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Response to the recommendation

Dear Mr. Legal Chancellor,

In the letter of 12.04.2011 regarding the engagement of the people not included in the administrative process in the proceedings of the preparation of the CA's methodology "Recommendations for calculating the price for water service", you issued a recommendation to the CA and asked to respond by 09.05.2011 at the latest, whether and how your recommendation is intended to be followed. To a large extent, your opinions coincide with the positions of the CA, incl. the following matters:

1. The methodology constitute an administrative rule that is aimed at a true and fair implementation of the PWSSA;
2. An administrative act is an internal act of the administrative process and cannot be equalised with an administrative act, as it does not have an immediate impact on a person. Immediate impact on the person is imposed by an administrative act, in the issuing of which law has been applied proceeding from the administrative rules. Therefore the Administrative Procedure Act does not apply to the proceeding of preparing an administrative rule;
3. The person enforcing the methodology shall decide upon the content of the methodology;
4. The opinion whether good engagement practices have been violated towards AS Tallinna Vesi with regard to the part named in the recommendation, does not in any manner influence the legality of the methodology as an administrative rule;
5. The number of comments received to the draft methodology was high (over 200) and the time provided for giving feedback was limited, but it does not mean that the engagement would have been seeming.

You have detected that the CA has violated the good engagement practice towards AS Tallinna Vesi with regard to the part in which in the notice of engagement you have marked a misleading purpose of the engagement for the people not included in the

administrative process. With regard to that you recommend the CA in the future when engaging people not included in the administrative process to mark clearly in the notices addressed to the parties engaged for which purposes the engagement is organised and what is the role of the parties engaged.

This recommendation concerns the compliance of the engagement notice published on the CA's webpage with the good engagement practices. More specifically, you find that the contents of the engagement notice given by the CA were generally understandable, concise and included all necessary information. The engagement notice can only partly be deemed as compliant with the good engagement practices because the engagement purpose presented therein does not correspond to the actual purpose of engagement. *./.../ Namely, when looking at the notice of engagement, then this says that the methodology is open for discussion and proposals and comments may be submitted for the methodology. From the notice of engagement it does not appear that the people not included in the administrative process were engaged for informative purposes. Rather the expression "open for discussion" indicates that on the basis of the proposals and comments submitted it is still possible to change the methodology content-wise. ./.../*

With regard to the other aspects you have deemed the CA's activities in the context of the subjects of the application and based on the legal framework compliant with the due process.

Considering the following of equal treatment principles you conclude that: *a) everyone was asked to render their opinion, b) only a limited number of people were separately informed about the possibility to render opinion, mainly to the representatives of larger water companies and public authority and partially also to the smaller; c) only the addressees of the email sent on 07.09.2010 were invited to the public discussion of the methodology, i.e. the representatives of larger water companies and public authority. ./.../* In those circumstances you note that to those whom the CA informed about the engagement being organised only through website, had only a seeming possibility to make themselves heard. However, as the CA notified ASTV via e-mail about the organisation of engagement, you find that towards ASTV the good engagement practices were not violated. You also note that *even though EVEL represents several water companies, then when comparing the number of water companies represented by EVEL with the actual number of water companies, then EVEL cannot be considered as the representation organisation for water companies, whose engagement alone would be sufficient.*

By assessing the actual possibilities that the parties engaged had been provided for making themselves heard, you find that the CA provide sufficient time for the parties engaged to express their opinion and for itself to make the final decision. You also find that the engagement was real. *./.../ This mainly for a reason that proceeding from the Public Water Supply and Sewerage Act and the recognised principles of price regulation the circle of issues could be clearly limited. Additionally it must be taken into account that a) the parties engaged were aware of the amendments to the Public Water Supply and Sewerage Act to be enforced on 01.11.2011; b) content-wise the price regulation did not change,¹ in certain cases only the regulator changed; c) the parties engaged had to be aware already previously which in principle are your starting-points in regulating the prices of universal services,² incl. which is*

¹ Both before 01.11.2011 as well as after that date the price of water service needed to be cost-based and the price could include only justified profitability.

² See e.g. Competition Authority. Methodology and instructions for approving maximum fees chargeable, available on web: <http://www.konkurenciamet.ee/?id=18306>.

your potential approach in regulating the price of water service³, etc. Therefore you found that a) the draft methodology prepared by you could not have received very many questions different on the principles or on the merits and b) taking as an assumption the fact that the engaged parties behave in good faith and are constructive when submitting their opinion regarding the methodology, it could not have been foreseeable for you that the parties engaged would submit that many questions, comments, remarks and other arguments.

When assessing the provision of feedback to the parties engaged, you state that as ASTV was aware of the provision of feedback, the good engagement practices were not violated towards ASTV. /.../ You have deemed the manner of feedback chosen by the CA, also amending the deadline for written feedback compliant with the good engagement practices.

In response we thank you for the recommendation. We take note of the recommendation and try to follow it when introducing guidelines (methodologies) prepared by the CA whilst fulfilling its duties as a regulator to the market participants (or also to the public). We agree that if the draft document is publicly displayed for opinions, remarks, objections or other comments before its approval, it is required to involve an explanation about the purpose of making the project public and the role of people not included in the administrative process in the course of the development of the document. Otherwise the persons may get a wrong impression of the engagement. It is not allowed to create an understanding as if anyone, including the persons subordinated to the regulation, would have the right to influence the process of an independent price regulation or the development of the administrative rules preparing the price regulation. The purpose of engagement cannot be to delegate the fulfilment of regulator's duties to the third persons, but still first of all to ensure as clear and explicit understanding as possible of the regulatory principles to be applied. The received feedback creates a precondition that the CA would already, before applying the regulation, be aware of: a) how the undertakings understand the principles stemming from the law, b) whether the methodology is clear and understandable, c) what kind of disputes can proceeding from the methodology in applying the law bring along.

We also agree that in order to prevent seeming engagement, the circle of the engaged parties should be limited each time. When making the draft methodologies public on the CA's webpage in the future, we wil clearly specify from whom and for what purpose the comments are expected.

Yours sincerely,

/Digitally signed/

Märt Ots
Director General

³ See Competition Authority. Analysis and opinion regarding the price formation of AS Tallinna Vesi. Tallinn, 2009, available on web: http://www.konkurentsiamet.ee/public/Tln_Vesi_30_11_2009_loplik.pdf.