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Global Forum on Competition

**THE RELATIONSHIP BETWEEN COMPETITION AUTHORITIES
AND SECTORAL REGULATORS**

Contribution from Estonia

-- Session II --

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CO-OPERATION BETWEEN THE ESTONIAN COMPETITION BOARD AND NATIONAL REGULATORY BODIES

1. Background

1. There are several regulatory bodies in Estonia, exercising regulatory and supervisory function over different fields of action, such as telecommunications, energy, railway transport, aviation etc. Their competence and the scope of supervision is different, arising from a special act and other legal acts adopted on the basis of a special act. In addition to that, ministries (for instance Ministry of Social Affairs concerning medicines) and local governments (district heating, water and sewerage) exercise some regulatory functions.

2. Regulatory bodies in their traditional meaning have been established mainly for the ex ante regulation and supervision of such fields of action, where there is no effective competition and application of the principles of the competition law and the ex post supervision exercised by the competition authority are not enough for functioning of normal market relations. Establishing an objectively justified ex ante regulation from the one hand and exercising ex post competition supervision from the other hand complement each other and should guarantee the normal functioning of market relations in a relevant market.

3. Most of the regulatory bodies are in the subordination of the Ministry of Economic Affairs and Communications, the Communications Board and the Energy Market Inspectorate exercise the most comprehensive regulatory functions.

4. In general, the co-operation requirement has been laid down in the statute of a regulatory body. Typical wording is as follows: in order to perform its main functions, the board co-operates with other government bodies, local governments, foundations, non-profit organisations, entrepreneurship and consumer organisations and respective bodies of other states and international organisations in a way laid down in legal acts. Such a provision can be found also in the statute of the Competition Board.

2. The need for co-operation and exchange of information

5. By now there is a clear understanding that co-operation between regulatory bodies is objectively justified and necessary. It should be mentioned that competition authorities are also sometimes considered as regulatory bodies. This is to a certain extent justified because the competition law has imposed some ex ante restrictions and prohibitions that undertakings have to take into account.

6. It is inevitable that the competence of the regulatory bodies and the Competition Board partially overlap. In such a situation it is very important to guarantee the legal certainty to undertakings and avoid making contradictory decisions by different government bodies. In addition to that, during proceedings of a matter sector-specific knowledge may become necessary, for example in the fields of telecommunications, where the Communications Board is more competent. The regulatory bodies also have systematically gathered information concerning a specific field of economy. Unlike the regulatory bodies and due to the specific characteristic of the competition supervision, the competition authorities do not continuously and systematically gather information on different fields of business activity. Therefore the exchange of information becomes important. The regulatory bodies should be interested in issues concerning fields under their supervision because it is the competency of the regulatory bodies to elaborate and apply remedies fostering competition. Concerning the mentioned function, the knowledge and experience on

competition issues of the Competition Board could be useful. Hence the mutual consulting and exchange of information is useful both to the regulatory bodies and the Competition Board, enabling better usage of resources of a government body and achieve better results of the proceedings.

7. Until now the special acts did not contain a requirement of co-operation between a regulatory body and the Competition Board, but in EU regulations concerning the electronic communications service (known as New Regulatory Framework for Electronic communications services) it has been laid down a requirement for such a co-operation, i.e. exchange of information, which has been taken into account in elaboration of a draft Electronic Communications Act.

3. Practical experience of the Estonian Competition Board

8. In its daily work the Competition Board has mainly co-operated with the Communications Board, the Energy Market Inspectorate, the Civil Aviation Administration, the Railway Board, Financial Supervision Authority etc. So far the co-operation with the Communications Board and the Energy Market Inspectorate has been closer and more effective. The co-operation between the Competition Board and the regulatory bodies is not based on formal agreements, but the principles of general need for co-operation.

9. As there have been quite many applications and enquiries concerning the telecommunications, the co-operation with the regulatory body of that field, the Communications Board, has been close. According to Article 8 (9) of the Telecommunications Act, if the market share of a public telecommunications network operator or public telecommunications service provider is at least 40 per cent of the turnover of the specific public telecommunications service market, the activities of the operator or service provider as the undertaking with significant market power shall be governed by the Competition Act, in addition to the Telecommunications Act. In this case the legislator has provided for the parallel application of two legal acts. In case of violation of the Telecommunications Act may for example the price of a service be unfair and therefore also the Competition Act may be violated. If the norms of those two acts split, the Telecommunications Act as a special act is applied. In case of issues not regulated by the Telecommunications Act, the Competition Act is applied. Such was the opinion of the Supreme Court in a case concerning complaint of AS Eesti Telefon on the annulment of a decision of the Competition Board and the Competition Board follows the principles of the opinion of the Supreme Court.

10. In several cases, when making decisions, the Competition Board has relied on the opinion (for example concerning the interpretation or application of the provisions of the Telecommunications Act) or formal decision of the Communications Board and arising from that assessed, whether there was a violation of the Competition Act. Such a practice has also been used with other regulatory bodies.

11. In order to avoid inexpedient duplication of the supervisory actions, it has been proved to be useful to reach an agreement between different regulatory bodies before the commencement of the proceedings, agreeing on the scope of the proceedings carried out by each regulator, so that in the end all necessary proceedings would have been carried out. It is also discussed what kind of information the regulators can exchange, taking into account the obligation to maintain business secrets.

12. As a more recent example, the Competition Board proceeded a matter, where a law office representing an undertaking providing cable distribution and data communications services, submitted an application to the Competition Board. The law office alleged that there was a rental agreement between the dominant telecommunications undertaking and a cable operator concerning the communications network and the provisions of the agreement were at variance with the Competition Act. According to the complainant, the terms of the agreement might be unreasonably favourable because the cable operator had agreed not to provide Internet services in that area. During the proceeding of the matter, there was a meeting between the officials of the Competition Board and the Communications Board, in order to

determine the issues each board would be dealing with. In this case, the issue of the rightness and validity of the rental charges was regulated by a special act – the Telecommunications Act, and therefore fell into the competence of the Communications Board and the Competition Board did not have to assess the validity of the rental charge under the Competition Act. The Competition Board held the proceeding of the matter in abeyance until the Communications Board had made a decision on the conformity of the rental charge to the requirement of the Telecommunications Act and that the rental charge was not too low. The Competition Board analyzed the conformity of other provisions of the rental agreement to the Competition Act and came to the conclusion that there were no characteristics of an abuse of a dominant position or agreements that restricted competition.

13. Using this case as an example, one can say that both the Competition Board and the Communications Board were very much interested in co-operation and there were no obstacles during this co-operation.

4. Legal bases for co-operation and exchange of information

14. In the Estonian legal framework, one of the legal bases for co-operation and exchange of information (concerning administrative procedure) would be Administrative Co-operation Act. This act determines the conditions and procedure for the grant of authority to natural and legal persons to perform public administration duties of the state and of local governments independently and the bases and procedure for the provision of professional assistance between administrative authorities. The act establishes basis for application for and provision of professional assistance, requirements to the information contained in the application for professional assistance and compensation for expenses of professional assistance. However, professional assistance is different from the common co-operation between government bodies. The co-operation principle means communicating with other bodies as equal partners, not spending resources in order to achieve goals of other bodies.

15. The co-operation and information issues are to a certain extent regulated by legal acts regulating different fields of economy.

16. According to Article 93(2) of the Electricity Market Act, if necessary, the Energy Market Inspectorate shall involve independent experts and co-operate with other Estonian and foreign supervisory authorities in order to exercise supervision.

17. At the same time the exchange of information has in different special acts been regulated in different ways and generally there is no possibility to exchange information containing business secrets or confidential information. According to Article 99(4) of the Telecommunications Act, officials of the Estonian National Communications Board are required to maintain state or business secrets which has become known to them in the course of performing their duties and have the right to use such information only to perform their duties.

18. According to Article 97(1) of the Electricity Market Act, the Energy Market Inspectorate shall maintain the confidentiality of information communicated thereto if the person communicating the information has indicated that it contains business secrets. According to Article 97 (3), the communication of information in the case where such communication is prescribed by law or where the person who provided the information or the person to whom the information pertains has given consent to the communication of the information shall not be deemed to be a breach of the obligation specified in Article 97(1). According to Article 97(4), the Energy Market Inspectorate shall use any information at its disposal only to perform the functions arising from the act.

19. According to Article 28(2) of the District Heating Act, supervisory authorities (the Energy Market Inspectorate and rural municipality and city governments) shall use the information at their disposal solely for the performance of duties arising from law.

20. According to Article 144 of the draft Electronic Communications Act, the Communications Board co-operates with the Competition Board and when necessary, exchanges information on the competition on the communications markets. The mentioned bodies may specify the conditions and organisation of the co-operation in a co-operation protocol. The extent of the information forwarded by the Communications Board to the Competition Board, including the possibility to forward confidential information and requirement to the Competition Board to maintain such confidential information have also been provided.. At the same time the draft act does not provide for an obligation to the Competition Board to exchange information. Also the Competition Act does not provide for such an obligation. Article 56 of the Competition Act regulates co-operation between the European Commission and the Competition Board. It is provided in Article 12 of the Council Regulation (EC) 1/2003, which competition authorities and on which occasion information, including confidential information is exchanged with.

21. As it can be seen, the legal regulation in force does not enable to exchange all the necessary information between the Competition Board and national regulatory bodies. In such a situation, one possibility is to ask the person that submitted the information, whether the Competition Board or regulatory body can forward the information to another government body. In case the person does not agree, the other government body has to independently request the information necessary to perform its main functions. But acting this way is an ineffective usage of administrative resources, which does not depend on the effectiveness of work arrangements of a regulatory body.

5. Conclusions

22. At present nobody doubts that co-operation between national regulatory bodies and competition authorities is necessary and even inevitable. That enables to use better their rather limited administrative and financial resources. In addition to that, exchange of the knowledge and experience on competition issues and sector-specific knowledge between officials of different government bodies, enriches them intellectually and enables them better perform their main functions. The possibility to exchange information also reduces the burden to undertakings to submit similar information to different supervisory bodies.

23. Clearly the legal bases regulating the exchange of information should be improved. But in this part the supervisory bodies themselves must be active enough and initiate the process of amending the legislation on this issue.