



EUROPEAN COMMISSION

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Constitutional Court
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REPLY FROM THE COMMISSION TO THE REQUEST FOR OPINION FROM THE CONSTITUTIONAL COURT OF THE REPUBLIC OF LATVIA IN CASE 2022-06-03

1. INTRODUCTION

- (1) On 20 September 2022, the Commission received from the Constitutional Court of Latvia a request for an opinion on the basis of Article 29(1) of Regulation 2015/1589 (the “Procedural Regulation”)¹.
- (2) It should be recalled that opinions of the Commission – in line with Article 29(1) of the Procedural Regulation and the Enforcement Notice² – are not binding upon the national court. Only the Union Courts can give a binding interpretation of EU State aid rules. Therefore, the Commission’s opinion is without prejudice to the possibility or obligation for the national court to ask the Court of Justice of the European Union for a preliminary ruling regarding the interpretation or the validity of Union law in accordance with Article 267 of the Treaty on the Functioning of the European Union (“TFEU”)³.
- (3) In accordance with the Enforcement Notice, when giving its opinion the Commission will limit itself to providing the national court with the factual information or the economic or legal clarification sought⁴.

¹ Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 of the Treaty on the Functioning of the European Union, Official Journal of the European Union (“OJ”) L 248, 24.9.2015, p. 9.

² See point 117 of the Commission notice on the enforcement of State aid law by national courts, OJ C 305, 30.7.2021, p. 1 (the “Enforcement Notice”).

³ See Enforcement Notice, point 102.

⁴ See Enforcement Notice, point 117.

2. RELEVANT FACTS AND PROCEDURE

- (4) The applicant in the national court case produces combined heat and power (CHP, also known as cogeneration).
- (5) By decisions of the Ministry of Economy of 16 July 2009, 3 December 2009 and 4 September 2012, the applicant was granted the right to participate in the mandatory procurement mechanism provided for by the Latvian support scheme for renewable energy sources (RES) and CHP. More specifically, the applicant received the right to participate in mandatory procurements on the basis of the rules on the production of electricity from cogeneration, which are different from those for participation in mandatory procurements for the production of RES.
- (6) The Constitutional Court indicated that national legislation established for the first time a time limit for the receipt of the aid on 8 September 2012, by entry into force of Cabinet Regulation n°604 of 28 August 2012 amending Cabinet Regulation n°221 of 10 March 2009 “Regulations Regarding Electricity Production and Price Determination upon Production of Electricity in Cogeneration” (Cabinet Regulation n°221). This was after the applicant was granted the right to participate in the mandatory procurement mechanism for cogeneration.
- (7) Amending Cabinet Regulation n°604 introduced the following new paragraph 53.¹ in Cabinet Regulation n°221:

“53.¹ A trader who has obtained the right to sell electricity produced in the context of a compulsory procurement procedure and whose installed electrical capacity of a cogeneration power plant or a separate cogeneration installation in that power plant does not exceed four megawatts shall purchase electricity produced by cogeneration for a period of 10 years from the date on which one of the following conditions is met:

53.¹ 1. The capacity of the cogeneration unit of a cogeneration power plant or of an individual cogeneration unit of that power plant has been put into service in accordance with a permit issued by the system operator to connect a cogeneration power plant or a separate cogeneration unit of that power plant, or, in the absence of such a permit, from the date of entry into service of the plant;

53.¹ 2. The capacity specified in the decision on the award of compulsory procurement of electricity produced from cogeneration after the extension of capacity has been commissioned in accordance with a permit issued by the system operator to connect to the system with increased capacity a cogeneration power plant or a separate cogeneration unit of that power plant.”

- (8) Paragraph 68 of Cabinet Regulation n°561 of 2 September 2020 “Regarding the Production, Monitoring and Price Determination of Electricity upon Production of Electricity in Cogeneration” (Cabinet Regulation n°561) provides in a similar manner:

“68. A public trader shall purchase electricity produced by cogeneration from a registered trader who has a mandatory procurement right and whose cogeneration power plant or separate cogeneration unit of that power plant has an installed electrical capacity not exceeding 4 MW for 10 years from the date on which one of the following conditions is met:

68.1. The capacity of the cogeneration unit of a cogeneration unit, or of a separate cogeneration unit of that power plant, has been put into service in accordance with a permit issued by the system operator to connect the cogeneration unit or a separate cogeneration unit of that power plant, or, in the absence of such a permit, from the date on which the plant is accepted;

68.2. The capacity specified in the decision on the award of compulsory procurement of electricity produced from cogeneration after the extension of capacity has been commissioned in accordance with a permit issued by the system operator to connect to the system with increased capacity a cogeneration unit or a separate cogeneration unit of that power plant.”

- (9) On 24 April 2017, the Commission adopted a decision authorising the Latvian support scheme for RES and cogeneration⁵ on the grounds that it is compatible with the internal market pursuant to Article 107(3)(c) of the TFEU.
- (10) The applicant objects to the 10-year period laid down in paragraph 53.¹ of Cabinet Regulation n°221 and paragraph 68 of Cabinet Regulation n°561.
- (11) The applicant claims to be able to rely on a period of State aid of at least 20 years. The applicant relies on considerations of legitimate expectations and on the fact that, at the time when the decisions to grant State aid were adopted, the provisions did not provide for a time-limit for the grant of State aid. The applicant also refers to the legal framework applicable to producers of electricity who receive State aid for the use of RES and for which the legislation lays down a 20-year period of State aid.

3. QUESTIONS RAISED BY THE CONSTITUTIONAL COURT

- (12) Before raising its questions to the Commission, the Constitutional Court recalls that, as reflected in the Commission Decision, the conditions for participating in the mandatory procurement mechanism are different depending on whether they refer to cogeneration or RES.
- (13) It notes, in particular, that the Commission Decision points out the difference in the time period during which the aid is granted, depending on whether the aid is for cogeneration or RES:
 - The maximum duration of the aid for cogeneration plants is 10 to 15 years, depending on the plant’s capacity (10 years for plants with capacity that does not exceed 4 MW and 15 years for plants with capacity above 4 MW; paragraph 28 of the Decision);
 - The maximum duration of the aid for RES production is 20 years (10 years with full grant of the aid and a further 10 years during which aid is granted at a reduced rate; paragraph 14 of the Decision).
- (14) Subsequently, the Constitutional Court states that “While the Commission Decision reflects these differences in the framework of the different State aid mechanisms, Section 3.3.1. of the Commission Decision, which assesses the compatibility of the

⁵ State aid decision of 24 April 2017 in case SA.43140 (2015/NN), ‘Latvia – Support to renewable energy and CHP’ (OJ C 176, 2.6.2017, p.2).

State aid, indicates that the aid will be granted for a maximum duration of 20 years (see: Paragraph 78 of the Commission Decision). Paragraph 78 of the Commission Decision seems to contain a conclusion on the two State aid mechanisms under examination, but only refers to the section of the Commission Decision on State aid for renewable technologies. That paragraph does not contain any indication of the time limits for State aid for cogeneration”.

(15) The questions of the Constitutional Court are the following:

- 1) Has the Commission, by its Decision, harmonised State aid to plants in connection with the production of electricity from cogeneration with a capacity of less than 4 MW for a maximum period of 10 or 20 years?
- 2) Is the reference in paragraph 78 of the Commission Decision to a maximum duration of State aid of 20 years also applicable to electricity producers receiving State aid solely for the production of electricity from cogeneration?

4. THE COMMISSION’S OPINION

- (16) Paragraph 78 of the Decision cannot and should not be construed as meaning or implying that cogeneration can also benefit from a **maximum aid duration** of 20 years, or that the Decision “harmonises” State aid for cogeneration plants of a capacity that does not exceed 4 MW in such a way that the maximum period during which aid may be granted to such plants can be of 20 years.
- (17) In the Decision, paragraph 78 is the last paragraph of Section 3.3.1. on compatibility of the aid with the internal market under the 2001 Community Guidelines on State aid for environmental protection⁶ (“2001 EAG”). That section covers both types of activities covered by the Latvian support scheme, *i.e.* aid to RES and aid to cogeneration.
- (18) Where the Commission states in its decision on the whole Latvian State aid scheme that “The aid under the scheme is provided for 20 years as of the start of operation”, it refers implicitly to the maximum duration of aid possible under the scheme as a whole.
- (19) The Commission based its assessment of the aid scheme on the information provided in the course of the procedure by Latvia.
- (20) Based on such information, as pointed in paragraph 28 of the Decision and noted by the Constitutional Court in its request for an opinion, the maximum duration for aid to cogeneration plants with a capacity that does not exceed 4 MW is 10 years and that for aid to cogeneration plants with a capacity above 4 MW is 15 years.
- (21) When it comes to aid to cogeneration plants, it is aid of such a maximum duration (10 or 15 years, depending on capacity) which the Decision finds compatible with the internal market.
- (22) The Decision indicates in its paragraph 6 that it “concerns the aid granted in the period from 1 July 2007 to 31 December 2012”.

⁶ Community Guidelines on State aid for environmental protection (OJ C 37 of 3.2.2001, p.3).

(23) The fact that paragraph 78 does not explicitly indicate the time limits for State aid for cogeneration cannot be construed as meaning that the maximum period for the production of electricity from cogeneration is increased or otherwise “harmonised” to 20 years.

(24) In view of the above:

1) The Commission, by its Decision, has not “harmonised” State aid to plants in connection with the production of electricity from cogeneration with a capacity of less than 4 MW for a maximum period of 20 years;

2) Paragraph 78 shall be read together with paragraph 28 of the Commission decision. Consequently, the reference in paragraph 78 of the Commission Decision to a maximum duration of State aid of 20 years is not also applicable to electricity producers receiving State aid solely for the production of electricity from cogeneration, but refers to the longest possible period of aid for any of the beneficiary categories in the decision (renewables).

Based on the information provided in the course of the procedure by Latvia, the aid declared compatible with the internal market in the Commission Decision is of a maximum duration of 10 years for cogeneration plants with a capacity that does not exceed 4 MW and of 15 years for cogeneration plants with a capacity above 4 MW.

With best regards,

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