R e p u b l i c o f S e r b i a
COMMISSION FOR PROTECTION OF COMPETITION
25/IV Savska Street, Belgrade
Number: 5/0-02-06/2022-2
Reference: 5/0-02-10/2021
5/0-02-69/2020
5/0-02-65/2019
5/0-02-459/2018
Date: July 13, 2022

Council of the Commission for Protection of Competition, pursuant to Article 22 paragraph 2 of the Law on Protection of Competition (“Official Gazette of the Republic of Serbia”, number 51/09 and 95/2013), and Article 101, paras. 1 and 3 of the Law on General Administrative Procedure ("Official Gazette of the RS", No. 18/2016 and 95/2018 - authentic interpretation), deciding in the proceedings conducted *ex officio* against the company JAVNO KOMUNALNO PREDUZEĆE GRADSKA TOPLANA NIŠ, registry number 07216009, with registered seat at: 3 Blagoja Parovića Street, Niš, represented by Predrag Milačić, in order to establish the existence of an act of abuse of a dominant position in the sense of Article 16 of the Law on Protection of Competition, at the 90th meeting held on July 13, 2022, adopts the following

D E C I S I O N

I SUSPENDING THE PROCEDURE initiated *ex officio* by the conclusion of the President of the Commission for the Protection of Competition No. 5/0-02-459/2018-1 as of May 6, 2018 , against the company JAVNO KOMUNALNO PREDUZEĆE GRADSKA TOPLANA NIŠ, registration number 07216009, with its registered seat at the following address: 3 Blagoja Parovića Street, Niš, in order to establish the existence of an act of abuse of a dominant position in the sense of Article 16 of the Law on Protection of Competition.

II This decision shall be published on the website of the Commission for Protection of Competition.

Statement of Reasons

The Commission for the Protection of Competition (hereinafter referred to as: the Commission), on the basis of the conclusion of the Commission’s President, number: 5/0-02-

459/2018-1 as of June 5, 2018, initiated the *ex officio* procedure against the company JAVNO KOMUNALNO PREDUZEĆE GRADSKA TOPLANA NIŠ, registration number 07216009, with its registered seat at the following address: 3 Blagoja Parovića Street, Niš, represented by the Director Predrag Milačić (hereinafter referred to as: City Heating Plant) in order to establish the existence of an act of abuse of a dominant position in the sense of Article 16 of the Law on Protection of Competition ("Official Gazette of the Republic of Serbia", number 51/2009 and 95/2013, hereinafter referred to as: the Law).

The competition infringement investigation procedure was initiated after the Commission, on the basis of publicly available information published in the daily newspaper "Politika", on February 7, 2018, that it has learned about the activities and findings of the State Audit Institution (hereinafter: SAI), in connection with the audit of financial statements and regularity of operations of the Public Utility Company "City Heating Plant" from Niš. At the request of the Commission, SAI has, in a letter filed with the Commission under no. 5/0-05-190/2018-2 as of February 27, 2018, submitted the Report on the Audit of Financial Statements and Operations of the Public Utility Company "City Heating Plant" Niš no. 400-444/2017-06/10 as of December 28, 2017 (hereinafter: the Report), prepared by SAI in accordance with the powers prescribed by the Law on the State Audit Institution ("Official Gazette of RS", no. 101/2005, 54/2007 and 36/2010). Taking into account the statements presented in the Report, the Commission reasonably assumed the existence of infringement of competition referred to in Article 16, paragraph 2, item 1) of the Law. Namely, determining the price of the heat energy supply service in a way that deviates from the methodology provided for in the Regulation on determining the methodology for determining the price of heat energy supply to the end customer ("Official Gazette of the RS", No. 63/2015 - hereinafter: the Regulation), which is based on the "Cost plus" principle, as a result of which it results in a higher price than the price amount that would be obtained by calculating in accordance with the methodology, and determining the price for connection to the hot water network in a way that is not provided for by the relevant legal framework, and all with invoicing such prices to consumers in a way that could deviate from the "cost principle", may represent an action of competition infringement from the aforementioned provision of the Law.

The City Heating Plant in its notice to the Commission filed under no. 5/0-02-459/2018-10 as of December 3,2018 pointed out that in the calculation of the price of thermal energy for the heating season 2018/2019, it took into account all the remarks from the Report, including the correction element for the heating seasons 2015/16 and 2017/18. To that end, they also pointed out that the official confirmation of the SAI is also expected, and that the conditions for the termination of the procedure have been met.

The Commission sent a request to the City Heating Plant to edit the submission no. 5/0-02-459/2018-14 as of December 10, 2018, to which the City Heating Plant responded by editing the application. The edited application for the suspension of the procedure was filed under the no. 5/0-02-459/2018-15 as of December 20, 2018.

In connection with the method and procedure for determining the price of heat energy supply, the City Heating Plant clarified that starting from 2015, it determines "zero prices" at the beginning of each heating season in accordance with the Regulation. The price proposal is made by the Supervisory Board of the company, in accordance with the provisions of the current Statute. The decision with accompanying calculations is submitted to the founder for control and approval by the City Council of the City of Niš. "Zero price" is a two-tariff price

and is determined as the price of supply: a) fixed part in the unit of measurement din/m2 (applied from August 1 of one year until July 31 of the following year, which is the so-called accounting year); b) variable part as din/kWh (applied only during the heating season in accordance with the Decision on the conditions and method of production, distribution and supply of thermal energy and the algorithm approved by the founder, which gives the possibility to pay for the delivered thermal energy in 12 monthly installments). According to Article 11 of the Regulation, a proposal to change the price of thermal energy due to an increase in the variable part of the price can be submitted in the event that the total price of energy increases by more than 3%, and must be submitted if it decreases by more than 5%. During the implementation of the Regulation, the City Heating Plant strictly adheres to this article and has changed the variable tariff both downward and upward. For all the mentioned changes, the consent of the founder was issued, i.e. i.e. of the City Council of the City of Niš, by passing a decision on granting consent.

In connection with the correction element, the City Heating Plant pointed out that, according to the Regulation, it is a value expression (monetary amount) by which the maximum amount of income for the regulatory period is reduced or increased, namely for the amount of the deviation of the realized income for the previous regulatory period based on the regulated prices for which consent was given from the maximum amount of income determined in accordance with the Methodology for the previous regulatory period. When calculating the maximum amount of income for the first regulatory period, the correction element is equal to zero. At the first price determination in 2015/16, the City Heating Plant stated a correction element of zero. Upon the following "zero price" calculation for 2016/17, the position of the City Heating Plant and the founders was that in this calculation as well, the correction element is not determined and calculated, given that in the previous calendar year, only the price established according to the Decree (adopted in July 17, 2015) was not valid. The City Heating Plant pointed out that when calculating the "zero price" for the heating season 2018/19, it applied a correction element, considering this kind of calculation to be the only correct one, upon the verbal consent of the SAI. The correction element calculated in this way for the last "zero price" included the correction element for the 2016/17 and 2017/18 and 2018/19 seasons, which fully complied with the requirements of the SAI.

The City Heating Plant clarified the payment per m2 and per measured amount of heat energy. It was pointed out that starting from 2013, i.e. starting from the heating season 2013/14, it fully applies the tariff system, i.e. the delivery and supply of thermal energy, invoicing and charging through a two-tariff price, namely:

- fixed price calculated as din/m2,
- variable price calculated as din/kWh.

The fixed price is paid during 12 months, and the variable price at the time of delivery of thermal energy (October - April) with the possibility that users can choose to pay this part in 12 months, according to the established algorithm. In several heating seasons, a special decision gave users the opportunity to opt for payment per m2 (flat rate), regardless of the fact that the City Heating Plant has metering at all points of heat energy delivery (100%). This possibility has been discontinued starting from the 2018/19 heating season. Also, the City Heating Plant has a single price for all users (both for residents and for the economy and for public users), regardless of the possibility provided by the Regulation, that this ratio can be 1:1.25%. For the controlled period (the period of application of the Regulation), the City Heating Plant had the consent of the founder on all determined and applied prices for the supply of thermal energy (both "zero" and changed prices), which was undisputedly

established in the control. With each decision on the price, the founder is also provided with the Opinion of the advisory body, in whose work a representative of the registered consumer association "Forum" Niš must also participate, in accordance with the Law on Consumer Protection.

Taking into account the above, the City Heating Plant proposed obligations, that it is willing to undertake voluntarily in order to eliminate possible competition violations, as well as a proposal to regularly, in writing, inform the Commission about the implementation of the proposed obligations, along with the delivery of supporting evidence.

In order to confirm the allegations from the proposal for the termination of the procedure, the Commission turned to the SAI with a request to clarify whether the remarks from the Report were taken into account, including the correction element for the heating seasons 2015/2016 and 2017/18. In its response filed under no. 5/0-02-65/2019-03 as of February 6, 2019, SAI pointed out that in accordance with the Law on the State Audit Institution, they sent a request to the City Heating Plant to submit a written report on the elimination of detected irregularities (Response to audit report) within 90 days, starting from the day after the report was delivered. The City Heating Plant submitted a Response to audit report to the SAI within the deadline, in which it presented the measures to correct the identified irregularities. After reviewing the Response to audit report, SAI assessed the corrective measures described in the Response to audit report, evaluated the unsatisfactorily remedied irregularities and determined that the irregularities that were not satisfactorily remedied, in terms of value, nature and context, represent significant irregularities, on the basis of which the conclusion of a serious violation of the good business obligations was reached. Following the submission of the Response to audit report and the issuance of the post-audit report, the City Heating Plant subsequently submitted the financial statements for 2017 and the Business Program for 2018 and other documentation, which was not the subject of the SAI audit, and based on which the price of heat energy supply for the heating was determined for the season 2018/2019, the documentation which was assessed by SAI.

On the basis of the above, SAI determined that the City Heating Plant fully acted according to the recommendations, which eliminated the irregularities noted in the Report. It was especially noted that the calculation of the price was subject to the rules of the Regulation, as well as that the correction element was calculated in accordance with the Regulation.

In terms of Article 53, paragraph 3 of the Law, a Notice on the submission of proposals for obligations that City Heating Plant is willing to undertake voluntarily in order to eliminate possible competition violations was published on the Commission's website, with an invitation to all interested parties to submit written objections, views and opinions related to the proposed obligations. Within the deadline of 20 days from the date of publication of the notice, no objections, positions and opinions regarding the proposal of the City Heating Plant were submitted to the Commission. By evaluating the proposed obligations and deadlines for their assumption, and based on the analysis of the market situation, the Council of the Commission determined that the goals of the measures referred to in Article 59 of the Law, have been achieved. Namely, it was established that the proposed obligations under the proposed terms enable the establishment of effective competition on the relevant market, and in terms of their content and effect, they correspond to the measures that the Commission would determine in accordance with Article 59 of the Law in the event that it determines the existence of competition infringement.

Therefore, the Council of the Commission passed a Conclusion on the termination of the competition infringement investigation procedure initiated *ex officio* against the City Heating Plant no. 5/0-02-65/2019-7 as of June 14, 2019 (hereinafter: The Conclusion) by which obligations and deadlines for the fulfillment of obligations were determined for the City Heating Plant, and in particular:

- that in price calculations, the appropriate act on determining the methodology for determining the price of the supply of thermal energy to the end customer and the clarification regarding its application, especially in the part related to the correction element, is fully and consistently adhered to;
- that each proposal of the newly established price is delivered to the founder together with the Opinion of the advisory body, one of whose full members is a representative of the local association for consumer protection;
- that the Supervisory Board of the company has a representative of the user of district heating with the right to discuss, without the right to vote;
- that in the event of doubts regarding the calculation of any of the mandatory elements of the price of supplying heat energy to the end customer, prescribed by the corresponding act on determining the methodology for determining the price of supplying heat energy to the end customer, the competent ministry should be contacted in writing with a request for interpretation;
- to publish the received instructions/guidelines/clarifications regarding the formation of the price of supplying the end customer with heat energy on its website, in order to ensure public insight and the possibility of verification by the public;
- to determine the price for the connection to the hot water network, apply only the criteria prescribed by the respective acts of the founders, which refer to the determination of the amount of the fee for the connection to the hot water network, as well as to publish the prices on its website;
- to regularly, after the end of the heating season, inform the Commission for the Protection of Competition in writing about the realization of the assumed obligations, with the submission of appropriate evidence thereof.

The conclusion, which the party received on June 17, 2019, also imposed the obligation upon the City Heating Plant to inform the Commission about the realization of the assumed obligations within 3 years from the date of receipt of the conclusion.

The City Heating Plant acted and informed the Commission, within the deadlines set in the Conclusion, regarding the actions as defined by the orders set forth in the Conclusion, whereby providing evidence for all of the afore specified, and through submissions filed with the Commission under the number 5/0-02-65/2019-8 as of July 15, 2019, 5/0-02-69/2020-1 as of June 4, 2020, with the supplement no.5/0-02-69/2020-2 as of June 16, 2020, 5/0-02-10/2021-1 as of May 19, 2021, with the supplements filed under no. 5/0-02-10/2021-2 as of May 31, 2021, and no. 5/0-02-10/2021-4 as of August 6, 2021, and submission no. 5/0-02-06/2022-1 as of May 18, 2022.

In the action reports, the decisions of the supervisory board of the City Heating Plant on new prices that should be approved by the founder, opinions of the advisory body, tabular representations of elements important for calculating prices in accordance with the prescribed methodology, evidence of the submission of proposals for newly determined prices together with the opinion of the advisory body, were submitted, as well as the decisions of the founders on giving consent to the decisions of the supervisory board of the City Heating Plant related to the new prices and evidence that the member of the supervisory board is a

representative of the district heating user. The City Heating Plant explained in its reports that all decisions on heat energy prices were published on the company's website

In the reports, the City Heating Plant noted that there were no doubts regarding the calculation of any of the mandatory elements of the price of supplying heat energy to the end customer, due to which, in accordance with the obligations from the Conclusion, it would have to contact the competent ministry with a request for interpretation.

Furthermore, the decision of the Supervisory Board of the City Heating Plant on the amount of the fee for connection to the hot water was delivered, proof of delivery thereof to the founder, the decision of the founder giving consent to the decision on the amount of the fee for connection, and contracts on the performance of works and connections in which those prices were applied.

Based on the analysis of the submitted submissions, the Council of the Commission stated that the City Heating Plant, during the period of three years from the receipt of the Conclusion, acted according to the obligations and within the deadlines set by the Conclusion.

In accordance with the previous statement, and due to the expiration of the specified period in which the party in the procedure was obliged to carry out the measures ordered by the same conclusion, the Council of the Commission determined that in this administrative matter there are no reasons prescribed by Article 58, paragraph 7 of the Law, for the continuation of the investigation of competition infringement, initiated *ex officio* against the City Heating Plant, and it was assessed that there are no longer any conditions for further action by the Commission in this administrative matter.

Based on all of the above, and in the light of provision of Article 101, paras. 1 and 3 of the Law on General Administrative Procedure (“Official Gazette of the Republic of Serbia”, no. 18/2016 and 95/2018 - authentic interpretation) it has been decided as given in the enacting terms of the Decision.

Legal remedy:

This decision shall be final in the administrative procedure and an administrative dispute can be initiated against it by filing a lawsuit to the Administrative Court in Belgrade, Nemanjina 9, within 30 days from the date of delivery of the decision.

For filing a lawsuit, a court fee in the amount of 390 dinars prescribed by the Law on Court Fees ("Official Gazette of RS", no. 28/1994, 53/1995, 16/1997, 34/2001 - other law, 9/2002, 29/2004, 61/2005, 116/2008 - other laws 31/2009, 101/2011, 93/2012, 93/2014, 106/2015 and 95/2018) shall be paid.

PRESIDENT OF THE COMMISSION

Nebojša Perić