Competition Law Insight
Business intelligence | informa

www.competitionlawinsight.com

Parallel proceedings

Implications of penal and administrative competition enforcement in Estonia

by **Elo Tamm**

The competition enforcement system in Estonia is about to change dramatically as Estonia transposes the ECN+ directive. This is a good time to reflect, and draw some conclusions on the effects of the current enforcement system on a few competition cases.

This article does not aim to provide a comprehensive overview of the competition enforcement system in Estonia. The author brings forward some interesting highlights of competition case law and, since these cases cannot be taken in isolation from the Estonian enforcement system, the general features of the enforcement system are summarised briefly.

Parallel penal and administrative (state surveillance) enforcement systems

Currently, competition law can be enforced in two parallel public competition enforcement systems in Estonia – the penal enforcement system, and the administrative (state surveillance) system.

The aim of the penal enforcement system is obviously to sanction violations. Criminal penalties can be imposed on cartels and anti-competitive agreements, whereas abuse of dominant position and merger control related infringements can be sanctioned in misdemeanour proceedings.

The Estonian Competition Authority has not been very active in using its powers as a preliminary investigator in a criminal case or an extra-judicial body in misdemeanour proceedings. Instead it has relied much more on its powers in administrative (state surveillance) proceedings.

The current administrative enforcement system has quite different objectives from the penal enforcement system. The aim of the administrative enforcement system is to ensure compliance with the laws, and to ensure that if a violation is established by the Estonian Competition Authority, measures are taken to put an end to an infringement. If a violation is not terminated by the person responsible for the breach, the Estonian Competition Authority can issue a decision ordering the termination of the infringement or other measures to ensure that the harm to competition is eliminated. Fines cannot be imposed in the administrative proceedings. There is a possibility for penalty payments in cases where the decision is not complied with by the subject of the decision. Penalty payments cannot be considered as fines, since their aim is to ensure compliance with the decision, not sanctioning itself.

The current set-up of parallel enforcement systems with different objectives has produced some interesting competition case law, where the end result may be significantly affected by the choice of procedure. The author aims to introduce a few interesting situations, where the choice of procedure has had a significant impact on the outcome of the case.

Effect of the protection of fundamental rights in criminal proceedings on the burden of proof in applying individual exemption criteria

We have seen in Estonian criminal proceedings how protection of fundamental rights has produced results, which might not be so certain in other jurisdictions with more common administrative enforcement systems.

A good example is a 2011 joint bidding case in the road construction sector.[1] Two road construction companies had submitted a joint bid in a public tender. One of the joint bidders applied for leniency, whereas the other was charged with exchange and coordination of prices and market sharing. The public prosecutor brought the charges to the criminal court. There was no dispute in the case that the joint bidders had coordinated their offers and fixed the bidding prices in the tender. The Supreme Court established that there had been a violation of Article 4 of the Competition Act (Article 101 of the TFEU analogue) and that the object of the conduct was to restrict competition. But this did not result in a conviction, since the court went further to assess whether the

cooperation of the joint bidders could benefit from the individual exemption (the Estonian equivalent is similar to Article 101(3) of the TFEU).

The defence attorneys argued that the bidders would not have been able to participate in the tender individually and this amounted to a circumstance precluding unlawfulness of an act in the meaning of criminal law. Article 2(2) of the Estonian Penal Code sets out that a person shall be punished for an act only if the act comprises the necessary elements of an offence, it is unlawful, and the person is guilty of committing the offence. If unlawfulness is precluded, a person cannot be convicted.

When assessing the unlawfulness of the cooperation of the joint bidders, the criminal court realised that the burden of proof of the individual exemption criteria as set out in the competition law cannot be applied in criminal proceedings. Domestic competition law regimes across the Union provide that if parties wish to claim an exemption under analogues of Article 101(3) TFEU then it is up to the parties seeking the exemption to demonstrate that they meet the exemption criteria. The Estonian Competition Act includes the same burden of proof for individual exemption. It means that under domestic competition law rules the parties need to prove that the pro-competitive features outweigh the anticompetitive features and then the agreement could be exempted .

Such an application of the burden of proof was rejected by the Estonian criminal court. The Supreme Court of Estonia held that presumption of innocence must be respected. Nobody must prove that circumstances are present that would exclude criminal liability. It is up to the public prosecutor to prove the guilt of a person, whereas the public prosecutor must also identify circumstances that justify the actions of an accused person. This applies also to individual exemption criteria. So, the court analysed the individual exemption criteria and concluded that the actual cooperation in this case met the individual exemption criteria. As a result the Supreme Court held that their actions were lawful, and the accused person was acquitted.

Thus, the consideration of a competition law case in criminal proceedings may result in different allocation of burden of proof, as compared to a situation where a case is considered purely under substantial competition law provisions according to a civil process and burden of proof.

Effect of the enforcement authority's wide discretionary powers on judicial review in administrative courts

We have seen equally interesting, but quite different outcomes of competition cases in administrative proceedings and their subsequent review in administrative courts.

As noted, the aim of the Estonian administrative enforcement system (state surveillance proceedings) is not to punish for the infringement, but to ensure that the infringement is terminated. Within the state surveillance proceedings, the Estonian Competition Authority enjoys wide discretionary powers. It can decide whether to start the proceedings, how to conduct them and whether and how to terminate the proceedings. In fact, many state surveillance proceedings are terminated by the Estonian Competition Authority without a thorough assessment of all aspects of the competition case, since the potential violator has already improved its conduct during the proceedings and there is no imminent harm to competition anymore.

There have been cases where complainants have not been happy with the process before the national authority where proceedings have been terminated. In some cases the complainants have sought to challenge the decision of the Competition Authority in the administrative courts. This has proved to be a difficult task. The Supreme Court has held that since the Competition Authority has the discretionary power to decide whether to initiate the surveillance proceedings and whether to issue a decision, this means that the complainants do not have the right to demand initiation of proceedings or an issuance of a decision with a specific content. The Supreme Court has acknowledged that one of the tasks of the Competition Authority is to protect market participants and thus, the surveillance proceedings are not conducted only in the public interest. The aim of the proceedings is to also protect the rights of the consumers and in such circumstances the persons who requested the initiation of surveillance proceedings also have the right to judicial review of the decision of the Competition Authority. However, since the decisions in the surveillance proceedings are discretionary decisions, judicial review is limited to checking that the rules of discretionary power have been observed by the Competition Authority.[2]

Thus, even though the courts have acknowledged that the state surveillance proceedings by the Estonian Competition Authority are concluded in the public interest and for the protection of market participants, the persons potentially affected by a competition law infringement do not have much control of the case after the filing of a complaint.

Another point to be taken from an interesting abuse of dominance case shows that it is difficult for a person alleging abuse of dominant position to challenge the decision of the Estonian Competition Authority, where the complainant does not agree with the assessment of the authority. Energy company VKG brought a complaint to the Competition Authority against the incumbent state-owned energy company, Estonian Energy. The parties had an agreement for the supply of oil shale. The majority of the mining rights for the oil shale were allocated by the local laws and administrative action to Estonian Energy.

The question in the proceedings concerned whether Estonian Energy had abused its dominant position by applying excessive and discriminatory prices when supplying to VKG. The Estonian Competition Authority conducted a substantial assessment of the case and concluded that the prices were not abusive, even though it also noted that in certain circumstances the pricing could be abusive.

VKG challenged the decision of the Competition Authority without success. The administrative court did not engage in a substantial review of the assessment of the decision of the Estonian Competition Authority for quite a peculiar reason – because the agreement setting the price under dispute had been terminated by the time of the court review. The administrative court noted that even if it would be established that the Competition Authority erred in finding that the price was fair, the Competition Authority would not be able to order the dominant undertaking to terminate the unfair pricing since the agreement setting the price had already been terminated. The administrative court held that it was not possible for the Competition Authority within the surveillance proceedings to oblige the dominant company to apply fair prices retroactively and to compensate the damages. The administrative court noted that such disputes should be resolved in civil courts.[3]

Thus, this is yet another example of a situation, where the administrative courts do not engage in a full review of the competition case due to the way that the Estonian public competition enforcement system has been designed.

Lack of clarity

The current Estonian competition enforcement system has resulted in many interesting cases of interplay between material and procedural law. But this also means that there are few court cases where substantive competition law matters would have been the primary focus of the case. This means that there is lack of cases to take guidance from.

The result of the possibility of parallel proceedings is lack of clarity for all concerned. Anti-competitive agreements can and have been considered by the Estonian Competition Authority both in criminal and administrative proceedings. Undertakings remain confused which proceedings could be initiated against them – penal or non-penal – and what their rights in the proceedings are.

It remains to be seen whether these thoughts will remain as a farewell to the current enforcement system, or Estonia will continue with some features of its current system. Article 13 of the ECN+ Directive (2019/1) requires member states to ensure that the national competition authorities have the power to impose effective, proportionate and dissuasive fines for competition infringements in their own enforcement proceedings or request the fines to be set in non-criminal judicial proceedings. The current enforcement system does not enable such fines. Thus, major changes to the Estonian competition enforcement system are expected soon.

Elo Tamm *is a partner at Cobalt in Estonia (https://www.cobalt.legal/en).*

Endnotes

1. Judgment of the Supreme Court (Criminal Chamber), 4 May 2011, Case No 3-1-1-12-11, *Kaupo Kaljuvee and KPK Teedeehitus*.
2. Judgment of the Supreme Court (Administrative Chamber), 22 October 2014, Case No 3-3-1-42-14, *H Reiljan and M Nõmmik v Competition Authority*, at paras 13–15; judgment of the Supreme Court (Administrative Chamber), 23 October 2013, Case No 3-3-1-29-13, *Medicum v Competition Authority*, at para 17.
3. Judgment of the Tallinn Administrative Court, 31 October 2017, Case No 3-15-2945, *Viru Keemia Grupp and VKG Oil v Competition Authority*, at paras 19–22; confirmed by the judgment of the Tallinn District Court, 8 October 2018, Case No 3-15-2945, at para 7.

Competition Law Insight is published by Informa Law, Third Floor, Blue Fin Building, 110 Southwark Street, London, SE1 0TA. *Competition Law Insight* alerts you to new opportunities and potential pitfalls in areas such as mergers, joint ventures, distribution agreements, international enforcement and technology licensing, whilst also covering overlapping policy areas that are helping to shape the framework of antitrust law and policy. For our full range of legal titles visit about.i-law.com.

Client Services: Please contact Client Services on tel: +44 (0)20 3377 3996; +65 6508 2430 (APAC Singapore), or email customersuccess@lloydslistintelligence.com

Editorial queries: Please contact Kate Clifton on tel: +44 (0)78 2579 9139, or email kate.clifton@informa.com

Informa Law is an Informa business, one of the world's leading providers of specialist information and services for the academic, scientific, professional and commercial business communities.

Registered Office: 5 Howick Place, London SW1P 1WG. Registered in England and Wales No 1072954.

Print managed by: Paragon Customer Communications.

Informa Law
Business intelligence | informa