Approved
by the Directive No ____ of _____December 2012
of the Minister of Economy and Communications

Summary of the proceedings of supervisory control over the activities of the Director General of the Competition Authority

I Introduction

1.1 On 10.09.2012, Ian John Alexander Plenderleith, the Chairman of the Management Board of AS Tallinna Vesi (hereinafter *ASTV*) sent a letter (no 6/1248819) to the Ministry of Economy and Communications (hereinafter the *MoEC*), in which he expressed an opinion that the CA may have violated professional ethics and immediately applied for *"a full and open"* [1] investigation into the "*tariff setting and business practices of the Competition Authority and Mr Ots as an independent regulator, and to make the complete results of this publicly available"*.

ASTV expresses an opinion in its letter that the CA has „*knowingly forced ASTV and its shareholders into a defence of the international privatisation contract based on a set of completely inaccurate accusations in the court*"; „*Knowingly misled the Estonian Courts and the EU Commission over the status of economic regulation in Estonia* "; „*Knowingly used inaccurate and contradictory statements and actions in allowing different regulatory methodologies to be used for local investors, whilst in the case of ASTV all the terms and conditions of the international privatisation were disallowed*".

ASTV asks in its letter to carry the supervisory control proceedings out especially in relation to the CA's approval to the tariffs of heating services sold by AS Kunda Elamu. ASTV finds in its letter that the CA „*knowingly made regulatory decisions in Kunda where Mr Ots, the Head of the Competition Authority had a very clear conflict of interest*"; „*knowingly made regulatory decisions in Kunda from which the Head of the Competition Authority may have personally benefited, but were to the detriment of the citizens of Kunda*"; „*knowingly made regulatory decisions in Kunda using inaccurate information*".

On 07.11.2012, Ian John Alexander Plenderleith submitted to the MoEC an additional letter (no 6/1248819-2), in which it presented statements of the same content as in the letter of 10.09.2012.

1.2 Minister of Economy and Communications initiated with its Directive no 12-0302 of 05.10.2012 supervisory control over the activities of Märt Ots, the Director General of the CA. According to the Government of Republic Act § 93 lg 6 (1) the supervisory control procedure set out in the law does not extend to the actions of national supervision and the

[1] Here and hereinafter the text presented in italics and in quotation marks are the quotations from ASTV's letter.

decisions given whilst applying the enforcement powers of a state, thus – by the law the institutions in the ministry's area of government are independent whilst performing natonal supervision and applying the enforcement powers of a state. The compliance of exercising of national supervision and application of the enforcement powers of a state with the law is controlled by the Administrative Court, to where ASTV has turned to regarding the CA's decisions. Therefore the proceedings of supervisory control have been initiated over the compliance of the the CA's Director General's activities with the requirement stemming from the public service code of ethics to perform its duties of employment in an impartial and objective manner and as per the prohibition in the Anti-corruption Act to make decisions stemming from duties of employment in case of conflict of interest.

As the Minister lacks competence to interfere with the individual decisions of national supervision carried out by the institution of the area of government and to impact pending court proceedings, then based on that restriction the persons carrying out the supervisory control do not analyse the substantial aspects of the national supervision actions that take place in relation to ASTV nor the ongoing court proceedings. Neither is the justifiability of any individual decisions being assessed in this summary, including the approvals to the maximum heat prices for Kunda network area. The questions on which this supervisory control focuses have in more detail been set out in the clauses 3.2 of this summary.

1.3 As per the clause 3 of the MoEC's Directive No 12-0302 of 05.10.2012, the supervisory control has been carried out by the following officials: Head of Internal Audit Department Meeli Õismaa, Head of Legal Department Eva Vanamb, Chief Specialist of Internal Audit Department Õie Soovik and Expert in Economic Analysis Services of Economic Development Department Mario Lambing.

II Factual circumstances

2.1 In 1999–2007 Märt Ots was one of the owners of AS Kunda Elamu operating as the heating company in Kunda (minority owner) through AS Wille Service and OÜ Klingsor. Those ownership relations have in a correct way been declared in Märt Ots' declaration of economic interests. During that period it was the local government who approved the maximum heat price for Kunda network area.

2.2 On 01.10.2000, Märt Ots took the position of the Director General of Energy Market Inspectorate and on 01.01.2008 after incorporating several institutions under the MoEC as the Director General of the CA (incl. Energy Market Inspectorate was merged with the CA).

2.3 In 2003, the assets of AS Kunda Elamu were revalued resulting in an increase of the fixed assets on the balance sheet from 1,1 m'EEK to 9,6 m'EEK. Revaluation was carried out based on the assessment of SA Regionaalsed Energiakeskused considering the fair value of the assets[2].

2.4 In May 2007 the owners of AS Kunda Elamu (incl. Märt Ots) sold the assets related to the heat production to AS Fortum Termest for the price of 16,6 m'EEK[3]. At the same time the total net book value of the fixed assets of AS Kunda Elamu was 12,6 m'EEK[4].

[2] 2003 Annual Report of AS Kunda Elamu
[3] 2007 Annual Report of AS Kunda Elamu
[4] the same

2.5 In October 2007, AS Fortum Termest turned to the Energy Market Inspectorate with an application to approve the maximum heat price for Kunda network area. Within the price approval proceedings the Energy Market Inspectorate did not approve the initial application, but the approved maximum price turned out to be lower than the initial price. Whilst approving the maximum price the value of investments into heat production was considered, i.e. the purchase-sale price of the assets of AS Kunda Elamu.

2.6 On 10.11.2010, ASTV submitted to the CA an application for the approval of water tariff in Tallinn and Saue City (Public Water Supply and Sewerage Act (PWSSA) § 14^2 lg 1). With the decision no 9.1-3/11-02 of 02.05.2011, the CA did not approve the water price applied for based on the considerations presented in the decision that were based on the wording of the PWSSA § 14 (2) that took effect on 01.11.2010. The named provision foresees the formation of water tariff by the water company so that it would include only justified costs and justified profitability on the capital invested by the water company. Water tariff applied for by ASTV was not formed in line with the PWSSA § 14 (2), but based on the tariff mechanism agreed in "Tariff Criteria" Schedule: E Part I of the Services Agreement signed at the time of privatisation between the City of Tallinn and ASTV on 12.01.2001, where the tariff is in the year 1 + K coeficient + CPI[5] = tariff in the year 2, therefore the water tariff submitted for approval was not reasonably cost-based according to the CA's opinion.

On 01.06.2011, ASTV filed a complaint to Tallinn Administrative Court on the CA's decision. Court proceedings are ongoing.

2.7 With the Decree no 9.2-5/11-011 of 23.02.2011 the CA initiated the supervisory control proceedings over the compliance of water tariffs with the legal requirements in Tallinn and Saue cities taking the PWSSA § 15^4 (1-3) as the basis. On 10.10.2011, the CA issued a precept (nr 9.2-3/11-001) to ASTV, by which ASTV was obliged to end the breach of PWSSA § 14 lg 2 p 1 ja p 5 and to bring the applicable water tariff into conformity with PWSSA § 14 lg 2 p 1 ja p 5, by excluding a fee on pollution loads taxed with higher pollution fee rate and cost of bad debt from the water tariff and by including justified profitability on the capital invested by the water company in the water tariff.

On 09.11.2011, ASTV filed a complaint on the CA's precept no 9.2-3/11-001 of 10.11.2011 to Tallinn Administrative Court. Court proceedings are ongoing.

III Content of the supervisory control proceedings

3.1 Below a short summary of ASTV's main substantial statements is outlined:
1) ASTV calls into question the CA's statement that in Estonia similar price regulation principles have been valid in the monopolistic fields already for some time that are in similar manner being applied with the aim of equal treatment in several monopolistic fields;
2) ASTV compares its tariff proceedings with the heating tariff proceedings of Kunda network area and finds that whilst approving Kunda tariffs the right balance sheet value of fixed assets has not been calculated and unjustified profitability has been enabled. Thus ASTV finds that the CA and Märt Ots personally have not applied the same tariff regulation principle in different monopolistic fields;

[5] CPI – Consumer Price Index.

3) Based on ASTV's opinion, Märt Ots has made tariff decisions regarding Kunda network area in the situation of conflict of interests, by personally benefitting from it and by damaging the interests of the residents in Kunda.

In addition it appears from ASTV's letter that ASTV is willing for the CA to publish information containing the business secrets of other companies that have been determined as business secret by the companies themselves.

3.2 Having analysed ASTV's letter, other documents collected during the proceedings, the explanations given by Märt Ots and the relevant applicable law, the persons carrying out the supervisory control focused on the following questions:
1) What are the tariff regulation principles of monopolistic fields that have been valid since privatisation (and before privatisation) in Estonia, are those principles different in different areas and has the legislator significantly changed those principles meanwhile?
2) Has the CA applied uniform price formation rules in monopolistic areas and treated the companies in monopolistic position in a similar manner, proceeding from the principle of equal treatment? ASTV's letter includes amongst other things a question: *„Why has the CA refused to recognise ASTV's privatisation agreement stressing the fact that when calculating justified profitability only the net book value of fixed assets can be used as infallible, whereas in case of Kunda, the CA has when calculating justified profitability allowed to use the value of private sales transaction, which is significantly higher than the net book value of fixed assets?"*
3) Has Märt Ots been acting in the situation of conflict of interests when approving the maximum heat price for Kunda network area?

IV Legal conclusions

4. 1 Before presenting a more accurate legal analysis, the persons carrying out supervisory control deem necessary to present their observations regarding several assumptions appearing in ASTV's letter, on which ASTV's positions are based, but which are clearly inaccurate and which have hindered ASTV itself to form an objective opinion when assessing the CA's activities:
1) ASTV has either deliberately or unwillingly in its letter confused the sale-purchase of the Company's assets (Kunda's example) and purchase-sale of the company's shares/privatisation (ASTV's example);
2) ASTV has, when analysing Kunda tariff proceedings, repeatedly been of the mistaken opinion that the CA should take into account the net book value of the fixed assets recorded on the balance sheet of the seller (not the buyer) when analysing the tariff application submitted by the new owner regarding the new network area;
3) ASTV has been mistaken in thinking or supposing that the sales contract of the assets of Kunda heat production is similar to ASTV's privatisation agreement by including contingent conditions for the future. Howver, this is not so, because the sales contract does not include such provisions – those are the usual conditions characteristic to a sales contract;
4) ASTV has disregarded the justification of revaluation recorded in the 2003 Annual Report of AS Kunda Elamu and the fact that until the end of 2005 all companies were allowed to carry out revaluation of assets if the fair value of the assets significantly differed from the net book value of assets[6]. Similar revaluation was done in many infrastructure companies;

[6] Accounting Guidelines 2004 http://www.easb.ee/index.php?id=685

5) In its letter, ASTV has when analysing the heating tariff regulation of Kunda network area addressed only one tariff component (the relation of the life span of fixed assets and justified profitability) leaving the other important component (cost of capital) that has an inversely proportional and stronger effect on the outcome.

4.2 As ASTV compares in its letter the water tariff proceedings carried out on itself with the tariff approval proceedings of the tariffs of AS Kunda Elamu, then the regulatory principles of the last ten years used in water pricing are being observed in line with the PWSSA and in heat pricing in line with the District Heating Act.

The District Heating Act was adopted in Riigikogu on 11.02.2003 and it took effect on 01.07.2003. The Act § 8 lg 3 stipulates the principles of pricing the maximum heat price. The maximum price of heat shall be set such that:

1) the necessary operating expenses, including the expenses incurred upon the production, distribution and sale of heat, are covered;
2) necessary investments for the performance of operational and development obligations are made;
3) environmental requirements are met;
4) quality and safety requirements are met;
5) justified profitability is ensured.

Those principles have not once been changed in the District Heating Act and the provision referred to is still applicable today in exactly the same wording.

The PWSSA was adopted by Riigikogu on 10.02.1999 and it took effect on 23.03.1999. Pursuant to the wording of that time of § 14 (3) the tariff of water supply and sewerage service was such that the water undertaking can:

1) cover production costs;
2) comply with quality and safety requirements;
3) comply with environmental protection requirements;
4) operate with justified profitability.

The PWSSA adopted on 08.06.2005 and amendments to the Water Act supplement the above-mentioned pricing components with the following component:

5) develop the public water supply and sewerage system in accordance with the public water supply and sewerage system development plan in an area where more than 50 per cent of residential buildings for which building permits were issued before 22 March 1999 are connected to the public water supply and sewerage system.

Since 01.11.2010 the following wording of the PWSSA is applied – § 14 lg 2 (also currently aplicable):

„(2) Prices for water services shall be established such that the water undertaking can:
1) cover justified operating expenses;
2) make investments in order to ensure the sustainability of the existing public water supply and sewerage systems;
3) comply with environmental requirements;
4) comply with quality and safety requirements;
5) ensure justified profitability of the capital invested by the water undertaking;
6) develop the public water supply and sewerage system, including rain water pipes, pursuant to the public water supply and sewerage development plan in specific development areas

where more than 50 per cent of residential buildings for which building permits were issued before 22 March 1999 are connected to the public water supply and sewerage system."

The above indicates that the legislator has not changed the pricing principles in two fields under observation, in terms of water tariffs the regulation has only been supplemented. Price regulation is similar in both fields.

4.3 As ASTV asks several concrete questions regarding the maximum heat price approved by the CA for Kunda network area on the basis of AS Fortum Termest's application („*Why did the Competition Authority and Mr Ots, when making its 2011 tariff determination in Kunda, deliberately not take into account the full regulatory facts, of which it was fully aware, thus making an incorrect determination which was detrimental to the customers?*"), then the persons carrying out supervisory control explain the following regarding the formation of maximum heat price.

Pursuant to the Administrative Procedure Act § 4 an administrative authority has within the authorisation granted by law the right to apply the right of discretion when regulating an individual case – to consider making a resolution or choose between different resolutions whereas following the limits of authorisation, the purpose of discretion and the general principles of justice, taking into account relevant facts and considering legitimate interests. The principles of the right of discretion have been established by the CA in the document „The principles of approving the maximum heat price". Although it is an internal administrative act or an administrative rule, which is of informative, not normative nature outside administration, then the standards of administrative rule also acquire factual external impact as a result of application thereof[7]. Therefore it is important to note that „The principles of approving the maximum heat price" have been drawn up in 2003-2012, the last of those have also been approved by the head of the CA, six different versions, but <u>the same formulas and principles have been used in all versions</u>. The named document has been updated on the basis of practice and court rulings, examples and additional explanations have been added. Thus the CA has applied the similar principles of right of discretion when approving the maximum heat price over the years.

In addition it is important to note that the persons, who state that the CA's approval to the heat price in Kunda network area infringed their subjective rights protected by the law, were entitled to turn to the Administrative Court for the protection of their nfringed rights. It does not appear from ASTV's letter that the CA's approval to the heat price in Kunda network area would have infringed ASTV's subjective rights.

4.4 The uniform tariff regulation method and the application thereof to applicants that apply for different type of maximum prices are explained as follows.

4.4.1 Various companies turn to the CA with their applications for tariff approval: 1) the companies, whose tariff aplications have been previously proceeded by the CA; 2) the companies, whose shares (stake) have been privatised (ASTV's example); 3) the companies, who have bought the assets necessary for the production of heat or for the provision of water service.

[7] The meaning of administrative rule has been teated also by the courts in their decisions, e.g. the Administrative Law Chamber of the Riigikogu (*Supreme Court? – H*) decision in the admnistrative case no 3-3-1-81-07 of 16.01.2008 has addressed the meaning of administrative rule based on the example of Health Insurance Fund.

The purchase-sale of the company's assets and the sale (privatisation) of the company's shares (stake) are in essence different transactions, the first of them impacts the fixed assets value on the buyer's balance sheet, but the other does not. Replacement of the share owner of a company does not change the value of the fixed assets of the company. Upon the sale of fixed assets, the value of the fixed assets sold changes, because for the buyer the purchase price is the value of the fixed assets. This principle is confirmed by the Accounting Guidelines 5 (tangible and intangible fixed assets) clause 13[8]. When approving the price in both cases (both regarding the sale of shares and fixed assets of the company applying for a tariff approval), the CA takes the book value of fixed assets as a basis.

In the "Principles of approving the maximum heat price"[9] the CA proceeds when calculating the cost of capital and justified profitability from the regulatory asset base, which consists of the tangible fixed assets and working capital used in regulatory activities. In case of a company that under the CA's regulation for the first time, the net book value of fixed assets used in the main activities shall be taken as a basis, it may differ from the total net value of fixed assets due to not accounting for the fixed assets not related to the main activities and for other reasons. Further the regulatory asset base may differ from the book value, because the revaluation of assets and depreciation norms used by the company might not be accounted for (in the last years the depreciation rates of the companies have been taken as a basis, therefore no differences appear between the book value and estimated value of assets due to different depreciation rates).

The approach used by the CA for determining the asset value can in practice part from what is accounted for in the books only towards one direction i.e. to the direction of decrease – the value of assets used when determining the maximum price cannot be higher than the net book value. Such an approach when approving the maximum price has been recurrent in different fields (heat, water).

When approving the maximum price for a company that has purchased the necessary assets for producing heat or providing water services, the value of the assets on the balance sheet of the company that bought the assets as stated before shall be proceeded from. Usually for the buyer of assets, the purchase cost of the assets is equal to the book value of the assets (wich must not get confused with the so-called historic, earlier book value of assets). In case of such transactions as the CA has explained the reasonableness of asset value is checked based on ratios in the similar manner with other price components (ratio of asset value to the volume of sld heat, comparison with different companies[10]).

4.4.2 Over the years the CA has been applied for by several companies, who have purchased assets (e.g. AS Fortum Termest and OÜ Avoterm). They have purchased the assets (fixed assets) of a company supplying the local area with heat, those assets have been recorded as investment in purchase value on thebalance sheet of the company that has purchased the assets (purchase value of fixed assets on the balance sheet) and the respective recording of the asset value on the balance sheet has been in turn taken as a basis when approving the maximum price by the CA. For specification it needs to be added that in the described cases

[8] http://www.easb.ee/index.php?id=1255
[9] http://www.konkurentsiamet.ee/?id=18306
[10] Separately set out in the guidelines „Guidelines for drawing up economic analysis for heating companies", „Guidelines for assessing the following of cost-based principes in tariif formula and maksimum heat price submitted for approval".

only the assets, liabilities have been left out from the transaction, i.e. to be borne by the previous owner of the assets.

The persons carrying out he supervisory control checked the tariff approvals of different heat producers to compare them in order to make sure that the practice described above is consistently applied. During the proceedings the cases were looked into, where the maximum price of the heat producer was approved by the CA for the first time. The following cases were looked into[11]:

- Vändra network area, buyer AS Fortum Termest (2003);
- Kostivere, buyer AS Fortum Termest (2005);
- Tõrva network area, buyer AS Fortum Termest (2006);
- Narva-Jõesuu network area, buyer AS Fortum Termest (2008);
- Loksa network area, buyer OÜ Avoterm (2009).

In all those cases the acquisition cost (or less if part of the assets were written off or were not considered in tariff calculations – Vändra example) of the assets served as the initial book value when approving the tariffs. The same practice was also used in Kunda network area (2007), where the acquisition cost was taken as a basis. As according to the CA, AS Fortum Termest's bookkeeping had serious problems with recording the assets, then for a start the value of assets lower than the actual investment had been mistakenly calculated as the value of assets and it was corrected only after a thorough audit on assets in the new tariff approval application for 2011. AS Fortum Termest made investments also in the period 2008 - 2011, therefore the value of assets was generated taking into account the additional investments made. At the same time one has to note that the sales prices of assets were higher in the cases referred to than the book values earlier recorded in the annual reports (in the annual reports of those companies, who sold the assets).

A the same time – even in case the CA found that the purchase price of the assets is too high, it might not be sufficient reason to leave the value of assets unaccepted. The CA has lost a court dispute about the reasonableness of the investments made, where based on the CA's opinion analogous investments could have been made for a cheaper price (AS Anne Soojus re the court decisions of Tartu combined plant[12]). Analogous outcome may be expected also to the CA's explanation added to the last version (5.03.2012) of maximum price approval principles, based on which in case of ssale transactions, where only the owner of the assets changes without making any additional investments and it results in an increase in the value of assets, the purchase price is not taken as a basis of the regulatory asset base (concerns the companies, the maximum price of whom has been already approve by the CA earlier and the prices have been previously approved based on the earlir value of assets). The CA explained that the described principle has not been earlier applied and in the future proceeding from that principle may turn out to be complicated in practice, because the book value of assets (which equals to the purchase price for the buyer) needs to be taken as a basis.

4.4.3 For comparison the supervisory control also looked into the cases where entire company was bought:

- OÜ Kuldala Soojus (sales transaction 2008);

[11] Another 10 cases were looked into, but as the seller was not known or the particular transacton could not be distinguished from the others, then double checking of data could not be carried out in those cases.

[12] Administrative case no 3-10-1829

- OÜ Pogi (sales transaction 2011).

In the named cases the book value of assets was proceeded from when approving the maximum price after the sales transaction, the purchase-sale transaction did not change the value of assets taken as a basis when approving the maximum price. The buyer of OÜ Kuldala Soojus, OÜ Energate bought three companies, the transactions made very clearly indicate the difference between the value of the company and the book value of the assets of the company – in one case the purchase price was significantly higher than the book value of the company, in the other case significantly lower and in the third case more or less in the same calibre with the book value of assets.

Summary: The documents, reviewed by the persons who carried out the supervisory proceedings, proved that the CA has used the uniform price regulation principles for the applicants of maximum price approval. Similar applicants have been treated on uniform and similar basis, taking into consideration the principle of equal treatment. AS Fortum Termest´s application for the approval of the heating tariff in Kunda network region has been proceeded in the similar way to other similar applicants. Compared to AS Fortum Termest, AS Tallinna Vesi has not been treated in a discriminatory manner (ASTV´s wish to calculate the conditions of ASTV´s shares derived from the privatisation contract into the maximum price) are not comparable to the approval procedure of AS Fortum Termest´s application whereby the approval of the maximum price was based on the book value of assets acquired by AS Fortum Termest itself. The persons carrying out the supervisory proceedings have no reason to think that the CA would implement the discretionary power groundlessly or would favour individual undertakings.

4.5 ASTV's statement that Märt Ots as the DG of the CA has acted in the situation of conflict of interest when approving the tariff application of AS Fortum Termest, is going to be discussed as follows. In its letter ASTV presents a question: „*Why did the Competition Authority and Mr Ots, when making its 2011 tariff determination in Kunda, knowingly make a tariff determination which included profits from transactions from which the Head of the Competition Authority had personally benefited?*"

As per the Anti-corruption Act § 25 (1) A conflict of interest occurs if an official, in the course of his or her duties of employment, is required to make a decision or participate in the making of a decision which significantly influences the economic interests of the official, his or her close relatives or close relatives by marriage or legal persons, if the legal person is:
1) a general partnership, the partner of which the official, his or her close relative or close relative by marriage is;
2) a limited partnership, the general partner or limited partner of which the official, his or her close relative or close relative by marriage is;
3) a private limited company, the shareholder or member of the management board or supervisory board of which the official, his or her close relative or close relative by marriage is;
4) a public limited company, the shareholder or member of the management board or supervisory board of which the official, his or her close relative or close relative by marriage is;
5) a commercial association, the member of the management board or audit committee of which the official, his or her close relative or close relative by marriage is;

6) other legal person in private law, the member of the directing or supervisory body of which the official, his or her close relative or close relative by marriage is.
7) a company, the shareholder of which or a member of a management or supervisory body on an agreement with the official, his or her close relative or close relative by marriage, renders obedience to their orders, acts in their interest or account;
8) a company in which the official, his or her close relative or close relative by marriage, holds the right to acquire an ownership.

As has been noted in this summary of supervisory control proceedings part II „Factual circumstances“, the owneers of AS Kunda Elamu (incl. Märt Ots) sold the company's assets related to heat production in May 2007 to AS Fortum Termest. Only in October 2007, i.e. approximately 5 months after the sales transaction took place AS Fortum Termest turned to the Energy Market Inspectorate (the Director General of which Märt Ots was since 01.10.2000) with an application for an approval of maximum heat price for Kunda network area. Thus Märt Ots has not been acting in the conflict of interest in the meaning of the Anti-corruption Act when approving the maximum heat price applied for by AS Fortum Termest.

Märt Ots has confirmed that he as the minority shareholder has not participated in the management of AS Kunda Elamu or in the negotiations of the sales transaction. According to his explanations an obligatory revaluation of assets took place in 2003 in AS Kunda Elamu, where the evaluation certificates of real estate companies and the opinion of SA Regionaalsed Energiakeskused operating at that time served as the bases for that. The correctness and relevance of the evaluation certificates was approved by the auditor. The entire company was also reorganised, until in 2007 only the assets directly related to heat production were left in the balance sheet.

Märt Ots explained that the selling price for the assets of AS Kunda Elamu was according to his knowledge proposed by AS Fortum Termest, the offered price was based on the value of fixed assets and the obligations related thereto that were borne by AS Kunda Elamu. The persons carrying out the supervisory control proceedings looked into the purchase-sales agreement of AS Kunda Elamu's assets. That does not contain any references to the future price of the provided service, it is a usual sale of assets without any additional conditions.

When approving the price in 2007 the CA did not approve the initial application, but the approved maximum price turned out to be lower than the initial version. The persons carrying out the supervisory control proceedings analysed based on the balance sheet of AS Kunda Soojus and the existing data the potential price of Kunda network area in case the asssets would not have been sold and the previous owner of the assets would have continued to operate. The conclusion is that due to the change of owner and the CA's price regulation the price became more favourable for the consumers than it would have been with the previous situation continuing, because several pricing criteria became more favourable for the consumers (lower depreciation rate, higher benefit factor; in addition other advantages stemming from the scale effect – lower price of fuel and fixed costs) and regardless of higher book value of assets from earlier the maximum price turned out to be lower due to that.

It is important to note that Märt Ots as the Director General of the Energy Market Inspectorate has approved the applications for maximum price submitted by AS Fortum Termest to other network areas also before 2007 (e.g. in Viimsi and Väike-Maarja areas). The CA has been in a court dispute with AS Fortum Termest regarding the pricing of two big network areas (Tartu and Pärnu), one of which the CA won and it lost the other.

The persons carrying out the supervisory control proceedings do not have any evidence or confirmations that Märt Ots would have used his professional position in personal interests in the relationship with AS Fortum Termest. Court disputes with AS Fortum Termest [13] and the revenue lost by the company as a result of those prove on the opinion of the persons carrying out supervisory control proceedings the impartiality of Märt Ots with regard to the company under discussion.

Still, the ownership relations described above and consequently the fulfilment of regulator's duties after the termination of ownership relations towards the company which acquired the assets made it possible for the situation to occur that has enabled ASTV to accuse Mart Ots of violating the public service code of ethics[14].

In order to assess whether Märt Ots could have kept from the situation that has developed to date, the events need to be looked at on a timeline.
Märt Ots became a minority owner in the companies who owned heat production in Kunda, in 1999, when he did not yet work as the Director General of the Energy Market Inspectorate. Thus it is not likely that he could plan ahead the events that took place only in 2007. Neither the Anti-corruption Act nor the Public Service Act do not restrict the rights of a person to be an undertaking if it is not related to his/her functions. Märt Ots has not hidden the ownership relations from his employer and there is no evidence that he would have been active in managing AS Kunda Soojus. In the years preceding the sale transaction (1999 – beginning of 2007) Märt Ots was not able to foresee that those assets related to heat production would be purchased by a subsidiary to an international group Fortum, the network areas of whom had already earlier been subordinated to the obligatory approval proceedings of the Energy Market Inspectorate.

Summary: There is no evidence that Märt Ots would have acted in the situation of conflict of interest in 2007 when approving the maximum heat price applied for by AS Fortum Termest. Neither is there any evidence that Märt Ots would have in relation to AS Fortum Termest violated any prohibitions set forth in the Anti-corruption Act (procedural restrictions, forbidden transactions).

4.6 Having analysed ASTV's letter and evidence collected during the proceedings, incl. having analysed clearly mistaken assumptions on which the positions of ASTV's letter are based (addressed in the clause 4.1), the persons carrying out the supervisory control proceedings have reached to the opinion that the purpose of ASTV's letter may constitute a malevolent attempt to discredit the person of the CA's Director General either to influence the ongoing court matters or to influence the CA itself in order to make a decision on maximum price that is favourable for ASTV, but not compliant with the price regulation principles – for example it is realistically unconvincing that the persons who have been operating in business for years mix or cannot tell the difference between purchasing fixed assets and the

[13] Decisions of Tallinn District Court 5-10-359 and 3-10-1829

[14] The official also keeps from creating a seeming situation that may challenge his/her impartiality and objectivity of addressing the mattera (Public service code of ethics, clause 13).

privatisation of the shares of a company applying for an approval of maximum price. If this has been the purpose of ASTV's letter, then it is extremely condemnable by the opinion of the persons carrying out the supervisory control proceedings – amongst other things the resources of both the MoEC and CA have been unnecessarily wasted.

4.7 In its letter ASTV applies for publishing the results of the supervisory proceedings „*in full*". As these proceedings are not limited to only ASTV, but also concern several other companies, such „*in full*" would mean a breach of the obligation to keep business secrets. According to the Competition Act § 63 (2) an undertaking shall determine and indicate any such information which the undertaking considers, with good reason, to be a business secret of the undertaking, pursuant to the same Act § 63 (1) information subject to disclosure is not deemed to be business secrets. According to the Public Service Act § 67 all public servants shall maintain a business secret which becomes known to him or her due to his or her office.

V Proposals to the person carrying out the supervisory control

5.1 To terminate the proceedings of supervisory control.

5.2 To approve the summary of the supervisory control proceedings carried out over the Director General of the CA, including the conclusions of the persons who carried the proceedings out based on the evidence collected during the proceedings:
1) The CA and the Director General of the CA have treated the similar applicants for a maximum price based on the uniform price regulation principles in a uniform way and have not breached the principle of equal treatment, incl. in relation to AS Tallinna Vesi;
2) The Director General of the CA has not performed in a situation of conflict of interest while approving the maximum heat price applied for by AS Fortum Termest.

/digitally signed /

Meeli Õismaa

Eva Vanamb

Õie Soovik

Mario Lambing