Republic of Serbia
COMMISSION FOR PROTECTION OF COMPETITION
25/IV Savska St., Belgrade
Number: 5/0-02-459/2018-1
Date: June 5, 2018

Pursuant to Article 35(2) of the Law on Protection of Competition (Official Gazette of the RS 51/2009 and 95/2013), President of the Commission for Protection of Competition enacts the following

CONCLUSION

I **PROCEEDINGS IS INSTITUTED** *ex officio* for investigation of infringement of competition against **PUBLIC UTILITY COMPANY GRADSKA TOPLANA NIŠ**, company registration number 07216009, with registered seat at the address 3 Blagoja Parovića St., Niš, represented by CEO Predrag Milačić, in order to establish the existence of an act pertaining to the abuse of dominance within the meaning of Article 16(2/1) of the Law on Protection of Competition.

II All persons in possession of data, documents or other relevant information which could contribute to the accurate fact-finding in this proceedings are called upon to submit said to the Commission for Protection of Competition to the address 25 Savska St., Belgrade.

III This conclusion shall be published in the Official Gazette of the Republic of Serbia and on the website of the Commission for Protection of Competition.

Rationale

Based on publicly available information published in Politika newspaper on February 7, 2018, the Commission for Protection of Competition (hereinafter referred to as the Commission) has gained knowledge on activities and findings of the State Audit Institution concerning the audit of financial statements and regularity of operations of the Public Utility Company Gradska toplana from Niš. Following on the request presented by the Commission, in a letter entered in the Commission under number 5/0-05-190/2018-2 of February 27, 2018, the State Audit Institution (hereinafter referred to as SAI) has submitted the Report on the audit of financial statements and regularity of operations of the Public Utility Company Gradska toplana Niš no. 400-444/2017-06/10 of December 28, 2017 (hereinafter referred to as the Report).

The Commission has found that SAI's findings presented in the Report which concern the manner in which PUC Gradska toplana Niš (hereinafter referred to as Gradska toplana) was establishing the prices of thermal energy supply services, indicate that Gradska toplana has been setting the related costs in a manner which deviates from the method prescribed by the Regulation for the establishment of methodology for the calculation of thermal energy supply prices for end-users

(Official Gazette of the RS 63/2015, hereinafter referred to as the Regulation), in a segment relating to the variable part.

In the Report is underlined that Gradska toplana has been setting the thermal energy supply prices in disregard of the legal framework, in a manner where, when establishing the maximum amount of revenues relating to the variable part, has been including the following elements in calculations of the variable operating costs:
1) fixed costs (system access fee);
2) when estimating the market gas prices, Gradska toplana applied prices based on the July invoices, although gas prices were known for the entire regulatory period (January-June, based on delivered invoices, July-December, pursuant to the concluded Gas supply agreement with Yugorosgaz a.d. Beograd);
3) Gradska toplana has been assessing the heating oil prices based on the NIS's wholesale price list for the month of July, instead on prices established by the Heating oil supply agreement, while not including a rebate subsequently provided by energy suppliers as one of the pricing parameters.

In the Report is underlined that SAI has established that observed company failed to act in full and complete compliance with the Regulation for the establishment of a maximum revenue level of energy entities, in a segment relating to the fixed part, given that the following elements have been included in calculations of the fixed operating costs:
1) advance payment costs in enforcement procedures;
2) total amount of provisions for costs incurred for fees and other benefits, instead of remunerations paid on this basis which are regulated by the Regulation;
3) wage bill costs, fees of employees and other personal expenses exceeding the amount established by the legal framework.

Furthermore, in the Report in stated that SAI has established that Gradska toplana has failed to act in accordance with the Regulation, since it has failed to include the following elements in the other income category which are considered to be deductible, that is, which reduce the amount of a maximum revenue level based on activity relating to the production, distribution and supply of thermal energy – fixed part: income from the overhaul and maintenance of heating installations, income from the water heating in boilers, income from the provision of other services, differed income based on the implementation of grants, income from the remuneration for damages from property risk insurance, total amount of interest income, and income from the provision of thermal energy services to those users whose specific consumption, due to a lower energy efficiency of related buildings, is above the average monthly typical thermal energy consumption increased by 20%.

After reviewing a conclusion passed by the City Council of the City of Niš entered under number 1731-46/2015-03, SAI has established that the City Assembly has issued a recommendation to Gradska toplana to finance the costs of remotely monitorable and controllable energy heating system from its own resources in a segment of excess thermal energy provision from the average monthly typical consumption increased by 20%. It is underlined that Gradska toplana has failed to record revenues in the amount of 5,565 thousand dinars in 2016 generated from the provision of thermal energy in the volume of 1,212,937 kWh/m3 to users whose specific consumption is above the average monthly consumption increased by 20%. By failing to record these revenues, and given the manner for establishing the price of thermal energy, Gradska toplana has failed to exclude these revenues from calculations of a maximum revenue level, and in doing so, has reassigned the financing of the above-mentioned costs to other consumers.

Also, SAI has continued to establish that Gradska toplana has failed to determine a correction element in value, as an integral part of the fixed part of a price, which is contrary to the Regulation and the Energy Law (Official Gazette of the RS 145/2014). The Report also mentions that SAI has

established that in relation to the total annual delivered thermal energy quantities, one of the elements used for calculation of the thermal energy price has shown a difference between the accumulated thermal energy values and invoiced consumption values. SAI has established that when calculating the amount of regulated funds (calculation basis for return on capital employed which an energy entity may generate during a regulatory period), for 2015/2016 and 2016/2017 heating season Gradska toplana has also included a net value of obtained funds free of charge such as grants, although the Regulation stipulates their exemption.

SAI has also established that Gradska toplana applies prices for connection to the district heating network, where the distance of a targeted building from the backbone district heating pipeline is set as one of the criteria, although this element is not defined by the Rulebook for the establishment of fees for connection and access to the district heating network no. 3855/2010-09 of 23 December 2010.

By way of the provision of Article 16(2/1) of the Law on Protection of Competition (Official Gazette of the RS 51/2009 and 95/2013, hereinafter referred to as the Law) is stipulated that the abuse of dominance is particularly considered to be a practice which directly or indirectly impose unfair purchase or selling prices or other unfair business conditions.

Considering the above-listed statements presented in the Report, prepared by the SAI in accordance with competences stipulated by the Law on State Audit Institution (Official Gazette of the RS 101/2005, 54/2007 and 36/2010), the Commission has reasonably assumed the existence of competition infringement that as a purpose or effect have or may have a significant restriction, distortion or prevention of competition. Activities by way of which prices of thermal energy supply are regulated in a manner which derogates from a methodology prescribed by the Regulation, resulting in an increased amount of the service cost relative to the level that would have resulted from the use of prescribed methodology from the Regulation, and where connection costs to the district heating network are established in a manner not stipulated by the relevant legal framework, in addition to invoicing such costs to end-users in a manner which could depart from the "cost principle" within the meaning of the Law, may represent an anticompetitive action from Article 16(2/1) of the Law. The Commission will investigate and establish the existence of a potential infringement of competition in full and complete compliance with Article 41 of the Law.

Given that is assessed that conditions from Article 35(1) of the Law for instituting *ex officio* proceedings for investigation of competition infringement are fulfilled, pursuant to the provision of Article 35(2) of the Law, it is decided as in Paragraph I and II of enacting terms herein.

Pursuant to the provision of Article 40(1) of the Law, where is stipulated that a decision on instituting *ex officio* proceedings is published in the Official Gazette of the Republic of Serbia and on the website of the Commission, it is decided as in Paragraph III of enacting terms herein.

Instruction on legal remedy:

This conclusion is not susceptible to special appeal, but is permitted to institute administrative dispute by an appeal before the Administrative Court against the final decision of the Commission.

PRESIDENT OF THE COMMISSION

Dr. Miloje Obradović