Constitutional judgment 3-2-1-71-14

EN BANC

JUDGMENT
in the name of the Republic of Estonia

Case number	3-2-1-71-14
Date of judgment	15 December 2015
Composition of court	Chairman: Priit Pikamäe; members: Tõnu Anton, Jüri Ilvest, Peeter Jerofejev, Henn Jõks, Hannes Kiris, Lea Kivi, Indrek Koolmeister, Ants Kull, Villu Kõve, Saale Laos, Viive Ligi, Jaak Luik, Ivo Pilving, Malle Seppik and Tambet Tampuu
Case	Claim by Eesti Energia Aktsiaselts against Mati Makkar for payment of debt and interest for delay, and Mati Makkar's counterclaim against Eesti Energia Aktsiaselts to declare unlawfulness of disconnection of electricity and to obtain compensation for damage
Contested judicial decision	Tallinn Court of Appeal judgment of 12 December 2013 in civil case No 2-12-10352
Appellant and type of appeal	Appeal in cassation by Mati Makkar

Participants in the proceedings and their representatives in the Supreme Court

Claimant Eesti Energia Aktsiaselts (registry code 10421629)
Defendant Mati Makkar (personal identification code 36811200278), representative sworn advocate Ilya Zuev
Riigikogu
Chancellor of Justice
Minister of Justice
Government of the Republic
Estonian Competition Authority
Estonian Renewable Energy Association
Estonian Wind Technology Association

Date of review of the case

7 April 2015, written procedure

OPERATIVE PART

1. To reverse Tallinn Court of Appeal judgment of 12 December 2013 in civil case No 2-12-10352 and Harju County Court judgment of 29 May 2013 in the same civil case to the extent that they dismissed Mati Makkar's counterclaim for compensation of non-pecuniary damage and allocated the procedural expenses.
2. In the remaining part, uphold Tallinn Court of Appeal judgment of 12 December 2013 in civil case No 2-12-10352.
3. In the reversed part, remit the case for re-examination to Harju County Court.
4. To allow the appeal in cassation in part.
5. To refund to Mati Makkar the security paid for appeal in cassation.

FACTS AND COURSE OF PROCEEDINGS

1. On 12 March 2012, the public limited company Eesti Energia Aktsiaselts (claimant) filed a claim with Harju County Court against Mati Makkar (defendant), seeking an order that the defendant pay in favour of the claimant the principal debt of 5951 euros and 46 cents, interest for delay 73 euros and 29 cents, interest for delay 1261 euros and 44 cents which had become collectable, interest for delay at the rate of 0.1% of the unpaid principal debt daily until discharge but not more than the principal debt.

2. According to the statement of claim, on 22 April 2002 the parties concluded a contract for purchase and sale of electricity and provision of network services (the network contract). Under clause 9.7 of the standard terms of [the distribution network operator] Eesti Energia Jaotusvõrk OÜ, the defendant is obliged to pay for network services and other charges arising from the network contract based on invoices issued to him, by due dates indicated on the invoices. In the event of non-payment, under clause 9.9 of the standard terms the defendant is required to pay 0.1% daily interest for delay. The defendant failed to pay for electricity and for the network service. On 22 February 2011, the parties concluded an agreement for payment of the debt (debt agreement) under which the defendant owes the claimant 944 euros and 33 cents, including the principal debt of 802 euros and 66 cents, and interest of 141 euros and 67 cents. Under the payment schedule, constituting an annex to the agreement, the defendant undertook to pay the claimant the entire debt with interest by the dates indicated in the payment schedule, paying annual interest of 23% a year on the debt, and 0.1% daily interest in case of delay. The defendant paid only the first instalment indicated in the payment schedule. The defendant accumulated a debt for electricity, network service, renewable energy charge and electricity excise duty,

amounting to 5951 euros and 46 cents as at the moment of filing the claim. The claimant disconnected the defendant's network connection on 31 January 2012.

3. The defendant contested the claim as follows. The claimant's claim is unlawful and contrary to the principle of good faith. The claimant has no right to charge interest of 23% a year and interest of 0.1% for delay, because the debt agreement is void. The claimant is a monopolistic provider of a general-interest service in a member state with a restricted electricity market. The defendant was in a forced situation at the time of concluding the debt agreement, as he could not choose another electricity undertaking and had to agree to the claimant's conditions. The claimant has calculated the amount of electricity at a metering point which does not conform to the contract, the claimant changed the connection point without his consent. The claimant also has no basis to request a renewable energy charge. The parties have not entered into a contract on payment of the renewable energy charge. Renewable energy charge is contrary to Article 107 of the Treaty on the Functioning of the European Union (TFEU).

4. On 21 August 2012, the defendant filed a counterclaim, seeking to declare the disconnection of electricity by the claimant on 31 January 2012 unlawful and to order the claimant to pay loss of lease income suffered by the defendant in the amount of 1917 euros and non-pecuniary damages for health disorders and emotional distress caused by disconnection of electricity. Due to the disconnection of electricity the heating system at the defendant's main place of abode also broke down, the pipes froze, water consumption was impossible, toilet bowls broke and a pipe in the wall burst. The claimant could foresee that the defendant, his 8-year-old child and other family members might experience emotional distress and suffering, including health damage, if electricity was cut off in February with an outside temperature of minus 30 degrees. Due to the claimant's actions, the defendant's family members were forced to change their abode and the defendant fell ill. On account of the claimant's actions the defendant suffered damage in the amount of 1917 euros, i.e. lease income which he could have earned if the claimant had not cut off the electricity. The defendant had ongoing negotiations for leasing his dwelling and informed the claimant about this. The network contract between the parties does not mention that the standard terms of Eesti Energia Jaotusvõrk OÜ would be followed in providing the network service. The claimant breached the principle of good faith by refusing to work out a payment schedule and finding a reasonable solution with the defendant.

5. The claimant contested the counterclaim. Under clauses 5.2 and 5.3 of the standard terms and § 90 (7) of the Electricity Market Act (EMA) the claimant is entitled to disconnect the network connection because by having failed to pay the charge the defendant breached the network contract, and the defendant was notified at least 90 days in advance. Upon transfer of the enterprise, its legal predecessor also transferred to the claimant the network contract concluded with the defendant, so that the standard terms of Eesti Energia Jaotusvõrk OÜ also apply to the defendant. The defendant has not substantiated his alleged emotional distress and suffering. Similarly to its other customers, the claimant offered to the defendant a payment holiday as well as a payment schedule, and the parties concluded a debt agreement, but the defendant failed to comply with its conditions. The claimant has not caused pecuniary damage to the defendant, the defendant has not proved that he was intending to lease part of his house. Compensation of non-pecuniary damage is excluded under clause 11.9 of the standard terms and the defendant has not substantiated his alleged distress and suffering.

6. By decision of 29 May 2013, Harju County Court allowed the claim and the counterclaim in part. The County Court ordered from the defendant in favour of the claimant 7215 euros and 90 cents, including the principal debt of 5951 euros and 46 cents, and interest for delay 1261 euros and 44 cents, and interest for delay at the rate of 0.1% of the principal claim daily from the date of filing the claim until discharge of the principal claim, but not more than the amount of the principal claim. The County Court declared the disconnection of the defendant's electricity on 31 January 2012 unlawful. Procedural expenses were left for the parties to bear. Additionally, the County Court ordered from the defendant in favour of the state the unpaid state fee in the amount of 175 euros. According to the County Court judgment, the parties had concluded a network contract, also including standard terms, to which the defendant had consented. No bases exist for invalidity of standard terms under § 42 of the Law of Obligations Act (LOA). The claimant was entitled to relocate the meter and order an expert examination of it (clause 4.2). Under § 89 (1) of the EMA, the claimant had the right to amend the standard terms. The claimant's claim to order payment for electricity consumed is justified and substantiated. As the defendant neither complied with the debt agreement by due date nor paid the invoices issued for electricity consumed, interest for delay in favour of the claimant should be ordered from him under § 113 of the LOA. The defendant is not obliged to pay to the claimant interest under the debt agreement, as this condition is void under § 86 (2) and § 90 (3) of the General Part of the Civil Code Act. The request to pay the renewable energy charge in the invoices issued by the

claimant is lawful. The renewable energy charge is a charge imposed by the state with the aim of support for generating electricity from renewable energy sources or in an efficient cogeneration process (§ 59, § 59^1, § 59^2 EMA) and is collected by distribution network operators. The defendant's submissions concerning European Union law are not relevant. The case has no cross-border dimension, as both the claimant and the defendant are in Estonia. The applicable Estonian legislation is not in conflict with European Union law. The defendant's claims for compensation for loss of lease income suffered and emotional distress and suffering caused by health damage are unsubstantiated. The defendant is not entitled to request compensation of damage incurred on account of family members moving. As the claimant failed to notify the defendant 90 days in advance of disconnection of the network connection, as required under § 90 2) and (7) of the EMA, the claimant cut off the electricity unlawfully.

7. The defendant filed an appeal, seeking to reverse the County Court judgment to the extent that the court dismissed the defendant's counterclaim and allowed the claim and ordered the defendant to pay the state fee. The defendant sought to remit the case in the part reversed to the County Court for re-examination, or to issue a new judgment and dismiss the claim to the extent that the defendant does not admit the claim, and to allow the defendant's claim for non-pecuniary damages and loss of lease income suffered. The defendant requested an order that the claimant pay the procedural expenses.

8. The claimant contested the appeal and asked the court to dismiss it and to order the defendant to pay the procedural expenses.

JUDGMENT OF THE COURT OF APPEAL

9. By an order of 12 December 2013, Tallinn Court of Appeal reversed the County Court judgment to the extent that it had ordered the defendant to pay the state fee of 175 euros. In the remaining part the County Court judgment was upheld. The expenses of the appeal proceedings were left for the defendant to bear. According to the Court of Appeal judgment, the County Court had correctly held that Estonian law was applicable in the case, as the dispute lacked a cross-border dimension and Estonian legislation was in conformity with European Union law. The County Court did not have to seek a preliminary ruling from the Court of Justice of the European Union (CJEU) to adjudicate the case. The County Court correctly established the defendant's debt to the claimant. The County Court was also justified in holding that under § 113 (1) of the LOA the defendant was obliged to pay to the claimant interest for delay in discharging a monetary obligation. The County Court was justified in dismissing the defendant's counterclaim for compensation of pecuniary and non-pecuniary damage. The fact that the defendant leased his dwelling in 2005–2007 does not prove that he had a realistic opportunity to lease the dwelling again in 2012 and that he lost this opportunity on account of the claimant's unlawful activity. It is not substantiated that the defendant was in negotiations for entering into a lease contract. It is also unsubstantiated that the claimant's activity caused the defendant to catch cold. The defendant is not justified in claiming compensation for non-pecuniary damage on behalf of his family members.

Proceedings in the Supreme Court

10. The defendant filed an appeal in cassation, seeking to reverse the Court of Appeal judgment to the extent that it dismissed the defendant's appeal.

11. The courts failed to assess whether a metering point which had not been agreed could be considered a legitimate metering point, and failed to correctly evaluate the evidence on the defendant's electricity consumption. The Court of Appeal should have assessed ex officio whether the standard terms were void and declared the debt agreement of 22 February 2011 void in its entirety. The courts failed to assess whether disconnection of electricity supply in winter was compatible with Annex I and Article 9 para. 12 of Directive 2009/72/EC. The courts also failed to evaluate evidence proving that the defendant had sustained pecuniary damage. The courts concluded erroneously that the defendant had not substantiated loss of income suffered. The courts also erroneously failed to allow the defendant's claim for compensation of non-pecuniary damage. In addition, the courts wrongly held that the claimant was entitled to request payment of the renewable energy charge from the defendant. These charges did not conform to European Union law and the courts should have sought a preliminary ruling from the CJEU.

12. The claimant contests the appeal in cassation.

13. By an order of 27 October 2014, the composition of the Supreme Court Civil Chamber referred the case for review to the full panel of the Civil Chamber.

OPINION OF THE FULL PANEL OF THE SUPREME COURT CIVIL CHAMBER

14. By order of 12 February 2015, the Supreme Court Civil Chamber referred the case to the Supreme Court *en banc* on account of a suspicion that interference with a consumer's fundamental right to property under § 32 of the Constitution resulting from payment of the renewable energy charge under § 59^2 (1) in combination with § 59 (1) and (2) of the EMA could be unconstitutional.

15. Under § 59^2 (1) of the EMA, the expenditure arising in relation to funding the support described in § 59 of the Act is borne by consumers. The support established in § 59 of the EMA constitutes state aid. The renewable energy charge collected from consumers is a public financial obligation, which the transmission network operator distributes to renewable energy producers as state aid. Through the renewable energy charge, consumers have to fund as much electricity generated from renewable sources in Estonia as producers have the initiative and opportunity to generate in conformity with the grid code; a limitation is imposed only on support for wind energy. Although Estonia has a fully open electricity market, renewable energy charges are not linked to the exchange price of electricity. The defendant has been required to pay about 8% of renewable energy charge from his charge for electricity and network services; in addition he is required to pay about 5.4% of electricity excise duty. Both § 59^2 (1) of the EMA, imposing on consumers the obligation of funding the renewable energy charge, as well as § 59 (2) of the EMA, setting the amount of support paid to a producer, should be considered relevant for constitutional review proceedings.

OPINIONS OF THE PARTICIPANTS IN THE PROCEEDINGS

16.–72. [Not translated.]

CONTESTED PROVISIONS

73. The Civil Chamber has doubts about the constitutionality of the following provisions: § 59 (1) and (2) of the Electricity Market Act:
"(1) A producer is entitled to receive support from the transmission network operator:
1) for electricity generated from a renewable energy source using a generating installation whose net capacity does not exceed 100 MW;
2) since 1 July 2010, for electricity if it is generated from biomass in an efficient cogeneration process, except where electricity is generated from biomass in a condensation process, in which case no support is paid. Detailed guidelines for cogeneration shall be established by means of a regulation of the Government at the proposal of the minister responsible for the area. In formulating his or her proposal to the Government regarding detailed guidelines for cogeneration the minister responsible for the area shall proceed on the basis of the proposal of the Competition Authority;
3) for electricity if it is generated in an efficient cogeneration regime from waste within the meaning of the Waste Act, from peat or carbonisation gas obtained as a result of oil shale processing;
4) for electricity if it is generated in an efficient cogeneration process with a cogeneration installation which has an electric capacity not exceeding 10 MW;
5) for the availability of the installed net capacity of an oil shale-based generating installation if the generating installation started operation in the period from 1 January 2013 to 1 January 2018.
(2) The transmission network operator shall pay support to the producer on the basis of an application submitted by the latter as follows:
1) 0.0537 euros per one kilowatt-hour of electricity if it is generated in accordance with clauses 1 or 2 of subsection 1 of this section;
2) 0.032 euros per one kilowatt-hour of electricity if it is generated in accordance with clauses 3 or 4 of subsection 1 of this section;
3) for one kilowatt-hour of electricity at the rate specified in points 1 and 2 of this subsection or at a rate approved by the Competition Authority if electricity is generated in an efficient cogeneration process using a renewable energy source or

peat;
4) 0.016 euros per one kilowatt-hour of available net capacity referred to in clause 5 of subsection 1 of this section and subsection 11 of § 108 if the price of greenhouse gas allowance is more than 20.00 euros a tonne;
5) 0.015 euros per one kilowatt-hour of available net capacity referred to in clause 5 of subsection 1 of this section and subsection 11 of § 108 if the price of greenhouse gas allowance is 15.00–20.00 euros a tonne;
6) 0.014 euros per one kilowatt-hour of available net capacity referred to in clause 5 of subsection 1 of this section and subsection 11 of § 108 if the price of greenhouse gas allowance is 10.00–14.99 euros a tonne."

74. § 59^2 (1) of the Electricity Market Act:
"(1) The expenditure arising in relation to funding the support described in § 59 of this Act is borne by consumers according to the volume of network services used and the amount of electricity consumed via a direct line. The funding of the support also includes the cost of maintaining the electronic database of guarantees of origin referred to in § 58^1 of this Act."

75. The Court *en banc* also finds the following provisions relevant (see, in more detail, Part II of the judgment).

76. § 59^1 ("Conditions of support") of the Electricity Market Act, subsections (1), (2) clauses 2–5 and subsection (5):
"(1) The following conditions must be met in order to be eligible for the support specified in § 59 of this Act:
1) the electricity must be generated by means of a generating installation conforming to the requirements of this Act and the grid code;
2) the producer must fulfil the obligation provided in Chapter 4 and § 58 of this Act;
(2) The producer shall not be granted support:
/---/
2) for electricity on the basis of § 59 (2) clause 1 if the electricity is generated with a generating installation for the availability of the capacity of which the producer receives support on the basis of § 59 (2) clauses 4, 5 or 6;
3) if the producer uses wind as the source of energy and has received investment support from the government in respect of the same generating installation;
4) if the producer lacks the environmental licences required in order to generate electricity or is in breach of the conditions of such environmental licences.
5) for electricity generated for the power station's own consumption.
/---/
(5) A producer who uses wind as the source of energy may receive support until the total amount of 600 GWh electricity is generated from wind power in Estonia in a calendar year. Separate accounts are kept in respect of each calendar year.

77. § 59^2 ("Funding the support") of the Electricity Market Act, subsections (2), (4) and (5):
"(2) The transmission network operator shall prepare and publish on its website by 1 December each year an estimate for the next calendar year concerning the sums required for funding the support for electricity generated from renewable energy sources or in an efficient cogeneration process, concerning the volume of network services to be provided to consumers and concerning the amount of electricity to be consumed via direct lines.
/---/
(4) On the basis of the estimate referred to in subsection 2 of this section, the transmission network operator shall determine the cost of funding the support in the following calendar year for one kilowatt-hour of network services used and of electricity consumed via direct lines, taking into account any sums by which the funding of support during the 12 months immediately preceding preparation of the estimate overshot or fell short of the total of support payments, the interest earned on the overshot payments or the interest paid on the payments falling short and justified expenses incurred as a result of administrating payment of support. The transmission network operator shall publish on its website the cost of funding the support together with the underlying data and calculation methods.
(5) The network operator shall send the consumer an invoice for network services and for electricity consumed via the line possessor's direct line, setting out as a separate item the expense of funding the support for electricity generated from renewable energy sources and electricity generated in an efficient cogeneration process."

OPINION OF THE COURT *EN BANC*

78. First, the Court *en banc* will clarify the margins of constitutional review in the present case (I). Second, the Court *en banc*

will identify the relevant norms (II), and the relevant provision of the Constitution and the requirements for assessing constitutionality arising from this (III). Then the Court *en banc* will review the constitutionality of the relevant norms (IV). Finally, the Court *en banc* will adjudicate the appeal in cassation filed by the defendant (V).

I

79. The Court *en banc* does not concur with the opinion of the participants in the proceedings that the Supreme Court cannot assess the constitutionality of the renewable energy charge, as it constitutes state aid which the European Commission has declared legitimate.

80. Article 107 para. 1 of the TFEU provides: “Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market.” In its decision of 28 October 2014 the European Commission assessed the compatibility of support for renewable energy and cogeneration plants in Estonia in the light of the applicable environmental aid guidelines, and found that the regulative provisions in effect in 2004–2005, 2005–2007, from 2007 until notification to the Commission, i.e. to 2014, and the amended Electricity Market Act (see, in more detail, para. 18 above), were in line with the 2001, 2008 and 2014 guidelines on state aid for environmental protection (point 3.3.6 of the European Commission decision). The subject-matter of the present dispute are not issues whether the renewable energy charge constitutes state aid and whether the renewable energy charge as state aid is in line with the rules for granting it.

81. The Court *en banc* is adjudicating the present case because the Supreme Court Civil Chamber entertained a doubt whether § 59^2 (1) of the EMA in combination with § 59 (1) and (2) was constitutional. Under § 152 (1)–(2) of the Constitution, the courts will set aside any law or other legislation that is in conflict with the Constitution when adjudicating a case, and the Supreme Court repeals any law or other legislation that is in conflict with the letter and spirit of the Constitution. The fact that any provisions are compatible with European Union law cannot lead to the conclusion that the same provisions are also compatible with the Estonian Constitution or that declaring a provision unconstitutional and repealing it would constitute a breach of European Union law. The connection of a legal act with EU law, or an opinion of any other institution on the compatibility of domestic legislation with EU law cannot in itself preclude review of the constitutionality of the legal act within the meaning of § 152 of the Constitution.

82. The European Commission has assessed the compatibility of support intended for renewable energy and cogeneration plants with the state aid guidelines under European Union law. However, the Supreme Court Civil Chamber has initiated constitutional review court proceedings to check, first and foremost, for the constitutionality of interference with the defendant’s fundamental right to property. The fact that the effective regulative provisions on support for renewable energy and cogeneration plants in Estonia are compatible with the European Commission guidelines on State aid for environmental protection cannot lead to the conclusion that the same regulation is also compatible with the Estonian Constitution, including with provisions protecting inviolability of property.

83. Although the duty to promote production of renewable energy in Estonia derives from the European Union directive, EU law leaves a broad discretion for member states in deciding how to achieve this aim. Within the boundaries set by EU law, including state aid guidelines, the national legislator is bound by the requirements arising from the Estonian Constitution, and the national courts by the duty under § 152 of the Constitution to check the constitutionality of the measure(s) chosen for achieving the aim. By no means does EU law prohibit member states from ensuring domestic fundamental rights to the extent that the exercise of the rights does not endanger the supremacy, uniformity and effectiveness of EU law. No such danger exists in the present case. Therefore, the Supreme Court can assess the constitutionality of the norms, and repeal them in the event of their unconstitutionality.

II

84. The Court *en banc* will first examine whether the EMA rules cited by the Civil Chamber are relevant for adjudication of the present case.

85. The Civil Chamber had doubts whether a consumer's obligation to pay the renewable energy charge, or the amount of the charge levied, was compatible with the Constitution, finding that they arose from § 592 (1) in combination with § 59 (1) and (2) of the EMA.

86. The EMA does not directly prescribe the amount of the renewable energy charge. The amount of the charge is established on the basis of several provisions. § 59^2 (1) of the EMA gives rise to the obligation of consumers to pay the expenditure arising in relation to funding the support described in § 59 of the Act according to the volume of network services used and the amount of electricity consumed via a direct line, as well as the cost of maintaining the electronic database of guarantees of origin referred to in § 58^1 of the Act. Under § 592 (5) of the EMA, an invoice sent to the consumer for network services or for electricity consumed via a direct line should set out as a separate item the expense of funding support for electricity generated from renewable energy sources.

87. The transmission network operator calculates the amount of the renewable energy charge for one kilowatt-hour (the rate of renewable energy charge) under § 59^2 (4) of the EMA for each year based on the estimate mentioned in § 59^2 (2) of the EMA. Arising from § 59^2 (2) of the EMA, the transmission network operator prepares an estimate for each year concerning the volume of network services to be provided to consumers, the amount of electricity to be consumed via direct lines, and the sums required for funding renewable energy support.

88. The sum required for funding renewable energy support depends on the number of recipients of support, the amount of support, and the amount of electricity to be supported. The range of recipients of support is determined under § 59 (1) of the EMA. However, in the present case only § 59 (1) clauses 1–4 are relevant, but not clause 5, because the dispute concerns a debt arising from electricity consumed before 12 March 2012, while clause 5 establishes support only for generating installations, which started to operate since 2013. The rate of support for recipients defined under § 59 (1) clauses 1–4 of the EMA is prescribed under § 59 (2) clauses 1–3 of the EMA. § 59^1(1)–(2) of the EMA establish the general conditions for receipt of support, and among them only subsection (2) clause 1 is not relevant, as it regulates the recipient of support mentioned in § 59 (1) clause 5 of the EMA. § 59^1 (5) of the EMA imposes a limitation on support for a producer who uses wind as the source of energy. An additional limitation is imposed under § 108 (1) of the EMA, which allows payment of the support specified in § 59 (1) clauses 1–4 to a producer for 12 years from commencement of production.

89. As the obligation of a consumer, in the present case the defendant, to pay the renewable energy charge, as well as the amount of the charge, arise from a combination of the above norms, these norms are relevant. Thus, in the opinion of the Court *en banc* the provisions mentioned by the Civil Chamber and listed in paras 73–74 above are relevant, except § 59 (1) clause 5 and subsection (2) clauses 4–6 of the EMA; additionally, the provisions listed in paras 76–77 above are relevant to the extent that they impose an obligation on a consumer to pay the renewable energy charge and establish the bases for setting the amount of the renewable energy charge.

III

90. Next, the Court *en banc* will identify the relevant provisions of the Constitution. Although the Civil Chamber expressed a doubt whether imposing on consumers the obligation to pay the renewable energy charge was compatible with § 32 of the Constitution as an interference with the fundamental right to property, the Court *en banc* will first assess whether the renewable energy charge is a public financial obligation falling within the subject-matter of regulation of § 113 of the

Constitution. The reason being that, according to the case-law of the Supreme Court, interference with the fundamental right to property as a result of imposing financial obligations is seen as interference with a person's subjective right arising from § 113 of the Constitution (see, e.g., Constitutional Review Chamber judgment of 26 November 2007 No 3-4-1-18-07, para. 25). Public financial obligations inevitably interfere with the fundamental right to property, and therefore review of the contested norm in relation to § 113 of the Constitution also includes checking for interference with the fundamental right to property. If interference with inviolability of property has occurred by imposing a public financial obligation, the review of constitutionality of the relevant provisions cannot be limited to checking for interference with the fundamental right to property. § 113 of the Constitution prescribes specific additional requirements for establishing public financial obligations, conformity with which should also be reviewed in such a case. Therefore, the Court *en banc* will first analyse whether the renewable energy charge is a public financial obligation within the meaning of § 113 of the Constitution.

91. § 113 of the Constitution provides that national taxes, encumbrances, fees, fines and compulsory insurance payments are established by law. The Supreme Court *en banc* has found: "The wording of § 113 includes national taxes, encumbrances, fees, fines and compulsory insurance payments. In fact, the scope of protection of this provision is wider. The provision attempts to enumerate, as exhaustively as possible, all public financial obligations. The Supreme Court *en banc* is of the opinion that all public financial obligations, irrespective of how these are named in different pieces of legislation, are within the scope of protection of § 113" (Supreme Court *en banc* judgment of 22 December 2000 No 3-4-1-10-00, para. 20). The Court *en banc* maintains this opinion in the present case.

92. Although the rate of the renewable energy charge for each year is determined, the charge is collected and the support is paid by the transmission network operator, i.e. a legal person in private law, this does not mean that the renewable energy charge could not constitute a public charge within the meaning of § 113 of the Constitution. The obligation to pay the renewable energy charge has been established by law. The renewable energy charge was established with the aim of promoting generation of electricity from renewable energy sources in order to save the environment, hence in the public interest (see, in more detail, the aims in paras 101–104 below). The obligation to pay the charge follows directly from use of the network service and consumption of electricity via a direct line, without the payer receiving any performance in return. The Supreme Court has also earlier found a fee collected by an undertaking to constitute a public claim (cf. the obligation to pay the liquid fuel stockpiling fee also established in the public interest and by a legal act – Constitutional Review Chamber judgment of 8 October 2007 No 3-4-1-15-07, para. 17). In view of these circumstances, the Court *en banc* finds that the renewable energy charge is a public financial obligation within the meaning of § 113 of the Constitution.

93. The nature and aim of the public financial obligations covered by § 113 of the Constitution is different. Therefore, the scope of judicial review of their establishment also varies within constitutional review proceedings. To decide what kind of public financial obligation the renewable energy charge constitutes more specifically, and what the competence of the Supreme Court in assessing its constitutionality is, requires a closer analysis of the nature of the renewable energy charge.

94. According to the Supreme Court's earlier opinion, a tax is an indisputable financial obligation imposed on a taxpayer without any direct counter-performance for the purpose of raising revenue for performance of public functions (judgment of 22 December 2000 No 3-4-1-10-00, para. 24). Under § 59^2 (1) of the EMA the obligation to pay the renewable energy charge automatically follows consumption of a certain good and service (electricity and network service), and the consumer does not receive any benefit or performance in return for it, while it is used for funding the support paid to electricity producers under § 59 of the EMA and the cost of maintaining the electronic database of guarantees of origin. These aspects of the renewable energy charge refer to characteristics of a tax, but nonetheless the renewable energy charge is not a tax. A tax is established, first and foremost, for the general purpose of raising money for performance of public functions, whereas the whole renewable energy charge is used for one specific purpose lacking a fiscal character. Although earmarked taxes (e.g. social tax) also exist, the renewable energy charge by its nature differs from a tax with respect to the rate of the renewable energy charge being directly dependent on the size of the particular expenditure, i.e. the sum required for paying renewable energy support and maintaining the database.

95. With regard to a fee, the Supreme Court *en banc* has previously held: "A state fee is a charge for a step taken or a document issued by the state under public law. /---/ [T]he payer of the fee receives in return a specific counter-

performance in the form of a step taken or a document issued. The purpose of a fee is to have the interested persons compensate for the expense incurred by the state in performing a specific act" (see the judgment cited in the previous para.). The Supreme Court Constitutional Review Chamber has held that imposing a state fee on having recourse to the court is admissible within the meaning of the Constitution if the act entails counter-performance for the person having paid the fee, and the sum of money charged as the fee is intended to cover the costs incurred by taking the said step and it is not disproportionate to the right of access to the court (Constitutional Review Chamber judgment of 26 May 2015 No 3-4-1-59-14, paras 29 and 34). Even though correlating the rate of the renewable energy charge to specific expenditure is a feature characteristic of a fee, the renewable energy charge is not a fee either, as a person does not receive any counter-performance or benefit for it. Although indirectly a better environment could amount to such a benefit, such very general counter-performance is not compatible with the definition of a fee (e.g. taxpayers can similarly use universal public benefits, such as the road network, for the taxes paid by them).

96. Among the items listed under § 113 of the Constitution, the renewable energy charge is not an encumbrance (non-monetary obligation), fine or compulsory insurance payment either, as it is expressed in money, it is not a sanction by nature and does not bring about insurance against any risks. In the opinion of the Court *en banc*, the renewable energy charge is a public financial obligation sui generis not listed in § 113 of the Constitution. The reason being that the rate of the renewable energy charge, which is set for each year by the transmission network operator, is formed in a unique scheme essentially by itself, even though the expenses of the scheme are based on expenditure prescribed by law. The subjective right of a person arising from § 113 of the Constitution also extends to this financial obligation.

IV

97. The Court *en banc* has no doubt that, formally, the obligation to pay the renewable energy charge and its rate have been established in conformity with the Constitution. Arising from the general statutory reservation established under § 113 of the Constitution, establishing public financial obligations falls within the exclusive competence of the legislator. The Supreme Court *en banc* has previously held that the purpose of § 113 of the Constitution is to achieve a situation where all public financial obligations are established only by legislation adopted by the Riigikogu in the form of an Act of Parliament (see Supreme Court *en banc* earlier opinion, cited in para. 91 above). In the present case, the renewable energy charge has indeed been established under the EMA adopted by the Riigikogu.

98. The Court *en banc* is of the opinion that formal constitutionality of the renewable energy charge is also not confuted by the fact that the rate of the renewable energy charge has not been established by law as a specific figure but has been left for a legal person in private law to determine. Under § 59 and § 59^2 (2) and (4) of the EMA, the transmission network operator calculates the rate of renewable energy charge for each year based on estimates. Although the estimate might not correspond to the actual situation developing next year, the transmission network operator has no discretion in deciding the rate of the renewable energy charge. The inaccuracy of the estimate is adjusted under § 59^2 (4) of the EMA when calculating the rate of the renewable energy charge for the year after next, and, as a sum over the different years, the rate of the charge unequivocally corresponds to the statutory combination of factual circumstances and the criteria established by law. Hence, the legislator has established the criteria shaping the rate of the renewable energy charge, so that in formal terms the regulation conforms to the Constitution.

99. Next, the Court *en banc* will assess the obligation to pay the renewable energy charge and its rate in terms of its substantive constitutionality. For this, first the legitimate aim of establishing the renewable energy charge has to be identified.

100. In view of § 113 of the Constitution being a norm subject to a simple statutory reservation, the legislator may establish a public financial obligation for any purpose not in conflict with the Constitution.

101. The obligation of European Union member states to promote production of renewable energy arises from EU law

(Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC), under which Estonia is also required to increase the overall share of energy from renewable sources. Under § 2 of the Constitution of the Republic of Estonia Amendment Act, upon Estonia's membership of the European Union, the Estonian Constitution is applied without prejudice to the rights and obligations arising from the Accession Treaty. Thus, the aim arising from EU law to promote production of renewable energy is compatible with the Constitution.

102. Under § 59 (1) clause 1 of the EMA, support is given for electricity generated from a renewable energy source. Renewable energy sources are water, wind, solar, wave, tidal and geothermal energy sources, landfill gas, sewage treatment plant gas, biogases and biomass (§ 57 (1) EMA). Generating electricity from renewable energy sources is considered environmentally sustainable (see, e.g., the preamble to the directive cited in the previous para.). Traditionally, in Estonia electricity has been mostly produced from oil shale, which is a non-renewable fossil energy source. Production of electricity from oil shale results in large quantities of carbon dioxide emissions to the atmosphere, generation of large quantities of waste, and abundant use of water in the production process. In addition to generating electricity from renewable energy sources, support is also given for generating electricity in an efficient cogeneration process (§ 59 (1) clauses 2–4 EMA). Efficient cogeneration means generation of electricity by a combined power and heat production process based on demand for heat energy and which ensures energy conservation in accordance with the requirements for efficient cogeneration (§ (3) clause 261 EMA). Efficient cogeneration helps to reduce pollution and ensure security of energy supply. § 5 of the Constitution provides that the natural wealth and resources of Estonia are national riches which must be used economically. Under § 53 of the Constitution, everyone has a duty to preserve the human and natural environment and to compensate for harm that he or she has caused to the environment. Thus, the aim to produce electricity in a more environmentally sustainable manner also arises from the Constitution.

103. In addition to more environmentally sustainable electricity production, development of different forms of electricity generation also ensures energy security. § 1 of the Constitution stipulates Estonia's independence and sovereignty. The opportunity to generate electricity from different sources in Estonia also serves the interests of national sovereignty, as electricity is indispensable for the functioning of the modern state and society. Hence, the aim of ensuring energy security also arises from the Constitution.

104. On that basis, the Court *en banc* finds that the purpose of paying the renewable energy charge is to promote production of (renewable) energy. This purpose serves the aim of complying with the obligation imposed on Estonia under EU law, the aim of promoting more environmentally sustainable electricity production, as well as the aim of ensuring energy security. As these aims can be derived either from the Constitution or are compatible with the Constitution, imposing a public financial obligation for achieving the aims is legitimate within the meaning of § 113 of the Constitution.

105. As concluded above (see para. 90 of the judgment), in order to be constitutional a public financial obligation must meet specific requirements arising from § 113 of the Constitution, the substance of which depends on the type of the relevant public financial obligation. The Court *en banc* finds that should the legislator choose to establish a public financial obligation not in the form of a tax but in the form of a public financial obligation (charge) established for a specific purpose, the charge is compatible with the Constitution if the charge is established only for achieving that purpose, i.e. it does not amount to hidden taxation, the measure is appropriate for achieving the purpose, and the rate of the charge is not manifestly disproportionate in view of the aims sought by establishing it.

106. The Court *en banc* finds that the renewable energy charge is indeed used for funding production of the type of electricity considered to be more environmentally sustainable, and it is not used for achieving other aims for the following reasons.

107. By establishing the renewable energy charge, the legislator has unequivocally identified the range of producers to be supported from it. Thus, under § 59 (1) clauses 1 and 2 of the EMA support is first of all provided to those generating electricity from a renewable energy source. Second, under § 59 (1) clauses 3 and 4 support is given to those generating

electricity in an efficient cogeneration process. Generation of electricity from a renewable energy source or in an efficient cogeneration process are both considered environmentally sustainable (see para. 107 above). Thus, producers of electricity from a renewable energy source or in an efficient cogeneration process are both relevant persons to whom renewable energy support is to be paid.

108. The renewable energy charge is also used to cover the cost of maintaining the electronic database of guarantees of origin (§ 59^2 (1) EMA). Guarantees of origin are certificates intended to be used in Estonia and other EU member states (§ 58^1 (12) EMA). Regulation of guarantees of origin has also been established for promoting production of renewable energy.

109. The rate of the renewable energy charge is calculated by the transmission network operator for each year based on the estimated volume of network services to be provided to consumers, the amount of electricity to be consumed via direct lines, and the sums required for funding renewable energy support. As noted in para. 98 above, only the amount of charge necessary in view of the circumstances is collected. On that basis, the Court *en banc* finds that the renewable energy charge is used for funding production of more environmentally sustainable electricity, i.e. strictly for the purpose for which the legislator has established it, and it does not amount to hidden taxation.

110. Next, the Court *en banc* will consider whether the aim of promoting production of (renewable) energy can be achieved by establishing the renewable energy charge.

111. According to prevailing opinion, production of electricity from renewable energy sources is generally more costly than production of electricity from fossil sources. Therefore, production of electricity from renewable energy sources probably cannot be started without external (government) support or benefits. The renewable energy charge collected is used to pay support to producers of electricity from renewable energy sources or in an efficient cogeneration process because generating electricity from these sources and in a cogeneration process is more expensive than its market price. Practice has shown that during the period when renewable energy support has been in effect the share of renewable energy in electricity production has increased, and investments in efficient cogeneration of electricity and heat have also been made (see paras 38, 58 and 59 above), while during the period prior to introducing the support the share of production of electricity by these means was marginal. Thus, production of (renewable) energy can be promoted by collecting the renewable energy charge and using it to pay support to renewable energy producers.

112. Next, the Court *en banc* will consider whether the rate of the renewable energy charge is not manifestly unjustified in view of the aims sought by establishing it.

113. Materials submitted by the Riigikogu indicate that the legislator established the rates of support after having weighed different proposals. The initial proposal concerning rates of support was made by the Government by submitting the Draft Act (see the initial text of the Draft Act). The Riigikogu heard the opinions of the interest groups (see the opinions by Eesti Jõujaamade ja Kaugkütte Ühing, Eesti Turbaliit, Eesti Tuuleenergia Assotsiatsioon [the Estonian Association of Power Plants and District Heating, the Estonian Peat Association, the Estonian Wind Power Association], and individual electricity producers, the minutes of the Riigikogu Economic Affairs Committee meeting of 8 February 2007) and examined objections to the cost-benefit analysis drawn up by the Energy Market Inspectorate. The materials indicate that, in addition to the Riigikogu committee, an ad hoc working group formed in the Riigikogu was also dealing with the Draft Act, including the issue of rates of support (see the minutes of the Riigikogu Economic Affairs Committee meeting of 8 February 2007).

114. Through the norms relevant in the present case the legislator has created a scheme under which producers are paid support based on the amount of electricity generated and transmitted by them, and the support is funded by consumers according to the amount of electricity consumed by them. The Court *en banc* finds that, in principle, a scheme designed in this manner is constitutionally acceptable, as receipt of support depends on the amount of electricity actually generated

and sold, i.e. on how much a producer is generating (environmentally more sustainable) electricity; a consumer, on the other hand, pays the renewable energy charge according to the amount of their electricity consumption, including their share in the production of greener electricity. Such a scheme is compatible with the generally recognised “polluter pays” principle in environmental law – i.e. the more electricity a person consumes the more they have to pay for production of greener energy. Thus, everyone can influence the amount of the renewable energy charge paid by them by reducing their overall electricity consumption. The latter also serves the aim of environmental conservation. Thus, the renewable energy charge has been created to fund production of environmentally more sustainable electricity, which has a price higher than the market price, based on the amount of a person’s electricity consumption.

115. It is worth noting that the legislator has established payment of renewable energy support to producers of electricity not for an unlimited period but for a specified period. Thus, producers generating electricity from a renewable energy source and in an efficient cogeneration process are eligible to receive support for 12 years from commencement of production (§ 108(1) EMA). At the same time, an objective estimated technical lifetime is 20 years for a wind farm, 25 years for an efficient cogeneration plant using wood and peat, and 30 years for a hydro-electric power plant (Annex 3 to the opinion of the Competition Authority submitted to the Supreme Court: the Competition Authority’s letter of 15 November 2012 to the Ministry of Economic Affairs and Communications, pp. 4, 7 and 13; at the same time, the technical lifetime of cogeneration plants using natural gas was estimated at 12 years, because at the price level of natural gas at that time the investments were yielding a loss even with support, and it was assumed that after the end of the support period the cogeneration plants generating electricity from natural gas would cease production (ibid., p. 10)). Thus, the legislator has not established renewable energy support for the whole estimated service life of an energy generation installation, but only to the extent necessary for commencing generation of electricity from renewable energy sources.

116. The rate of the renewable energy charge depends on the rates of support paid to producers of renewable energy (see paras 87–88 above). Therefore, assessing the rate of charge inevitably involves ascertaining whether the rates of support paid to renewable energy producers are not manifestly excessive.

117. As the legislator has exclusive competence to establish public financial obligations, and the extent of judicial review over it within constitutional review proceedings is limited, the Court *en banc* can assess the justifiability of the rates of support only in general terms. As arising from the purpose of establishing the renewable energy charge setting the rate of the charge requires complex calculations, taking account of various preconditions, including future estimates, within constitutional review proceedings the justifiability of rates of renewable energy support in the light of the aims of establishing the support can also be assessed only based on generic data. Thus, in its earlier case-law, e.g. in the review of constitutionality of state fees, the Supreme Court has also held that legislation must be sufficiently generalising and cannot very accurately take into account every possible individual case covered by it (Supreme Court Constitutional Review Chamber judgment of 26 May 2015 No 3-4-1-59-14, para. 25). The legislator’s broad discretion in setting the rate of renewable energy support can also be justified by the fact that the price of necessary investments depends on a combination of several indicators. Their precise value may only become clear in the future. For example, creation of a renewable energy installation or a farm from the inception of planning to the beginning of operation takes several years, as a rule. During this period, the prices of planning and construction, loan costs, or the interests and opportunities of investors, change. The price of raw materials, wage costs, (market) price of electricity also change. Somebody undertaking such a project will inevitably run various commercial risks. The legislator can revise the rates of support at any time but cannot be required to deal with it constantly and react to each market change.

118. In the following assessment of whether the rate of renewable energy support may be manifestly excessive, the Court *en banc* will rely on the decision of the European Commission (see the reference in para. 80 above). The Court *en banc* has no reason to call into doubt the expert knowledge of the European Commission, which is a disinterested party in terms of the present dispute. The European Commission has reached the opinion that renewable energy support is not excessive. The Commission also assessed the Estonian scheme of renewable energy support and compatibility of the rates with the Community guidelines on State aid for environmental protection (2008 Guidelines, OJ C 82, 1 April 2008, p. 1). Section 3.1.6.2, point 109 a) in the 2008 Guidelines provides: “Member States may grant operating aid to compensate for the difference between the cost of producing energy from renewable sources, including depreciation of extra investments for environmental protection, and the market price of the form of energy concerned. Operating aid may then be granted until the plant has been fully depreciated according to normal accounting rules. Any further energy produced by the plant will not qualify for any assistance. However, the aid may also cover a normal return on capital.” Thus, operating aid is only admissible to the extent that it compensates for the difference between the cost of renewable energy

and the market price of the electricity, as well as a normal return on capital. In para. 79 of its decision the Commission found that the support scheme of renewable energy plants complied with point 109 a) of the Guidelines. Accordingly, the Commission reached the opinion that producers of electricity from a renewable energy source were not paid more renewable energy support than was necessary to compensate for the difference between the production cost higher than the market price of electricity and a normal return on capital, i.e. the amounts of support were not excessive.

119. Under point 119 of the 2008 Guidelines, operating aid for high-efficiency cogeneration may be granted in accordance with the rules for operating aid for renewable energy laid down in section 3.1.6.2, both to undertakings distributing electric power and heat to the public as well as for industrial use where the costs of production exceed the market price. Thus, in the case of efficient cogeneration plants, operating aid may also be used only to cover the difference between production costs and the market price of energy and a normal return on capital. In paras 86 and 88 of the decision cited above, the European Commission found that the support scheme for efficient cogeneration was in line with points 119 and 109 a) of the 2008 Guidelines. Accordingly, also with regard to renewable energy support paid to producers involved in an efficient cogeneration process the Commission reached the opinion that the amounts of support were not excessive.

120. As the claim was filed on 12 March 2012, it is not relevant in the present case to examine the opinions of the European Commission regarding the Guidelines on State aid for environmental protection and energy 2014–2020 (Official Journal C 200, 28 June 2014, p. 1), as the latter does not apply to legislation in force at the time when the contested claim originated. The materials of the case do not indicate clearly whether the claim also covers debt incurred before 2 April 2008 when the 2001 Community guidelines on State aid for environmental protection were still in force (point 202 of the 2001 Guidelines; Official Journal C 37/3, 3 February 2001, p. 76). In view of the fact that the defendant did not raise an objection, relying on a limitation period of the claim, it may be presumed that the debt does not originate from that time. On that basis, the Court *en banc* will not dwell in more detail on the European Commission's assessment regarding the compatibility of the scheme of renewable energy charges with the guidelines on state aid for environmental protection in force at the time, but will only note that the Commission found the system to be compatible as a whole.

121. Thus, in the opinion of the European Commission the amounts of renewable energy support were not higher than necessary to compensate for the difference between the costs of producing renewable energy and the market price of electricity and a normal return on capital. The Court *en banc* has no reason to reach a different opinion.

122. Finally, the Court *en banc* will assess whether the amount of the renewable energy charge infringed the defendant's fundamental right to property more than was necessary to attain a legitimate aim. In view of the broad discretion granted to the legislator under § 113 of the Constitution, in this regard the Court will also limit itself within the constitutional review proceedings to review of manifestness.

123. As noted by the Civil Chamber in the order issued in the present case on 12 February 2015, the renewable energy charge made up approximately 8% of the defendant's charge for electricity and network services. This does not constitute extensive interference with a person's right to property. However, the purpose of promoting production of (renewable) energy serves, inter alia, aims arising from the Constitution (see para. 104 above) and is thus important. On that basis, the Court *en banc* holds that interference with the defendant's fundamental right to property due to the renewable energy charge was not manifestly disproportionate.

124. In view of the foregoing – i.e. that the legislator has a broad discretion and that it considered different proposals when establishing the relevant norms, that the amount of support paid to a producer depends on the amount of more environmentally sustainable energy produced by it, and the charge collected from a consumer depends on the amount of electricity consumed by them, that support to a producer is paid within a limited period, that the rates of renewable energy support were not excessive, and that interference with a person's fundamental right to property was not disproportionate – the rate of the renewable energy charge was not manifestly unjustified.

125. In conclusion, the Court *en banc* holds that considering that the renewable energy charge has been established only for attaining the aim of promoting production of (renewable) energy, that the aim can be attained through the established charge and the support scheme, and that the rate of the renewable energy charge was not manifestly unjustified in view of the aims pursued by its establishment, the renewable energy charge as a sui generis public charge was compatible with the requirements arising from § 113 of the Constitution.

126. Consequently, § 59 (1) clauses 1–4, subsection (2) clauses 1–3, § 59^1 (1), subsection (2) clauses 2–5 and subsection (5), and § 59^2(1), (2), (4) and (5) of the EMA were constitutional to the extent that they impose on a consumer an obligation to pay the renewable energy charge and establish the bases for forming the amount of the renewable energy charge.

127. Additionally, the Court *en banc* notes that the opinion expressed in the previous paragraph does not mean that under different circumstances the Court *en banc* could not reach a different opinion concerning the constitutionality of the rate of the renewable energy charge. The Court *en banc* does not rule out that changes in the market price of electricity or in other circumstances relevant for the case may bring (or may already have brought) about a situation where the amounts of renewable energy support and the charges established for funding them would become (or have already become) excessive within the meaning of the Constitution. Regulation which was previously constitutional may later turn out to be unconstitutional by virtue of a change in facts.

V

128. The Court *en banc* holds that the Court of Appeal judgment should be reversed under § 692 (1) clauses 1 and 2 of the Code of Civil Procedure (CCivP) due to incorrect interpretation of a norm of substantive law and material breach of a provision of procedural law to the extent that the Court of Appeal failed to amend the County Court judgment concerning dismissal of the defendant's counterclaim for compensation of non-pecuniary damage and allocation of procedural expenses. Under § 692 (5) (second sentence) of the CCivP, the County Court judgment should also be reversed to the extent that it dismissed the defendant's claim for non-pecuniary damages and concerning allocation of procedural expenses. The Court of Appeal judgment is upheld to the extent that it allowed the claim in part and dismissed the counterclaim for compensation of pecuniary damage. In the extent of the reversed part, the case should be remitted under § 691 clause 4 of the CCivP for re-examination to the County Court. The appeal in cassation is allowed in part.

129. In line with § 688 (1) of the CCivP, in the cassation procedure the Supreme Court reviews the court of appeal judgment only to the extent it was appealed. The defendant filed a counterclaim with the County Court, seeking to ascertain that the claimant had disconnected the defendant's electricity network connection unlawfully, and thus to order the claimant to pay compensation for pecuniary and non-pecuniary damage. The County Court allowed the defendant's counterclaim in part, ascertaining that the claimant had disconnected the network connection unlawfully. As the claimant did not file an appeal against the County Court judgment, the County Court judgment in that part has entered into force under § 456 (4) (second sentence) of the CCivP. Under the same provision, the Court of Appeal judgment has entered into force in the part by which the Court of Appeal reversed the County Court judgment for ordering the defendant to pay the state fee in favour of the state.

130. On that basis, the Court *en banc* will rely on the fact found by the County Court that the claimant breached the network contract (clauses 1.1 and 1.2) by disconnecting the network connection before passage of the period of a 90-day advance notice prescribed under § 90 (7) of the EMA. The parties have no dispute over the fact that at the time of disconnection of the electricity the outside temperature in Tallinn was low (-10?C – -22?C). The parties also do not dispute the fact that the defendant was heating his dwelling at least partly by electricity. A functioning electricity supply is a critical service, and disconnection of its network connection may result in considerable domestic inconvenience and emotional suffering for an electricity consumer. Considerable inconvenience and emotional suffering, which might be caused by disconnection of electricity in a dwelling during a cold period, have a significant impact on the habitual lifestyle and, in the opinion of the Court *en banc*, may result in a person suffering non-pecuniary damage.

131. The Court *en banc* notes that filing a claim for compensation of non-pecuniary damage caused by breach of contract is significantly limited and, as a rule, no such claim can be made. As an exception, compensation for non-pecuniary damage can be claimed in situations described under § 134 (1) of the LOA, i.e. only if the purpose of the contractual obligation was to pursue a non-pecuniary interest and, under the circumstances relating to entry into the contract or to the non-performance, the debtor was aware or should have been aware that non-performance could cause non-pecuniary damage. According to the opinion of the Supreme Court Civil Chamber, while in the case of claiming compensation for pecuniary damage the claimant usually has to prove the existence and amount of damage, for compensation of non-pecuniary damage it is generally sufficient to prove the facts the presence of which has been laid down as a statutory requirement for compensation of non-pecuniary damage (see, e.g. Supreme Court Civil Chamber judgment of 22 October 2008 in civil case No 3-2-1-85-08, para. 13). Thus, to obtain compensation for non-pecuniary damage arising from breach of contract, under § 134 (1) of the LOA the aggrieved party must prove that the purpose of the contractual obligation was to protect them from sustaining non-pecuniary damage, as well as the fact that under the circumstances relating to entry into the contract or to the non-performance, the debtor was aware or should have been aware that non-performance could cause non-pecuniary damage.

132. Relying on § 134 (1) of the LOA, the Supreme Court Civil Chamber has recognised filing a claim for non-pecuniary damages in the event of breach of contract only in very limited cases. For example, the Supreme Court ruled out filing a claim for non-pecuniary damages in the case of breach of a waste transport contract (Supreme Court Civil Chamber judgment of 25 September 2013 in civil case No 3-2-1-80-13, para. 18). The Supreme Court has also held that compensation for non-pecuniary damage cannot be claimed in the case of breach of a lease contract (Supreme Court Civil Chamber judgment of 25 February 2010 in civil case No 3-2-1-159-09, para. 11). In the latter judgment, the Court reached the opinion that a claim for compensation of non-pecuniary damage in the case of everyday transactions is excluded, because these contracts are generally not aimed at pursuing a non-pecuniary interest. On the other hand, in its earlier case-law the Civil Chamber has admitted claims for compensation of non-pecuniary damage, for example, from a health service provider to compensate for physical and emotional pain and suffering arising from a diagnostic or treatment error (Supreme Court Civil Chamber judgment of 8 April 2011 in civil case No 3-2-1-171-10, para. 15). The Supreme Court has also considered it possible to file a claim for non-pecuniary damages in the case of unlawful termination of an employment contract (Supreme Court *en banc* judgment of 14 May 2014 in civil case No 3-2-1-79-13, para. 32.3, as well as judgment of 21 September 2015 in civil case No 3-2-1-80-15, para. 34).

133. The Court *en banc* finds that unlawful disconnection of the electricity network connection by the claimant may entitle the defendant to claim non-pecuniary damages under § 134 (1) of the LOA. Under § 90 (7) of the EMA in force at the time of disconnection of the defendant's network connection, if a network connection is disconnected by reason of failure to pay the sum prescribed in the contract concluded with the distribution network operator or with the seller designated by the distribution network operator for performance of the network operator's selling obligation under § 76 (1) of the EMA, the consumer's network connection may, during the period from 1 October to 30 April and in a building or part of a building which constitutes a dwelling and which is used as a permanent residence and heated exclusively or primarily by electricity, be disconnected only after the passage of 90 days from sending the notice (concerning disconnection of the network connection) mentioned in § 90 (2) of the EMA, and the consumer has failed to eliminate the circumstances which serve as grounds for disconnection or failed to notify the network operator of the elimination. This imperative provision has been established for protection of the consumer in order to avoid inconvenience in living arrangements and emotional distress and the risk of health damage, which may result in the case of disconnection from electricity as a critical energy source in a cold period. The Court *en banc* finds that the claimant's obligation under the contract to ensure the electricity network connection and not to disconnect it before the passage of the period prescribed in § 90 (7) of the EMA is also aimed at pursuing non-pecuniary interests. Although contracts for the sale of electricity and provision of network services are concluded frequently within economic activity, and therefore such a network contract can in itself constitute an everyday transaction, in the case of breach of such a contract the unique nature of the contract has to be taken into account. Electricity is at least normally a critical energy source for a consumer, and (unlawful) disconnection of its supply may entail significant inconvenience, emotional distress or health damage for the consumer, thus significantly impacting the consumer's qualify of life. The above view is also supported by the fact that a functioning electricity supply is a critical service the continuity of which should also be ensured in an emergency (see, e.g., § 1 (1), § 34 (2) clause 1, § 37 of the Emergency Act).

134. Although in itself § 134 (1) of the LOA affords an opportunity to claim non-pecuniary damages, inter alia, in the case

of violation of § 90 (7) of the EMA, the law does not prohibit parties from agreeing that non-pecuniary damage caused by breach of contract is not compensated, except in the case laid down under § 106 (2) of the LOA. However, the Court *en banc* notes that should such a condition be contained in standard terms, the court would assess its validity under § 42 of the LOA .

135. As under § 688 (3) and (5) of the CCivP, the Supreme Court itself does not establish facts and does not collect or examine evidence, and probably the Court of Appeal should also remit the case to the County Court, as regards the defendant's claim for non-pecuniary damages the case should be remitted to the County Court for re-examination. In a new hearing of the case, the County Court has to express a reasoned opinion whether the claimant must compensate the defendant for non-pecuniary damage caused by breach of the network contract. In line with § 134 (1) of the LOA, the County Court has to assess, inter alia, whether the claimant should have understood that non-performance of the obligation could result in non-pecuniary damage to the defendant (§ 127 (3) LOA). In addition, the County Court should analyse, inter alia, the claimant's counterclaim according to which the defendant's claim for non-pecuniary damages is excluded under clause 11.9 of the standard terms. Upon assessment of the standard terms, the County Court should reach an opinion whether this standard term excludes compensation of non-pecuniary damage. Should the County Court find that the standard term excludes compensation of non-pecuniary damage, the County Court should assess validity of the standard terms under § 42 of the LOA. The Court *en banc* draws the County Court's attention to the fact that under § 42 (1) of the LOA a standard term is void if, taking into account the nature, contents and manner of entry into the contract, the interests of the parties and other material circumstances, the term causes unfair harm to the other party, particularly if it causes a significant imbalance in the parties' rights and obligations arising from the contract to the detriment of the other party. Unfair harm is presumed if a standard term derogates from a fundamental principle of law or restricts the rights and obligations arising for the other party from the nature of the contract such that it becomes questionable whether the purpose of the contract can be achieved. Invalidity of standard terms and the circumstances relating thereto are assessed as at the date of entry into the contract.

136. Under § 134 (5) of the LOA, the gravity and scope of a violation and the conduct and attitude of the person who caused damage towards the aggrieved person after the violation should be taken into account for the purposes of determining compensation for non-pecuniary damage. Similarly to the situation under § 134 (2) of the LOA, in the opinion of the Court *en banc*, as a rule, an aggrieved party under § 134 (1) of the LOA should also be paid a reasonable sum as compensation for non-pecuniary damage. The amount of money to be awarded to a person as compensation for non-pecuniary damage caused as a result of unlawful disconnection of the electricity network connection depends on the specific circumstances. When setting the amount of compensation, the court will take into account, regardless of the requests submitted by the parties, the type and gravity of the violation, the guilt of the violator and its degree, the financial situation of the parties, the victim's own role in the occurrence of the damage, and other circumstances, failure to take account of which could result in an award of unjust compensation (for this, see Supreme Court judgment of 22 October 2008 in civil case No 3-2-1-85-08, para. 14). Inter alia, the period by which the network connection was disconnected earlier than the notice period laid down under § 90 (7) of the EMA should be taken into account when setting the amount of compensation. It should also be considered how unexpected the disconnection of the network connection was for the consumer. In the opinion of the Court *en banc*, compensation for non-pecuniary damage could even be excluded, or a minimum sum should be awarded as compensation, e.g. when a consumer has several dwellings and they can move to another dwelling without particular difficulty.

137. In the remaining part, in which the Court of Appeal upheld the County Court judgment, the Court of Appeal judgment is reasoned and lawful and no grounds exist for allowing the appeal in cassation. The mere fact that the defendant does not agree with the assessment of the County Court and the Court of Appeal with regard to allowing the claim in part and dismissing the counterclaim for pecuniary damages, does not mean that the courts breached the rules of procedural law when adjudicating these claims. The Court *en banc* notes in line with § 689 (5) of the CCivP that in the remaining part it adheres to the reasoning of the Court of Appeal and will not repeat it. In reply to the submissions made in the appeal in cassation, the Court *en banc* notes the following.

138. The Court *en banc* does not agree with the defendant's opinion that the Court of Appeal failed to analyse whether a point which had not been agreed as an electricity metering point could be considered a legitimate metering point, and incorrectly assessed the evidence concerning the defendant's consumption volumes. The County Court established that under clause 4.2 of the standard terms the claimant was entitled to relocate the meter and order its expert examination. The defendant has not substantiated how this standard term unreasonably harmed him as a consumer. Based on the

consumption charts submitted by the defendant, the County Court established that the meter readings recorded by the claimant did not significantly differ from the readings previously notified by the defendant for similar intervals. The Court of Appeal upheld the County Court's reasoning. The submissions made in the appeal in cassation give no grounds to reproach either the County Court or the Court of Appeal for any breach of procedural rules in assessing the evidence.

139. The defendant submits that the Court of Appeal should have assessed ex officio the voidness of the standard terms and declared the debt agreement of 22 February 2011 void in its entirety. In the opinion of the Court *en banc*, the courts have taken into account an earlier opinion of the Civil Chamber of the Supreme Court stating that in the case of a dispute between the parties over standard terms the court must review the validity of standard terms even when the parties themselves have not relied on this (see, e.g., Supreme Court order of 24 November 2011 in civil case No 3-2-1-109-11, para. 12; judgment of 17 June 2008 in civil case No 3-2-1-56-08, para. 13; judgment of 30 October 2013 in civil case No 3-2-1-106-13, para. 24). The courts have assessed the validity of the standard terms both with respect to the debt agreement as well as the circumstances of its conclusion. The defendant has not clearly indicated which standard terms harm him as a consumer in connection with the circumstances of the claim against the defendant and the claim for the electricity debt. Therefore, with regard to this part the Court *en banc* has no grounds to reach a different opinion than the courts.

140. The Court *en banc* finds that the Court of Appeal did not breach procedural rules when dismissing the defendant's claim for compensation of pecuniary damage. The Court of Appeal was justified in concluding that the previous lease of his dwelling by the defendant did not prove that he also had a realistic opportunity to lease the dwelling at the time of disconnection of the electricity and he lost it on account of the claimant's activity. According to the judgment of the Court of Appeal, it was not substantiated that the defendant was in negotiations for entering into a lease contract. The defendant has not submitted or proved that he had already concluded a lease contract.

141. As the Court *en banc* allows the appeal in cassation in part, the security paid on the appeal should be refunded to the defendant under § 149 (4) (first sentence) of the CCivP.

142. In line with § 173 (3) (second sentence) of the CCivP, allocation of procedural expenses remains for the County Court to decide.

Dissenting opinion of Supreme Court Justices Henn Jõks and Villu Kõve to the Supreme Court en banc judgment of 15 December 2015 in civil case No 3-2-1-71-14.

1. We do not concur with the opinion of the majority of the Court en banc that § 90 (7) of the Electricity Market Act (EMA) is also aimed at pursuing a non-pecuniary interest. Therefore, we also do not concur with point 1 of the operative part of the judgment in which the defendant's counterclaim for compensation of non-pecuniary damage is remitted for re-examination to the County Court.

2. The Court en banc reached the conclusion that § 90 (7) of the EMA was also aimed at pursuing a non-pecuniary interest by the following reasoning in para. 133 of the judgment: 1) this imperative provision has been established for protection of the consumer; 2) the purpose of the provision is to avoid inconvenience in living arrangements and emotional distress and the risk of health damage, which may result in the event of disconnection from electricity as a critical energy source in a cold period; 3) electricity is at least normally a critical energy source for a consumer; 4) a functioning electricity supply is a critical service the continuity of which should also be ensured in an emergency (see, e.g. § 1 (1), § 34 (2) clause 1, § 37 of the Emergency Act).

The opinion of the Court en banc can be briefly summarised as follows: if a norm has been established in an imperative form for protection of the consumer, it regulates provision of a critical service, and loss of the service may result in considerable inconvenience in living arrangements and emotional distress and risk of health damage for the consumer, then the relevant norm is also aimed at pursuing a non-pecuniary interest. In this case, the word "electricity" cannot entail

an independent, magical meaning.

In our opinion, none of the above reasons, either separately or in combination, can justify the conclusion that § 90 (7) is aimed at pursuing a non-pecuniary interest.

3. All the provisions which have been established for protection of the consumer are, as a rule, imperative, while, as a rule, they are not aimed at pursuing a non-pecuniary interest.

4. As concerns the aim of the provision to avoid consequences which may ensue in the case of cutting off electricity as a critical energy source in a cold period, we would note that orientation of a provision to pursuit of a non-pecuniary interest cannot be dependent on a current season. The aim to avoid consequences ensuing from disconnection of electricity in a cold period could come into consideration not in clarifying the aim of the provision but only upon assessment of whether a debtor understood or should have understood that breach of the obligation may cause non-pecuniary damage. Disconnection of electricity is, first and foremost, linked to the sphere of property, i.e. inconvenience experienced due to disconnection of electricity can be expressed and measured in pecuniary terms, inter alia as expenses for alternative arrangements for heating, water supply, or communications, or as expenses for temporary electricity supply arrangements (e.g. by means of a generator) or renting another dwelling as a replacement for the unheated dwelling. In extreme cases, when somebody sustains health damage due to disconnection of electricity supply, claims could be filed under § 1044 (3) of the Law of Obligations Act (LOA) on the grounds of non-contractual liability.

5. Orientation of a provision to pursuit of a non-pecuniary interest also does not ensue from the fact that electricity is a critical energy source for a consumer, the continuity of which should also be ensured in an emergency. The list of services the continuity of which should also be ensured in an emergency and which are provided on the basis of a contract, and the importance of which for a consumer is comparable to electricity supply, and the loss of which may result in considerable inconvenience in living arrangements, emotional distress and risk of health damage, is very extensive under § 34 of the Emergency Act, ranging from electricity supply to waste management.

6. In the Estonian legal order, instances in which claims for non-pecuniary damages can be made at all have been set out fairly precisely and clearly, including occasions when non-pecuniary damages may be claimed upon breach of a contractual obligation (e.g. § 877 (2) LOA). Thus, when trying to identify the aim of pursuing a non-pecuniary interest in respect of a provision and attributing the aim to the particular provision, the courts should be extremely careful and proceed from the assumption accepted in the legal literature that these occasions have been exhaustively established in legislation. When giving meaning to the aim of a legal norm, more relevant arguments should be used than was done with regard to § 90 (7) of the EMA.

7. The exception laid down under § 134 (1) of the LOA, providing that only if the purpose of a contractual obligation was to pursue a non-pecuniary interest and, under the circumstances relating to entry into a contract or to non-performance, the debtor was aware or should have been aware that non-performance could cause non-pecuniary damage, also has a pecuniary purpose. The purpose is to ensure that cases of compensation for non-pecuniary damage which may arise upon breach of a contractual obligation are foreseeable, do not inhibit entrepreneurship and do not contribute to a rise in the price of services.

8. Recognition by the Court en banc itself that filing a claim for compensation of non-pecuniary damage caused by breach of contract is significantly limited and, as a rule, no such claim can be made, at least in the case of breach of transactions entered into within economic and professional activity, to a large extent loses its meaning in the light of the reasoning used for interpreting § 90 (7) of the EMA.

9. To conclude, the Court en banc unduly interpreted § 90 (7) of the EMA and § 134 (1) of the LOA too broadly, thereby creating a dangerous precedent for frivolous disputes. The opinion of the Court en banc on the disconnection of electricity

can also be extended to other public utility services (see § 34 of the Emergency Act). Lowering the “threshold” of a non-pecuniary interest too much may “provoke” filing of claims for non-pecuniary damages in cases of breach of contract where no justification for such a claim exists, thus causing an unnecessary drain on time and resources for the parties and the court. Following the logic of the Court en banc, in the case of many service contracts one could imagine, at least theoretically, occurrence of non-pecuniary distress and damage, claiming compensation for which could be ventured. This would burden the legal system with unreasonable claims and would distract attention from more important issues, including whether a breach also resulted in a negative consequence measurable in pecuniary terms. The judgment of the Court en banc can be seen to reflect a wish to establish “punitive damages” against a service provider for unwarranted disconnection of electricity supply, which, however, is not in line with the general principles for compensation of damage. Punitive sanctions can be established by the state under public law, and this cannot be compensated by private law remedies.

Dissenting opinion of Supreme Court Justices Villu Kõve and Tambet Tampuu to the Supreme Court en banc judgment of 15 December 2015 in case No 3-2-1-71-14, with Supreme Court Justice Jaak Luik joining paras 1–3 of the dissent, and Supreme Court Justice Peeter Jerofejev joining para. 2 of the dissent.

We do not concur with point 2 of the operative part of the judgment of the Court en banc and with the reasoning to the extent that the Court en banc found that the renewable energy charge was in conformity with the Constitution and European Union law.

1. First, we cannot concur with the opinion in paras 97 and 98 of the judgment of the Court en banc that, formally, the obligation to pay the renewable energy charge and its rate were established in conformity with the Constitution.

In para. 96 of the judgment, in itself the Court en banc was justified in finding that the renewable energy charge was a public financial obligation not listed in § 113 of the Constitution and the subjective right of a person arising from § 113 of the Constitution also extends to this financial obligation. This view is in line with an earlier opinion of the Court en banc that all public financial obligations, irrespective of how these are named in different pieces of legislation, are within the scope of protection of § 113 (see Supreme Court judgment of 22 December 2000 in civil case No 3-4-1-10-00, para. 20).

Under the current case-law of the Supreme Court, arising from § 3 (1) of the Constitution the legislator itself must decide all issues that are material from the fundamental rights viewpoint, and must not authorise the executive to rule on these. The executive may only specify the restrictions imposed by law on fundamental rights and freedoms, but may not establish any restrictions in addition to those established by law (see Supreme Court Constitutional Review Chamber judgment of 24 December 2002 in case No 3-4-1-10-02, para. 24; Supreme Court order of 26 June 2014 in civil case No 3-2-1-153-13, para. 71). In addition, the Supreme Court has held that the Constitution does not enable delegation of all governmental powers to a person in private law. Functions which according to the spirit of the Constitution should be performed by governmental authority and which, therefore, form core functions of governmental authority cannot be delegated by the governmental authority to a legal person in private law. As exercise of governmental authority solely pursuant to the Constitution and laws in conformity with it also constitutes one of the expressions of the principle of rule of law, § 3 (1) of the Constitution should be read in combination with the principle of democratic government founded on the rule of law expressed in § 10 of the Constitution (see Supreme Court judgment of 16 May 2008 in misdemeanour case No 3-1-1-86-07, para. 17–26).

We hold the opinion that establishing the rate of a public financial obligation within the meaning of § 113 of the Constitution is one of the core functions of governmental authority, and as establishing the rate of a public financial obligation directly interferes with the fundamental right to property of obligated persons (§ 32 Constitution), delegating establishment of the rate of a public financial obligation to a person in private law is inadmissible under § 3 (1) and § 10 of the Constitution. The Court en banc has not expressed an opinion on this issue. Logically, the conditions arising from § 3 (1) and § 10 of the Constitution for establishing public financial obligations cannot depend on whether the issue concerns establishing the rate of a tax or the rate of another public financial obligation. Thus, in our opinion, in all the cases covered by § 113 of the Constitution the legislator itself must establish rates of public financial obligations or delegate the

respective decision-making to the executive.

The Supreme Court has previously also held that the requirement under § 113 of the Constitution to establish a national tax by law should be understood as meaning that this also applies to the rate of tax (see Supreme Court Constitutional Review Chamber judgment of 23 March 1998 in case No 3-4-1-2-98, IV). In line with this opinion, logically there should also be no difference based on what type of public obligation is involved. Under § 592 (4) (first sentence) of the Electricity Market Act (EMA), the transmission network operator determines the cost of funding support in the following calendar year for one kilowatt-hour of network services used and of electricity consumed via direct lines, i.e. the rate of the renewable energy charge. Thus, the rate of the renewable energy charge is not established by law. In view of the opinion expressed in case No 3-4-1-2-98 (cited above), the Court en banc should have expressed an opinion whether it was constitutional to establish the rate of the renewable energy charge as a public charge not by law but in another universally compulsory legal act.

However, establishing the rate of a public financial obligation by a person in private law need not be unconstitutional if the legislator, upon delegating that right, has established clear and objectively verifiable data based on which the person in private law can establish the rate of the public financial obligation as a technical activity, e.g. by making calculations based on data established by law.

Under § 592 (2) of the EMA, the transmission network operator prepares and publishes on its website by 1 December each year an estimate for the next calendar year concerning the sums required for funding support for electricity generated from renewable energy sources or in an efficient cogeneration process, concerning the volume of network services to be provided to consumers and concerning the amount of electricity to be consumed via direct lines. Under § 592 (4) of the EMA, on the basis of the estimate referred to in § 592 (2) of the EMA, the transmission network operator determines the cost of funding support in the following calendar year for one kilowatt-hour of network services used and of electricity consumed via direct lines, taking into account any sums by which the funding of support during the 12 months immediately preceding preparation of the estimate overshot or fell short of the total of support payments, interest earned on overshot payments or interest paid on payments falling short and justified expenses incurred as a result of administrating payment of support.

We are of the opinion that the competence granted to the transmission network operator under § 592 (2) and (4) of the EMA to establish the amount, i.e. the rate, of the renewable energy charge as a public financial obligation within the meaning of § 113 of the Constitution is too general, ambiguous and in any case contains too broad a discretion. With respect to such regulative provisions, it cannot be claimed that the activity of a person in private law (transmission network operator) in establishing the rate of the renewable energy charge as a public financial obligation amounts to a merely technical activity (which could justify delegation of decision-making in this regard). At the same time, the rate of the renewable energy charge significantly interferes with the fundamental right of electricity consumers to property under § 32 of the Constitution (the amount of the renewable energy charge payable by a consumer is set on the basis of the rate in the invoice sent to the consumer).

On that basis, we cannot concur with the opinion of the majority of the Court en banc that, formally, the obligation to pay the renewable energy charge and its rate were established in conformity with the Constitution.

2. In addition, we do not agree with the reasoning of the Court en banc to the extent that it states that the rate of the renewable energy charge is not manifestly unjustified in view of the purpose pursued by establishing it (see paras 112–126 of the judgment). The Court en banc found that, in view of the renewable energy charge being dependent on the rates of support paid to producers, in assessing the rate of the charge it is inevitable to examine whether the rates of support paid to renewable energy producers are manifestly excessive. To assess whether the rates of support are excessive, the Court en banc has relied on the decision of the European Commission (the Commission) of 28 October 2014 in which the Commission evaluated the compatibility of support for renewable energy and cogeneration plants in Estonia with the Guidelines on State aid for environmental protection (see paras 80, 118–121 of the judgment). The Court en banc noted that there was no reason to cast doubt on the expert opinion of the Commission, which is a disinterested

party in terms of the present dispute, and that the Commission had reached the opinion that renewable energy support was not excessive (see para. 118 of the judgment).

We find that the above opinion of the Court en banc is incompatible with § 152 (1) of the Constitution, according to which the courts will set aside any law or other legislation that is in conflict with the Constitution when adjudicating a case.

We cannot avoid noting that in para. 79 of the judgment the Court en banc has emphasised that it does not concur with the opinion of the participants in the proceedings that the Supreme Court cannot assess the constitutionality of the renewable energy charge, as it constitutes state aid which the European Commission has declared legitimate. The Court en banc has noted that the subject-matter of the present dispute are not issues whether the renewable energy charge constitutes state aid and whether the renewable energy charge as state aid is in line with the rules for granting it (see para. 80 of the judgment). The Court en banc has also held that the fact that any provisions are compatible with European Union law cannot lead to the conclusion that the same provisions are also compatible with the Estonian Constitution or that declaring a provision unconstitutional and repealing it would constitute a breach of European Union law. The connection of a legal act with EU law, or an opinion of any other institution on the compatibility of domestic legislation with EU law, cannot in itself prevent review of the constitutionality of the legal act within the meaning of § 152 of the Constitution (see para. 81 of the judgment).

We believe that if the Court en banc had been consistent then, in line with the opinion expressed in paras 79–81 of the judgment, it should also have assessed whether the amounts of renewable energy support were justified or excessive, in view of the fact that the rate of the renewable energy charge depends on them and taking into account interference with the fundamental right to property established under § 32 of the Constitution. Understandably, the Commission did not, and could not, express an opinion on this issue. The fact that the amounts of renewable energy support are not excessive under EU law does not preclude that they could be excessive when assessed from the aspect of interference with the fundamental right to property under § 32 of the Constitution. Thus, the Court en banc should have undertaken a substantive assessment, based on the provisions of the Constitution, of the margin of profitability of production of renewable energy that consumers should be required to ensure to renewable energy producers by paying the renewable energy charges.

3. The Court en banc has unduly neglected the issue whether the relevant rates of the renewable energy charge established by the transmission network operator have been published as legislation in force. Specifically, it arises from § 3 (2) (first sentence) of the Constitution that laws are published in accordance with prescribed procedure and, from the second sentence of the same subsection, that only published laws may have binding force. All universally compulsory legislation is published in the Riigi Teataja (see § 1 Riigi Teataja Act). In the present case, the rates of the renewable energy charge as universally compulsory legislation, on the basis of which the claimant calculated the renewable energy charge in the invoices issued to the defendant, established by the transmission network operator under § 592 (4) of the EMA on the basis of a delegation norm have not been published in the Riigi Teataja (on this, see Supreme Court order of 20 October 1995 in administrative case No III-3/1-28/95).

4. At all court instances, the defendant has argued that the renewable energy charge is contrary to Article 107 of the Treaty on the Functioning of the European Union (TFEU), and in this regard the courts should have sought a preliminary ruling from the EU Court of Justice (CJEU). The lower instance courts found that Estonian law was applicable in the case because the dispute lacked a cross-border dimension and Estonian legislation was compatible with EU law. The Court en banc in paras 80 and 82 of the judgment referred to the fact that the European Commission in a decision of 28 October 2014 assessed the proportionality of renewable energy support as state aid and concluded that both the current and the intended renewable energy support scheme were compatible with the guidelines on state aid under EU law. On that basis, the Court en banc does not see a conflict between EU law and Estonian law. The Court en banc was in itself correct in holding that the subject-matter of the present dispute was not the issues whether the renewable energy charge constituted state aid and whether the renewable energy charge as state aid was in line with the rules for granting it (see para. 80 of the judgment). The issue under dispute was whether regulative provisions on renewable energy support, which directly affect the amount of the renewable energy charges, were compatible with EU law.

In line with generally recognised principles of EU law, on issues of interpretation of relevant EU legislation the courts in member states are obliged to make a reference for a preliminary ruling to the CJEU. The courts do not have the obligation only when earlier CJEU case-law on interpretation of the relevant provision of EU law exists or interpretation of the relevant EU legislation is abundantly clear (on this, see Supreme Court order of 7 May 2008 in administrative case No 3-3-1-85-07, para. 38). In our opinion, it cannot be concluded merely on the basis of the Commission's decision that interpretation of a piece of EU legislation essential for a dispute in a different case is clear.

One of the contested issues on which the Commission expressed an opinion in its above decision (and on which the Court en banc also relied) was whether the amounts of renewable energy support in Estonia at the time of issuing the invoice to the defendant were excessive (see paras 118–121 of the judgment of the Court en banc). Article 107 para. 1 of the TFEU provides: "Save as otherwise provided in the Treaties, any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market." We are of the opinion that only the CJEU is competent to issue universally binding interpretations of EU law, including on the issue of when state aid is compatible with EU law.

In our opinion, clarity is also lacking concerning the issue whether, once a member state has received Commission approval for granting state aid, it would be possible in a subsequent legal dispute concerning application of EU law to establish that the member state's provisions on state aid as interpreted by the Commission are still contrary to EU law.

In view of the foregoing, we find that the Court en banc should have sought a preliminary ruling from the CJEU concerning the issue whether the provisions regulating renewable energy support are compatible with EU law.