



INFORMATION NOTE No. 1/2016

THE TC UPHOLDS THE CONSTITUTIONALITY OF THE DECREE ON URGENT MEASURES TO GUARANTEE STABILITY IN THE ELECTRICITY SYSTEM

The Plenary Meeting of the Spanish Constitutional Court has dismissed the appeal filed by the Government of Murcia against Royal Decree-Law 9/2013, of 12 July, establishing a new remuneration system for renewable energy sources. The Court considers that the Government sufficiently justified the need to approve measures on an urgent basis, consequently acting in compliance with Art. 86.1 of the Spanish Constitution (CE); furthermore, said measures do not infringe- as the appellant claimed- the principle of regulatory hierarchy (Arts. 9.1 and 3 CE) or the principles of legal certainty and non-retroactivity of sanctioning or unfavourable provisions (Art. 9.3 CE). Encarna Roca acted as the Reporting Judge in the judgment. Judge Juan Antonio Xiol issued a particular concurring vote, which was subscribed by the Vice President, Adela Asúa, and Judge Fernando Valdés Dal-Ré.

According to consolidated case-law, Art. 86.1 CE entitles the Government to legislate by means of a decree, as long as this is explicitly justified by an “*extraordinary and urgent need*” to approve the measures in question. The Court should determine, in each case, “*without conducting any political judgment*” whether said constitutional requirement is met.

According to the Preamble of the challenged rule and the Minister of Industry’s intervention in the discussions held in Congress to pass the decree, the measures contained in the Royal Decree-Law challenged were used to remedy “*an unexpected increase in the tariff deficit*” caused by the economic crisis, i.e. a fall in electricity demand and a general increase in electricity system costs. On the matter, in previous resolutions, which are applicable to this appeal, the Court had already determined that “*the relevance of the energy sector for the general economy means that its arrangement (...) should constitute a need that needs to be assessed within the scope of attributions entrusted to the Government*”. These attributions include the approval of “*provisional legislative provisions with immediate effects (...)*”.

The appellants claimed a breach of the principle of regulatory hierarchy because, in their opinion, the legislative decree is contrary to the Treaty on the Energy Charter, signed in 1994 and ratified by Spain. The Plenary Meeting has dismissed this claim, on the grounds that “*the Court is not competent to determine whether or not a law is compatible with an international treaty; nor may the latter constitute fundamental rules and constitutionality criteria*”. Furthermore, the appeal does not explain “*in what way the law disputed presumably breaches the rules of the Treaty and, particularly, what would be the consequences of such breach (...)*”, which is why the Court cannot “*infer the reasons why the appellant believes that the challenged law is contrary to the Constitution*”.

The judgment also dismisses the fact that changes in the remuneration of renewable energy sources, contained in the challenged decree, infringe the principle of legal certainty. The judgment explains that this principle, like the principle of legitimate

trust, does not “*protect in absolute terms, the regulatory stability or the unchangeable nature of rules*”. “*This regulatory stability*”, it adds, “*is compatible with legislative changes that are foreseeable and a result of a clear general interest*”. In this case, “*the change made cannot be referred to as unexpected, as the changes taking place in the circumstances affecting this sector of the economy made it necessary to adjust its regulatory framework, as a result of the difficulties undergone by the sector as a whole (...)*”. In short, states the judgment, “*the principles of legal certainty and legitimate trust cannot be used to enshrine an alleged right to freeze existing laws*”.

In turn, nor does the claim justify to what extent the rule could “*be misleading or generate uncertainty when applied*”; in fact, the challenged decree expressly specifies the parameters and criteria required to objectively determine the legal concepts of “*reasonable return*” and “*efficient or well-managed company*”; these concepts constitute the conditions that should be met in order for this additional remuneration to apply, which the appellants claim to be “*vague*”.

Finally, the Court does not believe that the decree infringes the principle of legal non-retroactivity, by establishing that it is immediately valid whilst referring to a subsequent regulation in order to effectively apply the new remuneration system. The challenged rule foresees a transitional regime until the subsequent regulatory implementation renders the new remuneration regime fully effective. It is then, explains the judgment, when “*the necessary adjustment will be made in relation to any payment rights or resulting payment obligations (...)*” generated.

The judgment reiterates that the non-retroactivity forbidden by Art. 9.3 CE constitutes the “*effects of the new law on legal effects already arising from prior situations*”, i.e. in the case of “*consolidated rights, undertaken as part of a citizen’s assets, not any pending, future and conditional rights and expectations*”.

In this case, states the Plenary Meeting, the holders of remunerated electricity generation facilities are subject to a new remuneration system from the very moment the challenged decree comes into force, “*without prejudice to the exact quantification of this remuneration taking place when a regulation is approved, and without this unfavourably affecting any rights acquired, from a constitutional perspective, i.e. there is no impact on previously consolidated material rights (...)*”.

In their particular vote, the Judges agree with the ruling of the judgment, but do not agree with its arguments, which they deem “*insufficient*” as regards the principle of legitimate trust and its constitutional significance as “*an integral component of the principles of legal certainty and non-retroactivity of any sanctioning rules or restrictions on individual rights, on responsibility and the forbidden arbitrariness of public powers, enshrined in Art. 9.3 CE*”; they also consider that the judgment should have included a “*thorough and detailed*” analysis of the challenge rule’s fulfilment of the principle of legitimate trust. Furthermore, they claim that the Court has “*missed the chance*” to pronounce itself on the influence of regulatory changes in this sector “*from the point of view of legitimate trust*”.

Madrid, 13 January 2016