

## Enforcement of EU Competition Rules in Estonia: Substantive Convergence and Procedural Divergence

by

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### *Abstract*

A decade of decentralized enforcement of EU competition rules under the procedural framework of Regulation 1/2003 has produced a diverse enforcement record that varies among Member States. While the numbers of notified investigations and infringement decisions based on Articles 101 & 102 TFEU are impressive, some EU jurisdictions have demonstrated an only negligible participation in the direct enforcement of EU competition rules. After joining the EU in 2004, Estonia has harmonized its competition legislation with EU standards and pursued active criminal enforcement of antitrust rules. At the same time, EU competition rules are absent from the enforcement practice of the Estonian competition authority and national courts. The present paper provides an overview of the specifics of the Estonian legal system including its substantive, procedural and institutional components. This overview demonstrates how the diversity and complexity of the

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procedural framework for the enforcement of competition rules (administrative, misdemeanour and criminal proceedings) effectively prevented EU competition rules from penetrating the national legal system.

### *Résumé*

La décennie de l'application décentralisée des règles de concurrence de l'UE dans le cadre procédural introduit par le règlement 1/2003 a produit un bilan d'application diversifiée qui varie entre les États membres. Bien que les nombres d'enquêtes notifiées et de décisions d'infraction prises à la base des articles 101 et 102 du TFUE sont impressionnants, les juridictions de certains pays de l'UE n'ont démontré que la participation minimale dans l'application directe des règles de concurrence de l'UE. Après avoir rejoint l'UE en 2004, l'Estonie a harmonisé sa législation sur la concurrence avec les normes de l'UE et poursuivi la répression pénale active des règles d'antitrust. En même temps, les règles de concurrence de l'UE sont absentes de la pratique de l'application par des autorités de la concurrence et les tribunaux estoniens. Cet article fournit un aperçu général des spécificités du système juridique estonien, y compris ses éléments de fond, procéduraux et institutionnels. Cet aperçu montre la manière dans laquelle la diversité et la complexité des cadres de la procédure nationale relatifs à l'application des règles de concurrence (administratives, pénales et criminelles) ont effectivement empêché les règles de concurrence de l'UE de pénétrer dans le système juridique national.

**Classifications and key words:** antitrust enforcement; Estonia; Estonian Competition Authority; EU competition rules; national courts; Regulation 1/2003

## I. Introduction

The year 2014 marks the 10<sup>th</sup> anniversary of the Estonian membership in the European Union<sup>1</sup>. Back in 2004, along with nine other European countries<sup>2</sup>, Estonia has become a 'new' EU Member State, a designation that is now predominantly used when referring to the 2007 entrants – Bulgaria and Romania, and, most recently, to Croatia, which joined the EU in July 2013. The year 2014 also marks a decade in the enforcement of Regulation 1/2003<sup>3</sup>, which has decentralized the enforcement of EU competition rules

<sup>1</sup> See generally *Estonia's Way into the European Union* (Tallinn 2009), available at [http://web-static.vm.ee/static/failid/052/Estonias\\_way\\_into\\_the\\_EU.pdf](http://web-static.vm.ee/static/failid/052/Estonias_way_into_the_EU.pdf) (2.05.2014).

<sup>2</sup> These include Cyprus, the Czech Republic, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

<sup>3</sup> Council Regulation (EC) No. 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty, OJ L 1, 4.01.2003, p. 1.

by establishing the European Competition Network (hereafter: ECN)<sup>4</sup>. The new system has brought enforcement down from the level of the European Commission and the Court of Justice of the EU to the national competition authorities (hereafter: NCAs) and national courts<sup>5</sup>. Early comments on the decentralization of EU competition law enforcement noted that the success of the reform will depend on the “capacity of the new system to achieve an acceptable degree of consistency in the application of Community competition law throughout the European Union”<sup>6</sup>.

According to the official statistics, the ECN has been informed of 1717 investigations between 1<sup>st</sup> May 2004 and 28<sup>th</sup> February 2014<sup>7</sup>. In the same period of time, 721 envisaged decisions were submitted by the NCAs to the ECN<sup>8</sup>. This statistics demonstrates that the NCAs have become the primary enforcers of Articles 101 & 102 TFEU. Some commentators have regarded the new enforcement system as a “major success, beyond expectations”<sup>9</sup>. Others have argued that Regulation 1/2003 “contained all the necessary tools to eliminate any concerns related to inconsistency” in the enforcement of substantive competition rules<sup>10</sup>. A comparison of the enforcement output of individual Member States reveals, however, a stark contrast in their enforcement levels. This enforcement gap is one of the reasons why the level playing field of EU competition law enforcement is far from being realized<sup>11</sup>.

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According to its Article 45, Regulation 1/2003 entered into force on the 20<sup>th</sup> day following its publication in the Official Journal on 4 January 2003. However, the Regulation has been effectively applied only since 1<sup>st</sup> May 2004, when the number of EU Member States has grown from 15 to 25.

<sup>4</sup> See generally F. Cengiz, “The European Competition Network: Structure, Network and Initial Experiences of Policy Enforcement”, *EUI Working Paper MWP 2009/05*.

<sup>5</sup> For early experiences with the decentralized enforcement of EU competition rules by national authorities and courts see R. Lane, “European and National Enforcement of EU Competition Law: Sharing the Sovereignty?”, *Working Paper of the Jean Monnet Centre for EU Studies at Keio University* (26 November 2008), available at [http://www.jean-monnet-coe.keio.ac.jp/workingpapers/robert\\_lane\\_01.pdf](http://www.jean-monnet-coe.keio.ac.jp/workingpapers/robert_lane_01.pdf) (2.05.2014).

<sup>6</sup> D. Gerber, P. Cassinis, “The ‘modernization’ of European Community competition law: achieving consistency in enforcement: Part 1” (2006) 27(1) *European Competition Law Review* 10.

<sup>7</sup> These statistics can be found at <http://ec.europa.eu/competition/ecn/statistics.html> (2.05.2014).

<sup>8</sup> *Ibid.*

<sup>9</sup> W. Wils, “Ten Years of Regulation 1/2003 – A Retrospective”, presentation at the conference *10 Years of Regulation 1/2003*, Mannheim Centre for Competition and Innovation, 7 June 2013, available at <http://ssrn.com/abstract=2274013> (2.05.2014).

<sup>10</sup> K. Pijetlovic, “Reform of EC antitrust enforcement: criticism of the new system is highly exaggerated” (2004) 25(6) *European Competition Law Review* 369.

<sup>11</sup> See A. Mateus, “Ensuring a more level playing field in competition enforcement throughout the European Union” (2010) 31(12) *European Competition Law Review* 514–529.

The picture looks somewhat different when considering the enforcement record of national courts. Regulation 1/2003 requires Member States to send the Commission a copy of any written national court judgment on the application of Article 101 or 102 TFEU “without delay after the full written judgment is notified to the parties”<sup>12</sup>. Official statistics indicate that ten EU Member States haven’t notified a single judgment on the application of EU competition rules by their national courts<sup>13</sup>.

Official statistics are indicative also of the Estonian contribution to decentralized enforcement of EU competition rules. During the reference period of 2004-2013, Estonia has notified seven investigations and three envisaged decisions<sup>14</sup>. These numbers place Estonian participation in EU competition law enforcement at a negligible 0.4% of the total number of investigations and envisaged decisions notified within the ECN. Estonia also stands amongst those Member States, which haven’t notified even a single judgment pursuant to Article 15(2) of Regulation 1/2003. The above data shows that direct enforcement of EU competition rules in Estonia is virtually non-existent. Such preliminary conclusion stands in stark contrast with the substantive harmonisation of domestic competition rules with their EU equivalents, the continuous implementation of EU enforcement standards and the practices in the Estonian legal system.

The present paper is an attempt to understand the factors that have precluded an effective enforcement of EU competition rules in Estonia. More specifically, it should provide a critical assessment on the specifics of the Estonian legal system<sup>15</sup>. It covers its substantive, procedural and institutional components that have precluded EU competition rules from penetrating domestic enforcement practice both at the level of the NCA and of the national judiciary. The ensuing sections shall present an overview of major features of Estonian competition legislation and its diverse procedural frameworks applicable to the enforcement of competition rules. While the paper was not intended as a comparative study, incentives derived from the Estonian experience could serve as a point of comparison for other EU

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<sup>12</sup> Regulation 1/2003, Article 15(2).

<sup>13</sup> These include Bulgaria, Cyprus, the Czech Republic, Estonia, Greece, Luxembourg, Malta, Romania, Slovakia and Slovenia. These statistics can be found at <http://ec.europa.eu/competition/elojade/antitrust/nationalcourts/> (2.05.2014).

<sup>14</sup> These statistics can be found at <http://ec.europa.eu/competition/ecn/statistics.html> (2.05.2014).

<sup>15</sup> See generally K. Miil, J. Kuusik, M. Ruttu, *UPDATE: Guide to Estonian Legal System and Legal Research*, Hauser Global Law School Program, New York University School of Law (October 2013), available at <http://www.nyulawglobal.org/globalex/estonia1.htm> (2.05.2014); M. Merimaa, S. Mandla, *Commercial and Economic Law in Estonia*, New York 2011, p. 148–160.

jurisdictions that display a similar record in relation to the enforcement of EU competition rules.

## II. National competition rules: substance and procedure

Early comments on the harmonization of Estonian competition rules with those of the EU noted that “there is hardly anything in EU competition law that has not found its way into the Estonian Competition Act, often even word for word”<sup>16</sup>. This early harmonization of substantive competition rules has signalled the intention of the Estonian state to follow the EU model in domestic competition enforcement<sup>17</sup>. The fact was questioned, however, whether the implementation of EU competition rules in ‘new’ Member States should take account of their local circumstances, such as the size of their economy, institutional enforcement capabilities and other factors<sup>18</sup>.

The national equivalents of Articles 101 & 102 TFEU have been incorporated into the Estonian Competition Act<sup>19</sup>, which has been in force since 2001 with the most recent amendments introduced in July 2013<sup>20</sup>. The respective provision of the Estonian Competition Act mirrors Article 101 TFEU, aside from addition of anti-competitive information exchanges to the list of prohibited multilateral practices<sup>21</sup>. The domestic prohibition of the abuse of a dominant position follows the structure of Article 102 TFEU

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<sup>16</sup> J. Thielert, M.P. Schinkel, “Estonia’s competition policy: a critical evaluation towards EU accession” (2003) 24(4) *European Competition Law Review* 175, available at <http://arno.unimaas.nl/show.cgi?fid=463> (2.05.2014).

<sup>17</sup> See generally J. Clark, *Competition Law and Policy in the Baltic Countries – A Progress Report*, Paris 1999. See also H. Vedder, “Spontaneous Harmonisation of National (Competition) Laws in the Wake of the Modernisation of EC Competition Law” (2004) 1(1) *Competition Law Review* 5–21.

<sup>18</sup> See D. Geradin, D. Henry, “Competition Law in the New Member States – Where Do We Come From? Where Do We Go?”, [in:] D. Geradin (ed.), *Modernisation and Enlargement: Two Major Challenges for EC Competition Law*, Antwerp-Oxford 2005; H. Horn, J. Stennek, “EU merger control and small member states interests”, [in:] *Pros and Cons of Merger Control*, Stockholm 2002; C. Ginter, M. Matjus, “Assessment of non-horizontal mergers in Estonia” (2010) 31(12) *European Competition Law Review* 504–508; A. Svetlicinii, K. Lugenberg, “Merger remedies in a small market economy: the Estonian experience” (2012) 33(10) *European Competition Law Review* 475–481.

<sup>19</sup> Competition Act (*Konkurentsiseadus*), passed 5.06.2001, RT I 2001, 56, 332, entry into force 1.10.2001.

<sup>20</sup> See “The Estonian Parliament amends its competition act”, 15 July 2013, *e-Competitions Bulletin* July 2013, Art. N° 58777.

<sup>21</sup> *Ibid*, para 4(1)(4).

adding the following to the exemplary list of abuses: forcing an undertaking to concentrate, to enter into an agreement which restricts competition, to engage in concerted practices or to adopt a decision together with the undertaking or another undertaking as well as; unjustified refusal to sell or buy goods<sup>22</sup>.

Prior to the 2013 amendments<sup>23</sup>, the Estonian concept of “dominance” covered also undertakings with special or exclusive rights and undertakings in control of essential facilities<sup>24</sup>. According to the new rules, undertakings with special or exclusive rights are no longer automatically considered dominant and thus their special obligations have been abolished, except for the duty to keep separate accounting of their revenues and expenditures relating to each product or service<sup>25</sup>. The Competition Act also provides for various categories of exemptions from the application of the national equivalent of Article 101(1) TFEU: the *de minimis* exemption<sup>26</sup>; individual exemptions<sup>27</sup> in line with Article 101(3) TFEU and; a set of block exemptions specified in the Estonian Government’s regulations on the proposal of the Minister of Economic Affairs and Communications<sup>28</sup>. Importantly however, there are no regulations or by-laws in Estonia that would provide further guidance on various aspects of antitrust enforcement carried out by the Estonian Competition Authority (hereafter: ECA)<sup>29</sup>.

Estonia has pursued the criminalization of competition infringements<sup>30</sup>. Certain violations of competition rules are considered criminal offences under

<sup>22</sup> *Ibid*, para 16(5) and (6).

<sup>23</sup> See Sorainen, “Estonian Competition Act amendments – something for every taste”, Newsflash/Estonia, July 2013, available at <http://www.sorainen.com/UserFiles/File/Publications/newsflash.competition-law.2013-07-11.eng.html> (2.05.2014).

<sup>24</sup> *Ibid*, paras 14 and 15. See also E. Tamm, K. Paas, “The Concept of Dominance in Estonian Competition Law” (2007) XII *Juridica International* 131-141, available at <http://www.juridicainternational.eu/index/2007/vol-xii/the-concept-of-dominance-in-estonian-competition-law/> (2.05.2014).

<sup>25</sup> *Ibid*, para 18. See also K. Paas-Mohando, “Estonia: general – legislative amendments” (2013) 34(11) *European Competition Law Review* N150-N151.

<sup>26</sup> *Ibid*, para 5.

<sup>27</sup> *Ibid*, para 6.

<sup>28</sup> Government of the Republic Regulation No. 197 of 30 December 2010 “Grant of Permission to Enter into Specialisation Agreements Which Restrict or May Restrict Free Competition (group exceptions)” (RT I, 04.01.2011,11); Government of the Republic Regulation No 60 of 27 May 2010 “Grant of Permission to Enter into Vertical Agreements Which Restrict or May Restrict Free Competition (group exceptions)” (RT I 2010, 23, 112); Government of the Republic Regulation No 66 of 3 June 2010 “Grant of Permission to Enter into Motor Vehicle Distribution and Servicing Agreements Which Restrict or May Restrict Competition (Block exemption)” (RT I 2010, 28, 149).

<sup>29</sup> *Konkurentsiamet*, <http://www.konkurentsiamet.ee/> (2.05.2014).

<sup>30</sup> See generally A. Proos, “Competition Policy in Estonia”, [in:] K.J. Cseres, M.P. Schinkel, F.O.W. Vogelaar (eds.), *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States*, Cheltenham 2006.

the Penal Code. As such, they are prosecuted in criminal proceedings initiated by the Prosecutor's Office<sup>31</sup> upon request of the ECA. They include: repeated abuse of a dominant position<sup>32</sup>; agreements, decisions and concerted practices restricting free competition<sup>33</sup>; and repeated failure to perform obligations by an undertaking in control of an essential facility<sup>34</sup>. Other infringements of competition rules are regarded as misdemeanors and prosecuted under the Code of Misdemeanour Procedure<sup>35</sup>. They include: abuse of a dominant position; implementing a concentration without clearance; and failure to perform its obligations by an undertaking in control of an essential facility<sup>36</sup>.

Competition rules laid down in the Competition Act apply to all sectors of the economy (except the labour market)<sup>37</sup> including the extraction of natural resources, the manufacture of goods, provision of services and sale and purchase of products and services<sup>38</sup>. They are applicable to "undertakings" determined under a functional approach related to the exercise of an economic activity: "a company, sole proprietor, any other person engaged in economic or professional activities, an association which is not a legal person, or a person acting in the interests of an undertaking"<sup>39</sup>. Following this approach, state, local governments, legal persons in public law and other persons performing administrative duties can be treated as undertakings if they participate in a goods market<sup>40</sup>. The agricultural sector is subject to Estonian competition rules only to the extent determined on the basis provided for in Article 42 TFEU<sup>41</sup>. The geographical scope of the application of domestic competition law extends beyond the territory of Estonia when acts or omissions committed on foreign soil have a restrictive effect within the national territory<sup>42</sup>.

Certain economic sectors are subject to market regulation and the relevant sector-specific legislation contains provisions aimed at the protection and promotion of competition in those sectors. For example, in telecommunications,

<sup>31</sup> *Prokuratuur*, <http://www.prokuratuur.ee/> (2.05.2014).

<sup>32</sup> Penal Code, passed 6.06.2001, RT I 2001, 61, 364, entry into force 1.09.2002, para 399(1).

<sup>33</sup> *Ibid*, para 400.

<sup>34</sup> *Ibid*, para 402.

<sup>35</sup> Code of Misdemeanour Procedure, passed 22.05.2002, (RT I 2002, 50, 313).

<sup>36</sup> Competition Act, para 73<sup>9</sup>.

<sup>37</sup> *Ibid*, para 1(3).

<sup>38</sup> *Ibid*, para 1(1).

<sup>39</sup> *Ibid*, para 2(1). On the notion of undertaking in Estonian competition law see R. Rüütel, "Konkurentsikeeld võib viia vangimajja" ["Definition of undertaking in competition law"], Eversheds (5.02.2014), available at <http://www.eversheds.com/global/en/what/articles/index.page?ArticleID=en/global/Estonia/en/definition-undertaking-competition-law> (2.05.2014).

<sup>40</sup> *Ibid*, para 2(2).

<sup>41</sup> *Ibid*, para 4(2).

<sup>42</sup> *Ibid*, para 1(2).

relevant legislation addresses potential abuses of dominance by imposing a wide range of conduct obligations on undertakings with the ‘Significant Market Power’ status<sup>43</sup>. In the postal sector, the conduct of the universal postal service provider is placed under the supervision of the ECA’s Communications Regulatory Division<sup>44</sup>. The Natural Gas Act<sup>45</sup>, also enforced by the ECA, imposes special obligations on the dominant gas undertaking. They include: the publication of the terms and conditions of gas sales and the principles of price setting; prohibition to refuse gas sales to a household customer if the latter so requests<sup>46</sup>. Sector specific rules applicable in the railway sector<sup>47</sup> allow infrastructure managers and railway undertakings to submit complaints to the ECA if they were treated “in a discriminatory or otherwise unfair manner in the approval of the notice concerning a railway network, distribution of capacity, organisation of the co-ordination procedure, declaration of capacity to be depleted<sup>48</sup>, preparation of a timetable or determination of user fees”<sup>49</sup>.

### III. The Estonian Competition Authority: structure and powers

The first Estonian NCA – the Estonian Competition Board (*Konkurentsitenistus*) (ECB) – was set up on 21 October 1993 within the Ministry of Finance in order to supervise the implementation of the 1993 Competition Act<sup>50</sup>. The ECB was headed by the Director General, appointed and removed from office by the Minister of Finance. The ECB continued its activities also under the new Competition Act, which entered into force on 1 October 1998<sup>51</sup>. The next phase of its history commenced on 1 October 2001

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<sup>43</sup> Electronic Communications Act (*Elektroonilise side seadus*), passed 8.12.2004, RT I 2004, 87, 593, entry into force 1.01.2005.

<sup>44</sup> Postal Act (*Postiseadus*), passed 6.04.2006, RT2 I 2006, 18, 142, entered into force 1.07.2006.

<sup>45</sup> Natural Gas Act (*Maagaasiseadus*), passed 29.01.2003, RT I 2003, 21, 128, entry into force 1.07.2003.

<sup>46</sup> *Ibid*, para 9<sup>1</sup>.

<sup>47</sup> Railways Act (*Raudteeseadus*), passed 19.11.2003, RT I 2003, 79, 530, entry into force 31.03.2004.

<sup>48</sup> This is where the railway infrastructure company is unable, for technical reasons, to attribute railway capacity to the undertakings requesting it.

<sup>49</sup> Railways Act, para 64<sup>1</sup>.

<sup>50</sup> Competition Act (*Konkurentsiseadus*) (RT I 1993, 47, 642).

<sup>51</sup> Competition Act (*Konkurentsiseadus*) (RT I 1998, 30, 410).

when the current Competition Act entered into force<sup>52</sup>. The ECB's structure reflected its workload: it contained three supervisory departments dealing with anti-competitive agreements and the abuses of a dominant position in various economic sectors as well as a merger control department supervising concentrations in all economic sectors<sup>53</sup>. Hence, the organisational structure and the powers of the ECB initially reflected those of the Directorate General for Competition of the European Commission<sup>54</sup>.

The Estonian NCA has experienced a major organisational reform in 2007. In order to increase the efficiency of domestic economic regulation, it was decided that the NCA should also perform the functions of a national regulatory authority in various economic sectors. This resulted in the fusion of the ECB with the Energy Market Inspectorate and with the Communication Board. As a result, the newly established ECA combined the functions of a competition authority with those of a market regulator in the energy, communications and railway sector. The ECA commenced its activities under the reformed structure on 1 January 2008. It included, at that point, three divisions: the Competition Division, the Communications Regulatory Division and the Railway and Energy Regulatory Division.

The year 2010 brought further structural shifts to the ECA, which included a change in the names of its organizational units and a partial re-allocation of tasks. The re-organised ECA assumed the following structure from November 2010: the Competition Division, the Railway and Communications Regulatory Division, and the Energy and Water Regulatory Division<sup>55</sup>. In 2012 the ECA was granted additional competences concerning the supervision of the aviation sector. This led to further re-organisation of its structure. The new tasks were absorbed by the Railway and Communications Regulatory Division, which was once more re-named into the Communications Regulatory Division (a name that reflects the primary subject of its current activities)<sup>56</sup>.

The ECA is a government agency which operates under the responsibility of the Ministry of Economic Affairs and Communications<sup>57</sup>. The Minister

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<sup>52</sup> See V. Põldoja, "An overview of the Estonian Competition Law and relevant institutions", 1 July 2006, *e-Competitions Bulletin* July 2006, Art. N° 13308.

<sup>53</sup> See A. Proos, "Development of Competition Policy and the Competition Board in Estonia", ABA Antitrust Session's 2006 Spring Meeting, Washington, D.C., available at <http://apps.americanbar.org/antitrust/at-committees/at-ic/pdf/spring/06/145.pdf> (2.05.2014).

<sup>54</sup> Structure of the DG Competition is available at [http://ec.europa.eu/dgs/competition/directory/organi\\_en.pdf](http://ec.europa.eu/dgs/competition/directory/organi_en.pdf) (2.05.2014).

<sup>55</sup> ECA 2010 annual report, p. 6, available at <http://www.konkurentsiamet.ee/?id=19860> (2.05.2014).

<sup>56</sup> ECA 2012 annual report, p.6, available at <http://www.konkurentsiamet.ee/?id=24394> (2.05.2014).

<sup>57</sup> *Majandus- ja kommunikatsiooniministeerium*, <http://www.mkm.ee/> (2.05.2014).

approves and amends the ECA's annual budget, oversees its implementation, approves the staffing and structure of the ECA upon a proposal of the Director General. The ECA has three field-based divisions: the Competition Division, the Energy and Water Regulatory Division and the Communications Division<sup>58</sup>. Technical support and communications are ensured by the External and Public Relations Department. The ECA is headed by the Director General while the heads of its three divisions carry the rank of Deputy Director General. The Director General is authorised to issue administrative acts independently, in accordance with domestic legislation, and to authorise the Deputies to issue administrative acts for the performance of their functions in various proceedings conducted by the ECA.

The ECA can initiate an investigation *ex officio* or following a complaint submitted by a 3<sup>rd</sup> party (any natural or legal person including associations which are not legal persons)<sup>59</sup>. The ECA must refuse to initiate an investigation if: (1) the application is clearly unjustified; (2) an action concerning the same matter has been filed with the European Commission or a decision of the Commission concerning the same matter has entered into force; (3) it is not possible to identify the applicant on the basis of the information contained in the submission<sup>60</sup>; (4) the application contains deficiencies and the applicant has failed to eliminate them by the date set by the ECA<sup>61</sup>.

Under the rules of criminal procedure, the ECA has the status of an independent investigative body empowered to carry out a series of investigative pre-trial activities<sup>62</sup>. Thus, it has the power to commence a criminal investigation and an obligation to notify the Prosecutor's Office<sup>63</sup>. Since criminal prosecution demands substantial evidentiary support, the ECA has been invested with a wide range of investigatory powers and competences. It can request natural or legal persons, including state authorities, to provide information or explanations in writing<sup>64</sup>; to submit materials requested by the ECA<sup>65</sup>; or to summon natural persons to the ECA's premises to provide

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<sup>58</sup> The internal structure and organization of the ECA is regulated in the Statutes of the Estonian Competition Authority, Approved by Regulation No. 101 of the Minister of Economic Affairs and Communications of 17.12.2007 (RTL1 2007, 97, 1628), entered into force 1.01.2008.

<sup>59</sup> Competition Act, Article 63<sup>1</sup>.

<sup>60</sup> On the basis of a reasoned request from the person submitting the application, the name of the person may, by a decision of the ECA, be declared not to be subject to disclosure to other persons. Competition Act, Article 63<sup>1</sup>(3).

<sup>61</sup> *Ibid*, para 63<sup>2</sup>(1).

<sup>62</sup> Code of Criminal Procedure, passed 12.02.2003, RT I 2003, 27, 166, entry into force 1.07.2004, paras 31(1), 212(2)(5).

<sup>63</sup> *Ibid*, para 193(2).

<sup>64</sup> Competition Act, para 57.

<sup>65</sup> *Ibid*, para 59.

information or explanations<sup>66</sup>. The ECA can also initiate and conduct dawn raids at the company seat or place of business during working hours or whenever the place of business is used<sup>67</sup>. In such cases, the search is conducted on the basis of an order issued by the preliminary investigation judge. In cases where dawn raids are to be carried out on request of the European Commission, pursuant to the procedure provided by Articles 20 & 21 of Regulation 1/2003, the ECA submits a reasoned written opinion to the Chairman of the Tallinn Administrative Court<sup>68</sup>, or an administrative judge of that court appointed by the Chairman<sup>69</sup>. The parties concerned can contest the investigative actions of the ECA before the Prosecutor's Office and preliminary investigation judge<sup>70</sup>. Once the ECA is convinced that sufficient evidence has been collected in a criminal matter, it sends the criminal file to the Prosecutor's Office<sup>71</sup>. The Prosecutor Office prepares the statement of charges and sends it to the defence counsel together with the criminal file<sup>72</sup>.

The 2010 amendments of the Penal Code have increased sanctions that can be imposed on legal persons for taking part in anti-competitive agreements to a maximum of 5% of annual turnover. The fine could reach up to 10%, and cannot be less than 5%, of the annual turnover, for hard-core cartels. Natural persons responsible for the involvement in a hard-core cartel will risk a pecuniary sanction or at least one year of imprisonment, which could be raised up to three years for hard-core cartels<sup>73</sup>.

In case of anti-competitive agreements, abuses of a dominant position, violations of merger control rules or any procedural provisions of the Competition Act (i.e. failure to supply the ECA with requested information, interference with dawn raids, failure to appear when summoned, etc.), the ECA can issue an order requiring the natural or legal person concerned to: 1) perform the act required by the order; 2) refrain from a prohibited act; 3) terminate or suspend activities which restrict competition; 4) restore the situation prior to the offence<sup>74</sup>. If a person fails to comply with such order, the ECA may impose penalty payments of up to EUR 3,200 on a natural person

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<sup>66</sup> *Ibid*, para 58.

<sup>67</sup> *Ibid*, para 60(1).

<sup>68</sup> *Tallinna Halduskohus*, <http://www.kohus.ee/et/halduskohtud/tallinna-halduskohus> (2.05.2014).

<sup>69</sup> Competition Act, para 63<sup>5</sup>.

<sup>70</sup> Code of Criminal Procedure, paras 228–232.

<sup>71</sup> *Ibid*, para 222.

<sup>72</sup> *Ibid*, para 226.

<sup>73</sup> See "The Estonian Parliament adopts a new legislation on leniency and sanctions", 27 February 2010, *e-Competitions Bulletin* February 2010, Art. N° 33407.

<sup>74</sup> Competition Act, para 62(2).

and up to EUR 6,400 on a legal person pursuant to the procedure set out in the Substitutive Enforcement and Penalty Payment Act<sup>75</sup>.

Legislative amendments that entered into force in July 2013 have authorised the ECA, in line with the powers of the NCAs laid down in Regulation 1/2003, to issue orders in cases where “there is a risk of significant and irreparable damage to competition due to violation of the provisions of Article 101 or 102 TFEU”<sup>76</sup>. The term of such orders is up to three months (with the possibility of an extension by the ECA for up to one year). The ECA has also been authorised to accept commitments from undertakings suspected of a violation of Articles 101 or 102 TFEU (or their national equivalents)<sup>77</sup>. If the undertaking concerned fails to comply with such obligations, the ECA may now on its own initiative, or on the basis of an application of a 3<sup>rd</sup> party, resume the infringement proceedings terminated upon the acceptance of the binding commitments<sup>78</sup>.

The ECA conducts the proceedings and imposes pecuniary penalties in relation to competition law violations treated by the Penal Code as misdemeanours: refusals to provide information or submission of false information (up to 300 fine units<sup>79</sup> for a natural person and up to EUR 3,200 for legal persons); abuse of a dominant position (up to 300 fine units for a natural person and up to EUR 32,000 for legal persons); implementation of a concentration without clearance (up to 300 fine units for a natural person and up to EUR 32,000 for legal persons); non-performance of obligations by undertakings in control of essential facilities (up to 300 fine units for a natural person and up to EUR 32,000 for legal persons); failure to comply with special requirements concerning accounting (up to 300 fine units for a natural person and up to EUR 32,000 for legal persons)<sup>80</sup>.

In the context of leniency, the authority of the ECA is very limited due to the fact that antitrust violations are criminalised and sanctioned in criminal procedure before the court. Under the relevant provisions of the Competition Act, the ECA must confirm the receipt of a leniency application and forward it to the Prosecutor’s Office that heads the criminal prosecution<sup>81</sup>.

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<sup>75</sup> *Ibid*, para 62(3).

<sup>76</sup> *Ibid*, para 63<sup>6</sup>.

<sup>77</sup> *Ibid*, para 63<sup>7</sup>.

<sup>78</sup> *Ibid*, para 63<sup>7</sup>(6).

<sup>79</sup> A fine unit is a base amount of a fine and is equal to 4 EUR. Penal Code, para 47(1).

<sup>80</sup> Competition Act, paras 73<sup>1</sup>, 73<sup>5</sup>–73<sup>8</sup>.

<sup>81</sup> *Ibid*, para 78<sup>1</sup>. See also K. Paas-Mohando, L. Kais, “Current Developments in Member States: Estonia” (2013) 9(3) *European Competition Journal* 779–784.

#### IV. National judiciary: public and private enforcement of competition rules

The judicial review of the decisions issued by the ECA (administrative decisions establishing violations of Articles 101 & 102 TFEU and their national equivalents, orders issued to undertakings found in violation of competition rules, and misdemeanour procedures conducted by the ECA for the imposition of pecuniary penalties on undertakings found in violation of competition rules) falls under the competences of administrative courts.

Estonian administrative courts, the same as general jurisdiction courts, have a three-instance structure. Estonia has two administrative courts<sup>82</sup> (1<sup>st</sup> instance), two circuit courts<sup>83</sup> (2<sup>nd</sup> instance) and the Supreme Court<sup>84</sup> (3<sup>rd</sup> and final instance). The administrative justice system is organised regionally, the 1<sup>st</sup> and 2<sup>nd</sup> instance courts are located in Estonia's two main cities: Tallinn and Tartu. Each of the two administrative courts is divided into two courthouses to facilitate access to the justice system by natural and legal persons. The review of judgments issued by administrative courts is exercised by the Tallinn Circuit Court<sup>85</sup> and Tartu Circuit Court<sup>86</sup>. The Supreme Court is located in Tartu. Its work is organised through chambers specialising in various legal areas: constitutional review, civil law, criminal law, administrative law.

The review of the decisions issued by the ECA is carried out by the competent courts pursuant to the rules contained in the Code of Administrative Court Procedure<sup>87</sup>. Infringement decisions on misdemeanours, delivered by the ECA in the capacity of an extra-judicial body, are reviewed by the competent courts pursuant to the rules contained in the Code of Misdemeanour Procedure<sup>88</sup>. Decisions of the ECA can be challenged, requesting an annulment, before the administrative court within thirty days of the date on which the decision was notified to the applicant<sup>89</sup>. An appeal against a judgment of the administrative court can be lodged before the circuit court within thirty days from the day on which the judgment was publicly pronounced<sup>90</sup>. A cassation request concerning

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<sup>82</sup> <http://www.kohus.ee/en/estonian-court-system/administrative-courts> (2.05.2014).

<sup>83</sup> <http://www.kohus.ee/en/estonian-court-system/circuit-courts> (2.05.2014).

<sup>84</sup> *Riigikohus*, <http://www.riigikohus.ee/> (2.05.2014).

<sup>85</sup> *Tallinna Ringkonnakohus*, <http://www.kohus.ee/et/ringkonnakohtud/tallinna-ringkonnakohus> (2.05.2014).

<sup>86</sup> *Tartu Ringkonnakohus*, <http://www.kohus.ee/et/ringkonnakohtud/tartu-ringkonnakohus> (2.05.2014).

<sup>87</sup> Code of Administrative Court Procedure, passed 27.01.2011, RT I, 23.02.2011, 3, entry into force 1.01.2012.

<sup>88</sup> *Ibid*, para 13.

<sup>89</sup> *Ibid*, para 46(1).

<sup>90</sup> *Ibid*, para 181.

a judgment of the circuit court can be lodged before the Supreme Court within thirty days of the public pronouncement of the 2<sup>nd</sup> instance judgment<sup>91</sup>.

Preliminary proceedings are followed by a court session, which under normal circumstances should be held not earlier than thirty days from the date of the delivery of the action to the respondent<sup>92</sup>. Misdemeanour infringement decisions of the ECA can be appealed by the parties before the county court within fifteen days of the receipt of the contested decision<sup>93</sup>. An administrative review procedure results in a ruling on the legality of the decision issued by the ECA, which could be either upheld or annulled. The court will not engage in an exercise of its discretionary powers in place of the ECA – it will only rule on the legality of the administrative decision, it will not substitute the decision<sup>94</sup>.

Private enforcement of competition law in Estonia is not limited to follow-on actions – concerned parties can submit damages claims resulting from a violation of the Competition Act without the need of a decision from the ECA<sup>95</sup>. Parties should follow civil procedure for all claims for damages caused by acts prohibited by the Competition Act. Such damages claims should be litigated in general courts. The 1<sup>st</sup> instance court decides the case on the merits, that is, it establishes the eligibility for damages and quantifies their amount. The court of 2<sup>nd</sup> instance can uphold the original judgment, amend or annul it, in full or in part, and terminate the proceedings or send the judgment for a new hearing at the 1<sup>st</sup> instance court<sup>96</sup>. The Supreme Court has similar authority in relation to cassation requests lodged against the judgments of the circuit courts<sup>97</sup>.

## V. Enforcement of EU competition rules: influencing factors

In order to verify EU statistics on the enforcement of EU competition rules in Estonia, a search has been conducted for national infringement decisions and judgments involving the direct enforcement of Articles 101 and/or 102 TFEU. No such cases were identified neither by searching the official database

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<sup>91</sup> *Ibid*, para 212.

<sup>92</sup> *Ibid*, para 127.

<sup>93</sup> Code of Misdemeanor Procedure, para 114.

<sup>94</sup> Code of Administrative Court Procedure, para 158. See also E. Tamm, “Estonia: Tallinn Administrative Court’s ruling: it is not possible to contest the reasoning of Competition Authority’s decision” (2012) 5(3) *Global Competition Litigation Review*.

<sup>95</sup> Competition Act, para 78.

<sup>96</sup> Code of Civil Procedure, para 334.

<sup>97</sup> *Ibid*, para 362.

of court rulings<sup>98</sup> nor through consultations with the ECA and practicing lawyers. While there were several instances when national courts have indeed referred to EU competition rules or EU jurisprudence, this has always been done in the context of the application of domestic competition rules, including criminal provisions sanctioning certain types of anti-competitive behaviour<sup>99</sup>.

Generally speaking, there are no significant barriers in Estonia when it comes to access to justice specific to competition law cases. According to the 2013 EU Justice Scoreboard<sup>100</sup>, the average duration of administrative cases in Estonia was between 100 and 200 days while litigious civil and commercial cases that cover follow-on claims lasted circa 200 days<sup>101</sup>. The above statistics demonstrates that the average duration of administrative cases in Estonia is far below the EU average. The use of the centralized electronic system “E-File”, utilized for filing claims and monitoring the progress of the cases, makes it possible to save time and resources<sup>102</sup>.

The reasons for the absence of EU competition rules from the judgments of the Estonian courts should be considered in light of the specifics of the diverse underlying procedural frameworks. In criminal cases, charges are formulated by the Public Prosecutor on the basis of the offenses listed in the Penal Code. Abuses of a dominant position are prosecuted by the ECA under the procedural rules for misdemeanour. In administrative cases, courts review various procedural infringements committed by the investigated undertakings as well as the legality of the orders issued by the ECA which are meant to remedy the anti-competitive behaviour of the offender.

Researching the enforcement record of the ECA has not uncovered any infringement decisions based on direct application of EU competition rules. The ECA has a clearly defined priority to primarily pursue criminal enforcement of domestic competition rules, leading to the criminal prosecution of the offenders. For instance, in the ECA's annual report, the year 2012 was labelled as “the most successful year for judicial decisions” because the three criminal cases handled by the ECA that year have all ended in

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<sup>98</sup> [https://www.riigiteataja.ee/kohtuteave/maa\\_ringkonna\\_kohtulahendid/main.html](https://www.riigiteataja.ee/kohtuteave/maa_ringkonna_kohtulahendid/main.html) (2.05.2014).

<sup>99</sup> See e.g. Supreme Court, Criminal law Chamber, Judgment No. 3-1-1-12-11 dated 4.05.2011; Supreme Court, Criminal law Chamber, Judgment No. 3-1-1-10-11 dated 1.07.2011.

<sup>100</sup> The 2013 EU Justice Scoreboard, COM (2013)160 final, available at [http://ec.europa.eu/justice/effective-justice/files/justice\\_scoreboard\\_communication\\_en.pdf](http://ec.europa.eu/justice/effective-justice/files/justice_scoreboard_communication_en.pdf) (2.05.2014).

<sup>101</sup> The data is from 2010.

<sup>102</sup> <https://www.e-toimik.ee/> (2.05.2014).

convictions<sup>103</sup>. As a result, a significant part of the resources of the ECA's Competition Division is directed towards the investigation and prosecution of cartels, that is, toward the collection of evidence, which is later forwarded to the Prosecutor's Office in order to initiate criminal proceedings against the suspects. Public prosecutors launch criminal proceedings on the basis of the provisions of the Penal Code. As already emphasized however, these provisions do not mirror the Articles 101 & 102 TFEU as they refer only to horizontal cartels and repeated abuses of a dominant position. Hence, since EU competition rules are not applied by the ECA/Public Prosecutors under the criminal or the misdemeanour proceedings, there is limited possibility for Article 101 & 102 TFEU to be applied by Estonian courts when the latter review the decisions of the ECA or judgments rendered by lower courts in criminal cases.

Private enforcement of competition rules in Estonia is virtually non-existent and competition-related damages claims are usually resolved in out-of-court settlements. A recent study on comparative private enforcement and consumer redress identified the following obstacles in relation to private enforcement of competition law in Estonia: (1) prevalence of out-of-court settlements; (2) unfamiliarity with competition law for Estonian judges, attorneys, in-house counsel; (3) high burden of proof associated with the demonstration and quantification of damages; (4) absence of collective redress mechanisms<sup>104</sup>. This closes another door for the penetration of EU competition rules into the Estonian legal system.

Finally, domestic public opinion is hardly interested in the diversity and complexity of Estonia's procedural frameworks for the enforcement of competition rules. The attention of the media is normally focused on high impact cases that would demonstrate the existence of anti-competitive agreements among manufacturers or distributors of socially sensitive products such as food, household items, and utilities<sup>105</sup>. These considerations might divert the resources and public attention further away from the enforcement of EU competition rules.

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<sup>103</sup> 2012 ECA Annual Report, p. 9, available at [http://www.konkurentsiamet.ee/public/Aastaraamat/ECA\\_Annual\\_Report\\_2012.pdf](http://www.konkurentsiamet.ee/public/Aastaraamat/ECA_Annual_Report_2012.pdf) (2.05.2014).

<sup>104</sup> See K. Sein, "Private Enforcement of Competition Law – the Case of Estonia" (2013) 6(8) *Yearbook of Antitrust and Regulatory Studies* 139.

<sup>105</sup> See e.g. A. Svetlicinii, "The grocery retail market: is antitrust efficiency handling this market? (merger, restrictive practices, abuse of dominant position) Country Report: Estonia", 2013 Congress of the International League of Competition Law, 19–22 September 2013, Kiev, Ukraine, available at <http://www.ligue.org/documents/2013rapportAestonien.pdf> (2.05.2014).

## VI. Conclusion

This paper does not claim to be exhaustive in listing the influencing factors that affect the enforcement of EU competition rules in Estonia, nor does it claim to provide a comprehensive explanation of the reasons for the absence of EU competition rules in domestic public and private enforcement. Yet several major obstacles should be highlighted. First, despite profound harmonization of substantive competition rules contained in the Estonian Competition Act, the national legislator has opted for a diversified procedural framework for their enforcement. Public enforcement of antitrust provisions is thus carried out through administrative, misdemeanour or criminal proceedings by the ECA and by the Public Prosecutor through courts. As a result, the choice of proceedings and thus the available remedies and sanctions largely depend on the ECA's discretion. According to the practitioners, this makes the outcomes of Estonian investigations and prosecutions less predictable<sup>106</sup>. Second, pursuing optimization of state resources, the Estonian Government has continuously expanded the competences of the ECA combining under the responsibility of a single administrative authority the functions of competition protection and market regulation. As a result, the ECA is responsible for antitrust enforcement, merger control, state aid control, the enforcement of unfair competition rules, and the regulation of energy, transport and telecommunications markets. As a result, limited human and financial resources are stretched over a wide variety of tasks. This in itself limits the probability of the ECA taking on demanding investigations into the violations of EU competition rules. Third, the virtually non-existent private enforcement of competition rules, and insufficient public attention vis-à-vis competition matters, further reduce the chances for EU competition rules to fall into the ambit of judicial proceedings in Estonia.

Divergence in procedural rules and institutional variations have been mentioned as important influencing factors that affect the enforcement of EU competition rules in various Member States<sup>107</sup>. These factors have led to a virtually complete exclusion of EU competition rules from the domestic legal system in Estonia. As a result, after a decade of decentralized EU competition law enforcement, Estonian judges, public officials, undertakings and their legal counsel have little, or no direct contact with EU competition rules.

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<sup>106</sup> See E. Tamm, K. Paas, "Estonia Chapter – Enforcement of Competition Law 2009" (International Comparative Legal Guide), available at <http://www.iclg.co.uk/practice-areas/enforcement-of-competition-law/enforcement-2009/estonia> (2.05.2014).

<sup>107</sup> See K. Cseres, "The Impact of Regulation 1/2003 in the New Member States" (2010) 6(2) *Competition Law Review* 145–182.

Admittedly, some of Estonia's recent legislative amendments were meant to facilitate leniency applications and substantiate the ECA's powers under Regulation 1/2003 to accept commitments and order interim measures<sup>108</sup>. It is doubtful, however, whether direct enforcement of EU competition rules will experience any significant growth without a profound reform of the procedural and institutional frameworks of the Estonian competition law enforcement system.

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<sup>108</sup> See K. Paas-Mohando, "Estonia: general – legislative amendments" (2013) 34(11) *European Competition Law Review*.

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