for example, *Kotzé, L. J.* Global Environmental Constitutionalism in the Anthropocene.Bloomsbury Publishing Plc, 2016, pp. 152–153.

[53] *May, J. R., Daly, E.* Global Environmental Constitutionalism, Cambridge University Press, 2014, p. 18.

[54] *Campbell, T. A.* Environmental Constitutionalism: Marrying the Due Process Clause and the Equal Protection Clause With Climate Change. Vermont Journal of environmental law, 22(2), 2021, p. 106.

[55] To compare the regulation of environmental aspects in other constitutions, see: *Hayward, T.* Constitutional Environmental Rights, Oxford University Press, 2005, p. 28; *Daly, E.* Constitutional Protection for Environmental Rights: The Benefits of Environmental Process. International Journal of Peace Studies, Vol. 17, No. 2, Winter 2012, pp. 72–73.

[56] Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, namely, Aarhus Convention, has been applied by the Constitutional Court in cases several times. For example, in a recent case which was decided at the end of 2023, the court applied this convention, explaining the necessity to involve society by deciding the issues related to the environmental issues. See. Judgement of the Constitutional Court of the Republic of Latvia of

standi rules of NGOs to apply to the court[57]. The jurisprudence of the Constitutional Court explains that this subjective fundamental right covers not only the interests of the present generations, but also the interests of future generations to live in a benevolent environment. Namely, this ideal must be taken into account when deciding the issues which can influence next generations and protection of nature in a broader sense. In other words, the Constitutional Court has broadly defined the term "everyone" who can be affected in the future, allowing to bring a case to the court to protect future generations. The second manifestation of constitutional environmentalism can be seen in the Preamble of the *Satversme* that *expressis verbis* defines the principle of sustainability.[58] The Constitutional Court has declared that sustainability is the basis of the country's existence. This principle has been applied in different areas, but it is most often referred to when deciding environmental issues. Undoubtedly, the opportunities of current and future generations to live in a benevolent environment depend on the readiness of countries to implement sustainable development policies, protecting the Earth's climate system, anticipating and preventing or neutralizing the causes of climate change and mitigating their harmful effects. In other words – the Constitutional Court in the case No. 2021-31-0103 analysed above has confirmed that in Latvian legal reasoning there is a place to talk about environmental constitutionalism, which combines the principle of sustainability and the fundamental right to live in the benevolent environment.[59]

So far, environmental constitutionalism as a concept has been directly referred to in two judgements of the Constitutional court. One of them has been explained in this article, the other is very recent and related to forest management policy.[60] However, in general lines, Latvian scholars have not been in dialogue with the Court about this new concept, as it has not been much described, analysed, or criticised in legal science papers. It seems that, by keeping their silence, legal scholars have accepted it. It is worth mentioning that this new concept already has been reflected in the applications, which are submitted to the Constitutional Court and are related to the protection of environment. For example, in the constitutional complaint, which was submitted by three NGOs – Latvian Fund for Nature, World Wide Fund for Nature and Latvian Ornithological Society – environmental constitutionalism was used as an argument to substantiate the claim.[61]

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27 November 2023 in case No. 2022-16-05, para. 20.4. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2022/05/2022-16-05_Spriedums.pdf#search=2022-16-05 [last viewed 06.04.2024].

[57] See, for example, Judgement of the Constitutional Court of the Republic of Latvia of 17 January 2008 in case No. 2007-11-03, para. 13. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=/wp-content/uploads/2007/05/2007-11-03_Spriedums_ENG.pdf#search= [last viewed 06.04.2024].

[58] The Preamble of the Constitution states: "While acknowledging its equal status in the international community, Latvia protects its national interests and promotes sustainable and democratic development of a united Europe and the world." The Constitution of the Republic of Latvia. Available: https://www.saeima.lv/en/legislative-process/constitution [last viewed 12.04.2024].

[59] Judgement of the Constitutional Court of the Republic of Latvia of 27 October 2022 in case No. 2021-31-0103, para. 36.1. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2021/07/2021-31-0103_Spriedums.pdf#search=2021-31-0103 [last viewed 06.04.2024].

[60] Judgement of the Constitutional Court of the Republic of Latvia of 8 April 2024 in case No. 2023-01-03, para. 17.2. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/01/2023-01-03-spriedums_.pdf#search=2023-01-03 [last viewed 11.04.2024].

[61] Decision of the 3rd Panel of 27 January 2023 to initiate a case. Available: https://www.satv.tiesa.gov.lv/web/viewer.html?file=https://www.satv.tiesa.gov.lv/wp-content/uploads/2023/01/2023-01-03_lemums_par_ierosinasanu-1.pdf#search=[last viewed 06.04.2024].

Summary

Historically, the state aid scheme for producing electricity in Latvia has been dual: with a set of rules for those participating in the mandatory procurement for using renewable resources, and another set of rules for those using combusting in highly efficient CHP plants.

The state aid scheme in Latvia favours those producers who use renewable energy resources and participate in the mandatory procurement for doing so. On the one hand, the producers combusting fossil fuels in CHP plants cannot claim to have legitimate expectations to be subject to the same set of rules (fixed term of state aid) as the producers using renewable resources. On the other hand, the producers using renewable resources can challenge the newly enforced standards that previously were attributed only to producers participating in mandatory procurement for producing electricity in high-efficiency cogeneration, and have successfully done so.

In its jurisprudence, the Constitutional Court takes into account the principles of legal certainty and legitimate expectations when deciding on issues of state aid, as they are related to the right to property. However, there is an unanswered question of how far these principles reach in the context of Article 6.1 of Directive (EU) 2018/2001.

As the Constitutional Court has drawn the attention of the legislature, EU climate goals are being taken very seriously not only in relation to the environment, but also regarding energy independence. These issues are intertwined and demonstrate the necessity to move away from the use of fossil fuels.

Execution of judgment of the Constitutional Court is a prerequisite of the state ruled by law. It demonstrates dialogue between Constitutional Court and the parliament. Execution of the judgement in case No. 2021-31-0103 exemplifies the necessity to find a fair balance between the duty to improve and promote the use of renewable energy resources for electricity production and efficiency requirements.

The Constitutional Court has formulated a new aspect of constitutionalism – environmental constitutionalism, which has been neither analysed, nor commented upon by legal scientists in Latvia. Nevertheless, it appears that this concept has been accepted by lawyers, since it has been reflected as an argument in the applications submitted to the Constitutional Court.

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