

Unclassified

DAF/COMP/AR(2012)15

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

31-May-2012

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2012)15
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ESTONIA

-- 2011 --

This report is submitted by Estonia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 13-14 June 2012.

JT03322675

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

English - Or. English

TABLE OF CONTENTS

Foreword	3
1. Organisation.....	4
1.1 Structure.....	4
1.2 Personnel and budget	5
2. External and public relations.....	6
3. Competition supervision in 2011	7
3.1 Direction of waste by local governments.....	8
3.2 AS Levira earned inequitably large profit.....	8
3.3 Fines imposed on AS Eesti Post for abusing its dominant position in the market.....	10
4. Control of concentrations.....	12
4.1 Prohibition of the concentration of AS Eesti Post and AS Express Post.....	13

ANNUAL REPORT 2011**-- Estonian Competition Authority* --****Foreword**

Dear reader,

Once again it is a pleasure to present the overview of the activities of the Estonian Competition Authority in 2011. Highlights from the previous year come to mind when writing this foreword. The first that is remembered is, of course, adopting the euro – as a year ago we automatically calculated the prices in Estonian kroons, and now more than a year later this habit has gradually started to disappear. Surely, the decision made by Estonia has caused many discussions and raised questions about whether we are in a position to help those in need that are in fact richer than us. 2011 has been equally important in terms of the development of the European integration. It has been seriously discussed if in the future the European Union will be more like the United States of America, and if we are heading towards deeper integration or not. These are difficult choices and there are no clear answers. In Europe, we are united by the Christian cultural background, at the same time we are faced with language barriers. Considering the economic power of the rest of the world and the English language being the *lingua franca* more and more nowadays, integration seems to be more inevitable than ever.

However, without the bad, there would be no good – the global economic crisis is indeed unpleasant and we all hope it would end sooner; however, such an intensive European integration would have probably not taken place without it. In addition it has pointed out the weaknesses in the world economy. Increasingly, it is stated, that economic growth is ensured by the competitiveness of the country and various restrictive factors of competition hinder economic development. It is, of course, impossible to achieve the ideal model of market economy, where the state is collecting taxes, ensuring the security and social protection of citizens, but the market barriers should be critically analysed. That is the reason why it is also one of the main aims of the Competition Authority to draw attention to possible bottlenecks and offer solutions for the promotion of competition. Although Estonia is an open, liberal economy, there are areas where things could be organized in a better way. An example of this is the restriction of the establishment of pharmacies. Seemingly it is nobly aimed at maintaining the pharmacies in the countryside, but there are cases where it has resulted in the fact that there are no pharmacies existing neither in the countryside nor in the densely populated areas. An activity licence is not granted to an undertaking that would be prepared for the free competition and to meet the strict quality requirements, but to whom that gains the licence in the form of drawing lots.

The subject, which also ties in with the Authority's daily work are different subsidies for the generation of electricity. If in 2007 the subject was of minor importance, then today we are dealing with a significant part of our electricity bill. It is difficult to find producers who are not subsidised - starting with the largest power station in Estonia *Narva Elektriijaam* and ending with a few hundred kilowatt watermills.

* Report submitted by Mr. Märt Ots, Director General, Estonian Competition Authority, 10317 Tallinn. E-mail: mart.ots@konkurentsiamet.ee.

I do not dispute that it is the task of the state administration to guide the production towards environmentally friendly ways, but it must be conducted by a tax policy, not by wide subsidies. Tax policy gives equal conditions for everyone and the winners are those who are more effective and use better technology. The winners through subsidies are the best deal makers. The EU's system of excise duties on motor fuels that has driven the producers to more effective models may be brought as an example here. Twenty years ago no one would have believed that a properly equipped comfortable passenger car only consumes on average 4 litres of fuel per 100 kilometres, but today it is reality. It would have hardly been achieved by other means than through the high fuel price, which has driven the producers towards innovation.

For the first year the Authority approved the prices both to all district heating as well as water undertakings. It has been widely discussed whether this step was right or not, but it is clear that in a small country like Estonia it is more effective to have one price regulator rather than many. It is also positive that prices for all undertakings shall be approved on the same basis. Now all the heating prices are comparable. It is also good to clear the problems – with today's high prices for oil and gas there is no place for a heat supply where nearly half of the energy does not reach the consumers, but vanishes somewhere halfway. And once again we end up with competition matters; namely, the local self-governments have the right to designate district heating network areas, where this type of heating is the only possibility. Seemingly this is aimed at consumer protection, but regrettably, as a result the consumer lacks the money as well as the possibility to choose an alternative type of heating.

Fortunately, however the previously mentioned areas are rare examples, where free competition should be implemented more effectively. As mentioned above, Estonia may certainly be used as an example of a country where the emphasis is on promoting free and fair competition. This trend must undoubtedly continue in the future and the Estonian Competition Authority is responsible for making every effort to contribute to the goal.

With best wishes,

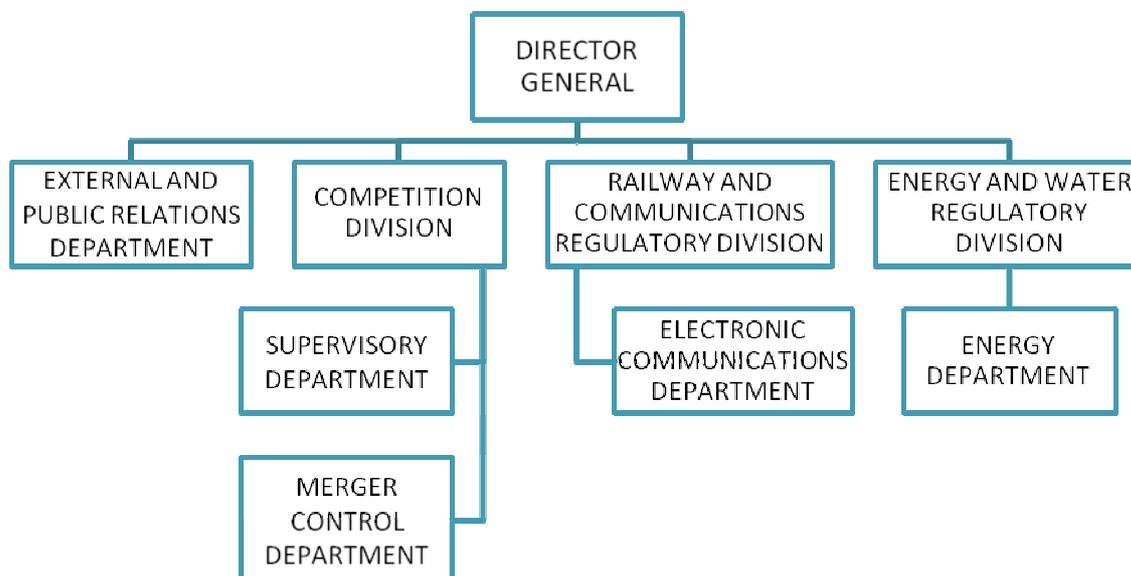
Märt Ots
Director General

1. Organisation

1.1 Structure

1. According to the statutes of the Competition Authority, the Authority includes three field-based divisions, which are the Competition Division, the Energy and Water Regulatory Division and the Railway and Communications Regulatory Division. In addition to the divisions, there is the External and Public Relations Department which is responsible for ensuring effective support services. The Director General is at the head of the Authority (Figure 1). Structural Divisions are directed by the Heads of Divisions, who are at the same time the Deputy Directors General.

Figure 1. Structure of the Competition Authority



2. According to the statutes, the functions of the Authority are divided between structural units or divisions as follows:

3. The main functions of **the Competition Division** are: conducting the proceedings of complaints and concentration notifications submitted by undertakings; conducting proceedings of cases on its own initiative; replying to inquiries of undertakings and their representatives; counselling and raising competition related awareness of the public.

4. The main functions of **the Energy and Water Regulatory Division** are: price regulation; activity licences; market supervision; security of supply and quality control in the energy and water sectors.

5. The main functions of **the Railway and Communications Regulatory Division** are: regulating the communications market; monitoring the performance of imposed measures; monitoring developments on the markets of electronic communications; settlement of competition and electronic communications related disputes regarding communication services and networks; regulating the postal market; organising the provision and exercising the supervision of the universal service; settlement of applications, inquiries and complaints regarding postal services; perform duties regarding railway regulation.

6. The main functions of **the External and Public Relations Department** are: coordination of the relations between the Authority and the general public; organisation of international relations; ensuring administrative organisation; organisation of state assets and means in the possession of the Authority; ensuring the existence of tools and inventory; organisation of personnel work and training; organisation of customer service, document management and administration of archives.

1.2 Personnel and budget

7. The Competition Authority employed 62 persons as of the end of 2011, 8 new employees joined the Authority and 2 people left the organisation during the year. The division of personnel between the structural units was as follows:

- External and Public Relations Department : 6 persons
- Competition Division: 21 persons
- Energy and Water Regulatory Division : 20 persons
- Railway and Communications Regulatory Division : 15 persons

8. Officials with up to 10 years of public service were the majority. Most staff members have higher education in economics (business administration, business management, finance, economics, etc) or in law. The third group of officials consisted of those with higher education in other disciplines, such as radio electronics, telecommunications, thermal energy, public administration or other.

9. In 2011 the budget of the Competition Authority was 1,83 million euros.

2. External and public relations

10. In 2011 the Estonian Competition Authority hosted the Annual Baltic Electronic Communications and Postal Services Regulators Meeting in Kuressaare, and in addition the everyday work in working groups of international organisations continued. Many officials gave lectures or presentations at various Estonian or international events and responded to numerous inquiries from undertakings and organisations in Estonia and other countries.

11. The Competition Authority participates in the work of competition, energy, communications and railway related working groups and unions. During 2011 the officials of the Competition Division attended meetings and discussions of the ECN (*European Competition Network*), the ECA (*European Competition Authorities*) and the ICN (*International Competition Network*) working groups and subgroups. For the first time a representative of the Estonian Competition Authority acted as the rapporteur for the EC Advisory Committee on restrictive practices and dominant position. Officials of the Energy and Water Regulatory Division participated in the meetings of the CEER (*Council of European Energy Regulators*) and the ERRA (*Energy Regulators Regional Association*). The Railway and Communications Regulatory Division was actively involved in the organisation comprising European national communications regulators - BEREC by taking part in the working groups of mobile and fixed termination rates, cost accounting, transparency and the designation of undertaking with significant market power. Furthermore, the Authority has to also report the developments on the railways market, supervisory activities, and co-operation with other regulators and organisations at the meetings of regulators working groups. The Competition Authority is also involved in the work of IRG-Rail (Independent Regulators' Group – Rail)

12. On March 3, 2011 the Agency for the Cooperation of Energy Regulators (ACER) began to operate. The ACER was established by the regulation (EC) No 713/2009 of the European Parliament and of the Council because the need was identified for a partner that has the right to adopt legally binding decisions. One of the objectives of the ACER is to contribute to the functioning of cross-border energy trade and the removal of obstacles, as well as to contribute to the national regulatory authorities fulfilling the regulatory tasks at the EU level and, if necessary, to coordinate the activities of these bodies.

13. The Annual Baltic Electronic Communications and Postal Services Regulators Meeting was held in Kuressaare on August 25th-26th. The annually organised roundtable provides an opportunity to introduce the previous years' developments in the legislation and on the organisational level, and also to discuss the possibilities of implementing single practices. Traditionally the first day is dedicated to general panel discussions and the second day focuses on the postal services and electronic communications working groups.

14. Raising the competition related awareness was also one of the Authority's priorities in 2011. One of the most visible events of these activities is the Estonian Competition Day, organised once a year. The third Competition Day brought together entrepreneurs from different sectors and competition experts who debated on these subjects and economic sectors that gained the most attention during the year. The main keywords of the Competition Day 2011 were electronic communications, banking, health care, food processing, aviation, tourism and water services.

3. Competition supervision in 2011

15. The Supervisory Department of the Competition Authority deals with solving all competition related matters, which are not covered by other economic sector specific regulatory units of the Authority. Therefore the field of activity of the Supervisory Department is extremely varied, ranging from extensive criminal cases to, for example, analyses of legal acts that may affect the competitive situation. The year 2011 brought along the first procedural act carried out in cooperation with the European Commission, namely the inspection of AS Eesti Gaas (Estonian Gas Company).

16. In 2011 the emphasis of the Supervisory Department was on several substantial and complex proceedings. Many of the supervisory proceedings were related to different infrastructure undertakings. For example the pricing of AS Levira was examined and it was found that its profitability was too high in 2007/2008 – 2009/2010. Such proceedings targeted directly at controlling the profitability of an undertaking in a dominant position are relatively rare both in Estonia as well as internationally, because these are fairly complex legal disputes. The Competition Authority, however, holds the development of competition law's approach to the pricing of incumbent undertakings as a matter of priority. Therefore the pricing control of the Eesti Interneti Sihtasutus (Estonian Internet Foundation) was also started in 2011.

17. Cases concerning the activities carried out by AS Eesti Post (Estonian Postal Operator) appeared to be the most considerable of the infringements committed by the undertakings in a dominant position. Historically AS Eesti Post is the only postal service provider operating the postal network covering the whole of Estonia and according to the Postal Act as well as to the Competition Act it has to enable other undertakings to access its postal network on non-discriminating conditions. The Competition Authority found on several occasions that AS Eesti Post had not done so and therefore incurred a fine on several occasions. The misdemeanour procedure conducted concerning AS Eesti Post also showed more clearly that such type of procedure is foremost meant rather for the simple and rapid proceeding of violations and is therefore inappropriate for the proceedings of complex economic violations. Compared to other countries the fines are very small and limitation periods are too short. The Competition Authority regards the ineffectiveness of sanctioning the incumbents as one of the biggest shortfalls in the supervisory activities.

18. Estonia is one of the few countries in Europe where agreements restricting competition are investigated as criminal matters. In 2011 the Competition Authority passed the materials of the criminal case of the competition restricting agreements concluded between AS Pristis and Securitas Eesti AS to the Prosecutor's Office. In April 2012 the parties to the agreement were found guilty by compromise procedure. The second significant case that was forwarded to the Prosecutor's Office was the one that accused AS Tartu Mill and its representatives of having participated in concluding the anti-competitive agreement. The court has not yet made a judgment in this criminal case. The decision made by the Supreme Court No. 3-1-1-12-11 of 04.05.2011 where AS KPK Teedeehitus and the member of its Board were acquitted of the charges in concluding an anti-competitive agreement must be considered as most substantial from the viewpoint of the interpretation of competition law. Under that decision the Supreme Court gave an important explanation, in particular, to the provisions of § 6 of the Competition Act containing the so-called exception to the rule in criminal proceedings.

3.1 *Direction of waste by local governments*

19. In previous years the Competition Authority has presented views to local governments condemning discretionary direction of waste to waste management facilities (mostly municipal). For example, such recommendations have been submitted to Tallinn and Narva City Governments. In 2011 the discussion concerning the determination of waste management facilities by the local governments continued. The Competition Authority doubts if local governments even have the competency to direct waste as the Waste Act does not include provisions that would clearly regulate this matter.

20. Of course, the final answer to this question will be given by the court. It is important that the market would remain open to other eligible undertakings – this means that the waste transport provider must have a choice of operators meeting the legal criteria. If the waste management facilities are limited to one, the market will be closed for other alternative, potentially eligible desired locations. Maintaining free competition is particularly important with respect to investments made in the waste management that have already created new environmentally friendly solutions.

21. In addition, the Competition Authority highlights that giving a competitive advantage to certain undertakings must always be justified by indicating which public interests or requirements of the law it serves. Thus, when granting a special or exclusive right the local government has to clearly indicate the reasons why the free competition would lead to non-desirable consequences and why the interference to effective competition would lead to a better outcome. The decision taken by the local government has to be justified particularly in the light of consumer's interests.

22. In 2011 the Competition Authority was informed that Võru Town Government wants to conclude an agreement which obliges the waste transporter Ragn-Sells AS to direct all mixed municipal waste which is collected in the framework of organised waste transport in the town of Võru to be handled by one undertaking – the waste management facility of MTÜ Võru Jäätmekeskus in Umbsaare, although Ragn-Sells AS had informed that it would be remunerative for the consumers if municipal waste will be driven to competing waste management facilities. At the same time, the new competition for waste shipment was being organised by the Võru Town Government. In the Competition Authority's view a remarkable advantage had been given to the waste management facility in Umbsaare. It remained unclear from the information collected in the course of the procedure which public interests does the intention of Võru Town Government to prefer Umbsaare waste management facility serve, if many undertakings wish to provide a similar service and some of them allegedly at a cheaper price. The environmental objectives named by the Town Government may also be obtained by other means and are not actually related to the exclusive right.

23. The Competition Authority took the view that the activity of the Võru Town Government has restricted competition, undermining the interests of consumers. On May 31st the Authority issued a recommendation to the Võru Town Government not to grant MTÜ Võru Jäätmekeskus waste management facility located in Umbsaare either directly or through public procurement conditions an exclusive right or other competitive advantages in the handling of waste collected through organised municipal waste transport in Võru. Võru Town Government informed the Authority of complying with the recommendation.

3.2 *AS Levira earned inequitably large profit*

24. On 16/09/2011, the Competition Authority made a decision according to which AS Levira (hereinafter Levira) had earned an inequitably large profit in the financial years 2007/2008 through 2009/2010 due to the dominant position in the market. The undertaking's profitability decreased back to a reasonable level in the course of the proceedings.

25. The Competition Authority found that Levira held the dominant position on the television broadcasting market due to its above-ground broadcasting network, which means that the prices of its services should have been calculated on a cost basis. The most important factor for the assessment of Levira's market power was the fact that the only above-ground broadcasting network covering the whole of Estonia was at the undertaking's disposal. The network consists of above-ground masts and transmitters conveying the signals that can be received with a standard TV antenna.

26. Although the Technical Surveillance Authority announced Starman to have won the tender for the issue of three multiplex frequency authorisations organised in January 2011, Starman made an agreement with Levira about the construction of the networks on the basis of the latter's masts after winning the tender. Thus Levira essentially remained the only undertaking in Estonia to provide above-ground broadcasting services. The fact the Starman did not construct its network independently of Levira confirms the conclusion that prospective competitors would find that extremely expensive. The main reason there is no competition for Levira as far as the above services are concerned lies in the fact that it is the tall masts over a hundred meters high that are suitable for the above-ground transmission of television programmes, and the majority of these belong to Levira. In addition, these masts are located to cover the whole territory of Estonia. The masts belonging to other companies do not cover the whole country.

27. The Competition Authority regards the construction of a television network covering the whole territory of Estonia on the basis of low, so-called mobile communication masts and the use of the same frequency transmitters so financially and technically complicated that it would not exert much notable competition pressure on Levira. Low masts have been designed and constructed to provide mobile communication, and the needs of broadcasting have not been taken into consideration, especially as far as powerful transmitters, including energy supply, the antenna and the permanent connection, are concerned. In addition, consumers will have to buy supplementary antennas if such a network is constructed. The existing antennas can be redirected, but one would not be able receive the signal of the free channels transmitted by Levira with the same antenna, which would make entering the market with a new network even more complicated.

28. Other types of television programme transmission such as cable broadcasting, satellite broadcasting and broadband networks (IPTV) are not of much competition to Levira's services either. The reason for that lies in the limited availability of various technical solutions and strikingly different price formation. For instance, the fact that cable broadcasting and broadband networks only allow densely populated areas to be covered with a television signal must be taken into consideration. In such case television shows and programmes would not find their way to more sparsely populated places and the expansion of the broadcasting area in the coming years would be out of the question. In consumers' opinion, those various technical solutions are not interchangeable in this particular instance. As opposed to Levira's above-ground network services, fees are charged for cable broadcasting and broadband network services, which changes the state of competition drastically. As far as satellite networks are concerned, price formation is similar, but these can cover the whole territory of Estonia as opposed to cable broadcasting and broadband networks. It turns out that while the services provided through Levira's above-ground network are free of charge for consumers as far as free channels are concerned, a fee is charged for the services provided through the satellite network, and consumers must buy parabolic antennas to receive the signal. The free channels include, for example, ETV, ETV2, Kanal3 and TV3. The Competition Authority finds that the large price difference supports the positioning of these two services in different goods markets from the consumers' point of view. Having switched from the above-ground broadcasting service to the satellite service, consumers do not replace one type of service with the other, but change their consumption habits by starting to consume a more expensive and considerably more extensive service.

29. In the process of the assessment of Levira's price formation, the Competition Authority proceeded from the determination of whether the ratio of the profitability and the economic merit of the service provided by Levira were reasonable. According to section 16 of the Competition Act, any direct or indirect abuse by an undertaking or several undertakings of the dominant position in the goods market is prohibited. Clause 1 of section 16 of the same act forbids an undertaking of the dominant position in the goods market to impose unfair purchase or selling prices or other unfair trading conditions directly or indirectly.

30. It was found that Levira had earned profits higher than usual in the financial years 2007/2008 through 2009/2010 as it simultaneously provided both analogue and digital signal broadcasting services in 2007–2010 and received fees for both services. The situation at the moment was different from other periods. The Competition Authority believes that a period of three years should have been sufficient for a market-dominant undertaking to have adjusted its price formation to the changed circumstances. Prices in a competitive market would certainly have decreased significantly within that period due to the pressure of competition.

31. Levira ceased broadcasting the analogue signal on 01/07/2007, which resulted in a decrease in both sales proceeds and profitability. However, Levira's expenses did not decrease in the amount proportional to the decrease in returns after the broadcasting of the analogue signal was ceased. By the end of the proceedings, the Competition Authority was convinced that the profit earned by Levira was not unreasonably high any more as the result of the changes introduced by Levira. As Levira had stopped violating the law, the Competition Authority ended the proceedings without issuing a precept.

3.3 *Fines imposed on AS Eesti Post for abusing its dominant position in the market*

32. By the decision dated 16/11/2011, the Competition Authority imposed fines for a total amount of 36,000 euros on AS Eesti Post (hereinafter Eesti Post) for the infringement of the Competition Act committed in September 2010. The Competition Authority found that Eesti Post, holding the dominant position in the market, discriminated against AS Itella Information (hereinafter Itella) on two separate occasions having offered postal services to the latter under unfair trading conditions.

3.3.1 *AS Eesti Post's first infringement*

33. In September 2010, the Ministry of Finance conducted simplified public procurement proceedings for the "Provision of postal services" service to be purchased; the service included the storage of information materials about the adoption of the euro in Estonia and euro calculators and assembling them in sets, the production of envelopes, placing the sets in envelopes and delivering them as unaddressed direct mail (so-called blind mail) to the post boxes of all private persons. The bidders for this public procurement were Itella and Eesti Post jointly with its subsidiary undertaking AS Eesti Elektronpost (hereinafter Eesti Elektronpost).

34. Both Itella and Eesti Elektronpost offer the services of printing materials or letters and placing them in envelopes as well as personalisation and set-assembling services (so-called preparation services). None of the above companies deliver mail, and they have to use the services of a postal operator. Eesti Post is by far the largest postal operator in Estonia and the only holder of the nation-wide postal network. Eesti Post uses the above postal network for providing a variety of postal services and other services including the delivery of direct mail (for instance, blind mail services). Thus Itella must usually use Eesti Post's services for completing large-scale orders which imply the delivery of mail in addition to the services provided by Itella itself.

35. The Competition Authority found that in its joint bid with its subsidiary undertaking Eesti Elektronpost, Eesti Post had offered the delivery of the materials of the Ministry of Finance at a significantly lower price than the price Eesti Post had quoted to Itella on the basis of the price lists of the former for the purpose of Itella taking part in the public procurement announced by the Ministry of Finance. Considering the fact that Itella and Eesti Elektronpost would have equally prepared the materials of the Ministry of Finance to be forwarded to Eesti Post for delivery, the cost of the delivery incurred by Eesti Post could not have varied significantly depending on whether the materials of the Ministry of Finance were prepared by Eesti Elektronpost or Itella.

36. According to clause 3 of section 16 of the Competition Act, an undertaking of the dominant position in the goods market is forbidden to offer or apply dissimilar conditions to equivalent agreements with other trading parties, thereby placing some of them at a competitive disadvantage.

37. The Competition Authority confined the relevant goods market to the provision of blind mail (unaddressed direct mail) services in the Republic of Estonia and found that Eesti Post held a dominant position in the above market.

38. By quoting a significantly lower price for the delivery of the materials of the Ministry of Finance to be prepared by its subsidiary undertaking Eesti Elektronpost than the price for the delivery of equally prepared materials quoted by Eesti Post to Itella, Eesti Post placed Itella at a competitive disadvantage in the process of bidding for the provision of the preparation services. In a situation where the customer (the Ministry of Finance) wished to purchase a complex service which included both the preparation services and the delivery service, Eesti Post created an advantage for its subsidiary undertaking Eesti Elektronpost, thus limiting competition in the bidding for the provision of the preparation services. The Competition Authority found that the activity of Eesti Post described above had violated the prohibition for an undertaking of the dominant position in the goods market established by clause 3 of section 16 of the Competition Act, which qualifies as the abuse of the dominant position in the market.

39. According to clause 1 of section 73⁵ of the Competition Act, the establishment of unfair trading conditions, or the limitation of production, services, market, technical development or investments, or engaging in activities involving abuse of the dominant position in the market shall be punished by a fine of up to 300 fine units or by detention. The same act, if committed by a legal person, is punishable by a fine of up to 32,000 euros (clause 2 of section 73⁵ of the Competition Act).

40. The Competition Authority found that the activity of Eesti Post met the criteria of a violation described in clause 2 of section 73⁵ of the Competition Act and imposed a fine in the amount of 18,000 euro on Eesti Post.

3.3.2 AS Eesti Post's second infringement

41. In September 2010, Eesti Energia AS conducted a tender procedure for the printing of letters about the replacement of the information system and delivering them to the customers of Eesti Energia AS. The bidders for the above public procurement were Itella and Eesti Post jointly with its subsidiary undertaking Eesti Elektronpost.

42. The Competition Authority found that in its joint bid with its subsidiary undertaking Eesti Elektronpost for the purpose of the tender of Eesti Energia AS, Eesti Post had offered the delivery of the letters of Eesti Energia AS at a significantly lower price than the price Eesti Post had quoted to Itella on the basis of the price lists of the former. Considering the fact that Itella and Eesti Elektronpost would have equally prepared the letters to be forwarded to Eesti Post for delivery, the cost of the delivery of Eesti

Energia AS's letters incurred by Eesti Post could not have varied significantly depending on whether the letters were prepared by Eesti Elektronpost or Itella.

43. The Competition Authority confined the relevant goods market to the provision of direct mail (i.e. addressed direct mail) services in the Republic of Estonia and found that Eesti Post held a dominant position on the above market.

44. The Competition Authority found that by quoting a significantly lower price for the delivery of the Eesti Energia AS's letters to be prepared by its subsidiary undertaking Eesti Elektronpost than the price for the delivery of equally prepared letters quoted by Eesti Post to Itella, Eesti Post placed Itella at a competitive disadvantage in the process of bidding for the provision of the preparation services. In a situation where the customer (Eesti Energia AS) wished to purchase a complex service which included both the preparation services and the delivery service (provided neither by Eesti Elektronpost nor Itella on their own), Eesti Post created an advantage for its subsidiary undertaking Eesti Elektronpost, thus limiting competition in the bidding for the provision of the preparation services. The Competition Authority found that the activity of Eesti Post described above had violated the prohibition for a undertaking of the dominant position in the goods market established by clause 3 of section 16 of the Competition Act, which qualifies as the abuse of the dominant position in the market. As the activity of Eesti Post met the criteria of a violation described in clause 2 of section 73⁵ of the Competition Act, the Competition Authority imposed a fine in the amount of 18,000 euro on Eesti Post.

45. AS Eesti Post filed a complaint to Harju County Court concerning the Competition Authority's decision of 16/11/2011. On 27/04/2012, Harju County Court made a judgement according to which the Competition Authority's decision of 16/11/2011 concerning AS Eesti Post having violated the Competition Act was to remain in force, but the fine imposed on AS Eesti Post on the basis of clause 2 of section 73⁵ of the Competition Act was to be decreased to 18,000 euros.

4. Control of concentrations

46. The control of concentration is designed to assess its effects of the competition law and to prevent the creation or strengthening of a market dominant position which may impede effective competition in the market.

47. In 2011, 21 notices of concentration were submitted to the Competition Authority and one case was brought over from 2010. Thus the Authority proceeded with 22 cases and made 17 decisions to grant permission to concentration, one decision to prohibit concentration and in one case the proceeding was ended because the parties to the concentration decided not to concentrate. In three cases the decision was postponed to 2012. In two cases a decision was made to initiate supplementary proceedings.

48. 16 out of 17 decisions to grant permission to concentration were made in the first phase of the proceedings, i.e. during the 30 calendar days prescribed by law. One decision to grant permission and one decision to prohibit concentration were made in the second phase of the proceedings i.e. during the five months prescribed by law. Thereby the running of the term was suspended in four cases in connection with the elimination of deficiencies in the notice. The actual average length of proceedings of the first phase was 21 days and the length of the supplementary proceedings was 130 days.

49. The breakdown by types of concentration was as follows:

- An undertaking acquired control of the whole or a part of another undertaking in the case of 16 concentrations (§ 19 (1) p 2);

- Undertakings jointly acquired control of the whole or a part of another undertaking in the case of 5 concentrations (§ 19 (1) p 3);
- A natural person already controlling at least one undertaking acquired control of the whole or a part of another undertaking or parts thereof in 1 case (§ 19 (1) p 4)

50. Majority of the concentrations (16) took place among Estonian undertakings; in three cases both of the parties to the concentration were foreign undertakings and also in three cases the parties to the concentration were both domestic and foreign undertakings.

51. In conclusion, it may be observed that the intensity of the concentrations between those Estonian undertakings whose specific impact on Estonian product markets is particularly important has increased significantly— this accounts for 73% of the total number of notified concentrations. The proportion of concentration between foreign undertakings has fallen and it now accounts for only 13,5% of the total number of the notified concentrations. Foreign investors continue to have an interest in the acquisition of Estonian enterprises (incl private capital funds), because the intensity of such concentrations was 13,5%.

52. In 2011 concentrations took place in the following goods markets:

- Sale and production of heat and energy;
- Real estate development and rental;
- Sale of developed real estate;
- Sale of passenger cars;
- Road maintenance;
- Security services;
- Postal services;
- Publishing and sales of newspapers and magazines;
- Wholesale and retail trade of LPG;
- Raw milk production, storage and sales;
- Pharmacy services;
- Ferry lines;
- Agent activity and railway transportation.

4.1 *Prohibition of the concentration of AS Eesti Post and AS Express Post*

53. In September 2011, the Competition Authority forbade the concentration of AS Eesti Post (hereinafter Eesti Post) and AS Express Post (hereinafter Express Post), which became the second decision prohibiting concentration in the history of the Competition Authority.

54. Both parties to the concentration operate in the sphere of postal services. Eesti Post is a commercial undertaking owned by the state and providing multi-purpose postal services, express mail delivery service, direct mail delivery service, letter delivery service and other postal services (incl. home delivery of periodicals). Express Post is jointly controlled by Aktsiaselts Ekspress Grupp and AS Eesti Meedia and provides the service for the home delivery of periodicals, direct mail service and letter delivery service. Eesti Post wanted to acquire control over Express Post and if the above concentration had been

permitted, there would be only one undertaking in Estonia to provide postal services (apart from express mail services). The Competition Authority analysed the competition situation in the sphere of postal services, and the information about the functioning of competition was also gathered from the customers of the parties to the concentration. Undertakings expressed the opinion that competition in the above sphere (incl. the delivery of letters and direct mail) was functioning and customers had a choice. The competition pressure of Express Post imposed on Eesti Post had been beneficial for the competition. Customers could choose the best of the two service providers on the basis of prices, quality and other criteria. Concentration would eliminate Express Post's competition pressure on Eesti post.

55. Customers, including final consumers, benefit from intense competition in the market in the form of lower prices, higher quality, a wider choice of products and services and innovation. Under the conditions of competition, undertakings are motivated to develop products, be flexible and customer-friendly and offer products at lower prices. Control over concentrations will allow such concentrations that would increase the market power of an undertaking and evidently leave consumers without the benefits from functioning competition to be prevented.

56. Express Post has secured a position of a competitor for Eesti Post that is to be reckoned with. If the only competitor that could impose competition pressure were to be overtaken, Eesti Post, having secured the position of the sole service provider, would apparently not have to make any substantial effort for customer satisfaction as customers in need of postal services would have no alternative to the services of Eesti Post.

57. The analysis of the competition situation resulted in the Competition Authority forming the conclusion that the concentration of Eesti Post and Express Post would significantly hinder the competition in the goods markets of the home delivery of periodicals, direct mail delivery and letter delivery as Eesti Post would secure the position of the sole service provider, and competition in the sphere of postal services (apart from express mail services) would disappear.

58. The Competition Authority presented the relevant assessment to Eesti Post for the undertaking to present its objections and the suggestion that obligations be assumed. Namely, according to the provisions of the Competition Act, the Competition Authority can grant permission for concentration provided that the parties to the concentration fulfil the obligations they assume to prevent damage to competition. In certain cases concentration can also be permitted if it is accompanied by a significant increase in efficiency. This is usually the case when evidential material proves that the increase in efficiency will apparently broaden the undertaking's opportunities and motivation to act in the interest of consumers and to promote competition thus providing leverage for the negative effects that the concentration would otherwise cause. The Competition Authority found that the obligations Eesti Post offered to assume did not clarify how the damage to competition as the result of the concentration would be repaired. The cost saving claimed by Eesti Post would not compensate for the loss of competition resulting from the concentration or outbalance it.

59. According to clause 1 of section 22 of the Competition Act, the Competition Authority's appraisal of a concentration shall be based on the need to maintain and develop competition. Thus a concentration that would entirely eliminate competition in the sphere of postal services (apart from express mail services) could not be allowed due to the following reasons:

- As the result of the concentration, Eesti Post would remain the sole provider of postal services (apart from express mail delivery services), which means that customers would have no choice whatsoever.

- The undertaking in the dominant position (in this case, the sole provider) in the market would have an opportunity to increase the prices of services and decrease flexibility and innovation as competition pressure would be non-existent.
- Postal services (incl. letter delivery and direct mail delivery) are still extremely important and necessary for customers and cannot be avoided. As a result of the concentration, this would allow Eesti Post to choose its course of action regardless of customers' interests.