Legal Chancellor's Office
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Confidential

Application submitted by: **AS Tallinna Vesi**
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15.11.2010 No

APPLICATION

For initiating a constitutional review proceeding of the decree No 95 adopted by the Minister of Economic Affairs and Communications on 02.11.2010 and enforced on 08.11.2010 "Procedure and terms and conditions for establishing a temporary price for the water services" and for checking the compliance with the principle of ensuring fundamental rights and freedoms and due process at the preparation and approval of the instruction "Recommendations for calculating the price for water service" by the Competition Authority

I am addressing you with a request for initiating a constitutional review proceeding insofar as the decree No 95 adopted by the Minister of Economic Affairs and Communications on 02.11.2010 (published on 05.11.2010) and enforced on 08.11.2010 "Terms and conditions for establishing a price for water service and the procedure thereof" (hereinafter the Decree) and the instruction "Recommendations for calculating the price for water service" by the Competition Authority published on their website on 12.11.2010 (hereinafter the Instruction or Methodology) are not in compliance with the due process resulting from § 13 (2) and (14) of the Constitution and the Administrative Proceeding Act for the following purposes:

1) The Decree that is extremely intensively infringing the freedom of enterprise of the norm addressees, i.e. the water undertakings, has been brought into force within an extremely short term. Thus the water undertakings have not been able to adjust their activities to the new circumstances.

2) The situation in which the Decree has been approved by involving the parties concerned only formally is not in compliance with the due process resulting from § 13 (2) and (14) of the Constitution. Concerned parties were asked for the opinions within an extremely short term, which is why the majority of the proposals were not even analysed before adopting the Decree, not to mention taking these into account. As such the discretionary power has been exercised only fictitiously when adopting the Decree.

3) The activity of the Competition Authority in preparing and approving the Methodology is not in compliance with the due process as the parties concerned have been involved only formally and their proposals have basically been ignored.

1. CIRCUMSTANCES AND THE PROCEEDING PROCESS

1.1. Methodology

1. On the basis of § 14 (9) of the Public Water Supply and Sewerage Act (hereinafter the PWSSA) (in the wording to enter into force on 01.11.2010) the recommendations for the calculation of the price for water service are prepared by the Competition Authority (CA). On 7 September 2010 the CA

sent a methodology named "Recommendations for calculating prices for water services" to the largest water companies, Estonian Water Companies' Association (EVEL), Tallinn City Government, the Cities' Union, AS Tallinna Vesi etc for a examining and for making proposals.

2. The term for making the proposals was 27.09.2010. Despite the extremely short term (14 working days) for performing an economic analysis of the regulation and for assessing the impacts thereof and for commenting, as many of the comments as possible regarding the still open issues as well as amendment proposals in cooperation with international experts were submitted on time. EVEL in cooperation with KMPG Baltics Sia submitted its amendment proposals on more than 23 pages, the amendment proposals by AS Tallinna Vesi (ASTV) were on eight pages. Amendment proposals were also submitted by the City of Tallinn with internationally recognised economic consultants from Oxera.

3. On 4 October 2010, i.e. only 5 working days after receiving the proposals, a discussion regarding the methodology for price formation (methodology) took place for the water undertakings by the Ministry of Economic Affairs and Communications and the Competition Authority. As the most important and high-volume proposals were received only on 27.09.2010, then within this period of 27.09.2010-03.10.2010, i.e. within a week, the CA did not manage to constructively analyse the received proposals and to integrate these to the Methodology, which was also clearly expressed orally.

4. At the discussion Mrs Klarika Siegel-Lorvi from the CA admitted that "*comments were received from 10 various authorities and companies, it is a third day when someone is only typing in the questions and proposals, there are thousands of them, responses to all of these will most probably be provided only in spring.*[1]"

5. From the received proposals the CA chose approximately 20 proposals for discussion. The Secretary General of the CA, Märt Ots, commented that: „*As there are ca 150 questions, then on 04.10.2010 we shall treat only the most important ones, otherwise we shall collect all to a table, who submitted, what proposal and we shall respond to all whether the CA took the proposal into account partially or fully. Then we shall publish it for all for examining*.[2]"

6. To the questions raised by the representative of ASTV: „*Will the table be published first, then there will be discussion and only then the methodology will be applied or will the methodology be applied and on the same day the table with the comments shall be distributed to everyone?*" Märt Ots responded that „*Undoubtedly the first is reasonable, however, don't know whether will make it, the methodology is recommendatory. Most probably the methodology will be announced on 01.11.2010 and in an amended form as per the important issues discussed today.*[3]"

7. In order to be professional and ensure that both parties had a clear and common understanding of the comments and proposals discussed and respective outcome of such discussions, ASTV's representatives took detailed minutes of this meeting (Annex 1). The key points of these minutes were sent to the CA on 13.10.2010 via email from Mrs Lahe to Mrs Siegel-Lorvi[4]. To date, however, the CA has not responded to these minuted key points, neither to confirm, deny nor amend them. Such behaviour will not enable both parties to have a clear and unambiguous understanding of the process.

8. On 21.10.2010, i.e. 13 working days after the discussion the CA sent to EVEL (not to any of the water undertakings directly) the revised version of the draft recommendatory methodology for establishing price for water service, asking for the comments at the latest by **26**.10.2010. Thus this time 4 working days was provided for responding. After the respective verbal request on 22.10.2010 the next version of the draft methodology was sent to ASTV on 25.10.2010. The time for responding was the same, i.e. 27.10.2010, which is only 2 working days from that moment on.

[1] Annex 1 Detailed minutes of the 04.10.2010 public discussion compiled by the representatives of AS Tallinna Vesi.
[2] The same
[3] The same
[4] Annex 2.

9. The amendments made in the second version of the recommendatory Methodology were mainly cosmetic. The second version of the methodology, virtually unaltered has been published on the CA's website on 12.11.2010 and it must be noted that, basically, neither the proposals of EVEL nor these of the water undertakings have been taken into account. For example, of the 45 proposals by EVEL only 5 had been taken into account. The table with all comments and the positions of the CA (whether taken into account, not taken into account and why) have not been sent to any of the concerned parties that made the amendment proposals.

10. Both EVEL[5] on 26.10.2010 as well as ASTV[6] on 27.10.2010 sent a letter to the CA, in which it was requested to discuss the amendment proposals made by EVEL, ASTV and the international experts involved by the aforementioned in the development of the Methodology.

1.2. Decree

11. On 22.10.2010 the Ministry of Economic Affairs and Communications (MoEC) published in e-õigus the draft decree "Procedure and terms and conditions for establishing a temporary price for the water services".[7] The term for responding was 29.10.2010, i.e. 5 working days. The draft decree has not been sent neither EVEL nor water undertakings for approval, despite the fact that the representative authority of the water economy is definitely a person interested, who should be consulted in establishing a regulation. The Instruction for establishing a temporary price for water service, in Annex 1 to the Decree, is in a large part identical to the second version of the recommendatory methodology sent for by the CA on 21.10.2010.

12. It was planned that the regulation enters into force on Monday on 1.11.2010, at the same time when the term for submitting comments was set to Friday 29.10.2010 (no working days). Thus it is apparent that involving the market participants in making discretionary decisions of the nature of legislative drafting took place only fictitiously.

13. In spite of the short deadline, with its 28.10.2010 letter AS Tallinna Vesi submitted a series of proposals to the MEC regarding suggested amendments to the Decree.[8] The ministry only took into account one proposal – to make it an obligation, nor a right for the CA to publish the temporary prices decision with reasoning (§ 6 sec 6). All other proposals made by the company have been discarded while the reasons for this have not been disclosed and the letter remains unanswered.

14. The Minister of Economic Affairs and Communications signed the Decree on 02.11.2010, the Decree was published on 05.11.2010 and it entered into force on 08.11.2010. **There were no working day between the publication and the taking effect of the Decree.** Compared to the draft version published on e-õigus, the Decree contains significant changes, of which the water company has not been notified.

2. DECREE IS NOT IN COMPLIANCE WITH THE CONSTITUTIONS AND LAWS

2.1. The Decree is intensively infringing the freedom of enterprise of the water undertakings

15. This application for initiating a constitutional review proceeding is based on a formal contradiction with the laws and the Constitution. Taking into account the extremely short term of the decree entering into force, it was not possible to assess the material compliance of the Decree with the laws and the Constitution. Firstly I will analyse, which fundamental rights and how are impacted by

[5] Annex 3
[6] Annex 4
[7] http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_W=305870 (28.10.2010)
[8] Annex 5

entering into force the procedure for establishing a temporary price for water service within such a short time period. In case of this analysis the approval of the recommendatory methodology of calculating the price for water service conducted by the CA and the preparation of the Decree of the Minister of Economic Affairs and Communications are treated as a common process. This for the reason that instruction in Annex 1 to the Decree is almost identical to the second version of the recommendatory methodology sent by the CA on 21.10.2010.

16. Despite that I consider it extremely important to check also whether in the preparation and approval of the Methodology the due process has been followed by the CA. Otherwise it is not possible to effectively protect the fundamental rights of ASTV. As the recommendatory Methodology prepared by the CA cannot be checked within the constitutional review proceeding, then a situation may emerge when the instruction intensively infringes the fundamental rights of ASTV.

17. Pursuant to the provisions of § 31 of the Constitution the Estonia citizens have the right to engage in enterprise and to form commercial undertakings and union. The Supreme Court has found that a law can stipulate the terms and conditions and the procedure for exercising this right. "1st part of the 1st sentence of § 31 of the Constitution „*Estonian citizens have the right to engage in enterprise.*" sets out the freedom of enterprise, which on the basis of § 9 (2) of the Constitution also expands to legal persons.[9]

18. **The material scope of protection of the freedom of establishment** includes all fields of area and professions, in case of which a person provides goods and services on behalf of himself/herself.[10] The economic nature of enterprise includes also the expectation of receiving revenue. **Therefore, a person's property expectations may be considered the scope of what the freedom of establishment protects**.[11]

19. When interpreting the freedom of enterprise, an important criterion is also the independence of the entrepreneur in organising its economic activities. Freedom of enterprise is the right of the entrepreneur to decide what and to whom, how and for which price to produce. **The scope of the protection of freedom of rights of the freedom of establishment has been breached**, in case public authority impacts that freedom unfavourably.

20. The Decree, based on which temporary prices for water service are established for the water undertaking, infringes the most directly the freedom of enterprise of the water undertakings. On the basis of § 16 (9) of the PWSSA the CA may establish a temporary price for water service to a water undertaking referred to in § 14^2 (1) of this Act in case the water undertaking provides water service for a price that is not in compliance with the terms and conditions stipulated in § 14 (2) of this Act and has not complied with the prescription of the CA. The price established by the CA shall be valid until the water undertaking approves a new price for water service with the CA.

21. On the basis of § 16 (10) of the PWSSA the Minister of Economic Affairs and Communications shall establish the terms and conditions for establishing a temporary price for water service and the procedure thereof. The aim of the Decree of the Minister of Economic Affairs and Communications is to establish the bases from which the CA must proceed when it decides to exercise the right provided thereto by the PWSSA of establishing a temporary price for water service to the water undertaking.

22. Thus to the norm addressees of § 16 (9) of the PWSSA or these who are obliged to approve the price for water service with the CA, however, whose proposed price for water service the CA

[9] RKPJKo 12.06.2002, nr 3-4-1-6-02, p 9.

[10] RPKJKo 28.04.2000, nr 3-4-1-6-00, p 10.

[11] RKPJKo 06.03.2002, nr 3-4-1-1-02, p 12

considers to be not in compliance with § 14 (2) and who have not complied with the prescription of the CA, compulsory principles for calculating the price for water service have been established with the Decree of the Minister.

23. The abovementioned conclusion is also confirmed by the explanatory note to the Decree[12]: *„When establishing the temporary price for water services it must be clear in which part and with which differences the general methodological bases of establishing the price of water services are applicable when establishing the temporary price for water services. Therefore, the conditions of establishing the price should be specified on the level of a methodology. As per the legal provision giving rise to this right and, considering the general provisions of establishing prices, the methodological bases of establishing the temporary price for water services shall be stipulated in the guidance material, which has been formulated as an Appendix to this Decree. The guidance material has an equal legal standing with the Decree and is mandatory to all addressees of the legal norms when establishing a temporary price for water services.*"

24. Thus the instruction annexed to the Decree has compulsory effect to all water undertakings referred to in § 14² (1) of the PWSSA, to whom the CA may establish a temporary price for water service on the basis of § 16 (9) of the PWSSA. The measures of the public authority, with which the price for the service provided by the entrepreneur is formed, extremely intensively infringe the freedom of enterprise.

25. Also the explanatory note to the Decree admits that establishing the Decree will have an intensive impact of the fundamental rights of the water undertaking: *„Establishing a temporary price brings about an intensive limitation of the freedom of establishment of the water undertaking. A temporary price is establishing without a tariff application by the water undertaking and based on the reasonable costs of the economic year preceding to CA's prescription (so-called accounting period) According to the law, the temporary water price may not, therefore, always cover all actual costs of the water undertaking, although they might be considered reasonable at the time of establishing the price, but they were not included in the costs of the accounting period and are, therefore, not considered as reasonable costs of the accounting period. Therefore, in accordance with the law, the temporary water service price may cause damages to the water undertaking.*" Thus, the Decree admits the possibility that the established prices may not reflect the actual economic situation of the entrepreneur during the time of establishing the prices.

26. The legislator cannot obligate the entrepreneur to deal with enterprise without receiving fair revenue from this. Otherwise the private entrepreneur would be forced to basically perform obligations in public law from the expense of its own funds, in which case it is *de facto* taxation (PS § 113).

27. Taking into account the abovementioned, I find that establishing the Decree with such a short notice term infringes the freedom of enterprise stipulated in § 31 of the Constitution in co-effect with the principle of legal certainty stipulated in § 10 and 13 of the Constitution.

28. Insofar as the above-described infringement of freedom of enterprise constitutes in a short term of entering into force, then in the following I shall cover whether the above-described infringement is in compliance with the laws and whether the Minister left sufficient time between publishing the Decree and entering it into force.

2.2. Insufficient time is left for the enforcement of the Decree

29. The principle of legal certainty resulting from § 10 of the Constitution protects that the regulations impacting entrepreneurship would not change "overnight" in the Republic of Estonia. This principle in general creates stability and order in society and protects the trust relationship between an individual and the state. The Supreme Court has said that: "*The principle of legal certainty means*

[12] http://eoigus.just.ee/?act=6&subact=1&OTSIDOC_W=305870

among other things also that a reasonable time must be foreseen for the enforcement of new regulations, during which the norm addressees could examine the new norms and to respectively reorganise their activities. Legal certainty corresponds to a situation where the state does not establish new regulations arbitrarily and so-called overnight. The same principle can be derived also from § 13 (2) of the Constitution, pursuant to which the law protects anyone from the arbitrary exercise of state authority, and from the general principles of justice.[13]"

30. In order to ensure the principle of legal certainty the terms and conditions have been established for enforcing the decree in the Administrative Proceedings Act (hereinafter the APA). Pursuant to § 89 (1) of the APA the decree is lawful in case it is in compliance with the valid law, complies with formalities and if it has been adopted pursuant to the procedure foreseen in the law on the basis of the provision delegating authority by an administrative authority referred to in the provision delegating authority.

31. Pursuant to § 93 (2) of the APA the Decree shall enter into force on the third day after publishing as per the valid procedure, unless a later date has been stipulated either in the law or in the Decree itself. If provided in the law, the Decree will enter into force earlier than what is provided in this section.

32. Decree No 279 of the Government of the Republic on 28. September 1999 sets out the guidelines of the normative technique of legislative acts.[14] On the basis of § 19 (3) „Enforcement norm of the law "of the guidelines of the normative technique, which pursuant to § 39 of the Rules is also adoptable to decrees, sets out that „*When setting the enforcement norm it must be taken into account that sufficient time must be provided for getting to know the amendments to the legal rights and obligations and for organisational and administrative preparations and sufficient money for implementing the law or the possibility of raising that money during the next budget year or the next budget years.*"

33. § 50 of the Rules „Enforcement norm of the decree" obligates to take into account in the enforcement norm in addition to the circumstances set out in § 19 (3) of the Rules also the term of 7 days foreseen in § 9 (6) of the «Riigi Teataja seaduse» required for publishing the decree.

34. Thus the APA foresees a minimal time for enforcing the decree, i.e. three days, which may be shorter only in case the law provides it *expressis verbis*. PWSSA does not include a provision that would enable to enforce the Decree earlier than 3 days as of the publishing thereof. This, however, does not mean that the 3-day term for enforcing the decree is always sufficient.

35. Supreme Court has emphasised that: „*When creating a new legal situation the legislator must ensure that the addressee of the law had a reasonable amount, i.e. sufficient time for reorganising its activities. Sufficiency or reasonableness can be assessed, by taking into account the nature of the legal relationship in question, the extent of changing the legal relationship and the resulting need for reorganising in the activities of the norm addressees, also by assessing whether the change in the legal environment could be foreseen or unexpected.*"[15]

36. According to the Supreme Court thus the duration of *vacatio legis* depends on how intense the change is for people. The more impact the amendment has, the longer should be *vacatio legis*. In addition, when assessing whether *vacatio legis* is constitutional, circumstances that justify the quick establishment of the legal regulation must be taken into account. In other words, on one hand the circumstances that conditioned the need for quick reorganising must be considered, and on the other hand the impact of the changes to people and their justified interest for sufficient time for adopting to the changes.

[13] RKPJKo 02.12.2004, nr 3-4-1-20-04, p 26.
[14] (RT I 1999, 73, 695
[15] RKPJKo 02.12.2004, nr 3-4-1-20-04, p 26.

37. The changes accompanying the enforcement of the decree bring about significant changes to the water undertakings. The Decree and the Methodology, which has already been incorporated into the Decree before the Methodology was even published enable the publiv authorities to establish a price for the water services, which would mean the water company would be providing services at a loss. Anything similar is absent from the Estonian legal system, and this is regulating an economic sector that has not been regulated before. In order to comply with the Decree so that its preconditions (and temporary prices as a punitive measure) would not apply, water companies will have to make a number of changes to how they undertake their business. For example:

a. Recording of accounting data for regulatory purposes as well as financial accounting purposes;

b. Modification of systems and process to implement the above change;

c. Understanding controllable and uncontrollable costs in detail and modifying their business strategies accordingly. For example, analysis and possibly discussion with the CA on how the CA will set target costs for costs such as electricity, and whether a company can make fixed price contracts or purchase from the pool, depending whether all costs will be passed to the tariff or not, or if a target will be set and the company will have to take all risk for achieving the cost. If the latter, then this will directly impact the company's purchasing strategy.

d. Analysis and possibly discussions with the CA on costs – e.g. if a company incurs more or less of costs in one year, or generates more or less revenues than planned, whether the company will be able to keep those gains or losses or would these be given back to the customers through next year's tariffs. Again, each company will need to understand how these risks will be dealt with in order to implement an effective business strategy.

38. Whilst these topics are not part of the Decree or the Methodology they are all issues that companies need to plan for to ensure they comply with the PWSSA and the Decree whilst not putting their businesses at greater risk. Establishing a temporary price for water service on the basis of the Decree enables the public authority to establish a price for water service that is not profitable for the entrepreneur. There was no similar regulation in the Estonian legal system previously, because no economic field has been regulated like this before.

39. The stranger the enforcement of the Decree in such a manner that no working days remain between its publication and enforcement. Such a short period does not enable the water companies to acclimatise themselves with the new legal framework. The Legal Chancellor has considered the extremely quick enforcement of amendments to the VAT Act to be contrary to the Constitution. I think that the enforcement of the Decree does not differ significantly from the enforcement of the VAT Act.

40. There is no pressing need for a quick enforcement of the Decree. From the behaviour of the representatives of public authority it may be concluded that the quick enforcement of the decree is conditioned by § 16 (9) and (10) of the PWSSA that was adopted on 03.08.2010 and to enter into force on 01.11.2010, which obligates the Minister of Economic Affairs and Communications to establish the principles of calculating the temporary price for water service.

41. I would like to stress that the Administrative Procedure Act (APA) § 93(2) together with PWSSA amended § 16(9) and (10) that take effect on 01.11.2010, do not require for the Decree to be effected by or on 01.11.2010. Although, generally, the implementation acts are enforced at the same time as the law that requires them to be established, then this is only the case where implementing acts have been carefully prepared, interested persons involved and sufficient time has been left for the act

to take effect. A conclusion to the contrary means that the Decree must be effected without regard to its quality and whether due process was used when establishing it or not.

42. The above is supported by the guidelines of normative technique of legislative acts § 50(3) of which specifies that „If it is not possible to effect a decree at the same time as effecting the law that enables the decrees existence, then a later date for enforcement of the decree may be foreseen." Considering how quickly and shallow the preparatory and approvals process has been conducted, it is obvious that it is not possible to enact the Decree at the same time as the law takes effect.

43. To assess, whether the implementing act should be effected invariably at the same time as the law, it is important to distinguish, whether the decree in question benefits or encumbers the addressees of the norm, i.e. water companies. The aim of the Decree is to create pre-conditions to enable establishing a temporary price, which qualifies as a limitation of the freedom of establishment of an extreme intensity. Considering that the pre-condition of establishing a temporary price is going through with the procedures foreseen in PWSSA § 16(9)[16], then it is clear that the methodology for establishing a temporary price does not have to take effect on 01.11.2010 or 02.11.2010. A contrary approach would confirm that the ultimate aim behind effecting the Decree so quickly is to start establishing temporary water prices already from 01.11.2010.

44. I admit that the term provided by the legislator for enforcing the implementing provision could have been insufficient. At the same time from the perspective of the water undertaking it is not important whether the fault lies with the MoEC and CA, who did not manage to prepare the implementing provision in the time between adoption of the law and the enforcement thereof, or with the legislator, who provided insufficient time for enforcing the implementing provisions. In any case, it is inadmissible in a state based on the rule of law to make the entrepreneur to carry the risks related to adopting a "immature" Decree.

45. When enforcing an immature Decree it is not possible to establish a transparent regulation that could be implemented continuously, similarly and commonly in the following years, thereby providing certainty to both customers, water companies, local governments as well as to creditors and investors financing the companies.

46. In this dispute the representatives of the public authority seem to see the consumer as the interested person, whose alleged interest is to receive water service at as low price as possible. At the same time the interest to a sustainable and high-quality availability of the water service is forgotten. As noted in the explanatory letter to the Decree, the establishment of the temporary price for water service may bring about a loss to the undertaking. Thus, in turn, may bring about the termination of the activities of the water undertaking, reducing investments in increasing the quality of water service or a rapid reduction in the quality of water. As such the risk to the sustainable and high-quality availability of the water service has not been considered sufficiently.

47. The Decree sets out a new and extensive regulation in Estonian legal system, and there is clearly little time for performing the economic analysis and assessing the impacts thereof both for the CA as well as for the water undertakings. For a procedure significantly changing the regulation of the entire sector, all in all less than one month of working days was left for the consultations. Thus efficient consultations have not taken place. It is a fact that the already collected positions have not even been systemised, not to mention taking these into account. This in turn may bring about a situation where the party implementing the norm and the addressee of the norm do not unambiguously understand the method of establishing a temporary price for the water service. The ambiguity of the Decree impacts unfavourably also the legal protection opportunities of the entrepreneurs, as such having also a direct infringement to the fundamental right set out in § 15 (1) of the Constitution – the right to an efficient court protection.

[16] ÜVVKS § 16 lg 9: Konkurentsiamet võib kehtestada käesoleva seaduse § 14^2 lõikes 1 nimetatud vee-ettevõtjale ajutise veeteenuse hinna, kui vee-ettevõtja osutab veeteenust hinnaga, mis ei vasta käesoleva seaduse § 14 lõikes 2 sätestatud tingimustele ning on jätnud täitmata Konkurentsiameti ettekirjutuse.

48. When assessing the sufficiency of *vacatio legis* it is important also how long was the time when the norm addressees or the water undertakings got to know the draft decree and to supplement it with their proposals. The longer and more constructive the approvals process, the shorter the enforcement period can be.

49. Despite there being 6 working days between the publication of the Decree in e-õigus and proclamation by the minister, no discussions over proposed amendments occurred during this time. All of the proposals submitted by AS Tallinna Vesi were discarded and without a response. Moreover, the Decree was amended with changes that the water companies were not informed about. Thus in this context, when assessing the efficiency of *vacatio legis* it is also important whether the people concerned were also involved, whether sufficient time was provided for them for making the proposals and whether these proposals were also discussed. In other words, whether the due process of the legislative drafting was followed in the preparation of the Decree. Thus in the following I will analyse whether due process was followed in the preparation of the Decree.

2.3. Decree is adopted and enforced not in compliance with the due process

50. In a state based on the rule of law the state authority cannot behave at its own discretion, but the exercise of the official authority has been limited with individual rights of the people and the general principles of justice. Based on the prohibition on arbitrary exercise of state authority resulting from § 13 (2) of the Constitution, the state authority, incl. the minister, has an obligation to explain and justify its principal decisions. Otherwise it is not possible to assess whether the activity of the state authority is the violation of the prohibition resulting from § 13 (2) of the Constitution or arbitrary exercise towards a person or not.

51. The justification obligation of the state authority proceeds also from § 13 (2) of the Constitution in co-effect with the due process resulting from § 14 of the Constitution. Pursuant to the due process when forming legal provisions the objective to be applied will be considered, because the measures to be used must proceed from it. Pursuant to the due process the decision to be made in legislative drafting must be transparent and justified. Justification is even more important, the more important is the change. When assessing the importance of the decision, the following is decisive: how intense is the impact accompanying the change on the fundamental rights of the person and how much the legal environment changes.

52. The obligation of involving people concerned is among others also deriving from the justification obligation. Thereby the involvement cannot be only fictitious, but must actually take place. When the people concerned are not involved in the preparation of the draft decree nor their proposals are considered, the draft decree cannot be regarded as justified and transparent. Involvement, however, becomes illusionary when the people concerned are given a short term for making the proposals and if these proposals are not thoroughly considered.

53. The 28.09.1999 Decree nr 279 of the Government of Estonia "Guidelines on normative technique of legislative acts" § 31(1) and § 34 obligate legislators to stipulate the reasons and impact analysis of means of regulation chosen in the methodology when enacting legislative acts, i.e. rules that are implemented for an unspecified circle of persons, which means the same rules apply to the Methodology. Therefore, in Estonia, we have a general requirement applicable to legislative acts as well as administrative act, whereby the market regulation choices specified in the Methodology must be weighed and reasoned and the results of such weighing and reasoning must be reflected in the Methodology or in a publicly available document that the Methodology refers to.

54. The implementer of methods of market regulation, i.e. the Competition Authority as the drafter of the Methodology as well as the MEC minister as the issuer of the Decree must provide adequate reasons for proposed measures. In a recent judgment C-58/08 of 08.06.2010, the ECJ (general assembly) decided that in the sphere of regulation of the market and the consumer it is important to follow the principles of proportionality and purposefulness (sec 51). ECJ admitted that when

establishing a market regulation the member states have an extensive discretionary power. "However, […], the Community legislature must base its choice on objective criteria. Furthermore, in assessing the burdens associated with various possible measures, it must examine whether objectives pursued by the measure chosen are such as to justify even substantial negative economic consequences for certain operators" (sec 53). The ECJ admitted that „in the light of the broad discretion which the Community legislature has in the area at issue, which involves choices to be made of an economic nature, requiring complex assessments and evaluations, […]" (sec 68). This judgment obligates administrative authorities to assess the purposefulness and proportionality of the imposed measure when regulating the market as well as to assess whether the (short term) positive consequences of the measure (e.g. lower prices) outweigh the negative consequences (e.g. obligation to buy more expensive fuel, limitation of investment, the breach of the basic rights of a company).

55. According to ECJ judgment in case C-58/08 when choosing measures for regulating the market a discretionary decision needs to be taken, which means that the explanatory note to the Decree should weigh, analyse and explain the choice of methods of market regulation. According to APA § 4(2) the discretionary right should be exercise in accordance with the provision that enables such powers, along with the aim of the discretionary right and the general principles of law, taking into consideration material circumstances and weighing reasonable interests. The respective reasoning, i.e. discretionary analysis and the result of such weighing must be stipulated in the administrative act, i.e. in this case in the Methodology.

56. Higher reasoning requirements exist for administrative acts given on the basis of a discretionary right.[17] In the reasoning of the administrative act given on the basis of a discretionary right the administrative authority must stipulate discretionary analysis, based on what the administrative act has been issued.[18] The administrative authority is obliged to persuade the addressees, other participants in the procedure and the court regarding the correctness of the choices it has made based on the discretionary right.[19] **Such persuasion must happen in the administrative act, not in the court proceedings that follow issuing such an administrative act.**

57. In the Methodology and in the Decree the choices for regulating the market are not reasoned neither to the extent required by Estonian law nor by the extent required by the EU law. The CA submitted the recommendatory Methodology to the water undertakings for examining on 07.09.2010 and they gave 20 days for making the proposals. Insofar as the it is a new regulation in Estonian legal system, which presumes economic analysis, the mapping of various impacts, knowing the international methodology and practice, then it was inevitable to involve international experts. Although the water undertakings managed to submit their proposals on time, the 20-day-term may in the given circumstances be considered insufficient.

58. At the discussion organised by the CA on 04.10.2010, only an extremely small amount of the proposals by the water undertakings were discussed, as the CA could not even type in the majority of the proposals, not to mention to work through these. This was recognised even by the representatives of the CA (see clause 4, 5 and 6).

59. Despite the fact that the majority of the submitted proposals had not been considered by the CA, then on 21.10.2010 the next version of the Methodology was sent to EVEL for examining and on 25.10.2010 also to AS Tallinna Vesi. Compared to the initial version of the Methodology sent on 07.09.2010, the changes were cosmetic, not substantial. Hereby I once again refer to the response of Märt Ots (clause 6), in which the representative of the CA admitted that it would be reasonable to beforehand publish the table with the received proposals and responses, if and how the proposals are taken into account, and only then to establish the methodology. Yet the CA broke their promise at that, and continued with establishing the methodology irrespective of the fact that the result of the

[17] RKHaKo nr 3-3-1-62-02
[18] RKHaKo nr 3-3-1-66-03
[19] RKHaKo nr 3-3-1-77-04

consultations has not become clear yet. It is clear that when establishing the methodology as part of the Decree on 02.11.2010 and by publishing the final version of the Methodology on the CA's website on 12.11.2010 it is not possible to partially or fully take into account the proposals, the systemisation of which is planned to be completed in spring 2011. As such (with the extremely short terms) a fact is proven that the consultations with the market participants took place only fictitiously. Thereby there is no evident reason why in this case a dominant public interest within such turbo-proceeding would request a factual preclusion of the consultations from the proceeding.

60. Taking into account the abovementioned and the fact that to date none of the parties that have submitted their amendment proposals have been sent an overview of all the proposals received regarding the methodology with the counter-arguments by the CA thereto, it is a violation of the due process. The abovementioned confirms the doubt of the signatory that the recommendatory methodology for establishing the price for water service was sent to the most significant parties of the Estonian water sector for examining and for submitting their proposals only in order to imitate the involvement and the conduct of procedural approvals, not with an honest wish to collect additional knowledge that would help to consider the decisions of legislative drafting better and to justify its choices.

61. The approvals process of the Decree validates the doubt that the ministry is interested in the fast enforcement of the Decree at the expense of the quality of the Decree. The most tell-tale sigh is the fact that the Decree was publishe in e-law on 22.10.2010, the deadline for comments was 29.10.2010 and the Decree was planned to be enforced from 01.11.2010. The Decree was not sent to the key representatives of the water industry for neither information nor comments.

62. A view, whereby considering the involvement obligation fulfilled by publicising the Decree in e-law is deeply erroneous. Proceeding from the principles of the law-abiding sate, effective legal protection and good legislation any person who it may be foreseen that the legal act may limit his rights must be included into the legislative process. By implementing these constitutional principles it is safeguarded that the authority preparing the decree is informed of material circumstances and forced to weigh, in depth, the rights of those involved and raise the material quality of legal acts. When describing the good legislative custom, it is possible, to a certain extent to use an analogy with a good administrative custom. The Supreme Court has repeatedly stated regarding the meaning of a good administrative custom that the administrative authority must do all in its power to **efficiently** involve interested persons into the proceedings.[20]

63. An efficient involvement in the context of this present case can definitely not be limited to publication of the Decree in e-law. Earlier, e.g. EVEL has been directly sent requests for comments on the amendments to the Environmental charges act. The addressee of the norm does not have to search e-law daily for draft legal acts that pertain to him. An efficient involvement is the more topical the more intensely the rights of those involved are limited and the quicker the legal act in question is trying to be implemented.

64. The argument that the inclusion has been formal, not material is confirmed by the fact that the CA's methodology published on 12.11.2010 differs little from the second draft version, i.e. the proposals from all stakeholders were discarded.

65. The argument that the inclusion has been formal, not material is confirmed by the fact that the Decree had significant and principled changes compared to the draft published on e-õigus. These have not been notified to the water companies nor has their opinion been sought.

66. According to Decree § 3(3) the CA may issue a prescription to the water company together with a warning to establish temporary prices. The draft Decree § 3 (1) and (2) foresaw that the warning may be made only when the water company has not fulfilled the prescription.

[20] RKHaKo 3-3-1-16-08

67. Decree § 4(4) enables the CA to immediately refuse the the water company's proposal for consultation when „*this proposal is not reasoned or if, in the opinion of the CA the water company's reasons to commence consultations are not relevant*." According to draft Decree § 3(4) „*the CA had the right at any time to end the consultations if the water company fails to provide requested information or if the CA has reached a position regarding implementing or not implementing temporary prices.*"

68. Decree § 5(1) foresees that the procedure of implementing temporary prices will take place during 30-60 days. Draft Decree § 3(6) foresaw that the procedure could last 30-90 days.

69. According to Decree § 7(2) the temporary price must correspond to the conditions set out in PWSSA § 14(2). Draft Decree § 4(1) stipulated the components, which must be secured for the water company.

70. According to Decree § 5(3), prior to establishing a temporary price, the CA must consult with the local self-government whether the temporary price accords with the public water and sewers development plan. The draft Decree did not contain such regulation.

71. The previous examples confirm that the issuer of the Decree has behaved in an underhanded way, as it has established significant changes in the Decree, which were not there in the draft. It is important to note that we are not dealing with cosmetic, but with principled changes, which expand the deliberation right of the CA when establishing temporary prices and decrease the rights of the water company to effectively defend itself. The more expansive is the deliberation right granted to administrative authorities, the more extensive the obligation to provide reasons to that extent. The changes have not been discussed with the water companies and the reasons for them cannot be found in the explanatory note to the Decree.

72. With these changes a question arises whether they are in accordance with the scope of the legal norm that allows the Decree to be established, as well as regarding the aim of the deliberation right and the general principles of law, i.e. in other words with material constitutionality. Considering how little time has been envisaged to familiarise oneself with the Decree, and, considering the need to commence the proceedings for constitutional review, the present application centres on the formal constitutionality of the Decree.

73. The behaviour of the representatives of the public authority with regard to processing the draft leaves an impression that behind the quick enforcement was the wish to establish at any cost the methodology as of 1 November 2010 and to implement immediately the establishment of the temporary price. Such an activity, which does not take into account the amendment proposals by the water undertakings and the international experts (Oxera, KPMG) involved by the latter, is not reasonable for the purpose of the sustainability of the water economy nor also essential.

74. The formation process of the instruction for establishing temporary price for water annexed to the Decree, and its source document, the Methodology of the CA, is not transparent and it has not been justified why the amendment proposals by the representatives of the water business and the international experts have not been taken into account. The concerned parties, whose freedom of enterprise is intensively infringed, have been involved in the proceeding of the draft only formally.

75. The abovementioned shortcomings in preparing and approving the CA's Methodology are also as separate the violation of due process.

2.4. Procedural requests

76. In conducting the constitutional review proceeding, the fact that the decree was enforced on 08.11.2010 is not unimportant. Thus from the perspective of efficient rights of the applicant the constitutional review proceeding only has a meaning in case the decree was brought into compliance

with the Constitution as soon as possible. Otherwise the national options of the applicant for protecting its rights are exhausted.

77. Declaring the Decree invalid does not bring along any irreversible consequences to the customers, local governments, water undertakings or also to the investors. EVEL has made a proposal to the CA to initially take over the price regulation principles and models that have been used between the local governments and water undertakings so far and as of 1 November, when approving the prices, to proceed from the practice so far and to take time for establishing a regulation corresponding to the consumers' interests and supporting the development of water sector.

78. In order to explain our legal positions and if necessary also the content of the economic activity under discussion, then I am asking for an opportunity to meet with the Legal Chancellor or the Deputy-Adviser organising the proceeding of the respective matter. Enabling a meeting and hearing out my position in this matter may be of importance for getting a thorough and comprehensive picture of this matter.

Taking into account the abovementioned and following the § 15 and 17 of the Legal Chancellor Act, I hereby ask to make a proposal to the Minister of Economic Affairs and Communications for bringing the Decree No 05 adopted on 02.11.2010 "Procedure and terms and conditions for establishing a temporary price for water services" into compliance with the Constitution and the laws for the reasons pointed out in this application.

Following § 19 (1) of the Legal Chancellor, I hereby ask to check whether the CA followed the principle of ensuring fundamental rights and freedoms and due process when preparing and approving the "Recommendations for calculating the price for water service".

Sincerely

Ian John Alexander Plenderleith

CEO, AS Tallinna Vesi

Appendices:
1. Minutes of the 04.10.2010 public discussion compiled by the representatives of AS Tallinna Vesi
2. Key points of the 04.10.2010 public discussion compiled by the representatives of AS Tallinna Vesi
3. EVEL's 26.10.2010 letter to the CA
4. AS Tallinna Vesi's 27.10.2010 letter to the CA
5.AS Tallinna Vesi's 28.10.2010 letter to the MEC

Compiled by: Ilona Nurmela, Head of Compliance and Legal 62 62 246