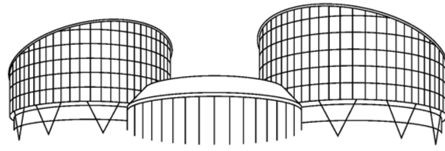

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

DECISION

Application no. 75088/17
ENERGYWORKS CARTAGENA S.L.
against Spain

The European Court of Human Rights (Fifth Section), sitting on 26 March 2024 as a Chamber composed of:
Georges Ravarani, *President*,
Carlo Ranzoni,
Mārtiņš Mits,
María Elósegui,
Mattias Guyomar,
Kateřina Šimáčková,
Mykola Gnatovskyy, *judges*,
and Martina Keller, *Deputy Section Registrar,*

Having regard to the above application lodged on 16 October 2017,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant company,

Having deliberated, decides as follows:

THE FACTS

1. The applicant company, Energyworks Cartagena S.L., is a Spanish legal entity based in Cartagena. It was represented before the Court by Mr I. Salama Salama, a lawyer practising in Madrid.

2. The Spanish Government (“the Government”) were represented by their Agent, Mr L.E. Vacas Chalfoun.

3. The facts of the case, as submitted by the parties, may be summarised as follows.

A. Regulation of the electricity sector

4. In 1997 the Spanish Parliament enacted Law no. 54/1997 of 27 November on the electricity sector (*Ley del Sector Eléctrico* – Electricity Sector Act) with the purposes of progressively liberalising the electricity market, improving energy efficiency, reducing electricity consumption and protecting the environment.

5. That law set out two regimes: an ordinary regime and a special regime, which was applicable to facilities using renewable energy sources and cogeneration plants. Under the special regime, the remuneration obtained in exchange for supplying energy to the market was supplemented by a subsidy, with the purpose of ensuring the investment delivered a reasonable return (*rentabilidad razonable*) calculated with reference to the cost of money on capital markets (see paragraph 21 below).

6. Between 2002 and 2012, Law no. 54/1997 was amended on several occasions (Royal Decree-Laws nos. 7/2006, 6/2009 and 14/2010; and Laws nos. 2/2011 and 15/2012) and implemented by a series of regulations governing the financial framework (Royal Decrees nos. 2818/1998, 1433/2002, 436/2004, 661/2007, 1565/2010 and 1614/2010).

7. Those regulations, and particularly the remuneration system established therein, were contested on several occasions before the domestic courts. The Supreme Court reiterated in various judgments that the remuneration system – including the level of profit, the reasonable return and the formulas to be used – was not immutable but rather that the Government had broad powers to modify it (see paragraphs 24-28 below).

8. In July 2013, to address the structural deficit of the Spanish electricity sector, Royal Decree-Law no. 9/2013 of 12 July was passed, introducing urgent measures to guarantee the financial stability of the electricity system. That legislation amended Law no. 54/1997, particularly with respect to how a reasonable return was determined, replacing the reference to "the cost of money on capital markets" by "the average yield in the secondary market of ten-year Government Bonds" (see paragraph 22 below).

9. In December 2013 Law no. 54/1997 was repealed by Law no. 24/2013 of 26 December on the electricity sector, which aimed to address the sector's structural deficit and to establish a new remuneration system.

10. Under the new system, in addition to remuneration from selling energy, facilities would receive specific remuneration during their regulatory useful lives made up of two components: (i) a return on investment, covering investment costs that could not be recovered from selling energy; and (ii) remuneration for operations, covering the difference between operating costs and income from participating in the production market. That remuneration would be calculated on the basis, for "an efficient and well-managed company", of standard revenues from the sale of energy valued at market price, standard operating costs and the standard value of an initial

investment. Remuneration under the system was not to exceed the minimum level required to allow those facilities to obtain a reasonable return. Pursuant to Law no. 24/2013, which retained the wording of Royal Decree-Law no. 9/2013, that minimum level was to be calculated over the entire regulatory life of the facility based, before taxes, on the average yield in the secondary market of the State's ten-year bonds plus the appropriate differential (see paragraph 23 below).

11. The technical criteria for calculating the remuneration were further developed by Royal Decree no. 413/2014 of 6 June 2014, regulating the production of electricity from renewable energy sources, cogeneration and waste, and Order IET/1045/2014 of 16 June 2014, approving the standard-facility remuneration parameters applicable to certain facilities generating electricity from renewable energy sources, cogeneration and waste. Pursuant to those criteria, facilities that had not reached the end of their regulatory useful lives but had achieved a reasonable return would receive a return on investment equal to zero but would continue, where applicable, to earn remuneration for operations for the remainder of their regulatory useful lives.

B. The applicant company's situation

12. The applicant company is a cogeneration facility based in Cartagena (Murcia), which started operations on 9 July 2002. By means of a system featuring two gas turbines and a steam turbine, fuelled by natural gas, it produces (i) electricity for its own consumption, feeding the surplus into the grid, and (ii) thermal energy, which it supplies to another company.

13. The applicant company's remuneration is governed by the provisions of the special regime, as established by the Electricity Sector Act and subsequent amendments. Accordingly, its remuneration was governed by Law no. 54/1997 when it started operations and by Royal Decree-Law no. 9/2013 and Law no. 24/2013 subsequently.

14. Pursuant to the regulations passed in 2013 and 2014, the reasonable return for facilities such as the applicant company's was set at 7.398% before taxes, subject to revision every six years (see paragraphs 17 and 23 below). According to a report by the Ministry for Ecological Transition and Demographic Challenge, by July 2013 Energyworks had achieved a return of 23.86%. While the applicant company disagreed with this figure, there is no information in the case file on any action it has taken to challenge the calculation at the domestic level.

15. According to the information submitted by the Government, and not challenged by the applicant company, Energyworks did not receive any sums in respect of its return on investment between August 2013 and the end of 2016. For the period from 2017 to 2019 the parameters were reviewed to take into account the fact that electricity market prices had been lower than

estimated, and the applicant company once again received a periodical sum in respect of its return on investment.

C. Domestic proceedings

16. On 31 July 2014 the applicant company lodged an application with the Administrative Disputes Division of the Supreme Court (*Sala de lo Contencioso-Administrativo del Tribunal Supremo*) for judicial review of Royal Decree no. 413/2014 and Order IET/1045/2014, claiming, in particular, that the reclassification of a portion of past profits as unreasonable and their subsequent offset against future remuneration amounted to cases of retrospectiveness prohibited by Article 9 § 3 of the Constitution and was contrary to the principle of legal certainty guaranteed therein.

17. On 8 July 2016 the Supreme Court dismissed the applicant company's complaint by four votes to three. It reasoned as follows:

> "... Royal Decree no. 413/2014 does not result in the retrospectiveness prohibited by Article 9 § 3 of the Constitution, because it does not have negative effects going back in time, in the sense that it does not annul, modify or review past subsidies received by owners of renewable energy facilities under the [previous regime], but rather [it] produces its effects from the entry into force of the new regime ...
>
> It is true that the calculation of the reasonable return takes into consideration the remuneration already received in the past, projecting the new remuneration model from the start of operation of the facilities, but this provision only implies that the reasonable return that the owners of such facilities are entitled to receive is calculated over their entire 'regulatory useful lives' without the amounts already received in the past having to be reimbursed, as will be explained below.
>
> The modification of the reasonable return foreseen for the useful life of a facility undoubtedly impacts legal situations which came into being prior to the entry into force of this regulation and continue to produce effects, but it does not entail prohibited retrospectiveness, as it does not affect the previously consolidated economic rights incorporated into the assets of the owners of such facilities, nor does it affect legal situations that have already been exhausted or come to an end. It only affects the overall calculation of the return that the owners of these installations are entitled to receive, with no impact whatsoever on the amounts received in the past. To do otherwise would mean recognising the consolidated right to receive a certain return also for the future, denying the legislature the possibility of establishing a different overall return for these facilities throughout their useful lives, separate from that which they had already been receiving. This possibility would involve freezing the existing remuneration system, which has been expressly rejected by this Court and by the Constitutional Court in the above-mentioned judgments. Moreover, this Court has already had occasion to point out in its judgment of 30 May 2012 (appeal no. 59/2011), as reiterated in its judgment of 19 June 2012 (appeal no. 62/2011), that '... the principle of a reasonable return must indeed be applied to the entire life of the facility, but not, as the party appears to understand it, in the sense that this principle guarantees the generation of profits throughout the life of the facility, but rather in the sense that it ensures that the investments made in the facilities deliver a reasonable return over the entire life of the facility. This means, of course, that the legal provision whereby a reasonable return must be ensured does not entail the continued existence of a given subsidy throughout the life of the facility, since it may well be that the cost of those investments has already

been recovered and such a reasonable return earned long before the end of the facility's period in operation. Consequently, it does not follow from the provision invoked that the subsidy-based financial framework must continue throughout the life of the facility'.

These same reasons can be applied to the case in question, in which the legislature has modified the remuneration system for such facilities by establishing a reasonable return, but over the entire useful life of the facility, which makes it possible to take into consideration the remuneration received since the start of the facility's operations for the purposes of calculating the future remuneration which [the owners] are entitled to receive outside the market, without resulting in prohibited retrospectiveness.

...

Finally, it cannot be upheld that, under the new remuneration system, some facilities may have to reimburse what they have 'received in excess'.

Such a hypothesis would undoubtedly amount to a case of retrospectiveness prohibited by Article 9 § 3 of the Constitution, as it affects 'consolidated rights, assumed and integrated into the assets of the subject', ... but this eventuality invoked by the complaint has no place in the new remuneration system, because it is expressly prevented by paragraph 4 of the third final provision of Law no. 24/2013, which establishes that 'under no circumstances may the new remuneration model result in a claim for remuneration received for energy produced prior to 14 July 2013, even if it is established that on that date that return may have been exceeded' (the reasonable return over the entire regulatory life of the facility, referred to in paragraph 3 of the same third final provision of Law no. 24/2013).

...

The [concept of] protection of legitimate expectations (*confianza legítima*) does not cover any subjective belief held by an individual, but rather ... [expectations] 'that are based on external signs or acts by the Administration which are sufficiently conclusive'.

In the present case there is certainly not – or at least the complaint does not cite – any kind of commitment or external sign, addressed by the Administration to the appellants, in relation to the immutability of the regulatory framework in force at the time they started generating energy from renewable sources.

Nor do we consider that the legislation in force at that time could be considered – by itself – a conclusive external sign sufficient to generate in the appellant a legitimate expectation, that is, a rational and well-founded belief, that the remuneration system for the electricity it produced could not be altered in the future, since no provision of Royal Decree no. 661/2007, to which its facilities were subject, guaranteed that the regulated tariff would remain unchanged.

In this connection, the case-law of this Division has been consistent over the years in stating, in the interpretation and application of the rules governing the legal and financial framework for the production of electricity from renewable sources, that those rules guarantee the owners of these facilities the right to a reasonable return on their investments, but do not grant them an immutable right to the inalterability of the remuneration framework approved by the holder of regulatory power.

Thus, more than ten years ago, in its ruling of 15 December 2005 (appeal no. 73/2004), in proceedings on the legality of Royal Decree no. 436/2004 on the methodology for updating and structuring the legal and financial framework for the production of electricity under the special regime, this Court stated that 'there is no legal obstacle for the government, in the exercise of its regulatory powers and the broad powers it has in such a highly regulated area as electricity, to modify a specific

remuneration system as long as it remains within the framework established by the Electricity Sector Act'. In the same sense, the Supreme Court ruling of 25 October 2006 (appeal no. 12/2005), handed down in an appeal challenging Royal Decree no. 2351/2004 amending the resolution procedure for technical restrictions and other regulatory rules of the electricity market, pointed out that section 30(4) of the Electricity Sector Act allowed the companies concerned to aspire to 'reasonable rates of return with reference to the cost of money on capital markets' or 'reasonable remuneration for their investments', without the remuneration system in issue guaranteeing, however, to the owners of special-regime facilities 'the immutability of a certain level of profit or income in relation to those obtained in previous years, nor the indefinite application of the formulas used to set the subsidies.'

This line of case-law has continued to the present day, in judgments ... in which this Court has insisted, in the face of successive regulatory changes, that it was not possible to grant *pro futuro* to the owners of electricity production facilities under the special regime an 'immutable right' to the inalterability of the remuneration framework approved by the holder of regulatory power, provided that the requirements of the Electricity Sector Act are met in terms of the reasonable return on investment.

...

All these elements – the absence of commitments or conclusive external signs from the Administration in relation to the inalterability of the regulatory framework, the existence of this Court's well-established case-law insisting that our legal system does not guarantee the immutability of remuneration to owners of renewable-electricity production facilities, the electricity system's tariff deficit and threatened viability, and the need to achieve renewable-energy targets – prevent the change in the remuneration system for renewable energies from being considered unexpected or unforeseeable by any diligent operator.

...

The new legal framework therefore maintains the traditional incentive measure of guaranteeing a reasonable return for the production of renewable energies, and this guarantee is given greater security by having its calculation system incorporated into a regulation with the rank of law, since section 30(4) of Law no. 54/1997, in the wording given by Royal Decree-Law no. 9/2013, now provides that said reasonable return 'shall be based, before taxes, on the average yield in the secondary market of ten-year Government Bonds after applying the appropriate differential'.

In the case of facilities which, like that of the plaintiff company, on the date the new remuneration system entered into force, were eligible for a subsidy-based system, that differential was set at 300 basis points by the first additional provision of Royal Decree-Law no. 9/2013, without prejudice to its possible revision every two years.

For existing facilities under the subsidy-based system on the date of entry into force of Royal Decree-Law no. 9/2013, as the value of the benchmark Government Bonds is equal to 4.398%, according to the Report on the disputed Order, once the 300 points established as the differential for the first regulatory period are added, the reasonable return established by the above-mentioned Royal Decree-Law is 7.398%.

The new legal regime for renewable energies thus maintains specific regulated remuneration for facilities that guarantees a reasonable return on investment.

For the foregoing reasons, we do not consider that the changes to the facility remuneration system in issue by Royal Decree-Law no. 9/2013, Law no. 24/2013 and,

> in its development, the impugned Royal Decree and IET Order have violated the principles of legal certainty and legitimate expectations."

18. The applicant company brought an action for the annulment of the proceedings, alleging errors and omissions in the judgment's reasoning. The action was rejected by the Supreme Court on 14 October 2016.

19. On 18 April 2017 the Constitutional Court declared the applicant company's *amparo* appeal inadmissible due to a lack of constitutional relevance.

RELEVANT LEGAL FRAMEWORK

20. The relevant provisions of the Spanish Constitution read as follows:

Article 9 § 3

> "The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal enactments, the non-retrospectiveness of punitive measures that are unfavourable to or restrict individual rights, the certainty that the rule of law will prevail, the accountability of the public authorities, and the prohibition against arbitrary action on the part of the latter."

Article 33

> "1. The right to private property and to inheritance is recognised.
>
> 2. The social function of these rights shall determine their scope, as provided for by law.
>
> 3. No person shall be deprived of their property or their rights except for a cause recognised as being in the public interest or in the interest of society and in exchange for fitting compensation as provided for by law."

21. The relevant provisions of the Electricity Sector Act, in its original wording, provided:

Section 30(4)

> "The determination of the subsidy will take into account the voltage level at which the power is fed into the grid, the effective contribution to improving the environment, primary energy savings and energy efficiency as well as the production of economically justifiable useful heat and the investment costs incurred, for the purpose of achieving reasonable rates of return with reference to the cost of money on capital markets."

22. This provision was amended by Royal Decree-Law no. 9/2013 of 12 July 2013, which adopted urgent measures to guarantee the financial stability of the electricity system, replacing the original wording with the following:

> "The remuneration system shall not exceed the minimum level required to cover the costs allowing the facilities to compete on an equal footing with the other technologies on the market and to obtain a reasonable return by reference to a standard facility in each applicable case ...

Such reasonable return shall be based, before taxes, on the average yield in the secondary market of ten-year Government Bonds after applying the appropriate differential.

The parameters of the remuneration system may be reviewed every six years.”

23. The relevant provisions of Law no. 24/2013 of 26 December 2013 on the electricity sector (repealing and replacing Law no. 54/1997), provide:

Section 14(7)

“Exceptionally, the government may establish a specific remuneration system to promote production from renewable energy sources, high-efficiency cogeneration and waste, when there is an obligation to comply with energy objectives derived from Directives or other European Union legislation or when its introduction entails a reduction in energy costs and external energy dependence, in the following terms:

(a) ...

This remuneration system, in addition to the remuneration from the sale of the generated energy valued at the production-market price, will consist of a component per unit of installed capacity that covers, where appropriate, any investment costs, for each standard facility, that cannot be recovered through the sale of energy on the market, and an operating component that covers, where appropriate, the difference between the operating costs and the income from participation in the production market of that standard facility.

...

(b) For the calculation of that specific remuneration, ... the following elements shall be considered based on the facility’s regulatory useful life and by reference to the business operations of an efficient and well-managed company:

(i) Standard revenues from the sale of the generated energy valued at the production-market price;

(ii) Standard operating costs;

(iii) The standard value of an initial investment.

...

The remuneration system shall not exceed the minimum level required to cover the costs allowing the facilities producing energy from renewable sources, high-efficiency cogeneration and waste to compete on an equal footing with the other technologies on the market and to obtain a reasonable return by reference to a standard facility in each applicable case. Such reasonable return shall be based, before taxes, on the average yield in the secondary market of ten-year Government Bonds after applying the appropriate differential.

...”

Third final provision

“3. Under the terms set out in Royal Decree-Law no. 9/2013 of 12 July 2013, for the establishment of this new remuneration system, the reasonable return over the entire regulatory life of the facility will be based, before taxes, on the average yield on the secondary market for the ten years prior to the entry into force of Royal Decree-Law no. 9/2013 of 12 July of ten-year Government Bonds plus 300 basis points, without prejudice to its subsequent review under the terms established by law.

4. Under no circumstances may this new remuneration model result in the claiming back of remuneration received for energy produced prior to 14 July 2013, even if it is established that on that date this [reasonable] return may have been exceeded.

5. The remuneration parameters will, in any event, be revised in accordance with section 14(4) of this law."

24. The Supreme Court's judgment of 15 December 2005 stated:

"There is no legal obstacle for the government, in the exercise of its regulatory powers and the broad powers it enjoys in a highly regulated area such as electricity, to modify a specific remuneration system provided it remains within the framework established by the Electricity Sector Act."

25. The Supreme Court's judgment of 25 October 2006 stated:

"Until it is replaced, the aforementioned legal regulation (section 30 of the Electricity Sector Act) allows the companies concerned to aspire to subsidies set based on relevant factors including that of obtaining 'reasonable rates of return with reference to the cost of money on capital markets' or, to use the words of the preamble to Royal Decree no. 436/2004, 'reasonable remuneration for their investments'. However, the remuneration system in issue does not guarantee ... the immutability of a certain level of profit or revenues in relation to those obtained in previous years, nor the indefinite application of the formulas used to set the subsidies."

26. The Supreme Court's judgment of 3 December 2009 stated:

"...the prescriptive content of Law no. 54/1997 of 27 November 1997 on the electricity sector does not imply the petrification or freezing of the remuneration system for owners of electricity facilities under the special regime or the recognition of the right of producers under the special regime to the immutability thereof, as the government has, by the legislature's design, a margin of discretion to determine the energy yields offered, having regard to clear objectives inherent in the implementation of economic, energy and environmental policies, and taking into consideration in the exercise of its regulatory power the obvious and essential general interests involved in the proper functioning of the electricity production and distribution system and, in particular, the rights of users."

27. The Supreme Court's judgment of 12 April 2012 stated:

"The principle of reasonable return must indeed be applied to the entire life of the facility – not, as the party appears to understand it, in the sense that that principle guarantees the generation of profits throughout [the life of the installation], but rather in the sense that it ensures that the investments made in the facility obtain a reasonable return over the entire life thereof. This means, of course, that the legal provision that a reasonable return must be ensured does not entail the continued existence of a certain subsidy throughout the life of the facility, since it may well be that the cost of those investments has already been recovered and such a reasonable return has been obtained long before the end of the period of operation. Consequently, it does not follow from the provision relied on that the subsidy-based financial framework must be maintained throughout the life of the facility."

28. The Supreme Court's judgment of 25 September 2012 stated:

"The thesis that the 'reasonable return' which was estimated at a given time should simply remain unchanged in successive periods cannot be upheld. Depending on changes in economic and other circumstances, a percentage return can be 'reasonable'

at that initial time but require a subsequent adjustment precisely to maintain its ‘reasonableness’ in the light of changes to other financial or technical factors.”

COMPLAINT

29. The applicant company complained of the loss of its State subsidies which, in its view, amounted to a breach of Article 1 of Protocol No. 1 to the Convention.

THE LAW

30. The applicant company submitted that the new regulation had retrospectively deprived it of the State subsidies it had previously received, in violation of its right to the peaceful enjoyment of its possessions as guaranteed by Article 1 of Protocol No. 1 to the Convention. This provision reads:

> “Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.”

A. The parties’ submissions

1. The Government

31. The Government referred at the outset to the reservation made by Spain to Protocol No. 1, which reads:

> “In accordance with Article 64 of the Convention for the Protection of Human Rights and Fundamental Freedoms, in order to avoid any uncertainty as to the application of Article 1 of the Protocol, Spain expresses a Reservation in the light of Article 33 of the Spanish Constitution, which stipulates the following:
>
> 1. The right to private property and to inheritance is recognised.
>
> 2. The social function of these rights shall determine their scope, as provided for by law.
>
> 3. No person shall be deprived of their property or their rights except for a cause recognised as being in the public interest or in the interest of society and in exchange for fitting compensation as provided for by law.”

They argued that this reservation implied a broader margin of appreciation of the State in relation to the content and limits of property rights.

32. Moreover, the Government put forward three objections as to the admissibility of the application. First, they argued that the complaint was incompatible *ratione materiae* with the Convention, stating that the alleged

possessions invoked by the applicant company could not be considered as such within the meaning of Article 1 of Protocol No. 1, as that concept did not cover expectations of future income. They stressed that States had a wide margin of appreciation when establishing and regulating national State aid schemes and that Article 1 of Protocol No. 1 did not preclude any evolution in those schemes or any changes in the rules governing benefits at a given time, including their amount or their conditions of access. Second, the Government argued that the applicant company had not suffered any significant disadvantage within the meaning of Article 35 § 3 (b) of the Convention. They alleged that the applicant company had not specified the damage resulting from the application of the new system, that it had not provided any evidence of damage and that it had maintained a similar level of income from public subsidies after 2013. Third, they considered that the applicant company had abused the right of individual application within the meaning of Article 35 § 3 of the Convention by concealing elements that were essential for the examination of the case, such as the specific safeguards included in the new legal framework preventing the reimbursement of subsidies already paid and the subsidies received by the applicant pursuant to the new regulation.

33. As to the merits of the case, the Government reiterated that the applicant company had not had a right to the immutability of future subsidies. They argued that the formulas contained in the 2014 regulation had calculated the remuneration payable to companies by taking into account any such amounts already received, with the sole effect that, if the cost of the investment had been recovered before the new rules had entered into force with a return higher than 7.398%, the companies would not have received any more subsidies but nor would they have been required to reimburse any excess amounts. There had thus been no interference with the applicant company's rights. Alternatively, even considering that the new regulation had amounted to control of the use of property, it would have met the requirements of Article 1 of Protocol No. 1, namely, to be provided for by law, to be in pursuance of a legitimate aim and to be proportionate.

2. The applicant company

34. The applicant company claimed that the implementation of the new regime had deprived it of its possessions. It stated that the subsidies received between 2002 and 2013 under the previous legal framework had been integrated into its assets and that the new legal framework adopted in 2014, retrospectively classifying part of those earnings as unreasonable and applying complicated mathematical formulas to calculate the future subsidies, had implied an obligation to reimburse some of the subsidies already received. It maintained that, under the new system, any earnings classified as "unreasonable" would be deducted from future subsidies and returned to the State with interest. It claimed that while a future change to the

system had been foreseeable and legitimate, its retrospective application had not. It advanced that the legal instruments had not identified a legitimate aim and that the interference had been disproportionate.

35. In reply to the Government's admissibility objections, the applicant company stated, first, that it did not seek the protection of "expectations" but rather of past remuneration incorporated into its possessions, which it claimed it had been forced to reimburse on the basis of "obscure mathematical formulas". Second, it maintained that it had suffered a reduction in revenues of about 12.5 million euros per year and that, in any event, the Government were "obliging it to give back past excess remuneration by reducing its future remuneration". Lastly, it denied having omitted any relevant information.

36. Concerning the merits, in the applicant company's view, the interference had led to a deprivation of possessions, as the new remuneration system had impinged on past remuneration that had been fully integrated into its possessions. In so far as it considered the reform of the system unforeseeable, it stated that the interference had not been provided for by law. Furthermore, it held that the deprivation of possessions had not been covered by the public interest as claimed to justify the reform of the system. Lastly, it argued that the interference had not struck a fair balance between the general interest and the protection of the individual's rights and was thus disproportionate.

B. The Court's assessment

1. Victim status

37. The Court notes, at the outset, that the domestic proceedings brought by the applicant company aimed to challenge two domestic rules – namely Royal Decree no. 413/2014 and Order IET/1045/2014 – and not an individual measure against the applicant company.

38. The Court reiterates that, in order to be able to lodge an application in pursuance of Article 34, a person, non-governmental organisation or group of individuals must be able to claim "to be the victim of a violation ... of the rights set forth in the Convention ...". In order to claim to be a victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008). It is, however, open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, if he or she is required either to modify his or her conduct or risk being prosecuted or if he or she is a member of a class of people who risk being directly affected by the legislation (ibid., § 34).

39. In the present case, the Court observes that it is not disputed that the applicant company was subject to the special regime's remuneration system under the Electricity Sector Act, as in force at the relevant time. It further observes that the remuneration system, as established by the 2013 and 2014 regulations, has been applied to the applicant company in practice. In these circumstances, the applicant company is directly affected by the legislation and can claim to be a victim of the alleged violation of the Convention (ibid., § 35).

2. General principles

40. The concept of "possessions" referred to in the first part of Article 1 of Protocol No. 1 has an autonomous meaning which is not limited to ownership of physical goods and is independent from the formal classification in domestic law: certain other rights and interests constituting assets can also be regarded as "property rights", and thus as "possessions" for the purposes of this provision. The issue that needs to be examined in each case is whether the circumstances of the case, considered as a whole, conferred on the applicant title to a substantive interest protected by Article 1 of Protocol No. 1 (see *Anheuser-Busch Inc. v. Portugal* [GC], no. 73049/01, § 63, ECHR 2007-I).

41. Article 1 of Protocol No. 1 applies only to a person's existing possessions. Thus, future income cannot be considered to constitute "possessions" unless it has already been earned or is definitely payable. Further, the hope that a long-extinguished property right may be revived cannot be regarded as a "possession"; nor can a conditional claim which has lapsed as a result of a failure to fulfil the condition (ibid., § 64).

42. However, in certain circumstances, a "legitimate expectation" of obtaining an "asset" may also enjoy the protection of Article 1 of Protocol No. 1. Thus, where a proprietary interest is in the nature of a claim, the person in whom it is vested may be regarded as having a "legitimate expectation" if there is a sufficient basis for the interest in national law, for example where there is settled case-law of the domestic courts confirming its existence. However, no legitimate expectation can be said to arise where there is a dispute as to the correct interpretation and application of domestic law and the applicant's submissions are subsequently rejected by the national courts (ibid., § 65, with further references).

43. In certain circumstances, the retrospective application of legislation whose effect is to deprive someone of a pre-existing "asset" that was part of his or her "possessions" may constitute interference that is liable to upset the fair balance that has to be maintained between the demands of the general interest on the one hand and the protection of the right to peaceful enjoyment of possessions on the other (ibid., § 82).

3. Application of the above principles to the present case

44. The Court notes, at the outset, that the new legal framework included specific safeguards preventing the reimbursement of subsidies paid before July 2013, even if the reasonable return had been exceeded by that date (see paragraph 23 above). Accordingly, facilities which had already achieved a reasonable return would not receive any further subsidies, but nor would they be asked to reimburse those received in excess of what had been considered reasonable under the new rules (see paragraphs 11 and 23 above). The applicant company has not advanced any evidence to show that those safeguards were not applied in practice in its case or that it was actually asked to reimburse any sums previously received. On the other hand, the information submitted by the Government shows that the calculation of the applicant's return on investment from 2013 was equal to zero for some years, but was never a negative figure (see paragraph 15 above). Since there is no evidence of any direct or indirect reimbursement of the sums already received, the Court is satisfied that the new regulations did not entail a retrospective deprivation of the possessions acquired by the applicant company prior to the change in the remuneration system.

45. The applicant company argued that the calculation method introduced by the new regulation, by taking into account past subsidies to reduce future benefits, had effectively offset all sums previously received in excess of the reasonable return, as calculated in accordance with newly established criteria.

46. The Court observes in this regard that the previous rules governing the electricity system in Spain did not set a specific amount to be received as a return on investment. On the contrary, the subsidy system was based on the concept of a reasonable return on investment (see paragraph 21 above). It further observes that, according to the Supreme Court's case-law, the reasonable return on investment could be adjusted in view of financial or technical factors and that the right to a reasonable return on an investment in renewable-electricity facilities did not imply a right to obtain the same remuneration throughout a facility's useful life (see paragraphs 24-28 above). Thus, in the Court's view, it cannot be said that the domestic courts created "a legitimate expectation" that the reasonable return or the remuneration for the investment would remain unchanged for the duration of the useful life of the facility were it not for the changes in the regulatory framework of 2013 (see, by contrast, *Smokovitis and Others v. Greece*, no. 46356/99, § 32, 11 April 2002). Indeed, the applicant company accepted that the Government had the power to change future subsidies.

47. It is undisputed that the calculation method took into account previously received sums to set future subsidies. In the applicant company's case, however, this simply meant that it temporarily stopped receiving a return on investment. As previously stated, according to the information provided by the Government, the return on investment granted to the applicant company was reduced to zero in the three years following the

approval of the new regulations, as it was considered that the applicant company had already achieved a reasonable return (see paragraph 15 above). While the applicant company disagreed with the figures submitted by the Government concerning the return achieved, there is no information in the case file on any action taken by the applicant company to challenge the calculation of this figure before the domestic authorities (see paragraph 14 above). Indeed, the applicant company has not provided any evidence to challenge the documentation submitted by the Government. In particular, it has not submitted to the Court any documentation concerning its income and expenses during the relevant period; its allegations are based solely on an expert report.

48. The Court thus considers that, while the new regulations may have impacted the applicant company's revenues by reducing the reasonable return and the sums to be received as a return on investment, they only affected subsidies to be received after the relevant provisions had entered into force; that is, subsidies which are to be considered future income. Furthermore, since the domestic law and case-law did not grant a right to a fixed and unchangeable amount to be paid as a reasonable return or as a return on investment (see paragraph 46 above), the Court finds that the subsidies to be received as of the entry into force of the new regulations did not have a sufficient basis in the national law to qualify as "possessions" within the meaning of Article 1 of Protocol No. 1 to the Convention and that the guarantees of that provision therefore do not apply (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 151, 20 March 2018).

49. Accordingly, the application is incompatible *ratione materiae* with the provisions of the Convention within the meaning of Article 35 § 3 (a) and must be rejected in accordance with Article 35 § 4.

For these reasons, the Court, unanimously,

Declares the application inadmissible.

Done in English and notified in writing on 18 April 2024.

Martina Keller Deputy Registrar	Georges Ravarani President