**DECISION No. 5**

Sofia, 11 May 2017

Constitutional Case No. 12/ 2016

Rapporteur: Mariana Karagiozova-Finkova

(Promulgated, DV, No. 40/19.05.2017)

The Constitutional Court: Boris Velchev, Chairman; and members: Tsanka Tsankova, Stefka Stoeva, Rumen Nenkov, Georgi Angelov, Anastas Anastasov, Grozdan Iliev, Mariana Karagiozova-Finkova, Konstantin Penchev, Philip Dimitrov, Tanya Raykovska; and with secretary record-keeper Kristina Encheva on 11 May 2017 heard in camera Constitutional Case No. 12/2016 that was reported by Justice Mariana Karagiozova-Finkova.

The proceedings conform to Art. 149, para 1, subpara 2 of the Constitution of the Republic of Bulgaria.

The case was filed by 49 Members of the 43rd National Assembly in keeping with Art. 150, para 1 of the Constitution.

The Constitutional Court's session on 13 October 2016 passed a resolution to consider upon its merits the challenge of 49 Members of the 43rd National Assembly of the constitutionality and of compliance with Art. 63 of the Treaty on the Functioning of the European Union (TFEU) of § 18, para 1, para 2, para 3, para 4 and para 5 of the Transitional and Concluding Provisions of the Act Amending the Energy Act (TCP AAEA) (promulgated, DV, No. 56/24.07.2015).

Positions were received from the Council of Ministers, the Ministry of Energy, the Ministry of Agriculture and Food, the Energy and Water Regulatory Commission, the Sustainable Energy Development Agency and the Commission for Protection of Competition.

Positions were submitted by the Energy Management Institute, the Alliance of Producers of Ecological Energy-BG, the Association of Producers of Ecological Energy, the Bulgarian Solar Association, the Bulgarian Wind Energy Association, the Bulgarian Industrial Association, the Bulgarian Chamber of Commerce and Industry, the Bulgarian Industrial Capital Association and the Bulgarian Association for European Law.

From among the eminent experts Prof. Dr Angel Kalaidjiev contributed with a legal opinion.

In the first place, the challenge saw violation of the Constitution-proclaimed principle of the state committed to the rule of law (Art. 4, para 1).

Drawing on the concept of the state committed to the rule of law as established in the constitutional law theory and constitutional court jurisprudence in terms of form and substance, the Members of Parliament (MPs) maintained that the provisions of § 18 TCP AAEA are in conflict with the material manifestations and requirements of this constitutional principle which requires that pieces of legislation be clear, precise and non-contradictory and appropriate to the objective of law, conform to the requirement of predictability of legislation and legal certainty and also to the requirement that the principle of proportionality apply whenever rights are trimmed.

Arguments were presented to prove that the rules in § 18 TCP AAEA violate this principle as they conflict with Art. 2, para 1 of the Energy from Renewable Sources Act (ERSA) (promulgated, DV, No. 35/03.05.2011) that sets out the objectives of legislation in the field of energy from renewable sources. The challenged provisions were said to be in contravention of Art. 1 of 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. This Directive (Directive 2009/28/EC) makes it binding on Member States to promote the generation of energy from renewable sources.

The MPs thought that the provisions of § 18 TCP AAEA in fact undermine the principles of predictable legislation and legal certainty. The outcome is a change of the price of electricity purchased which price is fixed and guaranteed throughout the duration of the Power Purchasing Agreements (PPAs) in line with the clear rules that were in operation as of the day of the PPA signature and the setting of a price that in the MPs' understanding cannot be known nor can it be foreseen by the producers that are covered by the commented text. Such price regulation will jeopardize the interests of the producers of energy from renewable sources creating defaulting payers all to the detriment of the businesses and the security of the national energy system. The MPs maintained that the lack of predictability and certainty about the national energy policy will negatively impact the investment climate in Bulgaria.

The MPs insisted that the provisions challenged are inconsistent, inter alia, with the international treaties to which the Republic of Bulgaria is a party and which make it binding on the Government to protect foreign investment and to prevent unjustified or discriminatory measures that may be to the detriment of foreign investment.

The MPs' claim of noncompliance with the principle of the state committed to the rule of law draws on the perceived disregard for the requirement that vested rights should be protected by the law and should be immune against retroactive legislation. Measures to the detriment of claimed vested rights pertain to the application that § 18, para 1 TCP AAEA provides for of the prescription of Art. 31, para 8 ERSA and to projects for which applications for support were lodged before the entry into force of the ERSA.

The MPs thought that the rules of § 18 TCP AAEA that are challenged run against Art. 19, paras 2 and 3 of the Constitution. They were of the opinion that the text under consideration negatively impacts the investment climate and seriously violates the rights of a definite group of economic actors in defiance towards the Constitution-established principle (Art. 19, para 3) of the protection of investments and economic activities of Bulgarian and non-Bulgarian persons and corporate entities. The MPs maintained that the enforcement of § 18 TCP AAEA will decrease the revenue that the producers of energy from renewable sources expect and that is calculated on the basis of acting legislation and long-term agreements in effect. In the understanding of the MPs such a regulation to the detriment of a certain group of economic actors runs against the Constitution-proclaimed principle of guaranteed equal legal conditions for economic activity (Art. 19, para 2 of the Constitution), and against the principle of protection and support of investment and economic activity (Art. 19, para 3 of the Constitution). The MPs insisted that the scope of Art. 19, para 3 of the Constitution extends to, inter alia, the legal defense of "legitimate expectations". The MPs maintained that the text challenged that decreases the feed-in tariff for the purchasing of electricity that is generated from renewable sources decreases the revenue that is legitimately expected by the electricity generation sector. The challenge resorted to an argumentation that was intended to prove

that the legal text challenged, in addition, breaches the Convention for the Protection of Human Rights and Fundamental Freedoms (CPHRFF).

Also, the MPs believed that the texts challenged are noncompliant with Article 63 TFEU. They maintained that the restrictive measures that the Government enforces by the passage of § 18 TCP AAEA negatively impact the freedom of movement of capital in two major aspects: first, the measures are detrimental to investment which has already been made in the country as they unilaterally change the legal frame and impinge on the outcome of trade agreements that were concluded years ago and that have been carried out for years: the investors are deceived as their estimates of returns on investment were made in a completely different legal context; second, unforeseeable and inadequate restrictive measures are in a position to discourage and even drive away investors who potentially might invest in the generation of electricity from renewable sources in this country.

The positions submitted by the institutions concerned, except for the position of the Commission for Protection of Competition, clearly expressed the view that the MPs' challenge is entirely untenable and should be dismissed. To sum up, the positions maintained that § 18 TCP AAEA puts an end to a privilege enjoyed by the economic actors who fall within subparagraph 1 of § 18, resulting from their exclusion from the scope of application of Art. 31, para 8 ERSA upon the Act's entry into force on 3 May 2011 and that the change is fully in compliance with the developing EU legal frame and with the national legislation concerning the energy from renewable sources. The position found untenable the claim that the challenge brings up of impacts based on retroactive legislation to the detriment of legitimate legal expectations and vested rights of the producers of energy from renewable sources. The Commission for Protection of Competition judged the impact of § 18 TCP AAEA in the context of a competition-specific legal analysis and concluded that the legal texts challenged might erode the Constitution-proclaimed principle (Art. 19, para 3) since the implications directly injure the legitimate expectations of the businesses that started implementing their investment plans when the legislation in place guaranteed that they would avail of a codified support scheme.

Six out of the nine positions received from the NGOs that were requested to contribute, despite some specifics of the argumentation and focus, fully shared the position stated in the challenge. The NGOs presented further argumentation to support the claimed inconsistence of § 18 TCP AAEA with Art. 4, para 1 and Art. 19, paras 2 and 3 of the Constitution and offered proofs to support the perceived inconsistence with Art. 17 and Art. 5 (the position of the Alliance of Producers of Ecological Energy-BG/APEE) and also with Art. 7 and Art. 15 (the position of the Bulgarian Solar Association/BSA) of the Constitution. The NGOs claimed infringement on rights as laid out in the Charter of Fundamental Rights of the European Union (CFR EU) viz. the right to property and the right to equality before the law and insisted that § 18 TCP AAEA runs against a number of international treaties whereto the Republic of Bulgaria is a party. The NGOs maintained that the texts challenged are codification of unforeseeable and inadequate measures which, in the long run, may thwart the movement of capital in general and of investment in particular. The position of the Bulgarian Association for European Law resorted to the extensive jurisprudence of the Court of Justice of the European Union (CJEU) as seen relevant to the theses in the challenge.

The Bulgarian Industrial Capital Association, the Bulgarian Industrial Association and the Energy Management Institute did not support the MPs' challenge. They had further reasons to the effect that prior to the enactment of the texts challenged, there had been "double subsidies and excessive State aids" to the producers of electricity from renewable sources. They found untenable the alleged waiver of the requirement that "the investors should be assured in their legitimate expectations of returns on the investment" because of the fact that the construction of the projects in which the investment was made received public money support. These three expressed a view that the prescriptions of the challenged legal text are intended to rectify certain legalized mistakes that were allowed in Bulgaria when the investment support was not subtracted in the calculation of the amount of the aid, therefore they accepted the change issuing from § 18 TCP AAEA was necessary.

In his legal opinion Prof. Dr. Angel Kalaidjiev supported the tenability of the challenge of the constitutionality of all provisions in § 18 TCP AAEA and of the compliance of these provisions with Article 63 TFEU and presented arguments that complemented and carried further the reasons as stated in the challenge. In his legal opinion he cited examples from the jurisprudence of the CJEU to elucidate the principle of fair legitimate expectations in EU law.

The Constitutional Court members discussed the reasons and considerations presented in the challenge and the positions and opinions presented on the case and the relevant legislation and to rule took into consideration the following matters:

Paragraph 1 of § 18 TCP AAEA establishes the rule that reads thus: In the case of renewable electric power producers generating electric power through projects whose construction has been funded by a national or European aid scheme and in respect whereof aid applications have been submitted prior to the entry into force of the Energy from Renewable Sources Act, the prices under Article 31(8) of the same Act shall apply, as last fixed by a decision by the Energy and Water Regulatory Commission as at the date of this Act's entry into force. The next three paragraphs of § 18 (paras 2-4) provide for the mode and time limits for the application of para 1: Paragraph 2 reads thus: Producers under Paragraph (1) shall, by 31 July 2015, adjust the electric power purchase agreements which they have concluded with the public provider or the relevant end supplier, in accordance with the requirements of Paragraph (1). Paragraph 3 reads thus: After the deadline referred to in Paragraph (2), the public provider or the relevant end supplier shall purchase the generated electric power at the prices provided for in Paragraph (1). Paragraph 4 reads thus: Paragraph 3 shall also apply in the cases of failure to observe the obligation referred to in Paragraph (2). Paragraph 5 reads thus: The provisions of Article 31(4) and Article 32(3) of the Energy from Renewable Sources Act shall not apply to the renewable electric power producers referred to in Paragraph (1). After the expiry of the period of validity of the purchase agreement referred to in Article 31(2) of the Energy from Renewable Sources Act, no preferential prices shall apply.

The Court specified that § 18, para 1 TCP AAEA extends solely to those producers of electricity from renewable sources that: first, producers generating electricity through projects whose construction has been funded by a national or European support scheme and, second, producers who have submitted aid applications prior to the entry into force of the ERSA, promulgated, DV, No. 35/03.05.2011, effective as of the date of promulgation. Also pursuant to Art. 31, para 8 ERSA which refers to § 18, para 1 TCP AAEA, with respect to the economic actors mentioned therein, the electricity shall be purchased by the public provider or by the respective end supplier at groups of prices determined by EWRC, under the conditions and according to the procedure of the respective ordinance under Art. 36, para 3 of the Energy Act. The purchasing prices for the energy from renewable sources are special and not the general feed-in tariffs as set in Art. 31, para 1 ARSE. These prices are set subject to a regulation, in this particular case Regulation No. 1/18.03.2013 on Electricity Prices (promulgated, DV, No. 33/05.04.2013, effective 05.04.2013, amended, No. 17/28.02.2014, effective 28.02.2014, No. 4/16.01.2015, effective 01.02.2015). The EWRC took the respective decisions to set the feed-in tariff mindful of the requirement of Art. 23, paras 1 and 2 of the said Regulation. In particular, the feed-in tariff of electricity of a certain type of technology is adjusted in a way to visibly show the impact of the aid approved under a relevant support scheme, viz., the subtraction, on a pro rata basis, of the investment from the value of the regulatory asset base. The last regulatory decision to adjust feed-in tariffs as per § 18, para 1 TCP AAEA was the EWRC Decision No. Ц-14/01.07.2014. The reference in § 18, para 5 TCP AAEA reaffirms that the producers of electricity from renewable sources under para 1 thereat shall be subject to the application of the rule that was enforced by the AAEA ( promulgated, DV, No. 54/17.07.2012) complementary to Art. 32, para 1 ARSE, with a new item 2, to the effect that the EWRC sets the feed-in tariffs annually and under the circumstances as described in item 2.

The above-stated reasons show that paras 2-5 of § 18 TCP ARSE were created to enable the enforcement of para 1 of § 18, therefore the Court concluded it is para 1 of § 18 TCP AAEA that should be checked for compliance with the Constitution-proclaimed principles and the Constitution-set

provisions and for compliance with Article 63 TFEU. The result of the judgment following the check should be transposed onto the other four paragraphs of § 18 TCP AAEA since they all bear on para 1 of § 18 TCP AAEA.

**On the claim of noncompliance with Art. 4, para 1 of the Constitution**

Most of the MPs' arguments intended to prove that § 18 TCP AAEA is unconstitutional supported the claim of the challenge, viz. the violation of inherent aspects of the state committed to the rule of law: the violation of the principle of the state committed to the rule of law, in particular, the violation of law (contrary to the goal of ARSE and of the ARSE provisions), the violation of provisions for predictable legislation and legal certainty (including the non-observation of the prohibition of retroactive legislation that indirectly ensures the protection of legitimate expectations), and the violation of the requirement of proportionality in the restriction of the rights (vested rights, as called in the challenge).

Though the principle of the rule of law was conceived and evolved in a different context and though it varies in some specifics from member country to member country, the Court of Justice of the European Union (CJEU) deduced a number of aspects that are specific of the rule of law: law-abidance and respect for legal hierarchy, predictability of legislation and legal certainty, prohibition of retroactive legislation, protection of rights and legitimate expectations that are accepted at the national level, with due recognition of the demands of Community law. The national legislations of the Member States and the EU institutions are bound with the requirements that proceed from the principle of the state committed to the rule of law and recognize the goals of common interest for the Union, including in the sector of generation of electricity from renewable sources.

The Constitutional Court thought that the check to make of the legal texts challenged for compliance with the dimensions, as outlined in the challenge, of the principle of the state committed to the rule of law, should be made in the context of the development of the legal frame, at the national and EU level, regarding the sector of electricity from renewable sources. The issue of infringement on the protection of the investors' legitimate expectations was discussed by the Court in relation to noncompliance with Art. 19, para 3 of the Constitution, as asserted in the challenge, and adjustments were made in the judgment of noncompliance with Article 63 TFEU, considering the challenge.

**Development of the EU legislative frame (the European legal frame) in the electricity sector, including in the sector of energy from renewable sources**

The establishment of an energy union is a major step in the promotion of European integration. The achievement of a fully functioning electricity market where electricity from renewable sources will tend to increase is of key importance. The achievement of the three set goals of EU energy policy – secure, sustainable, competitive and available energy supply to Europe is a sign, inter alia, of the efficient integration into the electricity market of economic actors in the generation of energy from renewable sources which is in the EU common interest. That objective is tied up with the larger task to develop low-carbon economy and to solve the problem of climate change, parallel to guaranteed security of energy supply. The establishment of a functioning energy market is of primary importance for the Union's energy policy (Article 194 (1) a) TFEU). Between 1996 and 2006 the EU adopted three successive legislation packages whose long-term purpose is to integrate and liberalize the national electricity and gas markets.

Given the subject matter of the case under consideration, it is worth noting the Community Guidelines on State Aid for Environmental Protection, adopted by the Commission in 2008 (Guidelines, 2008, Official Journal of the European Union (OJ EU) 2008/ C 82/1). The Introduction, 1.1 reads that the spring 2007 European Council called on Member States and EU institutions to pursue actions to develop a sustainable integrated European climate and energy policy (a target set by Article 1 of Directive 2003/30 on the promotion of the use of biofuels or other renewable fuels). To achieve the above interrelated targets measures were mapped out in Section 3.1.6 to promote the generation of energy from renewable sources. These measures comprised investment aid and operating aid. Concerning the latter, it was pointed out that the aid should be limited to compensating for net extra production costs resulting from the investment and that in determining the amount of this aid, any investment aid granted to the undertaking in question in respect of the new plant must be deducted from production costs.

The third legislation package known also as the liberalization package was adopted in 2009 and develops the idea of an integrated policy and targets – the further liberalization of the internal market in electricity (Directive 2009/72/EC concerning common rules for the internal market in electricity and Directive 2009/73/EC concerning common rules for the internal market in natural gas, including gas from renewable energy sources).

Directive 2009/28/EC on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (Official Journal of the European Union, L 140, 5.06.2009; Directive 2009/28/EC which, as the MPs claimed, is not complied with in the reasoning regarding § 18 TCP AAEA, is associated with the third legislative package in the energy sector. Formally the Directive is not incorporated in the package and was adopted within the Climate Change Package (CCP) based on the agreed idea of integrated policy and expresses the specifics of the implementation of policies within the EU. In addition to other things Directive 2009/28/EC defines a number of basic concepts in the sector of energy from renewable sources, one being the definition in Article 2 (k) of "support scheme". The schemes that are intended to promote the use of energy from renewable sources include, but are not restricted to, direct price support schemes including feed-in tariffs and premium payments. Directive 2009/28 sets a mandatory target of at least a 20% share of energy from renewable sources in the Community's gross final consumption of energy in 2020 with a breakdown of mandatory national overall targets for Member States (Annex I. A). The Directive provides a toolkit to enable the national targets and allows wide freedom of judgment and of choice to each EU Member State to achieve the indicative target of energy from renewable sources. The Directive sets the legal frame which comprises mandatory targets to provide the business community with the long-term stability it needs to make rational, sustainable investments in the renewable energy sector (Points 8, 14 of the Preamble to Directive 2009/28/EC). Alongwith, emphasis is placed on market-based support schemes (Point 25, Directive 2009/28/EC). Practically, direct price support schemes in the form of feed-in tariffs are applied on the largest scale though the green certificates and some other schemes are likewise used on a case by case basis.

Proceeding from the conclusions in the assessments in 2011 (COM(2011)0031) and in 2013 (COM(2013)0175), viz., that the market of energy efficient products does not develop as fast as foreseen, and that the high purchasing prices for energy from renewable sources stay on while the advanced renewable energy technologies become cheaper and that the volumes of electricity produced increase substantially and that it is an inadequate burden on end consumers – the industries and the households – the Commission drew a conclusion of essential importance for the development of the market of electricity. In a summarized form, the conclusion expressed the view that often uncoordinated State intervention leads to the distortion of the market of electricity with negative implications for investment and cross-border trade related, inter alia, to the application of non market-based support schemes.

In 2013 additional guidelines were presented to reach the renewable energy targets at lower costs (COM(2013)7243), and the Commission declared

an overall reconsideration of the subsidies that the Member States are free to offer in the renewable energy sector. An unambiguous preference was expressed for market-based methods like tendering procedure, feed-in premiums and suchlike rather than the usual feed-in tariffs. The Guidelines on State Aid for Environmental Protection and Energy 2014-2020 (2014/C 200/01) further shaped the new frame of support schemes to energy from renewable sources along the set lines.

In 2016 the Commission delivered a new package of documents of major importance in outlining the forthcoming steps in building the Energy Union and in rethinking and the full application in this context of the acting legal rules in pursuit of the three key targets of the EU energy policy. The package included, inter alia, the Commission's assessment of the impact of the acting Directive 2009/28/EC on the promotion of the use of energy from renewable sources (SWD (2016) 419), accompanying a proposed recast directive on the same matter (COM(2016) 767 final, 2016/0382(COD)), Proposal for a Directive of the European Parliament and of the Council on common rules for the internal market in electricity (COM(2016) 864 final 2016/0380(COD)).

The above-stated considerations gave the Court grounds to generalize that in the past few decades, at EU level, major consistent legislative and regulatory efforts were made towards a substantial change in the energy markets structure within the Union. The purpose was to transform national energy markets that are strongly protected by the Member States into a liberalized electricity market that allows cross-border competition and is a factor to meet the Union's commitments to climate change, including the ambitious climate targets pledged under the Paris Agreement (Accord de Paris) within the United Nations Framework Convention on Climate Change (UNFCCC), Paris, 2015; the Agreement was ratified by the Republic of Bulgaria by a law (DV, No. 86/2016, effective 29.12.2016). Central to this process is the promotion and security of investment in the generation of energy from renewable sources, however, to be implemented in a context of an energy market which is increasingly open to competition as a goal of common interest and subject to the application of a Community approach.

To make the pronouncement as requested from it, viz. on the compliance or noncompliance of § 18 TCP AAEA with the basic characteristics of the state committed to the rule of law such as predictability of legislation and legal certainty and the protection of legitimate expectations therefrom, the Court took into account the fact that the check for compliance with the Constitution-proclaimed principles requires to reckon, apart from the concrete legal provisions, the legal context in which these provisions exist and which is influenced by, among others, the EU institutional acts such as resolutions, communications, guidelines, etc. In connection with that the Court found that it is necessary to mention, in a summarized form, two aspects that are important, in its view, in the above-said preparatory documents of 2016 on the EU energy policy. The former concerns the assessment of the impact of the applied support schemes. In the Commission's view, given the lack of clear principles vis-à-vis the market compatibility of the levers of promotion in the Renewable Energy Directive, actually the Member States introduce non market-based promotion schemes. These schemes add a regulatory level to the electricity price that does not respond to the market signals. The latter relates to the need to adjust those support schemes in the future and even to phase them out altogether. Evidently preferential treatment must be reconsidered and the role of Directive 2009/28/EC in the continuing development of the EU common energy market must be redefined.

In addition, the Court noted that both reports of the Commission on the state of the Energy Union (in 2015 and in 2017) emphasize that still there are Member States that have not codified the rules required to guarantee that the wholesale power markets will be competitive and liquid (COM(2015) 572 final 8.11.2015.; COM(2017) 53 final; Framework Strategy(IP/15/4497)).

**Development of a national legislative frame in the sector of energy from renewable sources**

A number of regulations of the European Parliament and of the Council and several directives on the energy sectors have been transposed into the national legislation, i.e. Energy Act (EA) that was passed in 2003 (promulgated, DV, 107/09.12.2003). The Energy Act contains specific rules for the promotion of the use of energy from renewable sources. The Bulgarian Government choose feed-in tariffs as a gear to promote the generation of energy from renewable sources along with support in the form of investment for construction – a scheme that is applied by a significant number of EU states. The scheme underwent a series of changes. What is essential is that the Act Amending the Energy Act (AAEA) (promulgated, DV, No. 56/24.07.2015) minimized the application of a non market-based support scheme for the generation of energy from renewable sources and made a crucial step forward to phase out direct public funding. That measure was taken together with the restrictions as provided for in § 54 TCP AAEA of 6 March 2016 (promulgated, DV, No. 17/2015), and in § 20 TPC AAEA (promulgated, DV, No. 56/24.07.2015, amended, DV, No. 100/ 2015).

Though the changes in the Bulgarian legislation sometimes did not fully transpose the changes and the trends emerging in EU law in the sector of energy from renewable sources, the Bulgarian codification proceeded in the context of establishing an EU internal energy market.

The Constitutional Court emphasized it was a matter of legislation of support schemes for a regulated electricity market. The following incentive modalities were offered to the producers of energy from renewable sources in the form of feed-in tariffs as a subspecies of direct financial support:

Over the period 09.12.2003-19.06.2007 the promotion was laid down in the Energy Act that made it binding on the public provider and/or the end supplier to purchase all the electricity generated from renewable sources (Art. 159 Energy Act), including the electricity generated by hydropower plants (HPPs) with installed generating capacity of up to 10 MW (with a certificate of origin). Art. 158, item 1 made it binding to conform the generation of electricity from renewable sources to the electricity market principles. The purchasing was subject to ordinances as per Art. 36, para 3 EA on proposals on electricity prices and endorsement of electricity prices which ordinances were to be issued by the State Energy and Water Regulatory Commission/SEWRC (since 2015 EWRC, promulgated, DV, No. 17/06.03.2015); it lied within the competence of the Commission to decide on the setting of feed-in tariffs on the basis of the common principles of price regulation as laid down in the Energy Act. Pursuant to Art. 23, para 1 EA the SEWRC shall be guided by the principles of prevention and preclusion of limiting or distortion of competition in the energy market; ensuring balance between the interests of energy companies and the customers; ensuring equal treatment of individual categories of energy companies; creating incentives for development of a competitive market for energy sector activities, where conditions so permit. These principles were complemented by the principles as codified in Art. 31 EA where in addition to the principle that prices shall be non-discriminatory, it is required that prices shall ensure an economically justified rate of capital return.

The Constitutional Court drew attention to the fact that from the very beginning the Energy Act (that was passed in 2003) has been sticking to the idea as articulated in the European legal frame on the sector under consideration here that the state and development trends of the market of energy from renewable sources should be considered in setting the feed-in tariffs that are designed to promote the generation of electricity from renewable sources. Owing to the fact that the volume of energy generated from renewable sources was not significant yet, in terms of ratio in the energy mix, as of that point in time, it may be concluded that the feed-in tariffs did not tangibly impact the prices at which electricity was sold to end consumers on the regulated market.

The promotion of the generation of energy from renewable sources over the period 19.06.2007-03.05.2011 was subject to the Act on Energy from Renewable and Alternative Sources and Biofuels (AERASB) (promulgated, DV, No. 49/19.06.2007). Among the general principles as set forth in Art. 9

AERASB to be followed to promote the generation of energy from renewable and alternative sources (RAS) in the country were: recognition of the energy market principles; recognition of the specifics of the types of RAS and the electricity generation technologies. Art. 16, para 2 AERASB provided for the purchase of RAS electricity by the public provider, respectively by the end suppliers, excepting the energy generated by hydropower plants with installed generating capacity of 10 MW and over (HPP > 10 MW), where a feed-in tariff is applied, set according to the procedure of the respective ordinance under Art. 36, para 3 EA. Art. 21, paras 1-3 AERASB and the texts of the ordinances on proposals on electricity prices and endorsement of electricity prices which ordinances are to be issued by the State Energy and Water Regulatory Commission/SEWRC read that before 31 March every year the Regulator shall set these prices that make up at least 80% of the average selling price in the preceding calendar year to the public providers or the end suppliers. The SEWRC regulatory decisions were based on the texts thus cited.

The AERASB was abolished by the ERSA which took effect on the date it was promulgated in Durzhaven Vestnik (promulgated, DV, No. 35/03.05.2011). As an EU Member State Bulgaria transposed the directives on energy from renewable sources into the Bulgarian legislation. Relevant texts were transposed into the Energy Act, the AERASB, the Energy Efficiency Act (EEA), the Act on Technical Requirements Towards Products and the enabling legislation. The ARSE transposed Directive 2009/28/EC on the promotion of the use of energy from renewable sources (§ 2 ARSE Supplementary Provision). Therefore, the targets and all standpoints as spelled out in the Directive cited and considered in the context of the overall European legal frame in the sector of energy from renewable sources as outlined were transposed into the national legislation. This means, among other things, codification of the process of integration of the energy policy and the climate change policy and of the development of an EU internal energy market. This is to be deduced from the targets as formulated in Art. 2, para 1 ARSE, one of which was to create conditions for achieving sustainable and competitive energy policy and economic growth, security of energy deliveries, environmental protection and restricting climate change. These targets were set with due regard for the operation of the Energy Act general principles. The feed-in tariffs continued to be the support scheme applied. The ARSE-provided mode to promote energy from renewable sources (the text was promulgated in Durzhaven Vestnik of 3 May 2011) kept in place the obligation to purchase the energy generated from renewable sources under long-term power purchasing agreements (PPAs) in the course of 12 to 20 years, varying from type to type of the primary energy source. Art. 32, para 2 ARSE enumerated the criteria and factors to be considered in setting the feed-in tariffs for energy from renewable sources (and referred to Art. 36, para 3 EA) to accommodate the investment costs, including the costs for interconnection to the transmission or distribution networks, the rate of return, the capital and investment structure and other operational costs. The producers of energy from renewable sources had the option either to make inroads on the energy market or to stay in the regulated segment of the market for purchasing, at feed-in tariffs, the specified volume of electricity generated from renewable sources which volume was changed following an amendment to the ARSE (from the total volume of energy from renewable sources, holding a certificate of origin, initially, to the net specific generation of electricity today, as per § 16.3 TCP AAEA, effective 24.07.2015). The plants generating energy from renewable sources were divided into two major groups in terms of feed-in tariffs for purchasing, in line with Art. 31, para 7, subpara 2 ARSE (in the reworded version that took effect on 3 May 2011), read in combination with para 8 thereto: projects where the investment for the construction is supported with funds from a national or European support scheme; and projects in which owners made the investment. The electricity generated in the former group was not eligible to feed-in tariffs as per Art. 31, para 1 that were general and was purchased at prices that the EWRC set as per Art. 36, para 3 EA. That last provision made it binding to reduce the feed-in tariff in proportion to the investment made to build the project with funds from a national or European support scheme. Following the text of Art. 2(k) Directive 2009/28/EC, § 1, item 21 of the ARSE Supplementary Provisions provides a legal definition of “support scheme”. The definition is detailed in individual ARSE provisions in a way to make a clear differentiation between investment for construction and the direct price support scheme, including feed-in tariffs, that was the Lawmaker’s choice.

The Court thought it should emphasize that pursuant to § 11 TCP ARSE the provisions of Art. 31, para 7, subpara 2 and para 8 (in the published version of ARSE of 3 May 2011) are to apply solely to projects for which applications for support were lodged after the entry into force of the ERSA. The change brought about by the AAEA in 2012 (promulgated, DV, No. 54/17.07.2012) is of special importance. § 203 amended Art. 32, para 1 ARSE and created a new item 2 reading that the SEWRC shall be free to set feed-in tariffs for the energy from renewable sources whenever the findings of analysis indicate a substantial change of the pricing elements under Art. 32, para 2 ARSE, along with the obligation to annually set the feed-in tariffs before 30 June. Further to Art. 31, para 8, read in combination with para 7, subpara 2, ARSE, the EWRC regulatory decisions on the prices of energy from renewable sources are differentiated depending on the type of project: i.e. whether (and to what extent) the investment for the construction of the project was supported with funds from a national or European support scheme. The first such decision with adjusted prices was taken in November 2011. These purchasing prices were valid only for the producers who had lodged an application for support after the ARSE entered into force (03.05.2011) whereas identical producers but for the fact that they had lodged an application prior to the ARSE’s entry into force were not to benefit. The prices were set at groups and each group was under the heading of an average that was the ratio between the grant in the total investment, i.e. the grant was subtracted on a pro rata basis, from the regulatory-based value of assets. In 2012, 2013 and 2014 the SEWRC took two separate decisions on feed-in tariffs for energy from renewable sources, as mandated by Art. 31, para 8 ARSE. Decision № Ц-14/01.07.2014 was the last regulatory decision, prior to the amendments here contested, on the adjustment of the feed-in tariffs whenever the producers of electricity from renewable sources had been supported with funds from a national or European support scheme.

In recognition of the development of the national legal frame in the sector of energy from renewable sources as a whole, the Constitutional Court allowed for a broad range of measures in the implementation of a policy designed to promote the generation and the use of energy from renewable sources, in line with the Community policy of security of energy supplies, environmental protection and prevention of climate change. Consistent measures were taken in parallel to integrate the producers of energy from renewable sources into the national energy market, with due recognition of the development of the European legal frame concerning the sector to enable the continuous development of the internal energy market and to ensure competitive economy across the EU. These legislative changes show that at the national level and keeping in place the needed State aids, a gradual adjustment is under way of the applicable scheme to promote the generation of energy from renewable sources. The purpose was to make a smooth transition to market-based support schemes for the generation of energy from renewable sources, and further, to phasing-out non market-based schemes, in conformity with the sector-specific EU law prescriptions that are considered in the overall legal context in which they play.

In consideration of the aforesaid, the Constitutional Court found untenable the claim in the challenge, viz., that the challenged amendments were passed “on and off” and were sudden to the investors. In Bulgaria the generating capacities for energy from renewable sources increased very fast and the national overall target of 16% for the share of energy from renewable sources in gross final consumption of energy as per Annex I of Directive 2009/28/EC was reached in 2012. As a result of the considerable share of electricity generated from renewable sources and from cogeneration in the energy mix, the lasting tendency towards the decrease of the prices of technologies for energy from renewable sources, while keeping the initial feed-in tariff levels and the significant increase of the of public service obligation and inspired by the ambition to integrate the producers of energy from renewable sources in the free market, the Bulgarian lawmaking authority engaged in a number of changes in the legislation concerning this sector. For a long time the generation of energy from renewable sources had been based on a new technology that needed State aids to support its progress. As the investment spending on projects for the generation of energy from renewable sources decreased and as the output increased, many EU Member States started reforming their support schemes and introduced different market-based schemes (the prescription of Point 107 and Point 108 of the Guidelines on State Aid for Environmental Protection and Energy 2014-2020 is to that effect). Such a measure to limit the application of the feed-in tariffs scheme as a non-market measure is to be found in the challenged provisions of §18 TCP AAEA for which the Constitutional Court was approached. The explanation that was given for the measure was the quite long period of time of “double support” to the producers of energy from renewable sources who were out of the scope of § 11 TCP ARSE (effective

03.05.2011): the first time it was the investment for construction and the second time it was the feed-in tariffs for purchasing the energy generated by the same energy projects since prior to the passage of the amendment challenged here, §18 TCP AAEA, these investments were not proportionately counted. The abolition of this modality was cited as the legitimate objective of the amendments as presented in the attachment of the reasoning to the bill with the proposed amendments to the Energy Act (No. 554 – 01 -124); the matter was debated by the Parliamentary Energy Committee and the Monitoring Commission for the SEWRC (Minutes of their sittings held on 9 July 2015 and 20 July 2015) before the first and second voting in the 43rd National Assembly and on the floor reading which adopted the texts challenged herewith (Minutes of sittings on 14 July 2015 and 22 July 2015). Such findings and conclusions can also be red in the report of the ad hoc committee to examine and assess the health of the energy sector in the Republic of Bulgaria as of 31 January 2015; the commission was set up following a decision of the 43rd National Assembly /the report was reprinted in Durzhaven Vestnik, No. 46/17.06.2016./). The report that was approved by a decision of the 43rd National Assembly of 9 June 2016 (DV, No. 46/17.06.2016) concluded that the feed-in tariffs that had remained unchanged for a long period of time bred inequality within the sector – the generation of energy from renewable sources – and, in addition, distorted the electricity market.

Considering the development, as outlined, of the European and national legal frame concerning the sector of energy from renewable sources, the Constitutional Court thought that the amendments by the Bulgarian legislating authority were coherent and based on systematic analyses from the competent national institutions, that they were in tune with the Community objective to achieve the internal energy market and also with the lasting tendency in the EU regulatory frame to minimize direct price support and to integrate the producers of energy from renewable sources into the competitive market. Therefore, the Constitutional Court thought that the amendments challenged, as codified in § 18 TCP AAEA, cannot be termed as destructive to predictability of legislation and legal certainty in the sector of energy from renewable sources for any realistically minded bona fide investor and accepted that § 18 TCP AAEA is not dissonant with Art. 4, para 1 of the Constitution on these grounds.

Noncompliance with Art. 4, para 1 of the Constitution is claimed for the challenged § 18 TCP AAEA which, as maintained, runs against the principle of legal certainty and the protection that arises therefrom to be extended over legitimate expectations. Legal certainty is manifest as an essential element of the rule of law, both at the national and at the Community level. In abidance by its constant jurisprudence the Constitutional Court maintains that the principle of legal certainty cannot be identified with absolute unacceptability of changes whatsoever in the acting legislation in a certain field of societal relations. Each lawmaker has a certain discretionary power, including vis-à-vis the policy implementation measures in the sector of energy from renewable sources. The contested § 18 TCP AAEA updates the payments system that is made available to producers of energy from renewable sources and the changes meet objective, transparent and non-discriminatory criteria. Upon the very passage of the Energy Act, AERASB and ERSA the Lawmaker set a requirement that the Executive branch of power (i.e. the Government) should conform its regulation of the purchasing prices of energy from renewable sources to the feed-in tariffs in a way to secure fair proceeds from the investment made, bearing in mind the prices on the market. The Lawmaker shall be free to make changes in this matter in order to bring the legislation in harmony with the changing economic and social reality in the country and to stabilize the regulated sector, on the condition that the generating installations for energy from renewable sources that are eligible for special treatment would enjoy returns on their investment throughout the long-term agreements. The entitlement to returns on investment is not a privilege to be enjoyed so as to benefit from a fixed and unmovable necessarily high level of the power purchasing prices and respectively, all the time to obtain high proceeds from the generation of energy from renewable sources. This holds true especially when an EU Member State changes its sector-specific legislation in order to harmonize it with European law and with the continuing development of the EU electricity market alongwith the opening of the national electricity markets to competition. In this particular case the decrease of the purchasing prices was not an imposition of a disciplining sanction on the producers of energy from renewable sources but paved the way to equal treatment of all producers of energy from renewable sources. The purchasing prices of energy from renewable sources are not a freely negotiable matter but are set by a centrally appointed national regulatory authority following the codification of the appropriate procedure. The decrease of the purchasing prices for energy from renewable sources is a tool of fair spread of the costs within society so that the businesses that to a certain extent are privileged in terms of income reciprocally bear the due burden. No one will be immune against the placement of such a burden and even if the legislation that imposes it is retroactive, it is not necessarily equivalent to a breach of legal certainty. Whenever a legislative change pursues a legitimate goal whose attainment is made contingent upon rationally articulated arguments, the judgment of whether the decision is appropriate rests entirely with the Legislature.

The Constitutional Court believed that it should take into account the context of the sector of energy from renewable sources where the Lawmaker decided on a restrictive measure that was intended for the purchasing price of energy from renewable sources and that the MPs challenged. It is informative to read the findings and data that were reported at the discussions of the bill on amending the Energy Act by the relevant standing parliamentary committees and during the floor discussion as well as the data and findings in the above-mentioned report by the ad hoc committee to monitor and assess the performance of the energy sector in the Republic of Bulgaria as of 31 January 2015 and the EWRC regulatory decisions. The Court thought it would be appropriate to mention some of those in brief. The report makes an analysis of the renewable-fired power plants in 2006-2013 and found that despite the booming solar (PV) modules market, till 17 July 2012 the ERSA provided for a onetime setting of a feed-in tariff that was impossible to reflect the rapid development of market relations concerning the conventional photovoltaic (PV) technology. The modality of setting feed-in tariffs at which electricity generated from renewable sources was purchased and the impossibility to adjust the tariffs during the term (20 years) of the long-term agreement suggested overinvestment in the sector and distortion of the market as a result of such overinvestment. The installed capacities were severalfold in excess of the targets in the European Commission's Plan 2020 while the cost of their investment was economically burdensome conditions to be suffered by the end consumers and the businesses. The price of energy generated from renewable sources was severalfold the market price. The economic actors that the State put in an economically privileged position in order to achieve ends of public good cannot be sure that the Lawmaker will never reconsider the scale of the privilege thus granted. The economic actors have no justification to claim vested rights on the basis of a privileged position that has been granted subject to the Lawmaker's reconsidered judgment at a certain point in time. Realistically speaking the producers of energy from renewable sources continue to be supported under the legal text challenged here and nothing changes, not even the scheme of direct price support throughout the duration of the power purchasing agreements.

The Court noted that the corporate entities' expectations that the legislation would stay as it is are not constitutionally defended, especially where non-market mechanisms are to be arranged in a context of a clearly set objective which is the development of a competitive internal electricity market in the EU. In any case the changes that § 18 TCP AAEA brings about pursue a legitimate goal which is to prevent the inadequately heavy financial burden that is shouldered by the consumers of electricity. There is social justification for the intervention by the State into public spending by the restriction of the support measures whenever the economic situation calls for the restriction (in this particular case it is driven by the proven shortages of the National Electric Company/NEK and the unproportionate burden on consumers – the households and the businesses), except where the legislative changes are obviously irrational. However, the case as it is so far leads the Court to no conclusion to that effect. If the feed-in tariff mode persists at the level prior to the change, there will be a real risk that the support would be disproportionate to the ARSE objectives and to the EU law objectives in the sector. The above-presented position of the Court can be correlated to the CJEU jurisprudence (the so-called Judgment on Case C-201/08, Plantanol GmbH & Co. KG v Hauptzollamt Darmstadt, Paragraph 49; Judgment on the Case Di Lenardo and Dilexport, Joined Cases C-37/02 и C-38/02, Paragraph 70, etc.). The CJEU attaches special importance to legal certainty when it concerns the curtailment of fundamental rights and freedoms and on more than one occasion pointed to the need to justify the curtailment with a specific public interest whose validity, as an excuse for the curtailment, is to be judged with the instruments of proportionality (Judgment on the Case Wachauf, Hubert Wachauf v Federal Republic of Germany 5/88, [1989] 2609).

The Constitutional Court found untenable the claim in the challenge that § 18 TCP AAEA runs against the principle of legality as it contradicts the

ARSE objectives and that its texts provoke a contradiction in terms within the ARSE. The provisions challenged achieved just the opposite – they bring the legal text as a whole in harmony with the ARSE objectives that are understood in the legal context of the European legal frame and the national tasks in the sector, viz. the establishment of a functioning electricity market and fair spread of the financial burden across society, protection of the environment and the climate and guaranteed competitive economy. There is no way to ensure equality for the development of competitive business in the sector of energy from renewable sources and in parallel to save the privileges that are enjoyed by few within a certain group and to let those few operate in a business-friendly environment that favors them and discriminates against others within the same group and that guarantees that those few will make a profit which is higher than that made by all others.

Also the Constitutional Court found unsustainable the MPs' claim of noncompliance with Art. 4, para 1 of the Constitution on grounds of violation of the principle of legal certainty by the retroactive effect of the provision challenged.

In the first place, there is no reason to maintain that item 1 of the same paragraph that the MPs see as a retroactive measure has been to the detriment of vested interests. The Court commented solely on the alleged retroactive effect, if any, of the rule in question. The fact that prior to the adoption of § 18 TCP AAEA, the applicability of Art. 31, para 8 ARSE was limited, under § 11 TCP ARSE, to the hypothesis of projects for which applications for support were lodged after the ARSE's entry into force, i.e. from 3 May 2011 onwards whereas the rule challenged explicitly provides for the application of Art. 31, para 8 ARSE to projects for which applications for support were received after coming of the Act into force, is not a proof of a retroactive measure. This is so as the retroactive effect of the rule codified (as required under Art. 14, para 3 of the Statutory Instruments Act/SIA) and the feed-in tariff adjustment under the agreements on purchasing power from renewable sources from the producers as per para 1 of § 18 TCP AAEA starts applying after the expiry of the term under para 2 of § 18 TCP AAEA. That date was due after the AAEA's entry into force on 24 July 2015, viz., the day after 31 July 2015. In fact the rule in § 18, para 1 TCP AAEA became applicable from that date onwards to all contracts concluded prior to the ARSE's entry into force (3 May 2011) while the contractual relations continue to develop and the rule extends onto them in future.

Both the theory of law and jurisprudence differentiate between a retroactive law that makes rearrangement of juristic facts from the onset to the end of accumulation which concludes a legal relation (retroactive stricto sensu) and the cases where a new codification rearranges, ex nunc, legal relations that are still in progress (artificial retroactive effect – the law takes prompt effect). While the Constitutional Court emphasizes that the rule of being non-retroactive is a manifestation of the Constitution-proclaimed principles of the state committed to the rule of law and of the reign of law, the Court's jurisprudence advocates that in "the hypothesis of the application of the new law to an established state of affairs is not equivalent to the retroactive effect of the new law" (Decision No. 12/11.11.2010; Decision No. 9/1996; Decision No. 10/2011). The Constitution does not prohibit against the retroactive effect of legal texts in all fields of law: such prohibition derives from the supremacy of law as a Constitution-enshrined principle (Art. 4, para 1 of the Constitution) and is applicable to the hypotheses of retroactive stricto sensu when confidence in the legal system, legal certainty and vested interests is ruined. An explicit prohibition to that effect occurs solely in Art. 5, para 3 of the Constitution vis-à-vis criminal law that might provide for harsher sanctions than the revoked ones. The retroactive effect of law in civil matters has not been ruled out as it can be justified with public interest, especially where legal precepts are adopted in the process of transformation of the core values of society. While retroaction stricto sensu is accepted only by way of exception, artificial retroactive effect is, as a rule, possible when the interest of the individual cannot go beyond the objects of the law in the continuing action of the preceding law. The prompt application of the law is compatible with the principle of protection of legal certainty, when appropriate and necessary, so as to achieve the object of the statute and stay within the confines of what is reasonably acceptable and to strike a balance between "the betrayal of confidence" and the importance and urgency of the reasons for the legislative changes.

Protection against the retroactive effect of legal prescriptions is an element of the fundamental principle of legal certainty in the wording of the CJEU. The principle was formulated in 1978 (Case-122/78, Töpfer v. the Commission, (1978) ECR 1019; cf. also Case-74/74, CNTA v. the Commission, (1975) ECR 533) and as an element of Community law is binding on the Member States. Concerning retroactive legal measures the Court of Justice of the European Union is particularly adamant in the judgment if the case that it is approached with involves betrayal of confidence in the stability of the legal status of the individuals or corporate entities that suffered and that had been assured, explicitly or implicitly (binding arrangement) by the EU institutions. However, the Court admits exceptions from the principle whenever the objective in view is to be achieved and whenever the legitimate interests of the injured parties are appropriately considered and this was the position that the Court stuck to in the Racke Case, and in other cases (Case-98/78, Racke v. Hauptzollamt Mainz, (1979), Paragraph. 20; Case C-376/02, Stichting Goed Wonen v Staatssecretaris van Financiën, Paragraphs 32-34).

Evidently, a propos the rule in § 18, para 1 TCP AAEA what is observed is the effect of the challenged legal text on the status quo ante, legal facts that occurred prior to an act's entry into force and that were still in progress in a regulated market context. This assumption is different from the retroactive stricto sensu. The rule of § 18, para 1 TCP AAEA does not lead to any change of essential elements of the power purchasing agreements on electricity from renewable sources that were concluded prior to the enactment, the elements being the subject and terms of the agreement, the feed-in tariffs as applicable to the producers under the same paragraph 1; the rule affects solely the pricing modality of the purchasing agreements that are still valid, therefore, it has effect ex nunc. The object that the Lawmaker had in view was that the change would put an end to the "oversubsidy" for certain economic actors that enjoy economic privileges over other producers of energy from renewable sources, other than the producers under § 18, para 1 TCP AAEA and would ensure fair and equal legal treatment of the economic actors in the sector. This is an important public interest that is not to be overridden by the interest of the economic actors under § 18, para 1 TCP AAEA that the legislation in force prior to the enactment of the change continues to apply.

The Constitutional Court noted that the Lawmaker's position as to how to resolve the conflict of the operation in time of the previous and the new legislation is not, from a constitutional perspective, a matter of hazard or random decision; it is to weigh in competitive values. The legislative solutions of this type must be a result of assessment of the conflict from the perspective of proportionality, with consideration, as in this particular case, for the transition to the national electricity market which is being opened to competition and the development of an EU internal energy market. Therefore the assessment of the legislative solution to the chronological conflict of the laws rests on relevant circumstances like the public need for the enactment of new legislation on a certain matter. Such requirements are developed in the CJEA jurisprudence (Judgment on the Case Wachauf, Hubert Wachauf v Federal Republic of Germany 5/88, [1989] ECR 2609).

The Constitutional Court thought that artificial retroactive effect (when legal relations that were established in the past continue) goes beyond the line of constitutional acceptability only when and if the Lawmaker's choice was inadequate or unnecessary for the achievement of the objectives of the change or if the interest of the injured parties overrides the Lawmaker's reasons to pass the changes, yet this is not to be found in this particular case.

In view of the above-stated on the case the Constitutional Court found the object of the challenged § 18 TCP AAEA legitimate as it prevents the negative socio-economic upshot – the rising price of electricity for the end user – and in keeping with the requirement of State aids, as per the European legal frame, that are commensurate with the drastic decrease of the investment made. The Court did not find any constitutionally relevant interest on the part of the economic actors under § 18, para 1 TCP AAEA that the preceding legislation should continue to operate which interest would override the public interest that the electricity prices decrease and that a competitive electricity market develops in the country. The ways and means that the Lawmaker chose to achieve the end of the law are sensible and appropriate inasmuch as the feed-in tariffs are not abolished by retroactive effect stricto sensu; the tariffs are just decreased

while the duration of the agreements and the purchasing remain guaranteed, so as to ensure returns on investment and reasonable profit during the term of the agreement.

**On the claim of noncompliance with Art. 19, paras 2 and 3 of the Constitution**

The Constitutional Court discussed, among other things, to what an extent the provision challenged discriminates (puts in disadvantage) the economic actors that fall within the scope of § 18, para 1 TCP AAEA. In general, the challenge maintains that this group of producers/investors, whose legitimate expectations are thwarted, as alleged, is defined without overriding public interest at hand and in a way that violates the principle of equal protection by the law which principle is spelled out in Art. 19, paras 2 and 3 of the Constitution that read that the State shall establish and guarantee equal legal conditions for economic activity to all citizens and corporate entities and that all investments and economic activities by Bulgarian and non-Bulgarian nationals and corporate entities shall enjoy the protection of the law. The Constitutional Court clarified the meaningful substance of the principles as proclaimed in Art. 19, paras 2 and 3 of the Constitution in a number of decisions and sees no valid reason to sidetrack in this particular case.

Economy that is based on free enterprise does not preclude State intervention which is limited to the passage of a regulatory frame and control on its enforcement to guarantee equally suitable conditions for the operation of economic actors and with due consideration for the ultimate satisfaction of public demands. The enactment and the modification of special treatment for a certain group of economic actors is not unconstitutional providing the Lawmaker guarantees that all actors in such a group will be equally treated (Decision No. 5/2002; Decision No. 3 /2012). The Constitution-proclaimed principle of equality before the law does not preclude differentiation, providing it is non-discriminating – i.e. while the organic law provides against unjustified differentiation, it does not rule out an approach of differentiation by the Lawmaker. The Constitutional Court jurisprudence accepts that “equal guarantees and conditions for doing business should be offered to all economic actors within a definite group” (Decision No. 13/2014). All investors within the scope of § 18, para 1 TCP AAEA are brought together in one and the same group as producers of electricity from renewable sources and the provision challenged does not differentiate between them on the basis of any features whatsoever and, what is more, ignores even the owners of the capital in the respective energy projects. The very construction of the energy projects with funds from a national or European support scheme is some kind of privileged treatment that offers advantages to the players who benefited from such treatment. This privileged treatment was seen as acceptable for the public opinion and the Lawmaker allowed it for the purpose of achievement of definite objectives and results which objectives and results are of common interest for the European integration process – the achievement of a fully functioning electricity market.

The Constitutional Court systematically abided by the concept of equality before the law as relative and not as absolute equality in the understanding of modern constitutional law theory and jurisprudence. In this particular case the economic actors within the scope of § 18, para 1 TCP AAEA are brought together in a group on the basis of a criterion which is their exclusion from the application of Art. 31, para 8 ARSE as of the date of its entry into force – 3 May 2011 (at the time Art. 31, para 7, subpara 2 and para 8). Those were producers of energy from renewable sources who, given the feed-in tariff set and applied but devoid of the proportional subtraction of the amount of funding from national or European support schemes, had significant opportunities of returns on their investment and, in addition, of making an unexpectedly high profit. The European Commission made a conclusion to that effect in the audit conducted on Measure 311 “Diversification to non-agricultural activities” and Measure 312 “Support for the creation and development of micro enterprises under the Rural Development Programme 2007-2013” (RDP 2007-2013), under which measures investments were made available in varying amounts to put up installations/infrastructure for renewable energy. The Commission thought that the parallel financing of a project by the RDP 2007-2013 and by the high level of feed-in tariffs for the purchasing of energy resulted in double support that is at variance with the Commission Regulation (EU) No. 65/2011 laying down detailed rules for the implementation of Council Regulation (EC) No. 1698/2005, as regards the implementation of control procedures as well as cross-compliance in respect of rural development support measures. In this way the producers of energy from renewable sources who availed of such investment were in an economically privileged position that was based on the Lawmaker’s judgment (choice of policy) that this is justified given the object in view, to promote the generation of energy from renewable sources and to reach the national overall target of 16% for the share of energy from renewable sources in gross final consumption of energy. The target was reached in 2013 and duly stated in the national report to the Commission. The economic actors within the scope of § 18, para 1 TCP AAEA in the group that they made up were not subjected to discriminatory treatment nor were they forced to operate in economic conditions that were less favorable than those that were made available to the producers of energy from renewable sources who had lodged an application for support after the ARSE’s entry into force on 3 May 2011 and who were eligible to enjoy feed-in tariffs under Art. 31, para 8 ARSE. Prior to the amendment and over a relatively long period of time the economic actors under § 18, para 1 TCP AAEA enjoyed the privileged treatment that the State offered them as judged appropriate and the State alone was free to decide to revoke the privilege.

In the meaning of Art. 19, para 1 of the Constitution free enterprise will operate in conditions with a really and truly functioning market. The privileges that the Lawmaker grants, following its discretionary judgment, within the regulated segment of the market will not be transformed into vested interests. The opposite would be equivalent to a limitation that the Lawmaker will have to comply with in the choice of a policy that is consistent with the changing social and economic context and to make the public interest of which a lawmaker is an exponent subservient to private vested interests of investors who wish for the prolongation of the status quo. The producers of energy from renewable sources under §18, para 1 TCP AAEA had the choice of option to sell entirely on the free market; however, they preferred to opt for the law-guaranteed profit, being well aware that it is not to be expected that the Government would never revise its energy policy in the sector of renewables. Any prudent and bona fide investor makes a risk assessment (an assessment of market and non-market risks that may have to be taken). The investors’ interests and the capital flows as related to the economic actors’ activities within the EU are important, however, public interest extends also to the fair spread of the financial burden arising from the feed-in tariffs that are enjoyed by the producers of energy from renewable sources and from the industry’s public service obligation which burden is imposed on the end users which obligation is the justification for pooling together the above-mentioned group of producers of energy from renewable sources to receive the treatment under § 18, para 1 TCP AAEA. This corresponds to the changes in the European energy legal frame that puts consumers in the focus of attention in the drive to achieve a functioning electricity market and to ensure a competitive economy across the Union. As noted, when the text challenged passed on second reading in Parliament on 22 July 2015, it was made clear that the step was the rectification of an injustice since a grant amounting to 70% of the investment under RDP 2007-2013 and the full amount of the feed-in tariff had been received. As early as 2011 the lawmaking authority made a provision that given the above-described context, a feed-in tariff was to be calculated on the basis of 30% owner’s capital or bank loans complementary to the grants, however, the provision did not extend to the producers who fell under § 18, para 1 TCP AAEA.

The measure adjusted (the amount) that the text challenged provided for did not go beyond legal discretion and tallied with the Lawmaker’s legitimate object in view to prevent the public and private investors’ sudden excessive profits, to control the energy bills in a way that would not erode the investment climate in Bulgaria and thus to strengthen the confidence of all investors that their interests were equally protected by the laws. The CJEU jurisprudence provides examples that the Constitutional Court can draw on. The CJEU (Judgment on the Wachauf Case) ruled that the fundamental rights recognized by the Court are not absolute, but must be considered in relation to their social function. Consequently, restrictions may be imposed on the exercise of those rights, in particular in the context of a common organization of a market, provided that those restrictions in fact correspond to objectives of general

interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights (Wachauf v Bundesamt Fur Ernahrung und Forstwirtschaft 5/88,[1989]ECR 2609; Case Di Lenardo and Dilexport, Joined Cases C-37/02 and C-38/02, Paragraph 82; Judgement on Case C-44/94 Fishermen's Organisations and Others [1995] ECR I-3115, Paragraph 55). The legal text challenged did not abolish the feed-in tariffs for producers of energy from renewable sources but adjusted the tariffs to the goal of common interest to the EU.

In view of the above-stated considerations the Court thought that the legal change challenged does not betray the principle in question but rather enables it to materialize, viz. that equal legal conditions for economic activity shall be guaranteed by law to all economically active agents, as per Art. 19, para 2 of the Constitution. There exists no reason to claim, as the case stands, that the group of economic actors within the scope of § 18, para 1 TCP AAEA is a whim on the part of the Lawmaker and that the text [§ 18, para 1] infringes on their vested interests and discriminates against them and thereby violates Art. 19, para 2 of the Constitution.

Moreover, for Art. 19, para 2 of the Constitution to be really violated, the inequality must have aspects that, under the particular conditions, throw doubts about the very nature of equality and most often this is observed when the violation of this principles leads to the violation of another fundamental right, including the right to property. The Constitution allows for certain cases to limit, subject to law, Constitution-enshrined values and to enforce obligations. Art. 17, para 3 of the Constitution reads that private property shall be inviolable. Alongwith, the fathers of the Constitution definitely enumerated (in Art.17, para 5) the circumstances under which public interest overrides private interest and provides for the procedure to give primacy of the former over the latter (in this particular case the curtailment of the right to own private property for the sake of public interest).

The Constitutional Court underlined that by virtue of the above-mentioned provision, in the event of forcible expropriation of private property for the sake of needs of the State or of local needs the compensation shall not have to be the most lucrative (i.e. yielding the highest expected profit) but shall be fair to the owner of the property. Therefore, the Constitution extends protection on the right to be enjoyed by the owner to own the particular piece of property and implicitly excludes a right of some other kind – the right of use of the property at the greatest profit. The latter is largely a matter of rational and prudent property management, including sound market and non-market risk assessment by the property right holder.

On these grounds the Court concluded that the legal text challenged does not violate the Constitution-enshrined right to property nor does it create less favorable conditions for the operation of the economic actors within the scope of § 18, para 1 TCP AAEA and therefore does not violate the principle that Art. 19, para 2 of the Constitution proclaims.

The MPs maintained that the text that they challenge drastically infringes on the investors' legitimate expectations and clashes with the principle of legal certainty, as spelled out in Art. 19, para 3 of the Constitution – the protection of all investments and economic activities of Bulgarian and non-Bulgarian persons and corporate entities. The MPs insisted that under the new conditions the investors would not make the expected profit, i.e. the profit that, as already indicated, they made in the economic situation of the privileged treatment that they had enjoyed prior to the change in the legislation. As mentioned, the feed-in tariffs for energy from renewable sources were introduced to encourage the producers, in view of the achievement of the national and Community goals, by ensured returns on the capital investment and reasonable profit over time throughout the operational life of the installations – i.e. for the duration of the long-term agreements on the guaranteed purchase of the energy generated from renewable sources on a regulated market. That after the change the economic agents under § 18, para 1 TCP AAEA will make less profit probably falls short of their own economic expectations, yet this does not necessarily suggest that the legislative change was inconsistent with the Constitution-extended protection on legitimate expectations from the law.

Again the Constitutional Court emphasized that the expectation that the legislative frame will never change is unsound. Access to electricity is not simply an element of the market; it is a utility to enable each individual's socio-economic fulfilment and in the public interest. The construction and operation of installations for energy from renewable sources from the very start were focused to ensure the wellbeing of each individual and of society as a whole. The management of the sector of energy from renewable sources brings together many Constitution-enshrined values and principles and includes free enterprise and environmental protection and the principle of sustainable development of society and the safety of citizens alike. The legal text challenged here is one of the tools by which the State exerts its impact on the energy industry for the purpose of energy efficiency and which should be in harmony with the Constitution-set goals – the achievement of the development of society. There exists public interest that, in the context of the mentioned Constitution-set goals overrides free enterprise in the sector of energy from renewable sources and is of crucial importance for the investors' legitimate expectations.

The Constitutional Court coherently applied the notions of predictability of legislation and legal certainty in the sense of parameters of the state committed to the rule of law whereby it is constitutionally unacceptable for a lawmaker to impose afterward burdens on the subjects of law (Decision No. 7/2009), who were sticking their actions to the existing legislation (i.e. to withdraw vested rights by means of retroactive legislation). The Court's jurisprudence maintains that "Predictability is a requirement posed to legislative policy making and implementation…" Alongwith, the Court recognizes that this aspect should not be made absolute – modern constitutional law, both in Bulgaria and worldwide, does not explicitly indicate any such requirement to the Legislature. As regards the social sector, in times of transition or of crisis there have been smooth and predictable changes but also there has been likelihood of competition between justice and social safety stability (Decision No. 10/13.09.2012; Decision No. 1/2005).

On the particular Constitutional Case, the Court sticks to the quoted concept of predictable legislation. As discussed, §18, para 1 TCP AAEA has no retroactive effect nor does it withdraw rights inasmuch as the matter involved is privileged treatment by the Government of economic actors on a regulated market, subject to discretionary judgment, in the then existing economic and social context and in the public interest. The economically privileged status is not a set of vested rights for economic actors who owe it solely to the discretionary power of the State. The privilege granted may be revoked by the official authorities whenever they judge the revocation is in the public interest and find social justification for it. The Constitution makes no provision for legislation ad infinitum: therefore there can be no Constitution-nurtured legitimate expectation that the legislating authority will continue to stick to an opinion that will keep the privilege even if the objective reasons for such a privilege have ceased to exist.

The Constitutional Court jurisprudence associates the notions of "Constitution-based justified expectations" or "legitimate expectations" with the predictability of legislation and legal certainty and presupposes certain Constitution- or law-provided conditions where the organic law makes a reference to the legislation on a certain matter (the Court often judged on that in the context of lustration legislation). For example, the Constitutional Court's Decision No. 13/31.07.2014 outlined the Constitution-proclaimed principle of equality before the law in the economic sector, as specified in Art. 19, paras 2 and 3 of the Constitution and pointed out that "Free market and competition call for equal treatment of all economic actors…", i.e. in the context of free market that is wide open to competition the law should guarantee an identical legal status to the economic actors and, therefore, they can legitimately expect on grounds that the law is in place. However, economic actors that fall within the scope of § 18, para 1 TCP AAEA are positioned in the regulated segment of the market and the amendment challenged seeks to gradually bring them onto the free market where they are not positioned but must be, if the national and Community goal of a real competitive business in the electricity sector in the EU is to be achieved (such is the Commission's assessment of State aid SA.44840 (2016/NN) – Bulgaria p. 29). That is why the amendment seeks to create a free electricity market where all producers of energy from renewable sources, including those within the

scope of § 18, para 1 TCP AAEA, can have a legitimate legal expectation that the law will guarantee them equal legal conditions for doing business. The Court recalls that the amendment challenged minimized the application of a non-market support scheme like the feed-in tariffs for newly established installations for energy from renewable sources (The Guidelines on State Aid for Environmental Protection and Energy 2014-2020 and the Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty on the Functioning of the European Union provide for premium payments, green certificates, compatible schemes and other market-based support schemes). Economic actors that fall under § 18, para 1 TCP AAEA are not divested of the feed-in tariffs for power purchases or of the guaranteed purchases at these tariffs (the feed-in tariffs, though decreased, continue to be higher than the real economic value of such energy); the duration of the long-term agreements is not reconsidered either; however, prices are to be decreased from now onwards in a manner to spread, on an equitable basis and in the public interest, the financial burden arising from clean energy and environmental protection. Practically, such producers of energy from renewable sources are given, in this specific way, a period of transition for their smooth integration into the free market.

The position that the Constitutional Court upholds here draws on the CJEU jurisprudence, among other. Protection of legitimate expectation is one of the pillar principles of EU law, formulated by the CJEU in its jurisprudence (Judgment on Case C-369/09 P, ISD Polska and Others v. Commission, Paragraph 122). The CJEU associates the protection of legitimate expectation with the principle of legal certainty that calls for a stable and predictable legal frame (Judgment on Case C-63/93, Duff and Others v Minister for Agriculture and Food and Attorney General, ECR 1996, Paragraph 20). This does not mean that economically active agents should accept a change in the regulatory frame as haphazard and unfounded and derive the legitimacy of their expectations from the circumstance that they have received privileged treatment on the market at a certain point in time and from their hope that this situation will continue in the future (Judgment on Case 230/78, Eridania v. Minister of Agriculture and Forestry, Paragraphs 21-22; Judgment on Case 84/78, Ditta Angelo Tomadini Snc v Amministrazione delle finanze dello Stato, Paragraph 21; Judgment on Case 52/81, Werner Faust v. Commission, Paragraphs 26-27; and Judgment on Case T-223/00 [2003], Kyowa Hakko v. Commission, Paragraph 39). Also, the Court consistently held that if a prudent and discriminating trader could have foreseen the adoption of a Community measure likely to affect his interests, he cannot plead that principle if the measure is adopted (Judgment on Case 265/85 Van den Bergh en Jurgens and Van Dijk Food Products Lopik v Commission, Paragraph 44; Judgment of the Court of First Instance on Joined Cases T-116/01 and T-118/01 P&O European Ferries).

As a scheme of support to producers of energy from renewable sources in the public interest feed-in tariffs are more a tool to avoid the difficulties that economic and financial instability may cause to the achievement of this goal than to protect, in the first place, the individual business interests of those producers that are traders. The balance of the public interest and the interest of operating businesses rather than the expectations for a constant high profit for producers/investors has been pushed to the foreground.

The concept of legitimate legal expectations is manifest in a different way from sector to sector. It is very difficult to substantiate legitimate legal expectations in sectors that in principle are recognized as prone to frequent changes and the sector of energy from renewable sources is, no doubt, one of them. What makes expectations legitimate is their validity. They should be based on binding arrangement by the public authorities and not on the general legislative frame. Also expectations must be formed in good faith and with due attention. It is senseless to expect that a problem that has already been addressed by the Lawmaker, in the form of existing legislation, will not recur on the lawmaking agenda. Accordingly, the expectation that tomorrow the law may have to provide for or resolve on matters that need provisions and resolution today is absolutely devoid of meaningful justification and in that sense it is not a legitimate expectation.

**On the claim of noncompliance with Article 63 TFEU**

Also the MPs insisted that § 18 TCP AAEA is inconsistent with Article 63 TFEU. They expressed the view that the legislative change, that is the reduction of the feed-in tariffs which reduction runs against the principle of legal certainty in general and in particular, the protection therefrom of the legitimate expectations of the investors in/producers of energy from renewable sources within the scope of § 18, para 1 TCP AAEA shakes the investors' confidence altogether in the stability of legislation on that sector and thus checks the free movement of capital, in defiance of the explicit prohibition in Article 63 TFEU. In short, the core of the noncompliance, as maintained, of § 18 TCP AAEA with Article 63 TFEU is the claimed legitimacy of the legal expectations of the investors who fall within the scope of § 18, para 1 that, as heretofore, they will make a guaranteed high profit and will enjoy a privileged economic status.

The EU objectives in the energy sector as defined in Article 194 (1), Title IV (Free Movement of Persons, Services and Capital), Titre "Energy" reads that the Union policy on energy shall aim to ensure the functioning of the energy market; to ensure security of energy supply; to promote the development of renewable forms of energy. The feed-in tariffs for energy from renewable sources are a type of measure to promote the generation of energy from renewable sources and to achieve the stated objectives which measure, compared to other support schemes under Directive 2009/28 is not market driven. Premising on the Commission practices and the CJEU jurisprudence it is a State aid and like any State aid creates a selective economic privilege for the recipients and constitutes a potential threat as it may distort competition and be incompatible with the common market, save as otherwise provided in the Treaties (Article 107(1) TFEU).

Actuated by the above-stated considerations the Constitutional Court thought that first and foremost it should be made clear to what an extent, in this particular case, it is rightful to claim legitimate legal expectations of the economic actors within the scope of § 18, para 1 TCP AAEA, in the specific context of State aids while it abstained from delving into the essence and from covering all aspects of State aid.

On Case C-206/06 Essent Netwerk Noord [2008] the CJEU assumed that the concept "aid granted through State resources" in Article 107(1) TFEU provides for the inclusion of advantages granted directly by the State and those granted by a public or private body designated or established by the State. The Commission took such a position in a number of decisions on the compatibility of the support schemes with the requirements under Article 107(1) TFEU – Decision 2011/528/EU of 8 March 2011 on State aid measure No. C 24/2009 *(*ex N 446/2008) State aid for energy intensive businesses under the Green Electricity Act in Austria; Commission Decision 2016 on the support schemes for electricity production of renewable energy sources in the Czech Republic (SA.40171 (2015/NN), 28.11.2016, C(2016) 7827 final – Points 75-80 and Point 135); and Support for renewable energy generation in Bulgaria SA.44840 (2016/NN). The European Commission keeps under constant review all systems of State aids (Article 108 TFEU) and has a broad discretionary power in this matter while its decisions are subject to judicial review in line with the principle of the rule of law which is the pillar of EU law and of the national legal order of the EU Member States. The Commission has the authority to decide that certain categories of aid should be exempted from the notification requirement under certain conditions. (Commission Regulation (EC) No. 651/2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the TFEU, OJ EU, 187/1 – Commission Regulation (EU) No. 651/2014; Council Regulation (EU) No. 734/2013 amending Regulation (EC) No. 659/1999 laying down detailed rules for the application of Article 93 of the EC Treaty).

In March 2016 the competent Bulgarian authorities notified the Commission about operating aid to the producers of energy from renewable sources in the form of feed-in tariffs for the purchasing of energy (the measure thus notified became effective on 3 May 2015 and will cease to apply

on 31 December 2021). The notification was preceded by a letter to the European Commission from the SEWRC (EWRC, from 2015) of July 2014 where a conclusion was made that following the EC recommendations in recent years, the producers of energy from renewable sources had been strongly supported with feed-in tariffs and that is in harmony with the environmental targets to be reached by 2020, yet this kind of support distorted competition in the sector. Emphasis was laid on the excessive compensation, especially of phorovoltaics and wind farms and an assumption was made of irregular State aid received. On the basis of a thorough analysis of feed-in tariffs as a support scheme that is offered to producers of energy from renewable sources in Bulgaria in the context of Article 107 TFEU, the European Commission (Decision of 04.08.2016, C(2016) 5205 final State Aid SA.44840 (2016/NN)) saw the feed-in tariffs as unlawful State aid measure. While the EC decided (Point 104) that the aid is compatible with the internal market pursuant to Article 107(3)(c) TFEU, it noted that Bulgaria put the aid measure in question into effect without prior notification, therefore the aid granted prior to the adoption of this decision is unlawful State aid (Point 103).

The promotion of the generation of electricity from renewable sources is one of the European energy policy priorities. Article 194 (c) TFEU is a proof of that, among other. The same objective is to be found in Directive 2009/28/EC, which does not prescribe an indispensable means to reach the goal. The Commission premised on the view that State intervention is needed if the development of this sector is to be supported. Nonetheless, regardless of the kind and form of the support scheme, if it involves State aid, the Commission shall be informed in line with the procedure of Article 108 (3) in order to judge on the compatibility with European rules of State aid as per Article 107 (1) TFEU. State aid can be an efficacious remedy of some shortcomings of the market. As a protectionist tool of State intervention into the market State aid tends to erode competition and to distort the common market in the long run. That is why EU law provides for a strict procedure of granting State subsidies. Considering Case C-199/06, CELF and ministre de la Culture and de la Communication (Centre d'exportation du livre français (CELF) and Ministre de la Culture et de la Communication v Société internationale de diffusion et d'édition (SIDE)), Paragraph 35, the CJEU pointed out that "the Member State which envisages granting aid must not put its proposed measures into effect until that procedure has resulted in a final decision of the Commission". The Court also held that, so long as the Commission has not taken a decision approving aid, and so long as the period for bringing an action against such a decision has not expired, the recipient cannot be sure as to the lawfulness of the proposed aid which alone is capable of giving rise to a legitimate expectation on his part" (Paragraph 67, Judgment on the same case).

Though the afore-cited statement of the Commission refers to a measure effective since 3 May 2011, the analyses and the assessments that the Commission made of the scheme as applied in the country to support the producers of energy from renewable sources are important. Moreover, Point 46 of the Decision mentions that the Bulgarian authorities explained (upon a request from the EC for further information) that some irregularities were detected – double support to these producers in the form of full preferential prices and funding under national or European support schemes. These irregularities were detected following a mandatory audit in 2012 carried out by the Directorate-General for Agriculture and Rural Development (DG AGRI) under the 2007-2013 Rural Development Program with regard to investments under Measures 311 and 312. What is essential in this particular case is the Commission's definition of feed-in tariffs/preferential prices as State aid. The feed-in tariffs for purchasing energy from renewable sources were provided for in the AERASB (Art. 16, para 2 and Art. 21, para 2) and in the transposition of Directive 2009/28/EC into the ARSE again included them as a measure designed to promote energy from renewable sources. In 2007-2011 the European Commission was not notified about this support measure that was applied in the country. A bona fide recipient is supposed to have tracked the procedure to make sure it has been abided by rather than plead for legitimate legal expectations if the Commission has not been informed: information about that should have been sought prudently and with care (cf. the CJEU Judgment on Case T-328/09 Producteurs de légumes de France v Commission).

Emphasizing that the constitutional protection extends over justified legitimate expectations, recognizing the specifics of setting feed-in tariffs in the country for a certain group of economic actors in the sector of energy from renewable sources prior to the amendment that brought out the challenged § 18 TCP AAEA and considering the requirement that the investors' expectations should be formed with due attention and should be rational, given the circumstances obtaining, the Constitutional Court thought there was no raison d'être to refer to legitimate expectation in the case under consideration.

In addition, the Constitutional Court pointed out that the CJEU was not particularly well-disposed to the argument of legitimate legal expectations in the context of State aid and posed considerable requirements to investors (Judgment on Case C-5/89 Commission of the European Communities v Federal Republic of Germany, Paragraph 14; Judgment on Joined Cases T-427/04 and T-17/05 France and France Télécom *v* Commission; Judgment on Case C -24/95 Alcan, Land Rheinland-Pfalz v Alcan Deutschland GmbH, Paragraph 49; the CJEU did not support aid to remedy a disturbance in the economy on grounds of noncompliance with procedure – Case T-150/12, Greece v Commission, 2014г.)).

The Constitutional Court underlined that the promotion of investment and feed-in tariffs cannot be equated. Feed-in tariffs are a possible measure to promote development: however, as the internal electricity market of the EU continues to develop, the measure is to be downscaled substantially. The fact that in certain years an investment committed under a long-term agreement (of duration between 12 and 20 years, depending on the type of the renewable source of energy) will not yield profit in an amount which is sufficient to service debts under loans that were extended for a term shorter than the expected period of returns on the investment should not be taken as a sign that the investment as a whole will not be recovered and this will check the free movement of capital. The lower feed-in-tariffs change the period of returnability and do not go beyond that. However, there can be no legitimacy in a claim that the lawmaker shall not revise the promotion measure in the future. In the particular case under consideration it is a change that the goal – the achievement of a functioning internal electricity market for the EU – calls for and it is a process in which the Republic of Bulgaria is involved on a par with others. The gradual integration of the producers of energy from renewable sources into the free market presupposes substitution of the direct price support that they receive with market-based promotion schemes (The Guidelines on State Aid 2014-2020). The maintenance of unjustifiably high feed-in tariffs for the energy from renewable sources in favour of the economic actors who fall within the scope of § 18, para 1 TCP AAEA compared to the market prices constitutes a risk of the distortion of the market within the EU. The change made enables investors to plan their business moves and investments in the long term and to conform them to the market forces. Liberalization of capital movement seeks to promote the development of a single market, including an electricity market for the EU. This is the goal which § 18 TCP AAEA that is challenged herewith seeks to achieve.

Actuated by the stated considerations and in recognition of the fact that the MPs' claim of existing justified legitimate expectations by the economic actors who fall under § 18, para 1 TCP AAEA is untenable, the Constitutional Court did not find the challenged legal text to be noncompliant with Article 63 TFEU.

In view of the above-stated reasoning the Constitutional Court concluded that the challenge is unsustainable and therefore that it should be dismissed. Para 1 of § 18 TCP AAEA and the related provisions of paras 2, 3, 4 and 5 of § 18 TCP AAEA are not dissonant with Art. 4, para 1 and Art. 19, paras 2 and 3 of the Constitution of the Republic of Bulgaria nor are they dissonant with Article 63 TFEU.

The Constitutional Court

**RULED:**

The Constitutional Court dismisses the challenge of 49 Members of the 43rd National Assembly of the constitutionality and of compliance with Art. 63 of the Treaty on the Functioning of the European Union of § 18, para 1, para 2, para 3, para 4 and para 5 of the Transitional and Concluding Provisions of the Act Amending the Energy Act (promulgated, DV, No. 56/24.07.2015).