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Annual Report on Competition Policy Developments in Estonia

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This report is submitted by Estonia to the Competition Committee FOR INFORMATION at its forthcoming meeting to be held on 6-8 June 2018.

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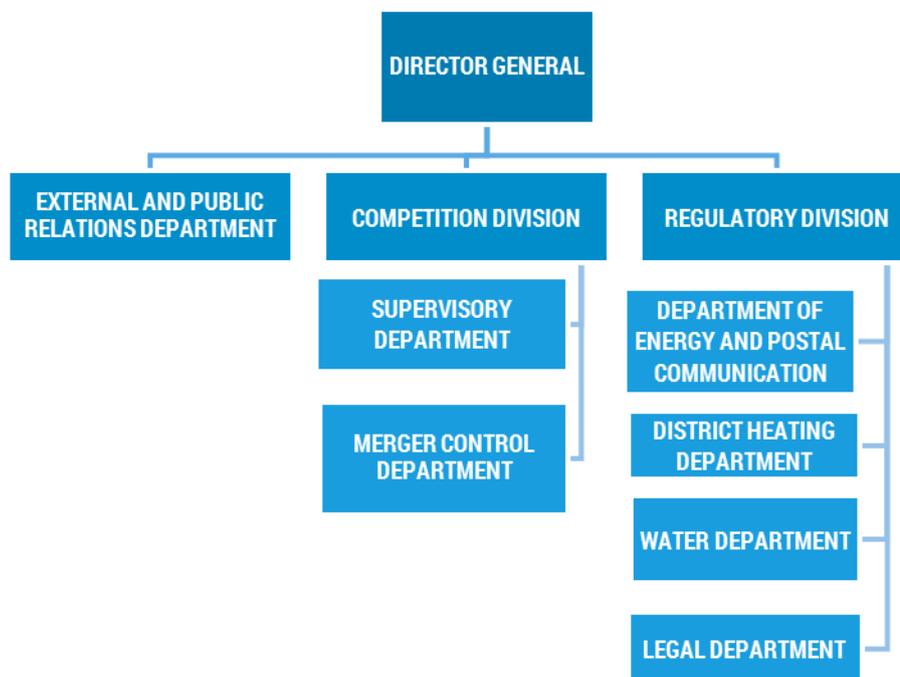
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1. About the authority

1. The Estonian Competition Authority exercises supervision in the fields of competition, electricity, natural gas, district heating, postal services, public water supply and sewerage and railways. In addition, the Authority settles disputes regarding airport fees. The Competition Authority is in the area of government of the Ministry of Justice.

2. The functions of the Authority are divided between two divisions. The Competition Division exercises competition related supervision, control of concentration in all economic sectors, analyses the competitive situation and raises competition related awareness. The Regulatory Division implements price regulation and market supervision in the markets of electricity, natural gas, district heating, water, railways and postal services. The External and Public Relations Department is responsible for ensuring effective support services of the Authority (including international and public relations, personnel work and training co-ordination, document management).

Figure 1.



3. The Competition Authority employed 45 people as of the end of the year 2016, and 41 people were civil servants and 4 people were employees. The Authority employed 30% of men and 70% of women. The average age of a staff member was 43 years and the average number of years of service at the Authority was 12 years.

4. Most staff members have higher education in economics (business administration, business management, finance, etc.) or law. In addition, there are officials with higher education in other disciplines such as thermal engineering, public administration, chemistry or other.

2. Co-operation

5. The Authority considers both international as well as national co-operation highly important. The Authority routinely participates in the work of different field-based working groups, networks and organisations.

6. Competition agencies and sector regulators in various countries share knowledge and experience in the form of bilateral co-operation, but most of the international co-operation is achieved via respective co-operation networks and organisations.

7. The European Commission's Directorate General for Competition and the national competition authorities in all EU Member States co-operate with each other through the **European Competition Network**. As all the members of the network apply the European competition rules, it is necessary for the competition authorities to pool their experiences and share best practices in order to ensure the effective and consistent application of these rules.

8. **European Competition Authorities** is a forum of discussion for the competition authorities in the EU Member States, European Commission and the EFTA States to discuss competition related problems and share experiences.

9. **OECD Competition Committee** is a committee of the Organisation for Economic Co-operation and Development, focusing on competition issues in the area that includes all 35 members of the organisation.

10. **International Competition Network** is a global network with members from every region in the world ranging from small agencies to large ones with different resources and capabilities. The network is an informal venue and it is mostly addressed to maintain contacts and create convergence towards sound competition policy principles and application thereof.

11. The Estonian Competition Authority has very good relations and co-operation with colleagues from neighbouring countries. Often the undertakings are active in many neighbouring countries and authorities are facing similar challenges. Annual meetings take place with Latvian, Lithuanian and Finnish colleagues for discussing competition as well as regulatory issues.

12. **The European Consumer and Competition Day** took place in Tallinn on September 20th. The high-level conference addressing respective areas is traditionally organised by the consumer protection and competition agencies in the framework of the Presidency of the Council of the European Union. In Estonia, the Estonian Competition Authority and the Estonian Consumer Protection Board jointly organised the European Consumer and Competition Day „Paradigm shift in consumer and competition environments – embracing the new reality”. The conference focused on the sharing economy, digital platforms, new technologies and consumer behaviour. Much of it is connected to what is known as the third wave of the Internet, but also with the rapidly changing economy, business models and new type of consumers. The sessions for competition related issues addressed the possibilities for reducing the barriers to free competition and the inevitable necessity of empowering competition authorities for more effective enforcement.

13. The Authority has contributed to co-operation and foreign aid projects whenever possible in terms of human resources. Previously the Authority has been engaged in staff training of Moldovan competition officials. In 2016 a development co-operation project

funded by the Ministry of Foreign Affairs and managed by Tallinn Law School was started. One of the aims of the Project „Digital Single Market as a Key element in EU-oriented Georgian Higher Education” is developing co-operation, exchanging knowhow and experiences between Georgian and Estonian Competition Authorities.

14. Just as important as international co-operation is developing co-operation on a national level with both public sector authorities and undertakings or unions thereof.

15. The Authority meets its co-operation partners and undertakings a little more casually at an annual conference “Konkurentsipäev”. “Konkurentsipäev 2016” took place on December 13 in Tallinn. The conference traditionally brought together undertakings, experts from various sectors of the economy and co-operation partners from the public sector.

3. Competition supervision

16. The competition supervisory activities are generally divided in two major parts: solving cases related to competition restricting agreements and conducting proceedings related to the activities of undertakings in a market dominant position. For the Authority, that means conducting criminal, misdemeanour or administrative proceedings. In addition, the Authority analyses the competitive situation in different economic sectors and if necessary makes proposals to respective ministries to improve the competitive situation.

3.1. Amendments to Competition Act

17. The Competition Act and Associated Acts Amendment Act, which lays down the amendments necessary to transpose certain provisions of the Directive 2014/104/EU of the European Parliament and of the Council, governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, entered into effect on 05.06.2017.

18. The amendments to the Competition Act simplify the procedure of filing claims for compensation for damages caused by co-operation between undertakings distorting competition and abuse of the dominant position. The amendments to the Competition Act regulate passing on of actual losses, as well as matters concerning mutual relations of solidary obligors, collection and admissibility of evidence, and expiry of claims. The amendments also cause precepts of the Competition Authority, judgments by the Competition Authority in misdemeanour matters, or court judgments, which have entered into force in a misdemeanour matter, to become binding for the court conducting the proceedings.

19. Additionally, the Competition Authority now is vested with the right to exercise administrative supervision over implementation of the Competition Act, and the Authority may issue precepts to local governments, state authorities or other persons performing administrative duties if their actions do not comply with the Competition Act.

3.2. Precept of Competition Authority to Tallinn City Government to Reduce Prices Charged for Waste Transport

20. The Competition Authority investigated the compliance of the waste transport prices, established in Tallinn, in particular in the waste transport areas of Põhja-Tallinn and Kesklinna (and later also in Lasnamäe and Nõmme), with the Competition Act. In the City of Tallinn waste transport has been organised so that an authority managed by the Tallinn Environment Board – the Tallinn Waste Centre – intermediates services of waste handlers and waste transport operators to consumers and adds to the service fee their surcharge for keeping records of waste holders and handling settlements.

21. Where a local government is carrying out economic activities by providing goods or services on a goods market, such activities of the local government are subject to the provisions of the Competition Act. In the waste transport areas serviced by the Tallinn Waste Centre the Tallinn City Government keeps records of waste holders and handles settlements with them via the Tallinn Waste Centre. This means that acting through their structural units the Tallinn City Government engages in economic activities, and therefore the Authority viewed such activities of the Tallinn City Government as economic activity, and applied the provisions governing undertakings to the Tallinn City Government as well.

22. In the waste transport areas allocated to the Tallinn Waste Centre for the provision of services the Centre holds the dominant position, being the only provider there. The price established for the service by an undertaking in a dominant position needs to correspond to the economic value of such service, inter alia, by being cost based, while this price may include a justified profit.

23. The Authority analysed the prices charged in these waste transport areas for emptying mixed municipal waste containers and removal of such waste and found that the surcharge is considerably higher than what is charged by other economic operators providing a comparable service. If this service were to be provided in a situation of competition, the price would likely be lower because competing undertakings could not charge fees that are many times higher than the actual costs. In terms of expenses, the service of keeping records of waste holders, and handling settlements with them is equivalent to customer relationship management in private undertakings; therefore, the Authority used the average customer relationship management costs of other waste handlers operating in Estonia (representing around 8% of the fees charged to end users) as the benchmark value. In terms of profit, the Authority compared the profits of other undertakings operating in the same area of business. Assuming that the area of activity is waste collection (average profit margin 7%), which is subject to competition risk, as opposed to intermediation, the profitability of the Tallinn Waste Centre should definitely not be higher.

24. Considering similar expenses and average profitability of undertakings operating in a situation of competition, the surcharge added by the Tallinn Waste Centre to the price of the intermediated services should not exceed 15%. However, in 2016–2017 the surcharge actually added to the price of the service amounted to 40%. Therefore, the established fees are not economically justified, and thus the Tallinn Waste Centre, being an undertaking in a dominant position, has applied unjustly high prices.

25. In order to remedy the violation of the Competition Act, the Competition Authority issued on 13.11.2017 the Tallinn City Government a precept obligating the

City Government to reduce the surcharge as from 1 January 2018 such that the surcharge would not exceed 15%.

3.3. Analysis of Prices of Estonia's Leading Towage Company Alfons Hakans AS

26. Based on the public information, and assuming the position that Alfons Hakans AS does not have any credible competitors in Estonia vis-à-vis the towing services, in February 2015 the Competition Authority launched supervision proceedings, which lasted altogether two years.

27. In 2013, there were still two competing towage services providers in Estonia. One of them was PKL AS, an Estonian capital-based company and the other was Finnish-owned company Alfons Hakans OÜ. The competition between the two towage services providers was quite strong. In 2013 Alfons Håkans Oy Ab (established in 1988 under the name Finntugs Ltd), that also owned Alfons Hakans OÜ operating in Estonia, started the process of acquisition and merger of PKL AS, and since its completion on 27 May 2014, there is one large towage service provider operating in Estonian ports.

28. The tugs of the Alfons Hakans Group are operating in all main ports in Finland, incl. Kotka and Hamina, as well as in all main ports in Estonia, including Muuga, Sillamäe, and Paldiski. Companies of the Alfons Hakans Group are rendering three principal services, i.e. towage services within harbour areas and on the high seas, as well as icebreaking services. In the proceedings the Competition Authority focused their attention, above all, on the towage service within harbour areas. Essentially towage service in harbour areas means assisting large cargo vessels in entering and leaving the harbour area, because due to their large size and poor manoeuvring capacity they would not be able to safely handle this on their own.

29. In the proceedings, the Competition Authority defined the ports located in Northern Estonia as such falling within the geographical area of the goods market. In most of these ports there is only one towage service provider operating applying a similar pricelist. The Authority found that Alfons Hakans AS holds a dominant position in the Northern Estonian market of harbour towage services.

30. In the course of the proceedings it turned out that the price of the harbour towing service in Estonia was increased on two occasions. The first price increase had taken place in April of 2013, before the merger was completed, when both of the companies increased their mooring tariffs. At the end of that year the companies were merged, which was followed by the second price increase, implemented in February of 2014 by PKL AS, which in June of 2014 was renamed into Alfons Hakans AS.

31. Alfons Hakans AS explained the Competition Authority that their prices are rather lower than those of other towage services providers operating in other ports of within the Baltic Sea region. Having analysed the data the Competition Authority took the position that this comparison cannot be applied, because in most of the ports of the Baltic Sea region towage service providers are also operating in a monopoly situation, and therefore there is no certainty that their prices have been established in a situation of free competition. It was further necessary to take into consideration, that in different ports the mooring service could differ in terms of scope as well as in terms of complexity, and therefore comparing prices of undertakings operating in different Baltic ports would be unreasonably complicated and burdensome.

32. The Competition Authority analysed the ratio of investment made by Alfons Hakans AS in Estonian ports for the provision of mooring services and profit made. In their preliminary opinion the Competition Authority established that the rate of return of Alfons Hakans AS amounted to 24.72 per cent, which is considerably higher than the average profitability in economy in general, and that of comparable Estonian undertakings. The Competition Authority also held the position that the profitability of Alfons Hakans AS was higher than that allowable for monopolies subject to price regulation by the Competition Authority.

33. In the course of negotiations between the Competition Authority and representatives of Alfons Hakans AS, Alfons Hakans AS expressed their willingness to improve the competitive situation. The proceedings in respect of Alfons Hakans AS were terminated due to their assumption of the obligation for a six-year period, i.e. for a period from 01.01.2018 till 31.12.2023. The main substance of the obligation was the commitment of Alfons Hakans AS to ensure that the return on equity (ROA) cap vis-à-vis the Estonian towage services business does not exceed 12 per cent on certain agreed terms.

3.4. Precept of Competition Authority to Estonian Lairiba Foundation

34. The Competition Authority issued a precept to Eesti Lairiba Foundation (ELA SA), where it demands to mitigate conditions of access to EstWin base network (starting from 20 November 2017) in order to improve high-speed Internet provision options for rural residents.

35. ELA SA is a foundation founded by the members of the Estonian Information Technology Association, which constructs EstWin network for high-speed Internet access in rural areas. By the beginning of this year, 58 million euro was invested in the network, 86% of which was covered by public funds. The goal of the public funding is to set up a basic network in rural areas where private companies are not prepared to invest under current market conditions. By using this basic network, communications companies are more able to offer broadband services to consumers in various ways.

36. ELA SA has developed conditions of access to EstWin base network in a way that is suitable primarily for large mobile communication companies with large number of consumers. However, in rural areas fewer consumers reside on larger area than in towns, and the pricelist of ELA SA is not suitable for other companies that wish to provide their services in rural areas. There is a service called “fibre line rent for consumer connection” developed for rural areas, where the fee per consumer is lower, but its usability is significantly limited by various conditions. In particular, by the number of consumers and the length of the rented fibre line. The precept of the Competition Authority calls for removal of these restrictive conditions.

37. It is important that reasonable options are available in rural areas on supplying broadband services, using technical solutions preferred by consumers. Mitigation of conditions of access to ELA SA base network will provide better opportunities for development particularly the fixed connections and other local solutions.

3.5. Court Judgement on “Vodka Cartel” Entered into Effect

38. On 07.06.2017 the Supreme Court decided to not accept the appeals of the accused. This meant that the judgment of the Tallinn Circuit Court delivered on

15.12.2016, which upheld the judgment of Harju County Court of 29.04.2015 that found AS Liviko, Selver AS, Rimi Eesti Food AS, MAXIMA Eesti OÜ, Prisma Peremarket AS and 9 individuals guilty of a criminal offence in the form of an agreement and concerted practices carried out in the summer of 2009 with a view to increase the price of lower-priced vodkas to the minimum level of 63.50 kroons, entered into effect.

39. The price increase agreement resulted in an up to 15.7% price increase for consumers. The aggregate market share of the retailers participating in the price increase agreement was as high as 66.3%. It was a nationwide price cartel, the particular feature of which was that retailers did not communicate directly with each other, instead all communication concerning the agreement and the price increase was arranged by employees of Liviko, who applied the so-called ‘hub-and-spoke’ model of information exchange.

40. During the court proceedings, led by Judge Velmar Brett, and held with the participation of two prosecutors and 12 defence attorneys, a vast body of materials describing the interaction of the accused, and the price increase controlled by them, was examined. For the purpose of comprehensive verification of authenticity of digital evidence gathered by the Authority certain technical specialists were also involved in the court proceedings: the court appointed a digital expert, while the defence involved specialists from the field of cyber defence, who analysed evidence with the precision of each byte and bit. Under the court judgment, the legal persons convicted were awarded a monetary penalty in the aggregate amount of 10 879 000 EUR, of which 90% would not be enforced, provided that no new offences are committed during the probationary period. Due to the scope of the examined evidence this court case can be regarded as one of the largest of recent times. The delivered punishments are the highest in history, both in the area of competition law, as well as in the Estonian criminal justice system in general.

41. Proving an extensive cartel offence in a court of law is a complex task that involves legal, economic and technical aspects. According to the judgment, legal aspects include, for instance, establishing the role of the accused (e.g. instigator, executor, and accomplice) and their contribution into the criminal episodes of which they are accused, as well as the objective and subjective elements of the offence. Generally, it presumes the existence of comprehensive evidence that could be used to prove the criminal methods of a particular person and to establish other legal elements of an offence. In terms of economic analysis, the matters that could arise are such that address consumer behaviour, and the defining of the appropriate product market and geographical market. Moreover, when dealing with digital evidence the proceedings can become highly technical, covering areas such as verification of hashes and the syntax of regular expressions.

42. Although proving the presence of a prohibited agreement could be an extremely wide-ranging task, the present case demonstrates that creating a cartel and managing a price increase process is relatively easy. The nationwide price increase was arranged through meetings, telephone calls and e-mails. Handling affairs in a cartel is further facilitated by the high motivation of its participants. As one of the participants in the cartel told the other participant in their e-mail message, the parties involved had an opportunity to earn more money by just replacing a number of price tags, which in effect amounts to all of the “expense” of the participation in a cartel.

43. The court materials reveal that the cartel was not merely interested in increasing retail prices of the vodka brands of the then largest vodka producer; instead measures were taken to ensure that prices of lower-priced vodka brands of other producers or importers were also increased, without giving heed to whether or not this matched the

market strategy of the importers of the competing brands. This served as a proof of the fact – which theorists had known for some time already – that in addition to consumers, a cartel can also damage interests of honest traders. The latter do not have any possibilities for defending themselves against actions of persons holding a dominant position in companies operating in the sector, who act clandestinely, and are highly motivated. In the course of state supervision, where the Competition Authority, other investigative bodies, and the prosecutor's office play crucial roles, it is difficult to track down such cartels, while proving their existence is even more complicated, because under criminal law participants in a cartel have in their disposal extensive defence options. Therefore, it is often necessary to hope that businesses, operating in industries with the highest level of cartel risk, act in a law-abiding and vigilant manner, and where any serious cartels are discovered, competent authorities are notified of them.

4. Control of concentrations

44. The main purpose of the control of concentrations is to avoid creation or strengthening of dominant position of an undertaking, which may give rise to a significant impediment to effective competition. A concentration shall be subject to control by the Competition Authority if, during the previous financial year, the aggregate turnover in Estonia of the parties to the concentration exceeded 6 million euros and the aggregate turnover in Estonia of each of at least two parties to the concentration exceeded two million euros.

45. In 2017, the Competition Authority conducted 43 concentration related proceedings, 38 concentration notices were submitted in 2017 and five cases were brought over from the previous year. In five cases the Authority decided to initiate supplementary proceedings. The Authority granted 36 permissions to concentration, in 33 cases thereof the Authority made decisions in the 30 calendar days prescribed in the Competition Act. In three cases (Elisa Oyj and Aktsiaselts Starman; AS Maag Grupp and Elveda OÜ; AS Aqua Marina and aktsiaselts „Johnny“) the Authority made a decision to grant permission during the supplementary proceedings, in the case of AS Aqua Marina and “Johnny” the permission was granted with an obligation. Supplementary proceeding is carried out in order to ascertain whether the concentration subject to control does or does not involve anti-competitive circumstances. According to the law, the maximum length of the supplementary proceeding is four months.

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

47. An undertaking acquired control of the whole or part of the other undertaking in case of 33 concentrations (Competition Act § 19 (1) p 2);

48. Undertakings jointly acquired control of the whole or a part of another undertaking in the case of 9 concentrations (Competition Act § 19 (1) p 3);

49. Undertakings merged within the meaning of the Commercial Code in one case (Competition Act § 19 (1) p 1).

50. The Authority conducted proceedings in the following sectors:

- Design works and construction of utility networks
- Financial services
- Courier services, parcel shops

- Production and sale of dairy products
- Provision of IT services and sale of IT infrastructure products
- Road maintenance
- Commercial property
- Internet portals
- Production of metal construction
- Retail of motor vehicles
- Extraction and sale of aggregates (limestone, gravel, sand)
- Retail of motor fuels
- Production of plastic details
- Planning construction and maintenance of electricity and communications networks
- Production of timber products and wooden pellets
- Construction
- Advertising services
- Agriculture
- Sale and rent of vending machines, sale of accessories and commodities
- Designing and installing lightning solutions
- Catering services
- Wholesale of food products, beverages and tobacco products
- Transport services (rail transport, road transport, river transport)
- Wholesale of alcoholic beverages
- Hospitals
- Dental services

51. The majority (27) of the concentrations took place between Estonian undertakings, while in the case of 8 concentrations both parties were foreign undertakings. In eight cases, the concentration involved both undertakings registered abroad and undertakings registered in Estonia. Compared to the preceding year the number of transactions subject to the Competition Authority's control has increased by 16%.

4.1. Concentrations on the Motor Fuel Retail Market

52. In 2017 – as in 2016 – the highest number of transactions involving concentration, controlled by the Competition Authority, were concluded in the motor fuel retail sector: 4 concentration notices were submitted:

- Olerex/Favora

- Alexela/Euro Oil
- Olerex/Circle K (1 filling station)
- Olerex/5+ KÜTUS (1 filling station)

53. During a two-year period, the Competition Authority has controlled in this sector eight concentrations. The changes set out in the Table have taken place in the number of filling stations, owned by the market participants before and after these transactions.

Table 1.

	The beginning of 2016	change	The beginning of 2018
Alexela	63	+35	98
Olerex	79	+17	96
Circle K	54	+20	74
Neste	55	+5	60
Others	193	-68	125

54. The changes presented in the Table have not occurred merely as a consequence of the transactions controlled by the Competition Authority, but also as a result of closing down and opening of new filling stations by market participants. All data presented in the Table are approximate, because the number of filling stations changes constantly.

55. When assessing any concentrations, the Competition Authority has analysed the impact of the concentration on the competition across the entire territory of Estonia. Also, the impact at a more local level was analysed - in areas that cover territories of about 10-minute drive from the filling stations owned by the participants in the concentration in the towns and cities, and within the radius of about 20-minute drive in rural areas.

56. The customer survey and the loyalty card analysis that were carried out in the course of reviewing the concentration of Olerex/Favora and Alexela/Euro Oil, confirmed the appropriateness of establishing the local goods market from the standpoint of a purchaser/consumer. The customer survey (a total of 422 respondents in 17 filling stations in the South-Eastern Estonia) revealed that a large share of visitors of filling stations located in a city considered other filling stations situated in the same city as the alternative, while the alternative for a large share of visitors of filling stations located in a rural area were filling stations situated in the nearest city. Both surveys demonstrated that a large share of visitors of filling stations located in a rural area live in the neighbourhood of that particular filling station.

57. In respect of two concentrations that took place in 2017, the Competition Authority established that the concentration would restrict competition in their local areas. In the case of the Olerex/Favora concentration the Competition Authority found that the concentration would restrict competition in the towns of Põlva and Võru, and therefore the permission for the concentration was granted on the condition that Olerex will dispose of a total of three Favora filling stations in these two towns. In case of concentration of Alexela/Euro Oil the Competition Authority found that the concentration would restrict competition in two areas: in Karksi-Nuia and its immediate vicinity, and along the Tallinn-Haapsalu highway on the section from Ääsmäe to Risti. Therefore, the permission to the concentration was granted subject to the condition that Alexela will dispose of one filling station in each of these areas.

58. In light of the above described obligation to dispose of certain filling stations in local areas, it is possible to generally identify the following market structures and situations, in the case of which the Competition Authority detected a problem with competition, and prevented concentration of undertakings:

- The concentration would result in a situation where an undertaking obtains a 40% to 50% market share (in terms of sales revenue) in urban areas, while the shares of the rest of the undertakings are considerably lower;
- The concentration would result in a situation where an undertaking obtains a 40% to 50% market share (in terms of sales revenue) in urban areas, there is another undertaking operating in the same area with a large market share, while the market shares of the rest of the undertakings are considerably lower;
- The concentration would result in an undertaking having in a rural area or in a low-density area three filling stations, which are the closest to each other;
- The concentration would result in an undertaking having in a rural area or in a low-density area three filling stations located one after another in one and the same highway section.