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Estonia

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The role of economics in Estonian competition law enforcement is limited, and the competition authority's approach to investigating cases has generally remained unchanged over recent years. The Estonian Competition Authority (ECA) operates both as a tariff regulator and a competition law enforcer, which has resulted in a relatively high number of excessive pricing cases. Although the upcoming implementation of the ECN+ Directive is expected to result in considerable changes in the Estonian Competition Act, the details remain unknown until half a year prior to its implementation. As a result of the ECN+ Directive, the criminalisation of cartels is expected to cease. This should reduce the burden of proof in cartel cases, which will potentially make economic arguments more appealing in court. Thus, we expect to see more cartel investigations in future.

This article is based on interviews with the ECA and prominent competition law practitioners from the law firms COBALT, Ellex Raidla, Eversheds Sutherland, Sorainen and TGS Baltic.

Use of economics in merger cases is limited

Except for large and complex cases, the ECA rarely carries out advanced economic analysis in merger investigations. Instead, the analysis tends to focus on the parties' joint market shares, where the market definition relies on previous case practice. The authority seems to emphasise the views of competitors and consumers in its evaluations of the effects on competition. In some Phase II cases, the authority analyses the proximity of competition based on customer surveys. In the past, the authority also conducted a proper catchment area analysis in a large case consisting of many local markets.

The interviewed lawyers consider the market research conducted by the ECA to be somewhat simplistic. Many of them say that the quality of work carried out by the authority depends on the ECA's prior knowledge of the affected market. This probably stems from the limited size of the ECA's staff, which consists of 14 experts, five of whom are economists in both the competition supervision and merger control department.

Merger decisions ruled by the ECA are rarely challenged in the Administrative Court and, so far, no prohibition decision has been overruled by the court. Use of economic experts is limited in such cases.

The ECA commonly disregards online and cross-border competition

While Estonia is commonly seen as one of the leading countries in digitalisation, the lawyers we interviewed told us that the ECA often disregards the effects of digitalisation in their analysis of the relevant market in competition law cases. Furthermore, the ECA considers markets national despite the importance of cross-border trade to the Estonian economy. In the upcoming years, some lawyers speculated that it will become more important for private practitioners to demonstrate the effect of potential and current competitive pressure exerted by online and foreign competitors. Already, the ECA has accepted the presence of global players, for instance, in the online advertisement market. The representative of the ECA stressed the importance of consumer confidence and network effects in two-sided digital markets, which increases the barrier for foreign competition to enter. Like many other European competition authorities, the ECA expects the EU Commission's market definition reform to clarify how to more seriously account for digitalisation in their analyses.

Excessive pricing cases are investigated actively

In addition to the public enforcement of competition law, the ECA acts as a tariff regulator in sectors with natural monopolies, such as electricity, postal services, public water supply and sewerage, and railways. The authority is also keen to analyse excessive pricing issues when clients or competitors file a complaint regarding pricing matters in unregulated sectors, as the ECA has a lot of experience of such investigations. In cases where competitive pressure is clearly present, the ECA accepts the counterargument that the market will solve the pricing problem without an intervention.

Private practitioners see that the ECA rarely changes its initial view in abuse of dominance cases and that the rationale behind the ECA's arguments is not always transparent. These cases are commonly argued on a "by object" basis. Some interviewed lawyers believe that the number of abuse of dominance cases may increase further following the implementation of the ECN+ Directive.

Harmonisation with the ECN+ Directive is expected to considerably change Estonian Competition Law

The ECN+ Directive aims to harmonise and improve the efficiency of competition monitoring within the EU. While the exact details of the changes are still unknown, the interviewed lawyers and the ECA expect the implementation of the Directive to change Estonian competition legislation remarkably.

Estonia seeks to simultaneously reform its procedures in financial supervision and data protection, further complicating the revision process. One of the interviewed lawyers thinks that the Ministry of Justice responsible for the reform is not familiar enough with competition law enforcement practices, which both creates friction between the suggestions and delays the process.

Cartels have been criminalised in Estonia, which has led to high burden of proof in cartel cases. Following the implementation of the ECN+, termination of criminalisation is on the table in the reviewing process to harmonise practices within the EU. This would lower the burden of proof in such cases, as cartel cases would be assessed in administrative court and would be subject to administrative fines. The ECA wishes to obtain additional resources to carry out more administrative cases in future.

Unlike in many other EU member states where cartels are not subject to criminal law and investigations, the ECA expects the ECN+ to decrease the procedural rights of the authorities. Currently, the authorities can use surveillance and wiretapping.

A pause in merger filings due to covid-19, but new cases arose quickly

The processes of the ECA slowed down owing to the covid-19 pandemic and the consequent requirement for remote working. The pandemic initially led Estonian companies to act cautiously towards mergers, but in summer 2020 new mergers have started to be filed again. The ECA expected to see several competition cases affected by the pandemic such as acquisitions of failing firms, but so far, the competition cases have been unrelated to the pandemic outbreak. Like many others, the ECA representative contemplated whether the economic crisis and cases related to it are still to come.



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