



ÕIGUSKANTSLER

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Your ref 28.01.2011 No 9.1-1/10-0485-003

LC 12.04.2011 No 7-4/101872/1101856

Recommendation for complying with legality and due process
when engaging people not included in the administrative process

Dear Märt Ots

Thank you very much for the thorough explanations and purposeful responses provided to me with regard to the matter of engaging people not included in the administrative process of preparing the methodology "Recommendations for calculating the price for water service". Hereby I inform you that having analysed the subject of the application I find that

You have violated the good engagement practices 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.

Proceeding from the identified violation and the need for better compliance with the good engagement practices I recommend you 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.

I kindly ask you to respond to me at the latest by 09.05.2011 whether and how you are planning to follow my recommendation.

In the following I shall explain how I reached such position. For that I will first explain the circumstances and the proceeding process (I). Then, on the basis of thereof, I shall render my legal opinion (II).

I Circumstances and the proceeding process

1. On 03.08.2010 Riigikogu adopted the Law of Establishing Price Limits for Monopolies. The law was published in Riigi Teataja on 13.08.2010 and it entered into force on 01.11.2010. With this law, among other things, the legislator amended extensively the Public Water Supply and Sewerage Act (hereinafter the PWSSA). As such Riigikogu stipulated in the Law of Establishing Price Limits for Monopolies that the prices for the service of water supply and wastewater

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discharge shall be hereinafter established by the water companies themselves instead of the local government. Thereby when forming these prices, water companies are obliged to comply with the law. Public authority checks whether the prices for the service of water supply and wastewater discharge formed by the water companies are in compliance with the law, in the form of preliminary check when approving these service prices and in the form of follow-up check after the prices have been established. In connection with the described amendment to the law, the Law of Establishing Price Limits for Monopolies provided the enforcement of § 14 (9) of the PWSSA, pursuant to which the recommendatory principles for calculating the price of water service will be prepared and published on its website by the Competition Authority.

2. Pursuant to § 14 (9) of the PWSSA you prepared the draft methodology “Recommendations for calculating the price for water service” (hereinafter *methodology*) and published it on your website on 07.09.2010.¹ To that you added the following notice: “On the basis of §14 (9) of the Public Water Supply and Sewerage Act that takes effect on 1 November this year the Competition Authority has been given a task to prepare a methodology “Recommendations for calculating the price for water service”. Methodology is published for discussion on the website of the Competition Authority (<http://www.konkurentsiamet.ee>) from 07.09.2010 until 27.09.2010. One can send its opinion to an email address: klarika.siegel-lorvi@konkurentsiamet.ee. We kindly ask the person publishing its opinion to mark his/her first and last name, in case of legal person or administrative authorities the name of the legal person or administrative authority. In case of comments and proposals please mark the clause of the methodology to which the comment or proposal applies. In case the opinion to be submitted uses information that includes business secret, then we kindly ask to mark specifically which information included in a sentence you regard as business secret. Competition Authority does not treat information that is subject to publication or published information as business secret. Anonymous opinions and opinions submitted after the term of submitting opinions shall not be taken into account. Reasons for considering/ not taking into account the received comments shall be published on the website of the Competition Authority along with the final version of the methodology. Click [HERE](#) to see the methodology.” The draft methodology was available for everyone through your website until 27.09.2010.

On the day of publishing the draft methodology, i.e. on 07.09.2010, you sent the draft methodology for commenting to the Ministry of Environment, Ministry of Economic Affairs and Communications, Environmental Investment Centre, Association of Cities of Estonia, Associations of Municipalities of Estonia, and the City Governments of Tallinn, Tartu, Pärnu, Narva, AS Tallinna Vesi, AS Emajõe Veevärk, AS Pärnu Vesi, Narva Vesi AS and AS Tartu Veevärk. The email included a following notice: “With this email (see the attached file) we shall send you the abovementioned methodology for reviewing and making proposals. We shall be waiting for your proposals, thoughts about the methodology at the latest by 27.09.2010. /.../” With that email you informed the addressees of the letter that on 4 October 2010 you will be organising a public discussion in the Ministry of Environment regarding the thoughts and proposals submitted with regard to the draft project. You asked the addressees of the email to previously register to the meeting if they would like to participate in the meeting.

In addition to the email sent on 07.09.2010, on 09.09.2010 you sent a following notice by email to 58 water companies: “Hereby we inform you that a methodology “Recommendations for calculating the price for water service” has been published on the website of the Competition

¹ Notice “Competition Authority is waiting for opinions regarding the methodology „Recommendations for calculating the price for water service“, available on web: <http://www.konkurentsiamet.ee/?id=15468&highlight=veeteenuse,hinna>.

Authority for rendering opinions and commenting. These recommendatory principles have been developed pursuant to §14 (6) of the Public Water Supply and Sewerage Act.” The addressees of the latter email were water companies whose operating area included wastewater collection areas with a pollution load of more than 2000 population equivalent and whose email address you knew.

On 23.09.2010 the questions-comments by AS Tartu Vesi to the methodology were sent. On 27.09.2010 you received comments and questions about the methodology from AS Viimsi Vesi, Tallinn City Government, Estonian Waterworks Association (hereinafter EVEL), AS Tallinna Vesi, Foundation Environmental Investment Centre. Thereby Tallinn City Government, EVEL and AS Tallinna Vesi expressed in their letters that they see their role in developing as well as commenting the methodology.² Ministry of Environment sent its opinion regarding the methodology on 29.09.2010.

On 04.10.2010 you organised in cooperation with the Ministry of Environment a public discussion of the draft methodology. At the public discussion you treated 7-10 main topics on the basis of the questions and comments that you received and responded to the questions of the participants and at their request provided additional explanations of the draft project. At the public discussion you informed everyone that you will respond to the questions presented and problems raised about the methodology via your website 30 days after publishing the methodology.

On 07.10.2010 EVEL asked for an opportunity from you to meet for the purpose of discussing the methodology. On 12.10.2010 you agreed on a meeting with EVEL.

On 13.10.2010 AS Tallinna Vesi sent you the minutes of your discussion organised at the Ministry of Environment on 04.10.2010, asking you to respond whether in your opinion the minutes reflect adequately the positions that you expressed.

On 18.10.2010 you met with EVEL and AS Tallinna Vesi regarding the methodology.

On 21.10.2010 you sent a new version of the methodology to the Ministry of Environment, the Foundation Environmental Investment Centre and EVEL, asking for comments at the latest by 26.10.2010.

On 25.10.2010 AS Tallinna Vesi asked from you the latest version of the methodology for reviewing. You sent this to the applicant on the same day. After receiving the methodology AS Tallinna Vesi asked for an opportunity to comment the methodology once more. You gave the company until 27.10.2010 for commenting.

On 27.10.2010 AS Tallinna Vesi sent you a letter in which it wanted to know then it will receive responses to the proposals, comments and remarks submitted by the company. You responded to the applicant on 02.11.2010.

² E.g. EVEL expressed itself as follows: „Thank you very much for the opportunity to participate in the development of the recommendatory principles of calculating the price of water service (hereinafter the regulation). We believe that as an association uniting the majority of the water companies Estonian Waterworks Association (EVEL) can contribute significantly to the development of regulation, as it will undoubtedly have a significant impact on the development of the entire Estonian water business already at the first implementation. /.../ Competition Authority has marked EVEL as one of the institutions engaged in the development of the regulation. As we have repeatedly conformed, we would be very glad to do it in cooperation with the Competition Authority. Yet we would like to emphasise that the regulation with its content as presented has nothing in common with the positions of EVEL. We allow to use the reference to EVEL only in case you will take into account all of the positions submitted in this letter and the annexes thereto and will amend the regulation accordingly.“

On midday of 04.11.2010 you sent the most recent version of the methodology to EVEL. On 05.11.2010 you organised a meeting with EVEL with the aim of introducing the principles reflected in the methodology to EVEL. On 09.11.2010 you signed and published the methodology at your website. On 08.12.2010 you published on your website the responses to the questions raised at the discussions held about the methodology.

3. AS Tallinna Vesi turned to me with an application to check the compliance of your activity with the principle of ensuring fundamental rights and freedoms and due process in the preparation of the methodology "Recommendations for calculating the price for water service". I accepted the application and for a true and fair settlement I turned to you with a request for information.

4. In the beginning you responded to me that the methodology is not a legal act, but an administrative rule that above all binds you in the approval of the prices of water supply and wastewater discharge services. The aim of the methodology is to formulate the methodical bases from which you will proceed in fulfilling the task of the price regulator imposed to you on the basis of Public Water Supply and Sewerage Act. This both in preliminary and follow-up check of the compliance of the prices of water supply and wastewater discharge services formed by the 70 larger water companies with the law as well as in the follow-up check of the compliance of the services of water supply and wastewater discharge services formed by the rest of the water companies. Besides that the methodology in question carries an objective of formulating common administrative practices for the equal treatment of water companies in approving the prices developed by the water companies and in monitoring the economic activity. The methodology is public so that the water companies would know already before the proceeding of a specific price regulation is commenced which are the methodical bases based on which you assess the compliance of the prices with the Public Water Supply and Sewerage Act.

You explained that even though the methodology can be treated as an administrative rule, then for giving the so-called finishing touches you enabled other persons, i.e. water companies, to comment on the draft methodology. Thereby you engaged other persons for giving the so-called finishing touches to the methodology in order to introduce to them the principles of price regulation relating from the law and the legal application practice planned. In addition you also wanted to receive feedback to the draft methodology in order to be aware before implementing the methodology a) how the water companies understand the principles resulting from the law, b) whether the methodology is clear and comprehensible, c) which disputes can be caused by proceeding from the methodology when implementing the law. In other words, the "engagement" of other persons into the development of the methodology was above all for informative purposes. In addition to that you noted that you had sufficiently explained to the water companies the purpose of the engagement, which is why the water companies could not in any way conclude that you had engaged them into the development of the methodology.

In addition, you expressed a position that adopting the methodology and responding to the comments submitted regarding the draft methodology are not one proceeding and equating these is not justified. Hearing out the opinions of the market participants and responding to their comments is indeed necessary; however, it is clearly a secondary task, as the law imposes the obligation of preparing and publishing the methodology on you without any obligation of external approval. Engaging other persons in giving the so-called finishing touches to the methodology could only fulfil the function of informative and helpful feedback.

You have pointed out that in the interim period between announcing the Law of Establishing Price Limits for Monopolies and the enforcement thereof you had to develop not only the methodology but also the questionnaires for submitting the price application for water supply and wastewater discharge services, to discharge the explanatory obligation related to the implementation of the new redaction of the law and perform other tasks. During that period you wished to develop a methodology, introduce to the water companies the principles to be included in the methodology, receive feedback from the water companies and if possible, to take into account the feedback received. Based on the experience gained at the development of other methodologies/instructions, e.g. the common methodology for calculating the price of balance energy, the principles of the price regulation of producing electricity and oil shale, the common methodology for calculating electricity network tariffs, the principles of approving the maximum fee chargeable for heating, you considered such action plan feasible.

You received ca 200 questions, comments, remarks or other arguments regarding the draft methodology, which included few specific amendment or improvement proposals. The following raised the most questions: AS Tallinna Vesi ca 58, EVEL ca 52, Tallinn City Government ca 42, AS Viimsi Vesi ca 24, AS Tartu Veevärk 17 comments. As a comparison you pointed out that in case of methodologies developed for other areas, the number of questions or comments received has in general been up to ten and usually one discussion round for methodology has been sufficient. For example, in the district heating price regulation practice the number of comments received from market participants to the draft methodology has been considerably lower (usually no more than about ten comments). You admitted that in a situation where the redaction of the Public Water Supply and Sewerage Act did not amend the bases for forming the prices of water supply and wastewater discharge services, but in certain cases replaced one regulator with another (local government with you), the receipt of ca 200 comments to the draft methodology was surprising for you. Although any of the comments could not in itself be considered malevolent, in your opinion the amount and tendency of the submitted comments referred to a possibility that the applicant and EVEL has coordinated their activities and worked towards preventing the adoption of the methodology.

You explained that even though surprisingly many comments were received to the draft methodology, you had sufficient time for reviewing these. However, as based on your previous experience you could not predict that the draft methodology would receive that many comments, then you ran short of time for responding to all more than 200 comments in writing, taking into account the enforcement of the Law of Establishing Price Limits for Monopolies on 01.11.2010. Therefore you changed your initial intention to publish responses to the comments with the methodology and decided to publish written explanations and responses to the comments on your website one month after publishing the methodology. You informed clearly at the public discussion on 4.10.2010 organised in cooperation with the Ministry of Environment that you had changed your initial intention, reasoning it with the receipt of unprecedentedly many comments. The same you explained also at the meeting held with EVEL and AS Tallinna Vesi on 18.10.2010.

After reviewing the received comments it appeared that for the most part you could not take into account the proposals made for amending the methodology because a) these applied to amending the provisions and principles of the Public Water Supply and Sewerage Act, b) the methodology reflected the principles of the law adequately and proceeding from the submitted comments did not require supplementing or specifying, c) in case you had changed the methodology pursuant to the proposals, then the methodology would conflicted with the principles of price regulation proceeding from the law. Generally, however, you found that as in principle to a great part the comments that were submitted to you were such comments that could not have been taken into

account without amending the established principles of price regulation and without conflicting with the law, then from the feedback that you received there was rather a dissatisfaction with the redaction of the Public Water Supply and Sewerage Act that took effect on 01.11.2010.

In taking into account the received comments, you mainly were limited to adjusting the wording of the methodology so that the market participants and relevant organisations would interpret the methodology purposefully. You published the responses to the questions raised at the discussions of the methodology on your website about a month after adopting and publishing the methodology.

II Legal opinion

5. The question is whether in the process of developing the methodology you organised the engagement of people not included in the administrative process in compliance with the good engagement practices. In order to respond to the question raised I shall first of all explain from which provisions of the Constitution the good engagement practices can be derived (clause 6), for which purposes the engagement of people not included in the administrative process is organised and which requirements the people not included in the administrative process must follow (clauses 7–12). Then I shall form an opinion on the subject of the application (clauses 14–37).

Good engagement practices

6. § 10 of the Constitution of the Republic of Estonia (hereinafter the Constitution) stipulates the principles of democracy and the state based on the rule of law. § 13 of the Constitution sets out the prohibition of arbitrary exercise of authority and § 14 of the Constitution sets out the right of the person to good administration. Among others, the good engagement practices is derived from good governance.

7. In general the Constitution does not require asking opinions from people for forming the application practice of a field of activity. In certain cases such obligation is imposed on Estonia from international law. E.g. Article 4 Section 3 of the Convention on the Rights of Persons with Disabilities, in case the public authority has ratified the respective convention as per the promise given to UN, imposes an obligation on the public authority to involve the disabled to the implementation of the legal acts. On the other hand, it must be admitted that an assumption to the true and fair, but also rational, implementation of law is competent information, which the implementer of the law may not know in full extent. Therefore in certain cases engaging people not included in the administrative process is rational for forming an application practice of legal acts. Also engagement might prove to be necessary in order to inform the parties acting in the regulated field of activity about the application practice of new regulation, in order to check whether the in the regulated area of activity the parties acting in the area of activity understand the (planned) application practice in a similar way, etc. Engaging does not grant to the parties engaged power of decision regarding for example what the application practice of a specific legal act turns out to be, but provides an opportunity to make one's position heard for forming one or another areas of activity.³ Final decision will always be adopted by the public authority, which directly has the liability for the trueness and fairness of the application of the legal act.

³ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 5.

8. In Estonian legal order there is no general legal act that would regulate when the public authority must engage persons and how the public authority must act when consulting with people (from which principles to proceed and how the process looks like). This means that in general the public authority decides on whether at all to engage people not included in the administrative process, how to engage them, how to organise the engagement and who and why to engage.⁴ Thereby the person not included in the administrative process decides whether to respond to the invitation of the public authority and to participate in the activity offered by the public authority. When deciding in favour of participating, then the person not included in the administrative process must take into account that the public is entitled to know what has affected the decisions of the public authority.⁵ Proceeding from that, the persons not included in the administrative process must be prepared to act in a so-called transparent meeting room so that the public would know who participated at the meeting and how they acted at the meeting.⁶

9. From the fact that there is no general legal act in Estonia that would regulate when the public authority must engage people and how the public authority must act when consulting with people (from which principles to proceed and how the process looks like), it cannot, however, be concluded that the public authority was entirely free in their behaviour. As from the good governance the requirements of simplicity, speed, efficiency, purposefulness and avoidance of excessive expenses and inconveniences derive to the activity of the public authority, then these requirements also expand to the administrative activities when engaging people. Also, for example, when engaging people, the principle of equal treatment resulting from § 12 of the Constitution also expands to the public authority. This means that if the public authority has decided to engage people not included in the administrative process for example into the development of any legal act, then when deciding on who, why and how to engage and how to organise the engagement, it must also proceed among others from the principle of equal treatment as well as the requirements deriving from good governance.

10. In cases when the public authority has tied itself to the minimum requirements of engagement established by itself, the public authority must follow these minimum requirements. This is the case for the Government of the Republic, who has established its good engagement practices⁷, but also for some ministries who have developed their principles of engaging people not included in the administrative process.⁸ E.g. the minimum requirements of engagement prepared by the Government of the Republic provide specific cases when the Government of the Republic must engage people not included in the administrative process. Thus the Government of the Republic must engage people not included in the administrative process in the development of the documents, policies, development plans, programmes, guidelines and procedures for providing public services significant from the perspective of the state's development as well as documents developed within conventions and international agreements and influencing society.⁹

⁴ See European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 11.

⁵ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 17.

⁶ Intelligibly the public authority needs to ensure the protection of business secrets and personal data.

⁷ Government of the Republic. Good Engagement Practices, as of 13.09.2010 available on web: <http://goo.gl/u54Vl>.

⁸ Ministry of Economic Affairs and Communications. Good Engagement Practices or general principles of written consultation in the Ministry, as of 31.03.2011 available on web: <http://www.mkm.ee/8243>.

⁹ Government of the Republic. Aim of engagement, as of 13.09.2010 available on web: <http://goo.gl/mfuHc>.

11. Be that as it may whether the public authority has tied itself with the minimum requirements of engagement established by itself, but proceeding from the corporate governance and other requirements set for the activity of the public authority stipulated in the Constitution the public authority must in any case take into account the following when engaging people not included in the administrative process:

- 1) All notices related to the engagement must be clear and concise and these must include all the required information for facilitating the receipt of feedback,¹⁰
- 2) When identifying the engagement target groups the principle of equal treatment must be complied with,¹¹ so that it would be possible for all the concerned parties to be engaged and to render their opinion;¹²
- 3) For increasing awareness about engagement taking place, sufficient public attention must be ensured for the engagement and the media used in engagement must be adjusted with taking into account the needs of all target groups,¹³
- 4) Sufficient time for participating should be provided for the people,¹⁴

¹⁰ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 19; Good Engagement Practices of the Government of the Republic clause 1: “We will briefly and clearly state the initial assignment, expected result, and projected effect of the consultations and resolutions.”; Good Engagement Practices of the Ministry of Economic Affairs and Communications clause 5: “When initiating the consultation the Ministry needs to clearly express the expectations with regard to the associations and the input received from them.”, clause 6: “When initiating the consultation it must be clearly expressed what is the further action plan with the comments of the associations and the legal act or the strategic document.”

¹¹ Before engaging people not included in the administrative process, the public authority must clearly identify who are the target groups of the engagement to be organised. The public authority must do that on the basis of reasoned criteria. When developing reasoned criteria, for ensuring the fairness of the engagement to be organised the public authority must also take into account that a) sufficient number of people would be engaged who are influenced by the planned rules, methodology, etc, must start to apply it or have direct interest in it; b) balance is ensured between the parties engaged (e.g. to engage both larger and smaller companies, representation of economic interests and social interests); c) whether there is need for speciality-related knowledge, d) if it is possible for the public authority to engage the representation organisation of a specific sector, then who this organisation specifically represents and whether it represents all the interests of the sector in a required extent; e) etc. See in detail European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, clause 11 and clauses 19-20.

¹² European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 19; Good Engagement Practices of the Government of the Republic clause 2: “We will determine the parties with whom to consult in the given field and take their wishes, needs, and distinctive features into consideration”; Good Engagement Practices of the Ministry of Economic Affairs and Communications clause 2.1.: “The Ministry shall engage associations representing interests in the decision processes pursuant to the peculiarities of the draft act and the specific features of the concerned interest groups; using in addition to the consultation in writing at the final stage of the development of the draft act also seminars, round tables and/or other informal methods in order to ensure that the required expertise, various positions and ideas are taken into account in the development of concepts, development plans, programmes, projects and legal acts.”

¹³ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 20; Good Engagement Practices of the Government of the Republic clause 5: “We will ensure that the public, interest groups, and those possibly affected by the strategic document will be informed.”

¹⁴ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 21; Good Engagement Practices of the Government of the Republic clause 3.4.: “The consultations generally last for a minimum of four weeks.”; Good Engagement Practices of the Ministry of Economic Affairs and Communications clause 4: “In general associations have 10 working days to 30 days to submit written positions, also the Ministry in general has 30 days for making conclusions/ giving feedback.”

5) Results of the public engagement must be announced to the participants and displayed publicly.¹⁵

12. In conclusion I find that although the public authority is free in deciding on the engagement of the people not included in the administrative process, however, when organising the engagement it is bound to good engagement practices, i.e. with the requirements listed above.

13. On the basis of the abovementioned positions I shall analyse the subject of the application in the following.

Opinion regarding the subject of the application

14. In the subject of the application the question is whether you complied with the good engagement practices in processing the methodology. When responding to this question I will first of all identify the legal nature of the methodology (clause 15). Then I will assess whether the preparation of the methodology is regulated by any act and then I will form a position based on which I will analyse the subject of the application (clauses 16 and 17). After that I will form a position whether in the engagement of the people not included in the administrative process you complied with the due engagement practices (clauses 18–37).

15. §14 (9) of the PWSSA stipulates that recommended principles for calculating the price of service of supplying water and leading off and purifying waste water, rain water, drainage water and other soil and surface water (hereinafter *water service*) shall be prepared and published on its website by the Competition Authority. In Estonian law there are also other similar norms that obligate the administrative authority to issue guidelines or some other act.¹⁶ With regard to an act issued on the basis of one similar norm the Supreme Court has found that it is an act directing and specifying the exercise of the right of discretion that must ensure for the administrative authority a solid and uniform realisation of the discretionary power given to it by law.¹⁷ Assessing the legal nature of the act of the Competition Authority in the light of the position of the Supreme Court I find that

¹⁵ European Commission. Communication from the commission. Towards a reinforced culture of consultation and dialogue - General principles and minimum standards for consultation of interested parties by the Commission. Brussels, 11.12.2002 COM(2002) 704 final, p 21; Good Engagement Practices of the Government of the Republic clause 7: “We will inform the engaged parties of the results of the engagement.”; Good Engagement Practices of the Ministry of Economic Affairs and Communications clause 7: “All proposals and positions submitted within the written consultation will receive a joint and public written response from the Ministry.”

¹⁶ Thus the Estonian Health Insurance Fund Act § 12(1) clause 2³ stipulates that the supervisory board of the Estonian Health Insurance Fund shall approve the bases for assessment of the circumstances provided for in §36 (4) of the Health Insurance Act, i.e. the circumstances regarding deciding on the conclusion of the contract of financing the treatment and the term of the contract. §36 (1) of the Health Insurance Act sets out that the health insurance fund enters into a contract for financing medical treatment with a health care provider or providers. Subsection 4 of the same section stipulates that In order for a decision to be made on entry into a contract for financing medical treatment and on the term of the contract, the health insurance fund shall take into account the following circumstances: 1) the need of the insured persons for the service, and the availability of the service; 2) the quality of and conditions for the provision of the service; 3) the price of the service; 4) the possibility of the service being provided in accordance with the standard conditions of accommodation; 5) the maximum number of health care providers providing the health service; 6) figures regarding the average density of provision of the health service; 7) developments in national health policy; 8) whether the health care provider has performed previous contracts for financing medical treatment or other similar contracts as required; 9) the existence or absence of tax arrears and the general financial situation of the health care provider; 10) compliance with legislation regulating health insurance and health by the health care provider or the employer thereof; pursuant to §25 (4) clause 3 of the Names Act the Personal Names Committee has the right to prepare instructions and explanations which are approved by a directive of the Minister of Regional Affairs in order to explain and publicise the Names Act, etc.

¹⁷ RKHKo 16.01.2008. a, nr 3-3-1-81-07, p 13.

the methodology “Recommendations for calculating the price for water service”¹⁸ prepared by the Competition Authority on the basis of §14 (9) of the PWSSA is also an administrative rule, i.e. a legal act of general nature issued within the administrative process. The aim of this administrative rule is to ensure to a solid and uniform realisation of the discretion power granted to the Competition Authority (with § 14² (1) and (4) of the PWSSA) and the unspecified legal concepts.¹⁹ This administrative rule has an influence on the water companies in the proceeding of issuing an administrative act as a result of the application of the rule.²⁰

16. As the administrative rule in question has an influence on the water company only as a result of the application thereof, then the Administrative Procedure Act does not apply to the process of preparing the administrative rule. Namely, the Administrative Procedure Act is applied only in cases when the activity of the administrative authority is directed outside the administrative authority – if it is an issuing of a decree or administrative act, performance of an act or conclusion of a contract under public law. As already said, 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.

17. As the methodology is an administrative rule that is aimed at a true and fair implementation of the Public Water Supply and Sewerage Act, then I shall in the following assess your activity in processing this methodology on the basis of the good engagement practice described above.

18. The processing of the methodology can be summarised as follows. First of all you prepared the draft methodology. Then on 07.09.2010 you published this draft on your website for reviewing and commenting and on 07.09.2010 and on 09.09.2010 you sent the draft methodology to a certain group of people for reviewing and commenting by email. During 23.09.2010–29.09.2010 questions-comments-remarks regarding the draft methodology were received from interested parties. On 04.10.2010 you organised a public discussion of the draft methodology, to which only these people to whom you sent the draft methodology for reviewing and commenting by email were expected. On 05.11.2010 you organised a meeting for discussing the new draft methodology, to which only EVEL was expected. You approved and published the methodology on 09.11.2010. Feedback to the parties engaged regarding their questions-comments-remarks was provided on 08.12.2010 publicly through your website.

19. On the basis of the described, I find that the relevant process can be basically divided into three stages. In the first stage you started the process of preparing the methodology and during that you prepared the draft methodology. In the second stage you engaged the people not included in the administrative process. This stage lasted from 07.09.2010 to 29.09.2010. In the third stage you decided in which format to enforce the methodology.

20. As in engaging people not included in the administrative process the two must be differentiated: enabling the right to speak to the engaged and the public authority making decisions on the matter, i.e. adopting a decision on the merits, the I shall in the following assess the compliance of your activity with the good engagement practice only with regard to the second

¹⁸ Competition Authority. Recommendations for calculating the price for water service, available on web: <http://www.konkurentsiamet.ee/?id=18324>.

¹⁹ RKHKo 16.01.2008. a, nr 3-3-1-81-07, p 13.

²⁰ RKHKo 16.01.2008. a, nr 3-3-1-81-07, p 13.

stage of the process of preparing the methodology. More specifically, I shall assess whether a) the notices related to the engagement were clear and concise and included all the required information for facilitating the receipt of feedback (clauses 21–26); b) when identifying the engaged parties you complied with the principle of equal treatment (clauses 27–30); c) left sufficient time for the engaged parties to deliver their opinions and required amount of time for yourself for final decision on the matter (clauses 31–37).

Compliance of the notice of engagement with the good engagement practices

21. An assumption of the purposeful occurrence of the engagement of people not included in the administrative process is that the notice aimed at people not included in the administrative process is clear, precise and includes only required data. For that the notices addressed to the people not included in the administrative process must publish in summary the background, extent and objectives of organising the engagement and to refer to the relevant documents. Also the following must be published: contacts to whom to turn to in case of questions about engagement, during which period one can submit its contributions, an explanation what the public authority does with the contributions, what kind of feedback to expect, which are the subsequent steps by the public authority after the occurrence of the engagement, etc.

22. From the subject of the application it appears that on your website you published the following notice: “On the basis of §14 (9) of the Public Water Supply and Sewerage Act that takes effect on 1 November this year the Competition Authority has been given a task to prepare a methodology “Recommendations for calculating the price for water service”. Methodology is published for discussion on the website of the Competition Authority (<http://www.konkurentsiamet.ee>) from 07.09.2010 until 27.09.2010. One can send its opinion to an email address: klarika.siegel-lorvi@konkurentsiamet.ee. We kindly ask the person publishing its opinion to mark his/her first and last name, in case of legal person or administrative authorities the name of the legal person or administrative authority. In case of comments and proposals please mark the clause of the methodology to which the comment or proposal applies. In case the opinion to be submitted uses information that includes business secret, then we kindly ask to mark specifically which information included in a sentence you regard as business secret. Competition Authority does not treat information that is subject to publication or published information as business secret. Anonymous opinions and opinions submitted after the term of submitting opinions shall not be taken into account. Reasons for considering/ not taking into account the received comments shall be published on the website of the Competition Authority along with the final version of the methodology. Click [HERE](#) to see the methodology.”

In the email on 07.09.2010 you sent the following notice: “With this email (see the attached file) we shall send you the abovementioned methodology for reviewing and making proposals. We shall be waiting for your proposals, thoughts about the methodology at the latest by 27.09.2010. /.../” With that email you informed the addressees of the letter that on 4 October 2010 you will be organising a public discussion in the Ministry of Environment regarding the thoughts and proposals submitted with regard to the draft project. You asked the addressees of the email to previously register to the meeting if they would like to participate in the meeting.

In addition to the email sent on 07.09.2010, on 09.09.2010 you sent an email with the following information to 58 water companies: “Hereby we inform you that a methodology “Recommendations for calculating the price for water service” has been published on the website

of the Competition Authority for rendering opinions and commenting. These recommendatory principles have been developed pursuant to §14 (6) of the Public Water Supply and Sewerage Act.” The addressees of the latter email were water companies whose operating area included wastewater collection areas with a pollution load of more than 2000 population equivalent and whose email address you knew.

23. You explained to me that even though the methodology can be treated as an administrative rule, then for giving the so-called finishing touches you enabled other persons, i.e. water companies, to comment on the draft methodology. Thereby you engaged other persons for giving the so-called finishing touches to the methodology in order to introduce to them the principles of price regulation relating from the law and the legal application practice planned. In addition you also wanted to receive feedback to the draft methodology in order to be aware before implementing the methodology a) how the water companies understand the principles resulting from the law, b) whether the methodology is clear and comprehensible, c) which disputes can be caused by proceeding from the methodology when implementing the law. In other words, the engagement of other persons into the “development” of the methodology was above all for informative purposes. In addition to that you noted that you had sufficiently explained to the water companies the purpose of the engagement, which is why the water companies could not in any way conclude that you had engaged them directly into the development of the methodology.

24. Based on the notices presented above and the explanations provided to me the following conclusions can be made: a) the notice included in summary the background for the engagement, b) on the basis of the notice it was clear regarding which issues the people not included in the administrative process are engaged; c) the objective of the engagement included in the notice and the actual objective of engagement were different, d) a relevant document, i.e. the methodology under discussion, was referred to, e) the contacts of the official whom to address with regard to engagement issues were published; f) the notice included an explanation about the period during which one can submit its contributions; g) the notice provided an explanation regarding what the public authority will do with the contributions; h) notices explained what kind of feedback, incl. In which format, the engaged party should expect; i) from the notice it appeared what would be your next steps after the engagement of the people not included in the administrative process has occurred.

On the basis of these conclusions I find that the notice of engagement that you submitted was in general from its content comprehensible, concise and included all the required information. Only partially the notice of engagement can be considered in compliance with the good engagement practice for a reason that the objective of the engagement presented in the notice and the actual objective of engagement do not coincide. 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. Additionally, the following is manifested from the foreword of the initial draft methodology: “The following were engaged to the development of the methodology “Recommendations for calculating the price for water service”: Ministry of Environment, Ministry of Economic Affairs and Communications, Environmental Investment Centre, EVEL, larger water companies: AS Tallinna Vesi, AS Emajõe Veevärk, AS Pärnu Vesi, Narva Vesi AS and AS Tartu Veevärk, Association of Cities of Estonia, Associations of Municipalities of Estonia, and the City Governments of Tallinn, Tartu, Pärnu, Narva.” You yourself admitted to me that you did not consider the opinions of the engaged parties

content-wise, but based on their opinion only adjusted the wording of the methodology. For these purposes the notice of engagement cannot be considered purposeful and this must be regarded as misleading for the people not included in the administrative process or not in compliance with good engagement practices. This despite the fact that people not included in the administrative process should have been aware of your approach to regulating the prices of universal services. Namely, while a person behaving reasonably should have understood when examining the methodology that there is no discussion with regard to the principal issues, then the note of engagement could leave an impression that with regard to some nuances you are so-called open for negotiations.

25. As it could be seen from the application sent to me by AS Tallinna Vesi that also AS Tallinna Vesi understood the notice of engagement similarly as I did, then I find that with regard to this issue the good engagement practice has been violated towards AS Tallinna Vesi. For clarity I consider it necessary hereby to emphasise that this conclusion does not in any manner influence the legality of the methodology as an administrative rule. As said, then, firstly, the person enforcing the methodology shall decide on the content of the methodology, secondly, the methodology has direct impact on the person not included in the administrative process only as a result of the application thereof.

Complying with the principle of equal treatment in engagement

26. With regard to identifying the engaged parties, then proceeding from the good engagement practice before engaging the people not included in the administrative process the public authority must clearly establish who the target groups in engagement are. Public authority must do that on the basis of justified criteria. Thereby in order to ensure justice, steps must be taken in order to engage sufficient number of people who are impacted by the planned rule, methodology, etc, must start to apply it or have direct interest in it.

27. From the subject of the application it appears that anyone could render their opinion about the draft methodology. You informed separately by email only the following parties about the fact that opinions can be rendered about the draft methodology: city governments of Tallinn, Tartu, Pärnu and Narva, Association of Cities of Estonia, Associations of Municipalities of Estonia, AS Tallinna Vesi, AS Emajõe Veevärk, AS Pärnu Vesi, Narva Vesi AS and AS Tartu Veevärk and 58 other water companies whose service area included wastewater collections areas with a pollution load of more than 2000 population equivalents and whose e-mail address you knew, and Ministry of Environment, Ministry of Economic Affairs and Communications, Environmental Investment Centre. You informed about the possibility to receive verbal feedback only to those to whom you sent the notice regarding engagement by e-mail on 07.09.2010. From this and based on the different content of the notices I 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. To my knowledge you did not inform other parties interested about the possibility of commenting on the methodology. The abovementioned leaves an impression that you actually did not see the public at large and consumer protection organisations as the target groups for engagement.

28. Thus you did not inform equally all the parties interested about the engagement being organised. Therefore I find that to those whom you informed about the engagement being

organised only through website you provided a seeming possibility to make themselves heard. It must be admitted that it is rather unlikely that other people interested in the matter would on a daily basis visit your website. Hereby I must as a remark once again 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. In addition I would like to turn your attention to the fact that as the methodology has indirect impact also to those water companies, whose prices for water services you do not approve, then these water companies should have been provided with a better possibility to be engaged.

29. Despite the above, I find that as you informed AS Tallinna Vesi by email about organising the engagement, then towards it you did not violate the good engagement practices.

Providing the engaged parties with the actual possibility of making themselves heard

30. It is clear that proceeding from the requirements of simplicity, speed and efficiency the activity of the public authority cannot become that similar to Kafka. On the contrary, for complying with the requirements of simplicity, speed and efficiency each activity must have a start and an end. This is also the case for engaging people not included in the administrative process. This means that engagement cannot become an endless process and thereby prevent the public authority to make the final decision. Due to the latter the public authority which involves people not included in the administrative process to organise the engagement in such a manner that a certain time period would be provided for the engagement and another time period for the final decision, for the trueness and fairness of which the administrative authority alone is responsible. Thereby both time periods should be proportional in comparison with the required objective. This means that the public authority must find a reasonable balance between the stages of engagement and decision-making. Thereby it must be ensured that the parties engaged would have sufficient time for making themselves heard depending on the issue under discussion, the experience of the people engaged etc. On the other hand, the public authority should be given with sufficient time for making the decision.

31. From the notices published by you it appears that you gave the people engaged ca 20 days to render their opinions. For decision-making you gave yourself more than a month. For giving verbal feedback to the persons engaged you gave one day and for giving written feedback you gave more than a month.

32. From the subject of the application it appears that the parties engaged submitted within the 20 days given to them for rendering opinions almost 200 questions, comments, remarks, or other arguments. At first in case of such a number of comments it could be concluded that you did not provide sufficient time for yourself both for making a decision as well as for providing verbal feedback to the parties engaged to the methodology, which is why your activity in engaging people not included in the administrative process could have been only seeming. The latter for a reason that at such a high number of questions it was not factually possible for you to hear out the parties engaged in making the decision. In connection to that it might be considered to reproach you that you could not foresee such a high number of comments to be received for the methodology in the light of the law enforcing on 01.11.2011. However, such a conclusion would be misleading. 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,²¹ 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,²² incl. which is your potential approach in regulating the price of water service²³, etc. Therefore I find 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. Therefore I find that you had provided sufficient time for the parties engaged for rendering their opinions and for yourself for making the final decision. Also, I find that the engagement that you organised was real.

Providing feedback to the parties engaged

33. Public authority also decides on providing feedback. More precisely public authority decides on how to provide feedback to the parties engaged. The respective decision should be set into dependence on how many contributions have been received. In such a manner the public authority may in one case decide to respond personally or by e-mail, in some case, however, to respond to all at once via website or by e-mail.

34. From the subject of the application it appears that initially you planned to provide feedback in writing to all parties engaged at the same time when publishing the methodology. As you published the methodology on 09.11.2010, then this would have meant that you should have provided feedback in writing to the parties engaged also on 09.11.2010. Thereby to the parties engaged by e-mail you wished to provide verbal feedback in advance on 04.10.2010. Actually, however, you only kept your promise with regard to providing verbal feedback.

35. In your response you explained to me that you could not keep your promise regarding responding to the parties engaged in writing at the same time as publishing the methodology due to a reason that you did not expect that many comments-remarks-questions to the draft methodology. Therefore you could not expect providing feedback in writing could take such a long time, and you had to change your initial intention of publishing the responses to comments with the methodology. You decided to publish explanations and responses to comments in writing on your website a month after publishing the methodology. In your opinion, you informed clearly about the fact that you had changed your initial intention at the public discussion organised in cooperation with the Ministry of Environment on 04.10.2010, pointing out as a reason the receipt of unprecedentedly many comments. The same you explained also separately to AS Tallinna Vesi.

36. Firstly, with regard to the manner chosen by you for providing feedback, then I find that providing feedback in such a manner is in compliance with the good engagement practice, because in such a manner in addition to the parties engaged everyone interested in the methodology has the possibility to get an understanding about the background of the formation of the methodology.

²¹ 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.

²² See e.g. Competition Authority. Methodology and instructions for approving maximum fees chargeable, available on web: <http://www.konkurentsiamet.ee/?id=18306>.

²³ 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.

Secondly, with regard to changing the date of providing feedback, I find that in the occurrence of objective circumstances changing the announced date for providing the feedback is in compliance with the good engagement practice.²⁴ This in case all the engaged parties were informed of postponing the term of providing the feedback. As in the subject of the application it is not clear to me whether all the parties engaged, incl. those who were informed of the possibility of commenting on the draft methodology by your e-mail on 09.09.2010 or via your website, were informed of postponing the term of providing feedback, then in this issue under question I will be limited only to the belief that as AS Tallinna Vesi was aware of postponing the term of providing feedback, then towards it you did not violate the good engagement practice.

For these reasons I find that you have 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. For other parts I did not identify any violations towards AS Tallinna Vesi.

Sincerely

/signed digitally/

Indrek Teder

²⁴ For example, Response to Memoranda and Requests for Explanations Act and Administrative Procedure Act allow to postpone responding in the occurrence of objective circumstances.