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

02-Jun-2014

English - Or. English

Directorate for Financial and Enterprise Affairs
COMPETITION COMMITTEE

DAF/COMP/AR(2014)16
Unclassified

ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN ESTONIA

-- 2013 --

18-19 June 2014

This report is submitted by Estonia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 18-19 June 2014.

JT03358457

Complete document available on OLIS in its original format

English - Or. English

TABLE OF CONTENTS

FOREWORD

1. We are glad to present another Annual Report of the Estonian Competition Authority. I, Märt Ots, Director General, share the view of those who believe that a strong economy and the well-being of the residents is one of the essential foundations of our country. The Competition Authority´s mission is to keep reminding that free competition is one of the main driving forces for the economy. Free competition does not necessarily depend on whether the Government has right, central or social orientation. Social orientation does not mean limiting free competition, hindering entrepreneurship or creating administrative monopolies. On the contrary, a social country may only benefit from good economic environment and instead of limiting the success of undertakings, it would be worth considering little higher taxes and then redirecting additional resources to strengthen the sociality.

2. In the light of activities of previous and this year, we can say that the Authority´s role of analysing various sectors and giving recommendations for improving the competitive situation is becoming increasingly important. The energy sector has always been in our focus, because the sector has a monopolistic image and it represents a relatively large share of consumer expenditure. It is rather common to say that oil shale is both our fortune as well as misfortune. Fortune, because it helps us to ensure our energy independence; misfortune, because the mining and processing of oil shale inevitably involves environmental impact. With regard to open electricity market and the completion of Estonian-Finnish connections we have been integrated into the Nordic electricity market since last year and also oil shale power industry has to compete with other resources of energy on equal terms. At the same time, however, the economic organisation of the oil shale sector has not considered these circumstances. Oil shale is a great challenge for our economy and the right organisation of the sector has enormous potential for achieving economic success. It is probably widely known that the majority of the liquid fuel resources are not in the form of oil, but in different types of solid oil such as tar sands, oil shale, etc. Estonia will certainly not strive for becoming a leading oil country, but we can surely contribute to the development of this sector. If so far the main use of oil shale has been electricity production, then in the conditions of high oil prices and open market, the economic trend is more on the oil production. Also, the sharing and direction of oil shale has to follow such trend. The resource must go there, where it will be the most beneficial and ensure the highest efficiency.

3. The Supreme Court´s decision on the abolition of limitations in connection with the establishment of pharmacies can also be considered as an important event last year. The Estonian Competition Authority and the Chancellor of Justice have been dealing with this issue for years. Of course, all the necessary services from medicine to public transportation need to be ensured for the residents of the rural areas. At the same time, it is not correct to restrict competition as a tool for achieving this. A large part of the price of prescription drugs is known to be funded by the State through the support of the Health Insurance Fund. Removing competition restrictions and designing more effective pharmaceuticals market would enable us to save costs and if necessary, support pharmacies in the rural areas at the expense of free resources. We can be absolutely sure that it would be more effective than the implementation of competition restrictions.

4. Important discussions are under way in the district heating sector. In Estonia, the local governments have the right to establish a region, where the only allowed type of heating is the district heating. The district heating sector is continuously over regulated and has too many administrative constraints. The Ministry of Economic Affairs and Communications has drawn up a draft act, which aims to implement free market rules more in the sector. Clearly, not all 200 district heating undertakings can be effective and free competition could be considered, when smaller undertakings are concerned.

1. Organisation

1.1 Structure

5. The Competition Authority includes three field-based divisions, which are the Competition Division, the Energy and Water Regulatory Division and the 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 – Deputy Directors General.

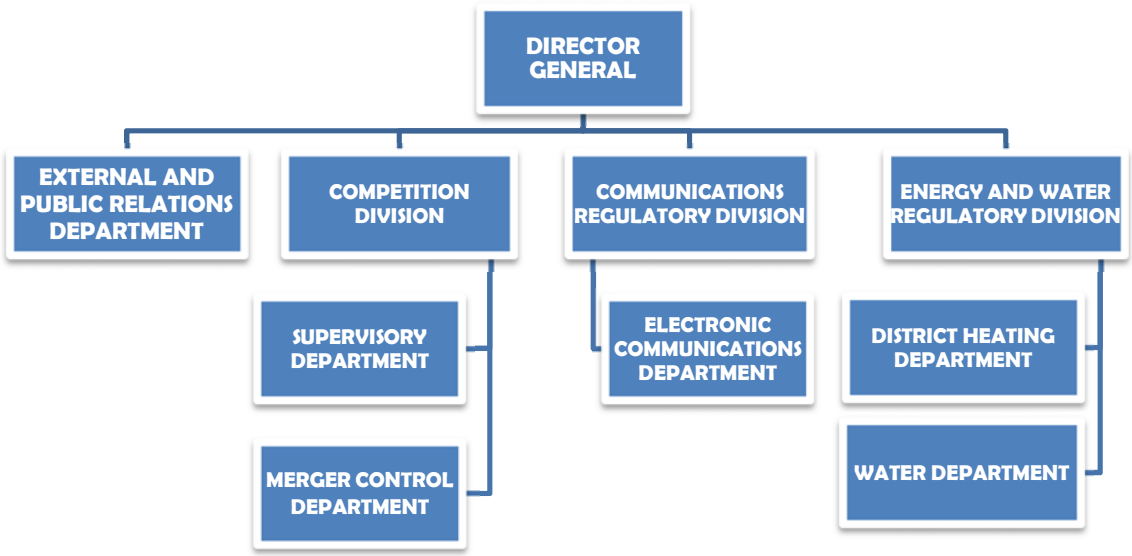

Figure 1. Structure of the Competition Authority

6. The functions of the Authority are divided between structural units as follows:

7. The main functions of the Competition Division are exercising competition related supervision; control of concentrations in all economic sectors; analysing competitive situations, counselling undertakings and raising competition related awareness.

8. The main functions of the Energy and Water Regulatory Division are implementing price regulation and market supervision in the electricity, natural gas, district heating and water sectors.

9. The main functions of the Communications Regulatory Division are: regulating the electronic communications market; regulating the postal service market; settling disputes regarding airport fees; perform duties regarding railway regulation.

10. The main functions of the External and Public Relations Department are coordination of public and international relations; organisation of state assets and means in the possession of the Authority; personnel work and coordination of training; document management and administration of archives.

1.2 Personnel and Budget

11. The Competition Authority employed 61 persons as of the end of 2013, 5 new employees joined the Authority and 12 people left the organisation during the year. The division of personnel between the structural units was as follows:

Competition division	19 persons
Energy and water regulatory division	20 persons
Communications regulatory division	11 persons
External and public relations department	5 persons

12. Officials with up to 10 years of public service experience were of 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.

13. A new Public Service Act entered into force on April 1st 2013 and changed the definition of an official. According to the new Act, an official is a person who is in the public service and exercises official authority. The Competition Division consists of officials only. The External and Public Relations Department consists of employees only and the employment relationships are regulated by the Employment Contracts Act.

14. In 2013 the budget of the Authority was approx. 1.99 million euros.

2. International relations and events

15. The Competition Authority routinely participates in the work of competition, energy, communications and railway related working groups and associations. The officials of the Competition Division attend meetings and discussions of the ECN (European Competition Network), the ECA (European Competition Authorities), the OECD Competition Committee and the ICN (International Competition Network) working groups and sub-groups.

16. From 4-5 June the Competition Authority hosted the annual meeting of the representatives from the Baltic and Finnish Competition Authorities – Regional Competition Conference, which was held in Tartu. The meeting was designed to focus on actual competition concerns, exchange information about developments and jointly find solutions. On the second day of the conference discussions between case-handlers took place in sectoral working groups.

17. The most important national event for the Authority was the Competition Day 2013, which took place in Tallinn on 5 December. The conference celebrating the 20th anniversary of the Authority brought together experts from various sectors of the economy and specialists active in competition matters.

18. Over the years, the Authority has dealt with very different sectors of the economy, analysed the problems and functioning of various markets. In this process, it is important to listen to the undertakings active in these areas on a daily basis. The main themes of the conference were banking, electricity, retail, real estate, market trends for mobile devices and the field of advertising.

19. Each year on 5 December, the competition authorities worldwide celebrate the World Competition Day, which seeks to draw attention to fair and free competition as an essential factor socially and in terms of human development. The conference of 2013 celebrated both the anniversary of the Estonian Competition Authority and the World Competition Day.

3. 2013 in the competition division

3.1 Changes in Legislation

20. Starting from 15 July 2013 (partly also from 1 January 2014), a number of amendments to the Competition Act entered into force, expanding the competence of the Competition Authority according to the European competition rules and clarifying the existing regulation due to the problems encountered in practice.

21. The most important change is complementing the Competition Act with provisions which allow the Competition Authority to use the rights granted to the national competition authorities pursuant to Council Regulation (EC) No 1/ 2003 for establishing interim measures and approve obligations. According to the amendments, the Authority may on its own initiative and in the case of urgency issue a precept to a natural or legal person to perform a required act or refrain from an illegal act if there is a risk of serious and irreparable breach of competition as set out in the Articles 101 and 102 of the Treaty on the Functioning of the EU (TFEU).

22. Activities of one or more undertakings affecting trade between Member States shall be subject to interim measure in case the Authority estimates on the basis of provisional data that there is an urgent need to protect competition. With the amendments to the Competition Act the Authority has been given a right to approve obligations proposed by an undertaking to remedy disturbance in the competitive situation when the previous activities of the undertakings might have violated § 4 or § 16 of the Competition Act or Articles 101 or 102 of the TFEU and the Competition Authority is considering to issue a percept to an undertaking to eliminate that disturbance. If the obligation proposed by the undertaking is appropriate for eliminating the potential harmful effects of the violation, the Authority will make the obligations binding for the undertaking and terminate the proceedings without taking a final position on whether the violation occurred or not.

23. The remaining changes mainly include the qualification and modification of the provisions of proceedings and liability set out in the Competition Act (for example, the grounds for issuing a precept and termination of supervision proceedings have been amended). Additionally, the concentration control provisions have been amended. The most important amendment is related to the determination of the term of validity of the permission to concentrate. It means that the parties to the concentration must, in general, implement the concentration within six months from the entry into force of the permission. The concept of special or exclusive rights was more clearly defined in the Competition Act as well (exceptionally came to force as of 1 January 2014) and the restrictions on the activities of undertakings, also provided for in the sector specific acts were repealed.

24. Finally, an important amendment regarding the limitation period of competition-related misdemeanours in the Penal Code entered into force as of 15 July 2013. While previously the general two-year limitation period was applied to competition misdemeanours then as of 15 July 2013, § 81 of the Penal Code provides that competition-related misdemeanour expires after three years have passed from committing the offence until the entry into force of the decision imposing sanctions for that infringement.

3.2 The analysis of the Competitive Situation in the Oil Shale Sector

25. The Competition Authority analysed the competitive situation of the oil shale sector and submitted its views about a number of problems associated with the sector to the Ministry of Economic Affairs and Communications and to the Ministry of Environment.

26. The Authority examined the current arrangement for sharing the oil shale resources and option for the future developments. Currently, the annual total amount of oil shale permitted to be extracted (20

million tonnes) is divided between four mining companies, and the largest part of the extraction permits belongs to the Eesti Energia group. Thus, it is not possible to introduce competitive situation in the access to oil shale resources in the foreseeable future. Probably even later than starting from year 2020 these permits will start to end in such a volume that there will be a considerable opportunity to issue new permits. The Competition Authority found that new permits should be issued via a transparent auction and the preferences to the companies already possessing mining permits in the current Earth´s Crust Act § 301(2) should be invalidated. The state may enhance competition in terms of access to the oil shale resources also earlier, by changing the sales principles of oil shale in the state-owned Eesti Energia group.

27. Although in the conditions of free market economy, the oil shale should be used in the industry, where more added value is created as a general principle, giving preference to electricity generation may be justified with the objectives of security of supply and energy security. Clear principles for giving such preferences must be set out in legislation.

28. The current state development plan for the use of oil shale sets out the general direction for preferences to be given to electricity generated from oil shale, but does not contain specific measures that would explain how and in what manner to ensure the use of oil shale precisely for the electricity generation. These principles are neither set out in legislation nor are they explained in the energy sector development plan. The contents of the security of supply and the role of oil shale in it are actually clearly undecided on political level, but such decisions must be made in the near future. The current development plan for the use of oil shale is valid until 2015 and reportedly preparations have started for drawing up a new development plan.

29. Specific legislative instruments for ensuring the objectives of security of electricity supply must be set out when giving preference to oil shale. The Authority's analysis reveals that electricity generation from oil shale is not likely to be competitive in the long term compared to the production of shale oil. In such a situation clear legislative mechanisms must be determined to warrant the competitiveness of power generation. One way is the reservation of certain amount of oil shale for the electricity generation. At the same time, when deciding the access to oil shale reservoirs, it is particularly important to ensure that the principles of access comply with the state aid rules.

30. The Competition Authority used only publicly available data to analyse the pricing of oil shale in order to avoid obstacles to its disclosure. Until 1 January 2013, the Eesti Energia group sold the main part of oil shale at cost-based price co-ordinated by the Estonian Competition Authority. Quite a large profit was earned from the vertical chain of mining and the production of oil and electricity generation in 2011, however, the above-average profit concentrated rather on the industry and less on the mining. Fundamentally rather the opposite, where the mine as the provider of the limited resources earns the greatest profit, would be justified.

31. At current prices for oil and electricity, the oil industry is more profitable than the electricity generation, which is why it has a greater ability to pay for the oil shale. According to the calculation made by the Authority, the price for oil shale is likely going to be higher on the free market than the previous regulated price (10,55 - 10,58 EUR/tonne). The calculation showed that the oil industry's ability to pay for the oil shale was higher than electricity generation, respectively ca 28 EUR/tonne and 18 EUR/tonne. Although the corresponding figures depend on the market situation and may differ at various points in time, it is believable that the oil industry will pay more also in the long term. Based on the data of 2011 the revenue from the difference of price would be 150.1 million euros. Thus, in the long run, the oil industry would be able to produce more revenues for the economy than electricity generation.

32. Complying with the principles of the free market, the price of oil shale should reflect the conditions of free competition and on an equal basis to both the electricity and oil production. In such case

the power generation would rather perish gradually due to its inability to pay competitive price for the oil shale. The fact that oil industry is more capable to pay for the oil shale than power generation is contrasted by the objectives of energy security and security of supply. The goal of the analysis of the competitive situation in the oil shale sector was not to conclude whether these objectives are big enough to weigh up the possible distortions of competition and/or additional costs. It is a political choice to give preference to power generation from oil shale in order to ensure the security of supply. The aim of the analysis was to draw attention to the fact that such a selection may involve additional costs and that, if such a choice is made, clear legislative principles must be laid down in order to preserve the competitiveness of the electricity generation from oil shale.

33. On its own initiative the Competition Authority also carried out supervision proceedings, which aimed at analysing compliance of the activities of Eesti Energia AS as by far the largest undertakings in the oil shale sector with the Competition Act. The proceedings were initiated mainly due to the lack of certainty, whether the Eesti Energia AS sells oil shale to the Viru Keemia Grupp AS in the long term or not. In the course of the proceedings, in the summer of 2013, Eesti Energia Kaevandused AS (part of Eesti Energia Group), VKG Oil AS and Viru Keemia Grupp AS concluded a long-term sales contract for the oil shale concentrate. This ensures the supply of oil shale for Viru Keemia Grupp AS over the next several years.

34. With this, Eesti Energia AS improved the competitive situation in selling oil shale; therefore it was not appropriate to continue with the supervisory proceedings in the given circumstances. In this context, the Authority left open the final evaluation about the undertaking's activities' compliance with the Competition Act (including questions whether Eesti Energia AS has a dominant position in the production and sales of oil shale and if it has abused its potential position prior to concluding the long-term contract).

3.3 Termination of the administrative proceeding concerning Forum Cinemas AS

35. The Competition Authority investigated whether Forum Cinemas AS (hereafter FC) has violated prohibitions provided in § 16 of the Competition Act, set for an undertaking in a dominant position for the public distribution of films in Estonian cinemas.

36. FC operates three cinemas in Estonia: Coca-Cola Plaza in Tallinn, Astri in Narva and Ekraan in Tartu. Until 2008, FC did not have competitors in operating cinemas in Tallinn and Tartu. In addition to operating cinemas, FC also distributes films to cinemas operating in Estonia. When the Competition Authority initiated the proceedings, FC was the sole distributor of films of six main Hollywood film studios (Buena Vista International, Columbia Pictures, 20th Century Fox, Warner Bros, United International Pictures, Sony Pictures) in Estonia. The studios mentioned produce films with large budget, meant for international distribution and belonging to the category of so-called mainstream films, i.e. films that are of interest for a large group of people. For film distribution, the film studio usually concludes a license agreement with the local distributor, on the basis of which the distributor is granted the right to distribute films produced by the film studio in a specific geographic area (usually, the territory of a particular country). The local distributor, in turn, concludes license agreements with cinemas of the respective countries, who would like to publicly screen the films in their cinemas.

37. In August 2008, Cinamon Operations OÜ (hereafter Cinamon) opened in Tartu a multiplex „Cinamon" with five halls (a cinema with three or more screens is considered a multiplex) and wanted to start ordering film copies from FC for this cinema. Cinamon found that several conditions of the license agreement offered by FC for ordering film copies contradict with the Competition Act and asked the Authority to determine whether FC has abused its dominant position in film distribution market, in order to protect its interests on the film exhibition market.

38. In the beginning of 2009, the Competition Authority sent its preliminary opinion to FC, finding that FC has a dominant position in distributing films for their public screening at cinemas located in Estonia. The Authority noted that with the concentration of distribution rights of most popular Hollywood films to FC, the latter had significant market power on the relevant market, which enabled it to direct the conditions of competition on this market[1]. The market power of FC was further strengthened by the fact that it also operates cinemas in the largest towns in Estonia. This ensures it the necessary distribution network in distributing films and thereby a considerable independence from non-related purchasers (i.e. the competing cinemas).

39. The Competition Authority found that conditions established in the license agreement by FC for Cinamon may restrict competition. For example, during the first two weeks of cinema exhibition of a film, the cinema did not have the right to exhibit other audio-visual works (except for trailers and advertisements) in the cinema hall used for public exhibition of films without prior written consent by FC (the so-called "two-week rule"). The restriction forced an inefficient business practice on Cinamon, competing with FC in Tartu, because Cinamon could not re-arrange films between different halls according to its own preferences or divide movie halls between different movies. According to the Competition Authority, this condition also restricted competition on film distribution market, since it restricted access of film distributors competing with FC to première cinemas[2].

40. In April 2009, FC announced that they have analysed the preliminary opinion of the Authority and have decided to change license agreements offered to cinemas, excluding or specifying those points of the agreement that the Authority had considered harmful to competition. Among other issues, FC replaced the "two-week rule" described above with a principle that cinemas themselves can determine in which halls, with how many sessions a day and during which time they will screen the films. Also, FC established procedural rules for ordering premiere copies of films, which determine transparent ordering conditions and objective criteria for distribution of film copies in a situation where the number of premiere copies of films is limited. The Authority found that with the above, FC significantly improved the competitive situation in distribution of films for public exhibition in Estonian cinemas.

41. During the proceedings, significant changes also occurred on the film distribution market. If until 2011 distribution rights of films of six main Hollywood film studios belonged in Estonia to FC, then in the beginning of 2011, FC transferred distribution rights of film studios Warner Bros and Sony in Estonia to ACME Film OÜ, and since the beginning of 2013 the distribution rights of film studio 20th Century Fox were also transferred from FC in Estonia to Film Distribution OÜ. Thus, while until 2011, the selection of films, ultimately necessary for operating a cinema oriented at wider public, had concentrated in the hands of one distributor (FC), in the beginning of 2013, a situation had formed where the distribution rights of a particular selection of films were at the hands of several distributors. The Competition Authority found that in such a situation each distributor could possess market power, in case the distributor offers a film selection without which a cinema directed at wider public could not operate sustainably. Namely, a cinema oriented at wider public needs to show a particular reasonable selection of films that an average cinema visitor wishes to see; otherwise, the activity of a cinema is not sustainable. As a rule, a particular film is available for the cinema only from one distributor, who has the distribution rights of the respective film studio in Estonia. This means that in order to show a critical selection of films necessary for cinema activity, cinema has to receive licenses from different distributors. Substitution of different films is rather limited, since a cinema visit is usually planned with the aim to see a particular film (not just to look at some film in the cinema), and thus an average cinema visitor is not likely to go and see another film at the

1 Until 01.11.2008, the market power of FC was further strengthened by holding the distribution rights of ACME films.

2 Premiére cinemas include Coca-Cola Plaza and cinema Solaris in Tallinn, Cinamon and Ekraan in Tartu, Astri in Narva and Mai in Pärnu.

same cinema in the absence of the selected film, but chooses a cinema which does screen the film selected. This, in turn, means that the competitive pressure exhibited by different distributors on each other is rather modest.

3.4 Percept to Ragn-Sells AS to reduce additional service fee

42. Based on the application of TÜ Madara, the Competition Authority analysed the validity of costs related to opening the locked gate established in the Lasnamäe area of Ragn-Sells AS (hereafter Ragn-Sells). According to the application, the fee for opening the barrier of Ragn-Sells by telephone was unreasonably high – 2.68 euros/time.

43. In 2011, Tallinn City Government gave Ragn-Sells the exclusive right for providing waste transport service in Tallinn waste transport region No. 10 (Pae-Ülemiste) for three years. The carrier had the right to apply an additional fee if the waste holder would like to have an additional service (e.g., opening the gate). In Lasnamäe region, Ragn-Sells established the fee of 2.68 euros/time for opening the gate (incl. the barrier).

44. During the period of exclusive right, no other undertaking can provide waste transport service on this territory, as Ragn-Sells is the undertaking in a dominant position, providing waste transport service in this region. In this case, the Competition Authority limited the goods market as a gate opening service, which differs from the service of organised waste transport. The gate opening service, however, is related to waste transport. As other carriers cannot operate in the respective region, it is not possible to provide the service of gate opening. For these waste holders who would like to keep their gates shut during the main part of the day, there are no reasonable alternatives to the service provided by Ragn-Sells. Therefore, Ragn-Sells is an undertaking in a dominant position in terms of gate opening service in areas where it has been given the right to provide organised waste transport.

45. According to the Competition Act, an undertaking in a dominant position is forbidden to abuse its position directly or indirectly on the goods market. The Act forbids the undertaking in a dominant position to directly or indirectly establish unfair purchase or sales price or any other unfair business conditions.

46. In case No. 3-3-1-66-02, clause 26, the Supreme Court has provided: /…/ "The fee established by an undertaking in a dominant position, which is not in reasonable correlation with the economic value of a service, is unfair. The economic value of a service, in turn, is related to the costs necessary for providing the service". As the economic value of the service is related to the costs necessary for providing the service, the costs related to the service had to be determined as well as in what extent the service cost is covered with them. During the procedure, Ragn-Sells presented the costs related to opening the gate, but according to the Authority all costs were nevertheless not related to the service. Some costs were also much more extensive than the observations and calculations conducted by the Authority. Therefore, the Authority concluded that the gate opening service by Ragn-Sells is not in reasonable correlation with the economic value of the service. The fee for opening the gate forms a significant part of the waste transport fee for the waste holder, and the unreasonably high cost of the service damages the interests of consumers.

47. Although during the proceedings, Ragn-Sells lowered the fee for opening the gate in Lasnamäe regions to 1.90 euros/time (without value-added tax), Ragn-Sells did not submit all inclusive and transparent calculations. Thus, it was impossible for the Competition Authority to evaluate in what extent the price reduction moved the fee for gate opening closer to the level allowed by the Competition Act.

48. The Competition Authority issued a precept to Ragn-Sells to terminate the demand for fee from waste holders for opening the gate in Tallinn waste transport region No. 10 (Pae-Ülemiste) in the extent of unreasonable costs as at February 1, 2014. Also, the undertaking was obliged to compile by February 1,

2014 transparent, all inclusive and controllable calculations for the service of gate opening; this included measuring the concerned temporal and monetary costs, based on which the unreasonable costs for the service of gate opening could be determined.

49. Although the proceedings were conducted for Tallinn waste transport region No. 10 (Pae-Ülemiste), the statements submitted by the undertaking indicated that similar calculations have not been conducted for other waste transport regions either, where Ragn-Sells also provides the service of gate opening. The Competition Authority obliged the undertaking to refrain from the fee demand from waste holders for gate opening in other waste transport regions in the extent of unreasonable costs as at February 1, 2014.

50. Ragn-Sells AS observed the precept of the Competition Authority, and as at 01.02.2014, the fee for opening client lock, incl. a gate or a barrier in Lasnamäe region is 1.04 euros/time (with value-added tax).

3.5 The service price of Estonian Internet Foundation was too high

51. The Competition Authority detected that the price provided by the Estonian Internet Foundation for registering domains was too high during the financial years of 2011-2012 and therefore it contradicted with the Competition Act.

52. Based on the inquiry of the NGO Estonian Internet Community, the Competition Authority studied the cost-orientedness of domain administration fees applied by the Estonian Internet Foundation (hereafter EIF). Based on the application, the fee for domain name established by EIF was 18.21 euros a year in 2011, while until 2009, the cost of the service – administered by EENet – was 2.88 euros a year.

53. EIF is an organisation that represents the Estonian Internet Community and domain names with Estonian state traits; among other issues, its task is registration of the domain .ee and imposition of fees. Since 2009, the domain .ee registration undergoes in Estonia a two-level registration. This means that the servicing of end-users is delegated by on EIF to accredited registrars (e.g. ZONE, Elion, etc). The final price of the registration service is formed in the competition between registrars. Accredited registrars forward the data to EIF, who registers the domain names. The Competition Authority studied the fee that EIF takes from the registrars. The Authority found that EIF – who is the only one to provide the registration and administration service of .ee top domain – owns 100% market share and thus a dominant position on the goods market of .ee top domain registration and administration. The Competition Act forbids an undertaking in a dominant position to directly or indirectly establish unfair purchase or sales price or any other unfair business conditions.

54. When evaluating the price-formation of EIF, the Competition Authority followed from the fact whether the profitability of the undertaking is in reasonable correlation with the economic value of the service provided by EIF. For this purpose, it had to be explained whether EIF has earned profit which it would otherwise not gain in ordinary and sufficiently efficient competitive conditions. When analysing the information collected during the proceedings, the Competition Authority reached a conclusion that in 2011 and 2012, EIF received too high profit in the sense of the Competition Act, because EIF would not be able to earn such profit on a competitive market. The Authority also highlighted the high costs of EIF and recommended EIF to consider establishing budget limits for their costs.

55. The Competition Authority found that in order to meet the Competition Act, EIF has to lower the price of the .ee domain and when changing the price in the future, it must be seen that the profit does not extend the profit calculated by the methodology described in the decision of the Competition Authority. During the supervision proceedings, the Authority was convinced that EIF has applied measures for saving

on costs and has started to lower the price for domain registration onto the legally recognised level. Above all, the Authority noted that as of 01.03.2013, the price for domain registration has been reduced from 17 euros to 15 euros, and the price was said to drop even further. On September 13, 2013, EIF made a decision to reduce since January 1, 2014 the registration fee for .ee domain name in the amount of 12 euros for one-year registration period. Also, during the proceedings, EIF approved the price-formation bases of the domain .ee. According to this the planned budget of EIF is generally in balance, taking into account both investments and reasonable reserve; the total net gain does not extend 7% a year of the budget, and the reserve is up to 80% of the budget expenditure.

56. The Authority terminated the supervision proceedings due to the significant improvement of competition by EIF, which was expressed in reducing the price of domain registration and establishing the price-formation bases for the domain .ee.

3.6 Declaration of restrictions on freedom of establishment of pharmacies unconstitutional by the Supreme Court

57. Since 2009, the Competition Authority has made several proposals for abolishing restrictions on issuing and changing an activity license of a general pharmacy, established in the Medicinal Products Act (hereafter MPA), in order to improve the availability of medicinal products, functioning of the market and lower the cost of medicinal products. Due to similar reasons, the necessity for the abolition of restrictions on freedom of establishment of pharmacies has been also suggested by the Chancellor of Justice.

58. Based on the application of the Chancellor of Justice, the Supreme Court en banc declared with its decision No. 3-4-1-2-13 of 9 December 2013 subsections 1-3 of § 421 of the MPA unconstitutional and invalid, as they restrict the freedom of establishment of pharmacies.

59. The Supreme Court en banc found that pharmaceutical service performance belongs to the area of freedom of business, pursuant to the constitution. According to the Medicinal Products Act, general pharmacy services can be provided only by having an activity license, while the receipt of the activity license is restricted with contested provisions. Thereby, already existing pharmacy licensees can also establish a new pharmacy only on the conditions of restrictions on freedom of establishment of pharmacies. The regulation prevents from establishing pharmacies in the amount and places foreseen by the undertaking so that it would be easier for the customer to buy medicinal products. In a situation where the establishment of pharmacies is restricted and a large extent of existing pharmacies have formed a so-called chain, being related to existing wholesalers, it is probably also difficult for a new wholesaler to find sufficient number of wholesale customers. The contested provisions therefore also indirectly prejudice the freedom to conduct business.

60. Although the restrictions on the establishment of pharmacies apply for everyone in the same way when establishing a new pharmacy, these enterprises which established pharmacies before the restrictions did have a priority. Enterprises who would now like to establish pharmacies cannot establish them to whatever place foreseen due to the restrictions on establishment. As they are in a worse situation than pharmacy licensees, already on the market, their fundamental right for freedom has been infringed.

61. According to the estimate of the Supreme Court, the aim of the contested restrictions on establishment is to ensure the consistent availability of the pharmacy service in the entire country. However, the requirement of availability should not be understood so that every Estonian village should have a pharmacy. Considering the population concentration of Estonia, it cannot be considered sufficient if the pharmacy service is available only in areas of as large demand, where pharmacy keeping is clearly profitable.

62. The Supreme Court consents to the claim of restriction supporters that the independent legitimate aim of restrictions is to protect existing pharmacies from too excessive competition. Restricting excessive competition can be an independent aim if the availability of pharmacy service would not be ensured without it. In a situation where there is sufficient demand for pharmacy service and the market can be entered, there are very likely always undertakings who would like to provide the service.

63. The Supreme Court finds that restrictions on establishment of pharmacies are not suitable for ensuring the availability of pharmacy service in regions with large demand. The legislator has established a limit for the establishment of pharmacies in towns as one pharmacy per 3000 residents, presupposing that in case of such number of residents the demand is sufficient for keeping a pharmacy that is profitable or at least not in loss. Almost as many pharmacies have been established in towns as enabled by the restrictions on establishment. This indicates that undertakings are interested in providing a pharmacy service also in case of a relatively small number of residents.

64. The Supreme Court also noted that both the demand for pharmacies and the return of pharmacies have increased during years. These circumstances exclude the situation where the provision of the service would be economically possible or worthwhile only if the service were consumed by a very large number of people, and the state would have to intervene to ensure this. The Supreme Court also marks that allowing free competition does not create a situation in an area with wide demand that all pharmacies would terminate their activity there and the pharmacy service would become unavailable.

65. In the estimate of the Supreme Court, restrictions on establishment of pharmacies are not suitable for continuing pharmacy service or commencing with it in areas with small demand. The specifics of the pharmacy market do not indicate in any way that the pharmacy service should be initiated or continued in a place where there is not sufficient demand, if there are no measures for alleviating the absence of demand. The data of the State Agency of Medicines also indicate that undertakings wish to open pharmacies above all in profitable town areas with large demand.

66. The Supreme Court tacitly accepts that contested restrictions may have some effect on ensuring the availability of the pharmacy service in areas with small demand. After abolishing restrictions on establishment, new pharmacies could be established in towns, which would also cause a need for additional qualified workforce. The increasing lack of workforce, in turn, would highlight the need for wage increase, which could motivate pharmacists in the countryside to move more from the countryside to towns. A significant wage increase, however, cannot be probably enabled by pharmacy licensees, due to the regulated price of pharmaceutical products and the restricted sales of other goods at pharmacies.

67. The Supreme Court proposed alternative measures in its decision, which would help to promote the availability of the pharmacy service in the areas with small demand as well or equally as the restrictions on the establishment of pharmacies, because the former are less burdensome. The availability of the pharmacy service could be, for example, ensured with the obligation of the pharmacy licensees in areas with large demand to provide pharmacy service also in areas with small demand (e.g. a permanent pharmacy or a pharmacy bus). The obligation to keep a pharmacy in an established location with small demand could be entailed either with obtaining a license for keeping a pharmacy in an area with particularly large demand or be related to return in a particular pharmacy or the pharmacies belonging to the group of undertakings. The solution described restricts freedom to conduct business less than a situation where a pharmacy cannot be kept at all. This infringes only the freedom for business of these undertakings, which have had an advantage for the right of keeping a pharmacy in a place with large demand. This would harmonise the conditions for competition and undertakings would be treated equally.

68. A similar effect on the freedom to conduct business could be found in a measure, which would provide a requirement for the payment of benefits to pharmacies located in areas with small demand; this

would be ensured through a support fund, which would be financed by pharmacies in areas with large demand. If the support would be of a proper size and only for places where the pharmacy service would otherwise not be economically feasible, there would be no competitive advantage or unequal treatment.

69. It would be also possible to establish support for pharmacies in areas with small demand. The support would be paid by the state, local government, or a support fund, to which pharmacies in areas with large demand would pay either a fixed fee or a part of their return. Thereby, the legislator should decide whether ensuring the availability of the pharmacy service is the task of the state or local governments. The support would help to increase the availability of the pharmacy service in areas with small demand better than the restrictions on establishment. Taking into account limits on support, established in the legislation on state aid rules, and the annual turnover of pharmacies, the support would be allowed according to the Supreme Court. However, the Supreme Court also emphasised that as paying support would mean additional costs for the state or local governments, this would entail other negative impacts.

70. In conclusion, the Supreme Court found that the restrictions on establishment of pharmacies are not necessary, suitable or proportional for ensuring the availability of the pharmacy service in the entire country.

71. The Supreme Court deferred the decision's entry into force by six months, so that the legislator could develop the measures necessary in a regulation.

4. Control of concentrations

72. The aim of the control of concentrations is to maintain and develop the competition and to prevent concentrations distorting the competition, namely these concentrations that may cause substantial rise in prices due to lack of competition. The Competition Authority grants permission to these concentrations, which affect economic development and competition in a positive way.

73. In 2013, 29 notices of concentration were submitted to the Competition Authority and two cases were brought over from 2012. The Authority made 27 decisions to grant permission to concentration, in one case the proceeding was ended because the parties to the concentration decided not to concentrate and in one case the proceeding was ended because it was not a concentration within the meaning of the Competition Act. In two cases the decision was postponed to 2014. In three cases a decision was made to initiate a supplementary proceeding.

74. 26 decisions to grant permission to concentration were made in the first phase of the proceedings, i.e. within the 30 calendar days prescribed by law. In five cases the proceedings were suspended in connection with the elimination of deficiencies in the notice.

75. The breakdown by types of concentrations was as follows:

- An undertaking acquired control of the whole or a part of another undertaking in the case of 24 concentrations (Competition Act § 19 (1) p 2);
- Undertakings jointly acquired control of the whole or a part of another undertaking in the case of 6 concentrations (Competition Act § 19 (1) p 3);
- Several natural persons already controlling at least one undertaking jointly acquired control of the whole or a part of another undertaking in the case of one concentration (Competition Act § 19 (1) p 5).

76. Majority of concentrations (23) took place among Estonian undertakings, in two cases both of the parties to the concentration were foreign undertakings and in six cases the parties to the concentration were both domestic and foreign undertakings.

77. It could be observed in 2013 that the share of concentrations of Estonian undertakings, whose concrete impact on the Estonian product market is particularly important, has increased and constitutes 74% of the total number of concentrations. Foreign investors are continuously interested in the acquisition of Estonian undertakings; the share of such concentrations was 19% of the total number of notified concentrations. 2% of the notified concentrations took place outside of Estonia, but due to the turnover criteria the parties to the concentrations also notified to the Estonian Competition Authority.

78. In 2013, concentrations took place in the following product markets: passenger transportation; sale of medical devices and accessories; retail and wholesale of fuel; development and rental of real estate; sale of developed real estate; manufacture and sale of paints; import and sale of electrical household appliances; pharmacy services, gas turbines and generators; sale of household goods; security services; telecommunications services; sale of sporting goods; construction services; sale of bunker oil; generation and sale of heating and electricity; IT services; production and sale of soft drinks, beer, cider and mineral water; showing films at cinemas; collection and transport of municipal waste; newspaper and magazine publishing; production and sale of wood chips.

4.1 The concentration of AS Forum Cinemas and Solaris Kino OÜ

79. From July 25 to December 19, the Competition Authority processed a concentration, as a result of which AS Forum Cinemas would have started to operate the cinema complex at the Solaris Centre in Tallinn, belonging to Solaris Kino OÜ. The concentration would have had an impact on two product markets: showing films at cinemas and the distribution of films. In case of the first product market, the Authority analysed the competitive conditions in Tallinn and its near vicinity, and in case of the other market, the conditions on the entire territory of Estonia.

80. During the proceeding, there were also other active cinemas in Tallinn, in addition to the two multiplexes owned by the merging parties (Coca-Cola Plaza and Solaris Cinema), such as cinema Artis, cinema Sõprus, Rooftop Cinema and the cinema hall „SuperNova cinema“ of the Baltic Film and Media School of Tallinn University. The Competition Authority compared the conceptions; size and selection of films of the cinemas named and found that the closest competitors are the merging cinemas. To some extent, competitive pressure can also be exhibited by cinema Artis, as their overlap in film selection with Coca-Cola Plaza and Solaris Cinema has increased year by year.

81. There is the total of 18 screens and 3508 seats at Coca Cola Plaza and Solaris Cinema; 2 halls and 253 seats at cinema Artis. As a result of the concentration, AS Forum Cinemas would have gained 90% market share in showing films at the cinemas in Tallinn and its vicinity.

82. Both Solaris Cinema and cinema Artis started their activity in the end of 2009, when the Solaris Centre was opened. The market entry of these cinemas was a good example on the formation of competition and its positive effect on the consumers – the prices of cinema tickets dropped drastically and the number of visitors increased significantly. The graph on Figure two illustrates the percentage change in the number of viewers and the average price of cinema tickets compared to previous years. The graph draws together the data on Coca Cola Plaza, Solaris Cinema and cinema Artis. The largest divergence in 2010 coincides with the market entry of Solaris Cinema and cinema Artis.

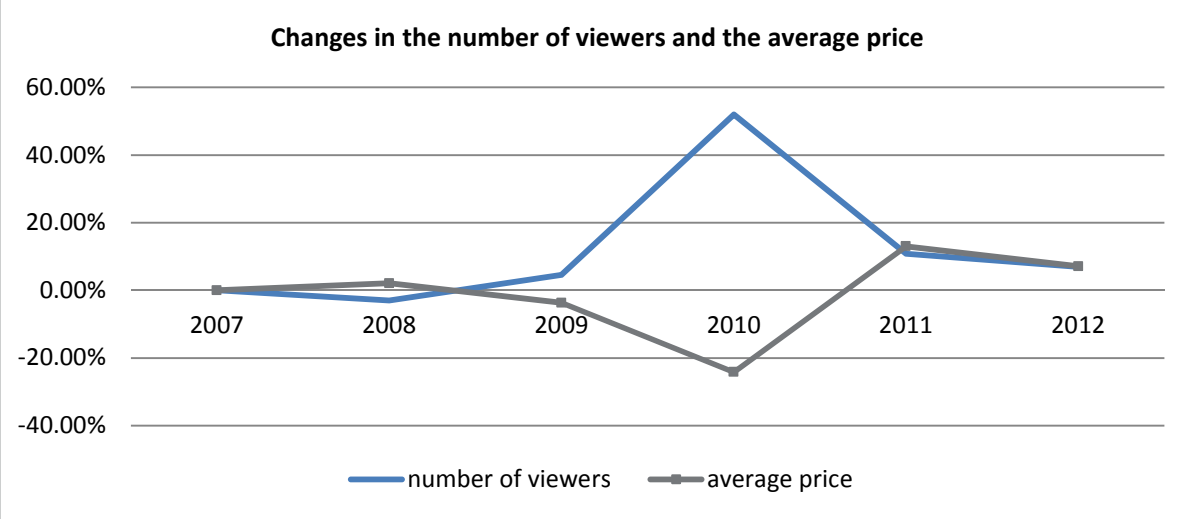

Figure 2. Changes in the number of viewers and average price

83. As a result of the concentration, the positive effect resulting from the the competition would have been lost. It also became evident that Solaris Cinema has grown quicker than Coca Cola Plaza, occupying increasingly more of the market share of Coca Cola Plaza. The concentration would have therefore resulted in eliminating basically the only competitor who exhibited increasingly growing competition pressure.

84. The concentration would have also damaged competition on the goods market of film distribution. Such an adverse effect would have been arisen as a result of having a dominant position on the market of showing films at cinemas, i.e. through a vertical integration. The purchasing power of AS Forum Cinemas on the market of showing films at cinemas, (which is the downstream market for the market of film distribution), would have enabled the company to change the license fees agreed with film distributors and other conditions in a direction beneficial for themselves. Also, as license fees are based on box-office revenue and on dividing the revenue between the distributor and cinema exhibitor, the merger would have automatically resulted in a loss in the financial situation for other film distributors. Hereby it has to be considered that AS Forum Cinemas is also one of the largest film distributors in Estonia.

85. In order to convince the Competition Authority to approve the concentration, the parties of the concentration emphasised the existence of a strong potential competition. As the future competitors, AS Forum Cinemas mentioned the following cinemas that would enter the market: IMAX cinema in the rooms of the former cinema Kosmos, the cinema of the Ülemiste Centre, the cinema of the shopping centre on the Peterburi Road, the cinema of Viimsi Spa, and the cinema of Mustamäe Centre. The Competition Authority confirmed that the new cinemas very likely to be opened in the near future are the cinema of Viimsi Spa and the IMAX cinema. The realisation of other planned cinema projects remained unclear. It became also evident that the concentration would hinder above all larger multiplexes to enter the market. According to the assessment of the Authority, the claimed benefit from potential competition does not eliminate the significant lessening of competition.

86. Although the parties of the concentration said that the concentration would entail only positive developments for cinema visitors, AS Forum Cinemas submitted a package of behavioural remedies to the Competition Authority. Namely, the Competition Authority may approve the concentration if the parties of the concentration assume obligations to prevent the restriction of competition. The obligations proposed included: (i) the obligation not to raise the price of cinema tickets more than the increase in consumer price index; (ii) the obligation to operate Solaris Cinema at least with the same number of screens and as extensive film selection as it was before the concentration; also, the obligation to make the necessary investments to cinemas; (iii) the obligation to refrain from opening new cinemas; (iv) the obligation to

implement the same loyalty programme in both cinemas; (v) the obligation to offer more beneficial screening conditions for Estonian films; (vi) the obligation to continue the equal treatment of cinemas as a film distributor as well as (vii) the obligation to ensure that the volume of films distributed by AS Forum Cinemas at the Solaris Cinema does not exceed the market share of AS Forum Cinemas on the distribution market. According to the Authority, the obligations indicated above were not suitable for eliminating the restriction of competition, related to the concentration. The remedies were not suitable substantively as well as for the fact that the need for their long-term validity significantly hinders the freedom of action of merged undertakings; it also makes the monitoring of performance of obligations complicated.

87. The proceeding of concentration was terminated, as the parties of the concentration decided not to concentrate. Otherwise the Competition Authority would have prohibited the concentration.