

Official Gazette of the Federation of BiH, No. 63/16

Pursuant to Article 25, paragraph (1), item e), Article 41, paragraph (1), item a), Article 42, paragraph (1), item a), Article 48, paragraph (1), item a), in conjunction with Article 4, paragraph (1) of the Law on Competition ("Official Gazette of BiH", 48/05, 76/07, and 80/09), in the proceedings initiated on the basis of a Request to Initiate Proceedings submitted by the business entity Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo, represented by attorney Samir Čengić, Prušćakova 14, 71000 Sarajevo, against the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo, for the purpose of determining the existence of a prohibited agreement within the meaning of Article 4, paragraph (1), item b) of the Law on Competition, the Competition Council of Bosnia and Herzegovina, at its 131st session held on 14 July 2016, adopted the following:

DECISION

1. It is established that the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo, by adopting the Rulebook on the Termination of the Rulebook on Packaging and Packaging Waste Management No: 04-23-1334/15 of 21 January 2016 ("Official Gazette of the Federation of BiH", No. 8/16), has prevented, restricted, and distorted market competition in the market of packaging and packaging waste management on the territory of the Federation of Bosnia and Herzegovina by restricting and controlling the market, which constitutes a prohibited agreement within the meaning of Article 4, paragraph (1), item b) of the Law on Competition.
2. The Rulebook referred to in item 1 of this dispositive section is null and void within the meaning of Article 4, paragraph (2) of the Law on Competition.
3. A monetary fine is hereby imposed on the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo, in the amount of 21,000.00 KM (twenty-one thousand and 00/100 Convertible Marks), within the meaning of Article 48, paragraph (1), item a) of the Law on Competition, which must be paid within eight (8) days from the date of receipt of this Decision, and proof of payment must be submitted for review.

In the event that the imposed monetary fine is not paid within the specified period, it shall be collected by means of enforcement, in accordance with Article 47 of the Law on Competition, including the calculation of statutory default interest for the period of delay, pursuant to the applicable regulations of Bosnia and Herzegovina.

4. The Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo, is hereby ordered to reimburse the costs of the proceedings to the business entity Ekopak – Company for Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo, in the total amount of 1,631.80 KM (one thousand six hundred thirty-one and 80/100 Convertible Marks), within eight (8) days from the date of receipt of this Decision.
5. This Decision is final and shall be published in the "Official Gazette of BiH", the official gazettes of the entities, and the Brčko District of Bosnia and Herzegovina.

STATEMENT OF REASONS

On 19 February 2016, under number 06-26-3-007-II/16, the Competition Council received a Request to Initiate Proceedings (hereinafter: the "Request") submitted by the business entity

Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo (hereinafter: “Ekopak” or the “Applicant”), represented by attorney Samir Čengić, Prušćakova 14, 71000 Sarajevo, against the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo (hereinafter: the “Ministry”), for violation of Article 4, paragraph (1), item b) of the Law on Competition (hereinafter: the “Law”).

Given that, upon examination of the submitted documentation, it was established that the Request was incomplete, in accordance with Article 28 of the Law, the Competition Council, by act number 06-26-3-007-1-II/16 of 24 March 2016, requested the supplementation of the Request.

The Applicant, by submission number 06-26-3-007-2-II/16 of 28 March 2016, provided the requested supplementation.

After the Request was completed, the Competition Council, by act number 06-26-3-007-6-II/16 of 7 April 2016, issued to the Applicant a Confirmation of Receipt of a complete and orderly Request, within the meaning of Article 28, paragraph (3) of the Law on Competition.

1. Parties to the Proceedings

The parties to the proceedings are the business entity Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo, and the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo.

The business entity Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo, was registered with the Municipal Court in Sarajevo on 28 April 2011 under number (..) * 1, ID number: (..)*.

The Federal Ministry of Environment and Tourism is the administrative authority that adopted the contested Rulebook and to which, in accordance with Article 2, paragraph (1), item b) of the Law, the provisions of the same apply when, through its actions, it directly or indirectly participates in or influences the market of Bosnia and Herzegovina.

2. Legal Framework of the Proceedings

In the course of the proceedings, the Competition Council applied the provisions of the Law, the Decision on the Definition of the Relevant Market (“Official Gazette of BiH”, Nos. 18/06 and 34/10), and the provisions of the Law on Administrative Procedure (“Official Gazette of BiH”, 29/02, 12/04, 88/07, 93/09, and 41/13), within the meaning of Article 26 of the Law.

The Competition Council also took into account the provisions of the Law on Waste Management (“Official Gazette of the Federation of BiH”, 33/03 and 72/09) and the Law on Environmental Protection (“Official Gazette of the Federation of BiH”, 33/03 and 38/09).

3. Relevant Market

In accordance with Article 3 of the Law and Articles 4 and 5 of the Decision on the Definition of the Relevant Market, the relevant market is defined as the market of certain products which are the subject of the economic activities of undertakings in a specific geographic area.

According to Article 4 of the Decision on the Definition of the Relevant Market, in terms of the product, the relevant market encompasses all products and/or services which consumers and/or users consider mutually interchangeable under acceptable conditions, taking into particular consideration their essential characteristics, quality, usual purpose, method of use, conditions of sale, and prices.

According to Article 5 of the Decision on the Definition of the Relevant Market, in terms of geography, the relevant market encompasses the whole or part of the territory of Bosnia and Herzegovina where the business entity operates in the sale and/or purchase of the relevant product under equal or sufficiently homogeneous conditions, and which is significantly distinguishable from the conditions of competition in neighboring geographic markets.

Consequently, the relevant market shall be considered the market for packaging and packaging waste management on the territory of the Federation of Bosnia and Herzegovina.

4. Procedure on the Request for Initiation of Proceedings

The Applicant, as the reason for submitting the Request, states:

- Article 16 of the Waste Management Act ("Official Gazette of the Federation of BiH," 33/03 and 72/09) stipulates that the producer is obliged to design the product and packaging, use technologies and develop production in a way that uses materials and energy most efficiently, stimulates reuse and recycling of products, and at the end of the product life cycle will promote environmentally sustainable treatment, use, and disposal. The producer is obliged to use such raw materials and basic materials, semi-finished products and packaging that reduce the use of energy and materials and by whose use the generation of waste and the use of packaging are reduced, which lasts longer and does not endanger the environment when it becomes waste. Residuals created during the technological process, which are reintroduced into the technological process as well as products that can be reused for their original purpose without further treatment, become waste only when they leave this production cycle;
- Article 58 of the Waste Management Act ("Official Gazette of the Federation of BiH," 33/03 and 72/09) prescribes that implementing regulations under Article 16 of this Act shall be adopted by the Federal Minister responsible for the environment, for certain types of waste, among which are packaging and packaging waste, within one year from the date of entry into force of the Waste Management Act;
- The Federal Ministry of Environment, by the Rulebook on Packaging and Packaging Waste Management ("Official Gazette of the Federation of BiH," 88/11 and 28/13), prescribed the rules for the management of packaging in production, trade and use of packaging and the rules of handling and other conditions of collection, reuse, recovery and disposal, in accordance with the priorities and basic principles of the Waste Management Act;
- The said Rulebook stipulates that the management of packaging and packaging waste may be performed by business companies that obtain a permit for waste management from the Ministry of Environment and the Public Institution Environmental Protection Fund;
- After meeting the prescribed requirements, the business entity Ekopak, on 09.05.2012, was granted by the Ministry of Environment a Decision on the permit as an operator of the packaging waste management system for a period of six years;

- In order to obtain a waste management permit, in accordance with the Rulebook on Packaging and Packaging Waste Management, the business entity Ekopak had to have 30 signed contracts with clients (business entities) Polluters and pre-contracts with Collectors for each canton;
- that the business entity Ekopak, after obtaining the permit, concluded contracts with (..)* 2 business entities for the provision of packaging and packaging waste management services and (..)* contracts with business entities that collect waste, which are still in force;
- that it has generated certain revenues which it has fully spent in accordance with Article 15 of the Rulebook on Packaging and Packaging Waste Management, which prescribes the obligation to invest profit exclusively in the construction of the system for the disposal of packaging and packaging waste;
- that in the previous period it duly fulfilled all its obligations towards the Ministry in terms of submitting reports, achieving targets and that at the moment of adoption of the disputed Rulebook it had a valid waste management permit;
- that the Ministry of Environment, in February 2016, adopted the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management ("Official Gazette of the Federation of BiH," No. 8/16), which in Article 3 prescribes that system operators are obliged to transfer all acquired obligations and all unspent earmarked funds, as well as remaining unspent financial resources, to the PI Environmental Protection Fund of the Federation of BiH, by 31.3.2016;
- that at the time of adoption of the said Rulebook, on the territory of the Federation of BiH, alongside the business entity Ekopak and the PI Environmental Protection Fund of FBiH, the business entity Ekoživot also operated;
- that preliminary analyses show that in 2014 the business entity Ekopak had (..) % *market share in the packaging waste market*, the business entity Ekoživot (..) %, and the PI Environmental Protection Fund of FBiH (..)* %.

The Competition Council, based on the allegations from the Request and the submitted documentation, assessed that the violations of the Act, to which the Applicant refers, cannot be determined without conducting proceedings, and, in accordance with Article 32, paragraph (2) of the Act, adopted a Conclusion on the initiation of proceedings on 07.04.2016, under reference number: 06-26-3-007-7-II/16 (hereinafter: Conclusion).

In accordance with Article 33 of the Act, the Competition Council submitted the Request and the Conclusion to the Ministry for a response, on 07.04.2016, by act number: 06-26-3-007-13-II/16.

The Ministry submitted a response to the Competition Council, on 20.04.2016, in a submission received under number: 06-26-3-007-17-II/16, and essentially states:

- that the Rulebook on Packaging and Packaging Waste Management ("Official Gazette of the Federation of BiH," 88/11 and 28/13), due to a number of problems identified during its implementation, ceased to be valid, i.e., was repealed by the adoption of the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management ("Official Gazette of the Federation of BiH," No. 8/16);
- that in Bosnia and Herzegovina there is an unharmonized legal framework in the field of waste management, which affects the market, and that active coordination was

conducted with the competent ministry from the Republic of Srpska and the competent service from the Brčko District with the aim of harmonizing regulations due to implications on the single market, which during the previous period of application of the said Rulebook was not achieved;

- that the Rulebook on Packaging and Packaging Waste Management granted public authorizations to system operators, which is contrary to Article 27 of the Act on Administration ("Official Gazette of the Federation of BiH," No. 28/97) and Article 26 of the Act on the Organization of Administrative Bodies in the Federation of Bosnia and Herzegovina ("Official Gazette of the Federation of BiH," No. 35/05);
- that public authorizations were granted for five years, that system operators collect fees from system obligors, i.e., business companies that first place a product in packaging on the market of the Federation of BiH, and that public authorizations can be granted exclusively by law and not by a rulebook as a lower legal act;
- that two permits were issued to business entities for packaging and packaging waste (Ekopak and Ekoživot) and that they had to conduct their business activities on a non-profit basis, while at the same time being established as business companies in accordance with Article 2, paragraph 1 of the Companies Act of the Federation of BiH ("Official Gazette of the Federation of BiH," No. 86/15) for the purpose of generating profit, which was one of the reasons to suspend the system and resolve it legally;
- that system operators, although legally obliged, did not plan in coordination with the Federal Ministry of Environment and Tourism and the Coordination Body for Monitoring the Implementation of the Rulebook on Packaging and Packaging Waste Management to spend funds and invest in infrastructure for the intended purpose, but did so at their own discretion;
- that after a comprehensive analysis of the legal content and application of the relevant rulebooks and the Waste Management Act, the Expert Commission for Drafting Regulations on Waste Management proposed that the existing Rulebook on Packaging and Packaging Waste Management be repealed and that amendments to the Waste Management Act be drafted;
- that by adopting the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management there was no prevention, restriction, or distortion of market competition in the market of Bosnia and Herzegovina, i.e., the market of the Federation of Bosnia and Herzegovina.

On the basis of the above, the Ministry maintains that the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management ("Official Gazette of the Federation of BiH," No. 8/16) in connection with Article 4, paragraph (1), item b) of the Act, in no way endangers competition in Bosnia and Herzegovina but represents a temporary solution until the competent authority establishes a new, more transparent and legally prescribed waste management system through operators.

The Ministry also considers that there was no distortion of the market in terms of restriction of competition, and in that respect the request for initiation of proceedings submitted by the business entity Ekopak is legally unfounded, and it is proposed that the Competition Council adopt a final decision rejecting the Applicant's request as unfounded or issue a decision terminating the proceedings.

5. Temporary Measure

- As part of the Request for Initiation of Proceedings, the Applicant requested the adoption of a temporary measure ordering the Ministry of Environment and Tourism to suspend the application of the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management.
- The Competition Council determined a preliminary violation of the Act and upheld the Request for the determination of a temporary measure submitted by the business entity Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, Zmaja od Bosne 7-7a, 71000 Sarajevo, and issued a Decision on the Request for the adoption of a temporary measure of the business entity Ekopak d.o.o. Sarajevo, number: 06-26-3-007-3-II/16 of 30.03.2016, ordering the Federal Ministry of Environment and Tourism, Marka Marulića 2, 71000 Sarajevo, to temporarily suspend from force and application the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management, number 04-23-1334/15 of 21.01.2016 ("Official Gazette of the Federation of BiH," No. 8/16).
- Acting on the Decision of the Competition Council, number: 06-26-3-007-3-II/16 of 30.03.2016, the Federal Ministry of Environment and Tourism prepared the Rulebook on the Temporary Suspension of the Rulebook on the Cessation of the Rulebook on Packaging and Packaging Waste Management, and requested opinions from the Ministry of Finance of FBiH, the Ministry of Justice, and the Office for Legislation;
- The Ministry of Finance gave a positive opinion, the Ministry of Justice did not provide an opinion, while the Office for Legislation, on 23.04.2016, gave a negative opinion on the grounds that "the said rulebook cannot be suspended, i.e. cannot cease to be valid, either temporarily or permanently, because if regulations were frequently suspended after adoption, i.e. ceased to be valid, then subsequently legally re-enforced, and finally ceased to be valid again, this would violate the principle of legal certainty";
- The Ministry forwarded the said Rulebook for publication in the Official Gazette of FBiH on 07.06.2016, i.e., more than two months after the adoption of the Decision of the Competition Council, and more than one month after obtaining the requested opinions;
- The said Rulebook was not published in the Official Gazette of FBiH because the Secretary of the Government informed the Ministry by letter that Article 94 of the Rules of Procedure stipulates that the Secretary of the Government cannot send regulations for publication if they are not harmonized with the Office for Legislation of the Government of the Federation of BiH;
- From the above, it follows that, legally speaking, the Decision of the Competition Council on the temporary measure was not implemented;
- However, in practice, the Applicant acted in accordance with the Decision of the Competition Council on the temporary measure and continued performing activities without sanction by the Ministry.

6. Oral Hearing

Since this is a proceeding involving parties with opposing interests, the Competition Council scheduled an oral hearing, in accordance with Article 39 of the Law, for 17.05.2016 (summons

delivered by acts number: 06-26-3-007-20-II/16 and number: 06-26-3-007-21-II/16 of 25.04.2016).

The oral hearing was held at the seat of the Competition Council with the presence of attorney Samir Čengić, legal representative of the business entity Ekopak – Company for Packaging and Packaging Waste Management Ltd. Sarajevo, the director of Ekopak, Amela Hrbat, and Samir Čorbo for the Applicant, and for the Ministry as the opposing party: Muhamed Mujakić, Mehmed Cero, Azra Bašić, Safet Harbinja, Sanela Popović, Anda Hadžiabdić, Indira Sulejmanagić, and Elma Hadžić-Ramić.

The Applicant's legal representative stated that he maintains the claims from the Request and essentially declared the following during the hearing:

- that the business entity Ekopak obtained a permit from the competent ministry for packaging and packaging waste management, has concluded contracts with business entities which are still in force, and that it has generated certain revenues which it has entirely spent in accordance with Article 15 of the said Ordinance, which prescribes the obligation to invest profits exclusively in the construction of the packaging and packaging waste management system;
- that at the same time, the business entity has duly fulfilled all its obligations to the Ministry of Environment in terms of submitting reports and meeting objectives, so that at the moment of adoption of the disputed ordinance it held a valid permit for waste management;
- that by a non-standard process of sub-legal norm-making, the Waste Management Law was seriously violated, because the legislator had charged the Minister to regulate the field of packaging and packaging waste by a sub-legal act, and not to return the regulated field de facto to the state before 2011;
- that the Applicant is of the opinion that the disputed ordinance, in the most severe way and in its entirety, clearly and indisputably prevents and restricts market competition in the market of packaging and packaging waste management, because it places the Public Institution Fund for Environmental Protection of the Federation of BiH in a monopolistic position and completely prevents the business entity Ekopak (and the other operator) from operating in the market of packaging and packaging waste management.

The Ministry's representatives stated that they fully maintain the response to the Request and essentially stated the following:

- that the temporary suspension of a system that has not proven transparent and sustainable, until the adoption of the Law on Amendments to the Waste Management Law and a number of new implementing sub-legal regulations, was not intended to disrupt the market because the collection of fees would be left to the Fund for Environmental Protection, which in this case did not occur, as the waste management market, i.e. the economy, would be relieved from paying fees until the entry into force of the new law, and thus the market would not be endangered;
- that Article 4 paragraph (1) point b) of the Law on Competition cannot be applied to the Ordinance on the Termination of Validity of the Ordinance on Packaging and Packaging Waste Management due to its overall correlation with the provisions of the Law on the Environmental Protection Fund, the Law on Environmental Protection, and the Waste Management Law, because the Environmental Protection Fund of the Federation of BiH

is not a commercial/business entity seeking monopoly on the market but a financial instrument of environmental protection of the Federation of BiH, and the fees for packaging and packaging waste management collected both by the system operator and the Environmental Protection Fund of the Federation of BiH are not voluntary but mandatory for all producers and importers of packaged products, based on the "polluter pays" principle;

- that the Ministry acted in accordance with the temporary measure of the Competition Council and forwarded the Ordinance on the Termination of Validity of the Ordinance on Packaging and Packaging Waste Management for opinion to the Federal Ministry of Justice, the Federal Ministry of Finance, and the Office for Legislation and EU Compliance of the Government of the Federation of BiH;
- that Article 21 paragraph (1) of the Ordinance on Packaging and Packaging Waste Management prescribes the obligation of system operators to send to the Federal Ministry of Environment and Tourism and the Environmental Protection Fund of the Federation of BiH a report on packaging and packaging waste management for the previous calendar year by March 31 of each year, and that all reports of the Environmental Protection Fund on the work of the Ekopak were negative.

At the oral hearing, each party submitted a written statement and additional documentation confirming their claims (Minutes 06-26-3-007-24-II/16 of 17.05.2016).

7. Established Factual Situation and Assessment of Evidence

- Article 16 of the Waste Management Law ("Official Gazette of the Federation of BiH", 33/03 and 72/09) prescribes that the producer is obliged to design the product and packaging, use technologies and develop production in a way that most efficiently utilizes materials and energy, stimulates reuse and recycling of products, and at the end of the product life cycle promotes environmentally sustainable treatment, use, and disposal. The producer is obliged to use such raw materials and basic materials, semi-finished products, and packaging that reduce the use of energy and materials and whose use reduces waste generation, as well as packaging that lasts longer and does not endanger the environment when it becomes waste. Residues generated during the technological process that are reintroduced into the technological process, as well as products that can be reused for their original purpose without further treatment, become waste only when they exit this production cycle;
- Article 58 of the Waste Management Law ("Official Gazette of the Federation of BiH", 33/03 and 72/09) prescribes that the implementing regulations from Article 16 of this Law shall be enacted by the Federal Minister responsible for the environment for certain types of waste, including packaging and packaging waste, within one year from the entry into force of the Waste Management Law;
- The Federal Ministry of Environment, by the Regulation on the Management of Packaging and Packaging Waste ("Official Gazette of the Federation of BiH", 88/11 and 28/13), prescribed the rules for managing packaging in production, trade, and use of packaging and the rules of handling and other conditions for collection, reuse, recovery, and disposal, in accordance with the priorities and basic principles of the Waste Management Law;

- The said regulation stipulates that companies may engage in the management of packaging and packaging waste if they obtain a permit for waste management from the Ministry of Environment and the Public Institution Environmental Protection Fund;
- After fulfilling the requirements set by the Regulation, the Applicant received, on 09.05.2012, from the Ministry a Decision granting a permit as an operator of the packaging waste management system for a period of six years;
- In order to obtain the waste management permit, the Applicant was required, under the Regulation on the Management of Packaging and Packaging Waste, to have concluded 30 contracts with clients (business operators) – Polluters, and preliminary agreements with Collectors for each canton;
- After obtaining the permit, the Applicant concluded contracts with (..)* 3 business operators for the provision of packaging and packaging waste management services and (..)* contracts with business operators collecting waste, which are still in force;
- The Applicant generated certain revenues which were fully used in accordance with Article 15 of the Regulation on the Management of Packaging and Packaging Waste, which prescribes the obligation to invest profits exclusively in the construction of the packaging and packaging waste management system;
- The Applicant duly fulfilled all obligations towards the Ministry during the relevant period in terms of submitting reports and meeting targets, and at the time of the adoption of the disputed regulation, held a valid waste management permit;
- Article 18 of the Regulation prescribes that the Ministry shall revoke the system operator's permit if it determines that: the operator does not manage packaging waste in accordance with the regulations; does not submit an annual report on packaging and packaging waste in accordance with this Regulation; does not achieve objectives across the entire territory of the Federation of BiH; or fails to provide evidence regarding confidentiality of the data indicated in the report. Upon the adoption of the decision on the revocation of the permit under paragraph 1 of this Article, the system operator ceases all activities related to waste collection;
- The Ministry has never applied these provisions, i.e., it has never revoked the system operator's permit;
- In February 2016, the Ministry adopted the Regulation on the Termination of the Validity of the Regulation on the Management of Packaging and Packaging Waste ("Official Gazette of the Federation of BiH", No. 8/16), which in Article 3 prescribes that system operators are obliged to transfer all acquired obligations and all purposefully unspent funds, as well as remaining unspent financial resources, to the Public Institution Environmental Protection Fund of FBiH by 31.03.2016;
- At the time of adoption of the said regulation, on the relevant market, alongside the Applicant and the Public Institution Environmental Protection Fund FBiH, the business entity Ekoživot was also active;
- By adopting the Regulation on the Termination of the Validity of the Regulation on the Management of Packaging and Packaging Waste, the Applicant and the business entity Ekoživot ceased operations;

- The Ministry prepared and submitted a new draft Law on Amendments and Supplements to the Waste Management Law; however, it was not adopted before the Decision of the Competition Council was issued;
- Article 4, paragraph (1) of the Law prescribes that prohibited agreements, contracts, individual provisions of agreements or contracts, concerted practices, explicit and tacit agreements of business operators, as well as decisions and other acts of business operators which aim to or result in preventing, restricting, or distorting competition in the relevant market, apply to:

- a) directly or indirectly fixing purchase and selling prices or any other trading conditions;
- b) limiting or controlling production, markets, technical development, or investment;
- c) dividing markets or sources of supply;
- d) applying different conditions to identical transactions with other business operators, putting them at a disadvantage in relation to competition;
- e) concluding such agreements whereby the other party is conditioned to accept additional obligations that, by their nature or trade customs, are not related to the subject matter of the agreement.

Having regard to the above, the Competition Council established a violation of the provisions of Article 4, paragraph (1), item b) of the Competition Law in the sense of adopting the Regulation which limits the relevant market by imposing obligations on system operators to transfer all obligations, including all contracts concluded by the operators with other business operators (Polluters and Collectors), as well as remaining unspent financial resources, to the Public Institution Environmental Protection Fund of FBiH. This directly closes the market and eliminates competition, i.e., prevents business operators who held a Permit as a system operator for packaging waste management from operating.

The Ministry's argument that the reason for adopting the Regulation on the Termination of the Validity of the Regulation on the Management of Packaging and Packaging Waste was the Applicant's non-compliance with obligations under the regulation could not be considered because, according to the same Regulation, the Ministry could have revoked the Applicant's operating permit, which it did not do. Instead of revoking the permit, the Ministry adopted the Regulation on the Termination of the Validity of the Regulation on the Management of Packaging and Packaging Waste, thereby completely closing the packaging waste market and preventing the operation of not only the Applicant but also the other market participant, the business entity Ekoživot d.o.o.

The Ministry's argument that the regulation was repealed in order to "correct the situation" in the relevant market and propose a new law addressing the deficiencies of the existing system could not be considered because the Ministry could have prepared a new draft Law and corresponding subordinate acts without repealing the existing regulation. On the contrary, before proposing a new Law, the Ministry adopted the Regulation which repealed the existing regulation, thereby closing the market and preventing all participants from operating.

Based on the above, and on the analysis of evidence as well as the results of the overall procedure, the Competition Council determined that the Ministry of Environment and Tourism, by adopting the said Regulation, prevented, restricted, and distorted market competition in the packaging and packaging waste management market in the territory of Bosnia and Herzegovina,

specifically by limiting and controlling the market. This constitutes a prohibited agreement within the meaning of Article 4, paragraph (1), item b) of the Law, and accordingly, a decision was made as set out in the operative part of this Decision.

In accordance with Article 4, paragraph (2) of the Law, the said regulation shall be considered null and void, and the Regulation on the Management of Packaging and Packaging Waste ("Official Gazette of the Federation of BiH", No. 88/11 and 28/13), which prescribes the rules for managing packaging in production, trade, and use of packaging and the rules of handling and other conditions for collection, reuse, recovery, and disposal, in accordance with the priorities and basic principles of the Waste Management Law, shall remain in force.

8. Monetary Fine

Pursuant to Article 48, paragraph (1), item a) of the Law, a monetary fine of up to 10% of the total annual revenue of the business operator from the year preceding the year in which the violation occurred shall be imposed on an business operator if it concludes a prohibited agreement or participates in any other manner in an agreement that impairs, restricts, or prevents market competition within the meaning of Article 4 of the Law.

Considering the indisputably established fact that the Ministry violated the provisions of Article 4, paragraph (1), item b) of the Law, the Competition Council imposed a monetary fine of 21,000.00 (twenty-one thousand and 00/100) KM, which corresponds to (..)* 4% of total revenue in 2015, which amounted to (..)* KM.

When determining the amount of the fine, the Competition Council considered the intent and duration of the violation of the Law, as well as the consequences it had on market competition in the relevant market, pursuant to Article 52 of the Law.

In determining the amount of the fine, the Competition Council considered as an aggravating circumstance the fact that the Ministry did not fully implement the Decision on the temporary measure.

Considering that the imposed fine is much lower than the maximum possible for the established violation of the Law, the Competition Council's primary aim was not punitive but to alert the Ministry to its obligation to comply with the market competition rules set forth in the Law.

The Competition Council considers that imposing such fines, in addition to punishing business operators for violations of the Law, should have a preventive effect to deter other business operators from engaging in or continuing behavior that constitutes a violation of the Law.

In the event that the monetary fine referred to in point 5 of the operative part of this Decision is not paid within the specified period, it shall be collected by enforcement, pursuant to Article 47 of the Law, with default interest calculated for the period of delay in accordance with the applicable regulations of Bosnia and Herzegovina.

9. Procedural Costs

The Applicant submitted, on 31.05.2016, a request for reimbursement of procedural costs (submission No. 06-26-3-007-30-II/16), which consists of the following costs: 1) Request for initiation of the procedure – 840.00 KM; 2) Attendance at oral hearing – 840.00 KM; 3) Request for action on temporary measure of 12.04.2016 – 840.00 KM; 4) administrative fee on the request – 1,000 KM; and 5) Copying – 100.00 KM, totaling 4,234.40 KM including VAT.

Pursuant to Article 108, paragraph 1 of the Administrative Procedure Law, in the decision terminating the procedure, the authority issuing the decision determines who bears the procedural costs, their amount, and to whom and within what period they must be paid. Article 105, paragraph 2, of the same Law prescribes that when two or more parties with opposing interests participate in the procedure, the party causing the procedure and losing it must compensate the other party for reasonable costs incurred during the procedure.

The Competition Council recognized only the necessary and justified legal representation costs for the Applicant and, in accordance with tariff numbers 18 and 33 of the Tariff on fees and compensation for attorneys in the Federation of BiH, determined and recognized the following attorney costs for the business entity Ekopak: 1) for filing a complaint against the Ministry on 19.02.2016 – 240.00 KM; 2) for attending the oral hearing on 17.05.2016 – 300.00 KM, totaling 631.80 KM including VAT. Also recognized were the administrative fee of 1,000.00 KM, bringing the total recognized costs to 1,631.80 KM.

10. Instruction on Legal Remedy

This Decision is final and no appeal is allowed against it.

The dissatisfied party may initiate administrative proceedings before the Court of Bosnia and Herzegovina within 30 days from the date of receipt or publication of this Decision.

No. 06-26-3-007-36-II/16

14 July 2016

Sarajevo

President

Mr. Arijana Regoda – Dražić, s.r.

1 (..)* – Data constitutes business secret

2 (..)* – Data constitutes business secret

3 (..)* – Data constitutes business secret

4 (..)* – Data constitutes business secret