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Annual Report on Competition Policy Developments in Estonia

-- 2022 --

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Estonia

Chairman's Foreword

Dear reader,

In front of you is the yearbook summarising the activities of the Estonian Competition Authority in 2022. Without hesitation, 2022 was once again an extraordinary year – the global economy had not yet fully recovered from the aftershocks of the COVID-19 pandemic, when Europe was hit by a security and energy crisis, leading to massive global inflation and price increase. This has raised many questions, including whether and how, if any, the European competition authorities should intervene in such a situation. But is the price of an energy carrier, which is the result of demand and supply on the market, a competition law problem? Probably not, if it appears not to be based on anti-competitive agreements or other anti-competitive practices. Central banks are trying to contain inflation by raising interest rates. This has sparked debate over whether banks' business practices, which involve collecting deposits, lending them out, and then making extraordinary profits only as a result of central banks' attempts to reduce demand and contain inflation by raising interest rates, are incorrect and in violation of competition law.

A well-functioning market economy means that the state intervenes in the functioning of the market when it is necessary to address market failures or conditions for the free functioning of markets so that competition in the market is fair and, as a result, prices are fair. A liberal market does not in any way imply lawlessness or arbitrariness on the part of merchants. Economists consider markets to be free and prices fair when bidders and buyers are free to make their decisions and there is trust between market participants that one does not deceive the other.

Also, the state itself can act as an entrepreneur, but it must also follow the rules of the market economy and not take advantage of its ability to intervene in the functioning of the market. But even in a country with an open liberal market economy, especially if it is a small country, there are areas where the market does not function and there are market failures. In those circumstances, national economic regulation must be ensured, where the state controls the prices of entrepreneurs in order to protect the consumer from unfairly high prices, while ensuring the sustainability of businesses.

As can be inferred from the above, in 2022 the focus of the agency was on energy-related topics. The world, like us here in Estonia, was actually aware that energy could be used as a weapon, and yet we were not ready for it when this happened. Energy prices have been rising steadily since 2021. At the same time, for example, natural gas was at a record low level, paying 7 euros/MWh on the Dutch TTF stock exchange in 2020. By August 2022, the price of natural gas on the same exchange had risen to a record 339.20 euros/MWh – a fifty-fold spread. Today, writing this introduction, the price of natural gas on the Dutch TTF exchange has stabilized at about 43 euros per MWh. We also saw a price peak in the motor fuel markets, where in the first half of 2022 the price of motor fuel increased by an average of 50%. It may be asked whether, in the face of such volatility and instability, the Competition Authority is at all able to react, as well as whether and to what extent the state should intervene in the activities of the market. Also, why and what kind of competition supervision and economic regulation do we really need in such turbulent times. The answer to this can only be that, in these times of instability, it is particularly important that national economic regulation and competition supervision are effective in order to ensure the stability of the markets and thus contribute to the economy.

I am convinced that the agency's work in previous years will be the foundation for future activities. The Estonian Competition Authority deals with both competition supervision and economic regulation, and as such is an expert organisation whose mission is clearly aimed at ensuring open markets and fair prices in Estonia.

Here is a summary of our main activities in 2022. Happy reading!

Evelin Pärn-Lee

1. About the Authority

1. The Competition Authority exercises state supervision over competition, electricity, natural gas, district heating, mail, public water supply and sewerage as well as railways, aviation and ports, and unfair trading practices. The office belongs to area of government of the Ministry of Justice.

2. The functions of the Competition Authority are divided between two divisions. The competition division supervises competition, controls mergers, analyses competitive conditions, monitors unfair commercial practices and raises competition awareness. The regulatory division exercises supervision and regulates prices in the areas of electricity, natural gas, district heating and water. The division is also engaged in controlling the rail and postal service markets as well as the markets in the above sectors. In addition, the Competition Authority resolves disputes related to airport and port charges.

3. The Cooperation and Support Services Department is responsible for the functioning of support services (including international and public relations, staffing, organisation of training and events, asset and document management).

4. As of the end of 2022 the authority employed 53 people.

Table 1. The breakdown of staff by sex and age

Age	Men	Proportion of employees	Women	Proportion of employees
Under31	4	22.22%	2	5.71%
31–40	4	22.22%	7	20%
41–50	4	22.22%	14	40%
51–60	5	27.78%	8	22.86%
Over60	1	5.56%	4	11.43%
Total	18	100%	18	100%

Table 2. Average length of service of staff

Seniority	Number of employees	Proportion of employees
Under 2 years	12	22.64%
1–4 years	12	22.64%
5–9 years	6	11.32%
10–14 years	8	15.09%
Over 15 years	15	28.30%
Total	53	100%

5. The majority of staff members have higher education in economics or law. In addition, there are employees who specialise in fields such as thermal engineering, public administration and materials technology.

6. In early 2022 the joint Cooperation and Support Services Department of the Competition Authority, the Patent Office and the Data Protection Inspectorate commenced operations within the Competition Authority at the Tatari 39 building. The portfolio of services of the new department includes HR management, administrative organisation, management of state assets and funds, financial accounting and reporting.

2. International cooperation

7. 2022 was a diverse year for international cooperation in the field of competition. The agency was highly involved in the work of the European Competition Network (ECN), actively participating in numerous virtual and on-site meetings of subgroups and working groups held in Brussels or Member States. In March the ECN issued a joint statement on the application of competition law in the context of the war in Ukraine, which emphasised, among other things, that it is of utmost importance to ensure that essential products (for example, energy, food, raw materials) remain available at competitive prices and that the current crisis is not used to undermine a competitive level playing field between companies.

8. The annual Baltic Competition Conference was hosted by the Competition Council of Latvia (Konkurences padome) this year, with the event also serving as a celebration of its 30th anniversary. The conference focused on the challenges stemming from national and local government authorities' participation in business, contemporary competition law challenges in digital markets and recent competition case law. The Director General of the Estonian Competition Authority participated in a round of discussions with the Directors General of other Baltic competition authorities and gave an overview of the most significant changes in the area of competition in Estonia. The representatives of the Competition Authority also discussed with their counterparts cases of abuse of dominant position, merger control, prohibited agreements and digital markets.

9. The Competition Council of the Republic of Lithuania (Konkurencijos taryba) also marked its 30th anniversary with celebrations. At the conference, companies and representatives from competition authorities engaged in discussions regarding the nature and future of competition and pricing regulation. In addition to the anniversary conference, the heads of the Baltic competition authorities held a meeting in Vilnius, where they discussed cooperation in various proceedings, including those related to energy prices and cross-border concentration transactions.

10. In addition to the OECD Competition Committee and working group meetings in June and November/December, the Global Forum on competition was held in December, where, among other topics of interest, the interaction between competition authorities and the sector regulator was discussed. The Director General of the Estonian Competition Authority also presented Estonia's positions on this topic. As the Estonian Competition Authority is responsible for handling competition issues and regulating certain sectors, the presentation provided an overview of potential points of contact and opportunities for mutual cooperation and also touched upon the authority's cooperation with the Consumer Protection and Technical Regulatory Authority.

11. This year, the authority also participated in the ICN Annual Conference in Berlin as well as other international competition seminars and conferences held across the globe.

12. The Competition Authority hosted the Baltic Electricity Market Forum in Tallinn on 24 May 2022 and the Baltic Gas Market Forum on 25 May 2022. These traditional regional meetings bring together energy regulators, market participants and policymakers from the Baltics, Finland, Sweden and Poland to find common solutions to the most pressing issues in the energy sector. The forums focused on the developments in energy markets. In addition, a district heating seminar was held among regulators to discuss possible solutions that would alleviate price increases for consumers, but which would also be sensible from a business and environmental perspective.

13. In late November the authority participated in the regional electricity and gas market forums held by the Latvian regulator in Riga, involving the Baltic States, Finland, Sweden and Poland. In addition, the authority also participated in the district heating and water sector seminar held between regulators. The district heating discussion focused on the factors affecting the prices of heating, including changing fuel prices, as well as national support measures. At the water sector seminar, the OECD recommendations for the development of the water sector were discussed.

2.1. Partner organizations

14. The Competition Authority participates in the work of working groups and associations in different fields of activity. The majority of international communication takes place through cooperation networks and organisations, but also in the form of bilateral relations. The Competition Authority also cooperates with the authorities responsible for the prevention of unfair commercial practices designated by the Member States of the European Union and the European Commission to prevent unfair commercial practices.

15. The European Competition Network (ECN) is the forum for cooperation between the European Commission's Directorate-General for Competition and the national competition authorities of the EU Member States to ensure an efficient division of work and an effective and consistent application of EU competition rules.

16. The European Competition Authorities (ECA) is an informal cooperation network, bringing together the competition authorities of the European Union, the European Commission and the competition authorities of EFTA Member States. ECA meetings are held once a year to discuss topical competition-related issues and share experiences.

17. The OECD Competition Committee is a committee of the Organisation for Economic Co-operation and Development (OECD) that focuses on competition issues in the region covering all its member countries.

18. The International Competition Network (ICN) is a global network of competition authorities with members from every region of the world. It aims to facilitate the maintenance of regular contacts and promote a common understanding of competition rules and their implementation.

19. The Agency for the Cooperation of Energy Regulators (ACER) plays a central role in developing of EU wide network and market rules to enhance competition. The agency coordinates regional and trans regional initiatives that foster market integration. ACER monitors the work of the European Network of Transmission System Operators for Electricity and the European Network of Transmission System Operators for Gas, in particular, their EU-wide network development plans.

20. The Council of European Energy Regulators (CEER) was established to promote cooperation among the independent energy regulators of Europe. The council aims to facilitate the creation of a single, competitive, efficient and sustainable internal market for electricity in Europe.
21. The Energy Regulators Regional Association (ERRA) is an international association of energy regulators established in 2000 to exchange information between energy regulators, provide sector specific training and offer expert advice in the field of energy.
22. The OECD Network of Economic Regulators (NER) is aimed at exchanging regulatory practices in different sectors and comparing the efficiency and independence of regulators. The Baltic Regional Gas Market Coordination Group is tasked with the development of
23. a single Baltic and Finnish gas market. The aim of the regulators is to develop a unified pricing scheme based on input-output points.
24. The European Water Regulators (WAREG) was established under the leadership of 12 European water regulatory or development organisations. The WAREG working group on regulation monitors the implementation of benchmarking in the water regulation of different countries, while the institutional working group addresses the issue of affordability of water services.
25. The Independent Regulators' Group-Rail (IRG-Rail) is a network comprising independent rail regulatory bodies from 29 countries. IRG-Rail analyses the legislative amendments proposed by the European Commission and proposes necessary additions or amendments. The European Network of Rail Regulatory Bodies (ENRRB) is an institution set up by the European Commission to bring together national rail regulatory bodies from EU Member States. The main task of the ENRRB is to assist the European Commission in the preparation of legislation and to facilitate active cooperation and information exchange between
26. national rail regulatory bodies.
27. The Thessaloniki Forum of Airport Charges Regulators (Thessaloniki Forum) is an expert group of the European Commission composed of airport charges regulators of EU Member States, the Airports Council International Europe, and representative institutions of international and European airlines. The task of the Thessaloniki Forum is to assist the European Commission in the implementation of existing EU legislation, programmes and policies as well as in the preparation of legislative proposals and policy initiatives, and to promote cooperation and communication between Member States.
28. The European Regulators Group for Postal Services (ERGP) is composed of EU Member States. The role of the ERGP is to advise the European Commission in the field of postal services and to facilitate cooperation and communication between the Member States and the European Commission.
29. The European Committee of Postal Regulation (CERP) is tasked with examining postal regulatory affairs in a European context, while also taking into account any regulatory changes. The CERP also assesses the influence of international regulatory policies and liaises with relevant international organisations concerned with postal regulation.
30. European working groups of the Universal Postal Union (UPU). The Universal Postal Union (UPU) is the primary global platform for cooperation among parties in the postal sector. The UPU also fulfils an advisory, mediating and liaison role, and

provides technical assistance where needed. The UPU sets the rules for international mail exchange and makes recommendations to stimulate the growth of letter, parcel and financial services and to improve the quality of services for customers.

31. The Competition Authority's closest cooperation is with its colleagues in neighbouring countries. The competition authorities, as well as energy and postal regulators, hold annual meetings with their counterparts from Latvia, Lithuania, and Finland.

3. Competition supervision

32. The primary task of the Supervisory Department of the Competition Authority is the investigation of anti-competitive agreements and undertakings in a dominant position on the market. In 2022, a large number of different cases were dealt with. The Annual Report describes in more detail the so-called dryer cartel case, which stands as one of the largest cases of its kind in the history of the Authority. The takeaway from this case under competition law is that competing undertakings cannot agree amongst themselves on non-competitive offers. In addition, the Annual Report details the case of a joint tender of timber transport undertakings in terms of co-operation between competitors in public procurement. This was a precedent-setting case in Estonia, where the majority of undertakings operating in this field decided to join forces and submit a joint tender in a large-scale public procurement. Although such joint tenders are reasonable under certain circumstances, the high level of co-operation in this case was undoubtedly anti-competitive.

33. Similarly to previous years, one of the keywords for 2022 was the anticipation of the Administrative Fine Procedure Act. Estonia's approach to handling competition matters is widely recognised as unique, as it involves both criminal and misdemeanour procedures, which are often perceived as less effective than the administrative fine procedure more commonly used across the EU. For this reason, the ECN+ Directive, which is aimed at reforming the way competition matters are handled in Europe, essentially calls for criminal procedures to be abandoned. While the Directive does not preclude the use of a misdemeanour procedure, it calls for such fundamental changes that the feasibility of such an approach is debatable. As a result, Estonia has opted for the introduction of an administrative fine procedure. The majority of EU Member States that have traditionally used a procedural system similar to that of Estonia have followed the same path. The Estonian Competition Authority, as one of the smallest national competition authorities in Europe, considers the strengthening of the procedural system to be of the essence. At the same time, we acknowledge that this represents a ground-breaking change in the legal system of Estonia, the shaping of which inevitably requires time.

34. The year 2022 will hopefully go down in history as the year that saw an end to the COVID-19 pandemic. While concerns were raised in the early days of the pandemic that lockdowns could result in numerous new types of competition problems, in reality, there were only a few cases. For instance, in Europe, there was concern that disruptions to production and supply chains could lead to the issue of the permissibility of so-called crisis cartels aimed at tackling these challenges. However, the Authority did not identify any instances where the pandemic could be used to directly justify anti-competitive practices. The turbulent economic situation of recent years has undoubtedly created challenges for both consumers and businesses alike. Although crises are a normal and inevitable part of a market economy, it is important not to address them in a way that undermines competition. As an example, the Annual Report describes the

unlawful co-operation of financially struggling bus undertakings to compel the state to provide additional funds to them. As prices, particularly for energy, continue to rise, an increasing number of voices argue that competition in these fields is no longer sustainable. It is important to differentiate between situations where competition fails to function and situations where it functions, but in a way that is undesirable for society. It is a basic principle of the market economy that when demand exceeds supply, price increases occur, stimulating new investment in the sector and eventually leading to lower prices. Competition supervision seeks to eliminate barriers that impede the functioning of the market mechanism, without challenging the mechanism itself.

3.1. Unfair trading practices

35. At the end of 2021, the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain entered into force, which transposed into Estonian law Directive (EU) 2019/633 of the European Parliament and of the Council of 17 April 2019 on unfair trading practices in business-to-business relationships in the agricultural and food supply chain. In September 2022, the 12-month transitional period for the application of the law expired, which meant that all contracts for the sale of agricultural and food products had to be in accordance with the law from that time on.

36. There are 16 unfair practices listed in the law: nine of which are always prohibited (§§ 4 and 5) and seven of which are prohibited if the parties have not agreed in clear and unambiguous terms of supply in a form reproducible in writing (§ 6).

37. For example, it is prohibited always and in any circumstances to pay for agricultural and food products later than within 30 days or to require the seller to make a payment not related to the sale of the seller's agricultural and food product. In the absence of such an agreement between the buyer and seller, the buyer is prohibited, for example, from returning unsold agricultural and food products to the seller without paying for those unsold products or without paying for the disposal of those products, or requiring the seller to pay for the promotion, advertising and marketing by the buyer of agricultural and food products.

38. In order to find out what products are considered agricultural and food products within the meaning of the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain, Annex I to the Treaty on the Functioning of the European Union (TFEU) should be consulted. In addition, agricultural and food products are products not listed in that Annex but processed for use as food using products listed in that Annex.

39. Last year, the Competition Authority commenced supervisory proceedings at its own initiative against a large retail chain. The authority has mainly processed requests for explanations regarding the interpretation of the law, which increased significantly shortly before the end of the transitional period. The majority wanted to know what constituted buying for own consumption and what did not. The interest in this topic stemmed from the fact that the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain does not apply to buyers who buy agricultural and food products for their own consumption. One example of buying for own consumption is when a legal person buys agricultural and food products to offer to its customers or employees (e.g., tea, coffee and candy at the premises of the company for consumption on site or as company gifts for partners). However, it is not considered buying for own consumption if, for instance, an animal keeper buys feed for the animals and later resells the animals or animal products. Resale of products, whether in raw or processed form, thus constitutes the dividing line by which buying for own consumption can be distinguished.

40. In addition, there were repeated requests for information on whether the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain also applies to food supplements and beverages. If the food supplement is intended for human consumption and it contains an ingredient listed in Annex I to TFEU, the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain applies to the food supplement. In such a case, the percentage of the ingredient in the end product is irrelevant. The same conditions also apply to beverages. Insofar as the legal definition of food does not specify that the food has to be in solid form, beverages also fall within this definition. The main condition is that the product is intended for human consumption. Therefore, a beverage that contains an ingredient listed in Annex I to TFEU is considered food within the scope of the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain. As Estonia has transposed the Directive into national law on stricter terms – the calculation of annual turnover was abandoned, as was the distinction of perishable products, as a result of which a shorter 30-day payment period applies to all agricultural and food product groups – there have been a lot of questions about invoice factoring. Factoring is a transaction in which the outstanding sales invoices of buyers are transferred to a finance company that pays the seller the full amount of the invoice in return for a service fee. Factoring helps undertakings finance their activities, in other words, factoring is a way for

41. sellers to finance their working capital.

42. Sellers have expressed concern that, compared to the 30-day payment period in Estonia, several other Member States have laid down longer payment periods of 60 days under the Directive. In light of the above, sellers operating in Estonia have been put under pressure because buyers outside of Estonia are not buying their products as much anymore as they are given longer payment deadlines in countries that introduced the 60-day payment period, which is something that Estonian sellers cannot offer. It has been pointed out that Estonian sellers have sustained losses of competitiveness as a result of the above and that solutions to this problem are needed.

43. Consequently, it has been asked whether an activity where the seller issues an invoice to the buyer with a 30-day payment period, which the seller then assigns to a factor who, as the new creditor, extends the initial 30-day payment period granted to the buyer by an additional 30–60 days so that the buyer can pay the invoice within a maximum of 90 days is prohibited within the meaning of subsection 1 of § 4 of the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain. The Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain does not preclude invoice factoring, however, it is important to ensure that the use of different financing mechanisms does not extend the payment periods laid down in the Act on Combating Unfair Trading Practices in the Agricultural and Food Supply Chain.

3.2. Joint action of undertakings in the light of competition law

44. As the economic situation deteriorates and the revenues of undertakings decrease, the desire of undertakings to act together to defend their interests increases. This, however, could put businesses into conflict with competition law. It could happen even if co-operation takes place through a professional organisation. The Authority finds that, in addition to the defending of interests, such cases usually also involve a warning to cease the supply of goods upon non-compliance with wishes. This leads to a situation where undertakings decide together how they behave on the market. Inevitably, there is a conflict with the Competition Act as the individual right of undertakings to decide how to behave on the market serves as the basis for competition law.

45. Although the Authority here describes the behaviour of bus undertakings, this case was far from being the only one of its kind. For this reason, the Authority wishes to draw the attention of undertakings to the limits of such an action, i.e., representation of interests and joint activities. It is important to bear in mind that co-operation or decisions by an association of undertakings that affect or aim to affect the independent (economic) behaviour of the members of the association are prohibited. Although the actions of undertakings in such a situation generally have other objectives (e.g., compensation of costs due to cost increases), it does not mean that the rules of competition do not apply. In other words, the pursuit of another objective does not prevent it from being regarded as an agreement restricting competition.

46. Bus undertakings AS GoBus, AS HANSABUSS, Aktsiaselts SEBE, Osühing M.K. Reis-X and ATKO Transport OÜ sent the joint public declaration 'Public declaration of five bus undertakings' to state authorities. In the joint declaration, the bus undertakings announced that they needed additional funding for the performance of the concluded public service contracts and that they had jointly decided to suspend bus traffic on one of the bus routes operated by them and commissioned by the state in Harju County on 11 June 2022. The joint declaration demonstrated that the bus undertakings that had signed the declaration jointly decided their market behaviour with the aim of encouraging the contractor to pay service providers more than the agreed-upon price. To assert their demands, the bus undertakings came to a joint agreement to halt bus traffic on a specific day on the bus route they operated. As such, the bus undertakings did not operate independently, instead they had agreed to act together. Such a joint activity constituted a violation of the Competition Act. Following the intervention of the Authority, the bus undertakings declared that they would proceed with their previously planned suspension of the bus route. The Competition Authority recognises the reasons behind the joint action of bus undertakings, but emphasises that the objectives of the undertakings should not be pursued by violating competition rules or by damaging competition and thereby the interests of consumers.

47. Therefore, undertakings should refrain from any of the above activities. In the event of any doubt as to the legality of an action, we recommend contacting the Authority before commencing any joint action.

3.3. Unlawful co-operation between sellers of grain dryers

48. Last year, one of the largest cartel cases handled by the Competition Authority was concluded. It involved criminal proceedings commenced against undertakings engaged in the sale of grain dryers, as part of which suspicions were filed against AS Tatoli, OÜ Agriland, AS Agribalt, OÜ Werneco, OÜ Baltic Agro Machinery (renamed OÜ BAM2), and OÜ Dotnuva Baltic. The proceedings were based on the suspicion that the undertakings had entered into an anticompetitive agreement on the goods market of grain dryers related to subsidies from the Agricultural Registers and Information Board (ARIB), as part of which they agreed among themselves on the division of the goods market and set the terms of tenders, including prices.

49. On 20 April 2022, at the request of the Prosecutor's Office, Tartu County Court terminated criminal proceedings against OÜ Agriland, AS Agribalt, OÜ Werneco and OÜ BAM2 under the principle of opportunity and the undertakings involved agreed to pay financial obligations to the state. The obligations imposed ranged between 9,500 and 100,000 euros. In total, the financial obligations imposed on the four undertakings came to 209,500 euros. In terms of private persons, financial obligations were imposed on five persons in the total amount of 4,300 euros. In respect to other suspects, the proceedings are ongoing.

50. Between 27 December 2018 and 18 January 2019, ARIB held the sixth round of applications for investment aid to improve the performance of agricultural undertakings, under which agricultural undertakings were able to apply for investment aid from ARIB, including for the purchase of grain dryers. To this end, the agricultural undertakings were required to submit at least three comparable price offers to ARIB. According to the suspicions filed, these three offers were often agreed upon by the sellers of grain dryers, meaning they were not competing offers.

51. The Competition Authority, in co-operation with the Prosecutor's Office, commenced the proceedings in October 2018 following an analysis of the price offers submitted to ARIB for investment aid to improve the performance of agricultural undertakings. A comparison of the price offers revealed that the allegedly competing offers appeared very similar and were prepared within a very short timeframe (e.g., within three minutes). After the commencement of proceedings, the next round of applications for investment aid was about to begin, which allowed for surveillance activities to be carried out during the period of preparation of price offers for the round.

52. Following the conclusion of surveillance activities, the Competition Authority, in co-operation with the police, conducted a search of 12 sites, which is the largest competition-related search carried out in Estonia to date. Based on the evidence gathered as a result of procedural acts, the undertakings engaged in the sale of grain dryers co-operated in the preparation and submission of price offers to receive ARIB subsidies. According to the filed suspicions, the undertakings divided among themselves the goods market for the sale of grain dryers related to the ARIB subsidies and fixed the prices of grain dryers with regard to third persons in such a way as to ensure that the offer of the respective undertaking was declared the best.

53. The undertakings implicated in the proceedings constitute the majority of the dryer sellers in Estonia, which is why the impact of their agreement on the grain dryer goods market was significant.

54. In conclusion, the Competition Authority would like to emphasise that competing undertakings must not collude to submit non-competitive tenders to meet the numerical condition of participation in a procurement, even if the contracting authority so desires. Otherwise, the concept of competition is compromised, as it becomes impossible to receive the best offer if all the offers are prearranged.

3.4. Prohibited joint tender for timber transport

55. The Competition Authority found that the large-scale joint tender submitted by OÜ Prenton in the public procurement for the road transport of round logs organised by the Estonian State Forest Management Centre (RMK) was anti-competitive. Consequently, the Authority issued a precept to the representative of the joint tenderers OÜ Prenton to cease co-operation between them at the request of the manager of the state forest.

56. In the procurement organised in 2018, the majority of the orders placed by RMK were won by a joint tender comprising 11 companies, including the biggest of the timber transport undertakings in Estonia. The undertakings that participated in the joint tender were OÜ AT Transwood, Expertline OÜ, OÜ HANT, Iriscorp Transport OÜ, Kanniku OÜ, AS KaroTrans, OÜ Kolmestar, OÜ NLLW, Sumros Grupp AS, Vikingmodum OÜ, and their representative OÜ Prenton.

57. Smaller companies made up the majority of other tenderers in the public procurement organised by RMK and, in terms of both the number of vehicles and the transport volumes offered, their combined share was less than one third. Although the

price offered by OÜ Prenton was on average about 1/4 higher than the price offered by other tenderers in the procurement, the volume offered by other tenderers was too low to compete and OÜ Prenton was awarded the majority of the contract. As the 11 companies had decided not to compete with each other when submitting their joint tender, the state forest manager did not receive any competing offers from them.

58. The Public Procurement Act provides for the submission of joint tenders in public procurement to promote competition. However, according to the Competition Act, competitors are only allowed to conclude agreements with each other under strict conditions. In particular, competitors are only allowed to submit joint tenders if they are unable to submit a competitive tender individually. In the Authority's view, the joint tender in the present case extended well beyond what is considered reasonable. The undertakings participating in the joint tender were the top timber transport undertakings in Estonia, and it is unlikely that they would not have been able to submit competitive tenders individually or in smaller groups. The joint tender could, therefore, not be regarded as anything other than a means to end the competition among them.

59. According to OÜ Prenton, the agreement between joint tenderers only provided for their joint participation in the procurement. Other joint tenderers are alleged to have entrusted the entire submission process of the tender to OÜ Prenton, with all communication taking place orally. The Competition Authority determined that, in those circumstances, the joint tender was in violation of competition law based on its excessive size alone. The delegation of price-setting to one central decision-maker by undertakings is as detrimental to competition as explicit price fixing. An agreement on a jointly offered price can be presumed in a joint tender, obviating the need for the Authority to identify such an agreement separately. The Authority refined the definition of the relevant goods market on the basis of the feedback received after the hearing of the undertaking. The Competition Authority is of the view that the road transport of timber, specifically round logs, between loading sites (where timber is loaded onto trucks at the edge of forest), ports, and other destinations, is a separate service with certain demand. The supply of this service has adapted to meet the demand. As a customer, RMK is characterised by a relatively high and stable demand for the road transport of timber as well as the fact that the pool of service providers has been determined by contracts awarded for five years following a public procurement. The geographic scope of the goods market is limited to Estonia. The 11 undertakings concerned accounted for more than half of the goods market.

60. The joint tenderers provided explanations for how their joint action allegedly contributed to the security of supply, logistical efficiency, and other such factors. The Competition Authority took the view that such benefits of a joint tender either did not exist in reality or were insufficient to justify such extensive co-operation.

61. OÜ Prenton contested the precept issued by the Competition Authority in the Administrative Court.

3.5. Supreme Court did not uphold the complaint of AS Eesti Post against the Competition Authority

62. In 2022, a court case involving the activities of postal undertakings was concluded in the Supreme Court of Estonia. AS Eesti Post filed a complaint with the Competition Authority, claiming that the undertaking had wanted to buy an early morning postal delivery service from AS Express Post to resell it to publishers. AS Express Post is engaged in the early morning postal delivery of periodicals in larger cities and the surrounding areas, primarily providing the service to its parent

undertakings, i.e., publishing undertakings AS Ekspress Grupp and AS Postimees Grupp. AS Express Post allegedly requested a higher fee from AS Eesti Post than it did from its parent undertakings, as a result of which the postal undertakings were unable to reach an agreement. AS Eesti Post was of the opinion that AS Express Post held a dominant position on the market for early morning postal delivery of newspapers in urban areas and was in control of essential facilities. Pursuant to the Competition Act, it is prohibited for such an undertaking to treat its customers unequally. The Competition Authority did not establish any violations and terminated the supervisory proceedings. The Authority took the view that AS Eesti Post, being a competitor of AS Express Post, could only challenge the discrepancy in pricing if AS Express Post was in control of essential facilities. Essential facility means a network or infrastructure that is necessary for operating on the market, but which other persons cannot duplicate or for whom it is economically inexpedient to duplicate. In the opinion of the Authority, the postal delivery network of Express Post cannot be deemed an essential facility, as Eesti Post itself also has a nationwide postal service network. AS Eesti Post contested the notice of termination of supervision in the Administrative Court, which upheld the complaint and ordered the Authority to continue the proceedings, but the Circuit Court subsequently annulled the judgment. The Administrative Law Chamber of the Supreme Court came to the same conclusion but changed the reasoning of the Circuit Court.

63. The Chamber determined that since the early morning postal delivery network of Express Post can be duplicated, it is not an essential facility that would have served as a basis for Eesti Post to demand the conclusion of a contract. The determination of an essential facility requires meeting a high threshold and the use of another undertaking's network must be essential in order for the access obligation to arise. The applicant failed to provide a convincing explanation as to why it could not modify or enhance the efficiency of its postal network to organise early morning postal delivery, for example, by combining the morning delivery of daily newspapers with some of its other deliveries.

64. At the same time, the Supreme Court pointed out that AS Express Post made a price offer to AS Eesti Post. Where an undertaking in a dominant position on the market is in principle willing to grant access to its infrastructure, sell goods or provide a service, it is prohibited from imposing or applying unfair trading conditions or discriminating against any of its trading partners, irrespective of the existence of an essential facility.

65. The Supreme Court, however, did not consider it necessary to provide a final verdict on whether the fees charged by AS Express Post were fair and non-discriminatory. AS Eesti Post admitted that the prices charged were comparable to those at which it offered its own newspaper delivery service. This suggests that the offer made to the applicant was at least near the economic value of the service and not unfairly high. AS Express Post is not necessarily obligated to provide the delivery service within the group at the same price as it does outside the group. Within the group, profits can be maximised at a particular segment that may not necessarily involve the distribution of periodicals, as long as there is no risk of competition distortion.

66. The Chamber concurred with the Competition Authority's assessment that the actions of Express Post did not pose a significant risk of distorting competition that would have adversely affected the interests of consumers and the rights of the applicant. Moreover, the Supreme Court rejected the primary argument of the applicant that the Competition Authority did not have the right to terminate the supervisory proceedings without defining the relevant market. The Supreme Court clarified that although it is generally appropriate to commence the analysis of suspected abuse of a dominant position with the definition of the relevant market, there may be additional conditions

to be met, beyond those that depend on market definition. If there are other factors that eliminate the need for continued supervision with a sufficient level of certainty, defining the relevant market may not be necessary.

4. Control of concentrations

67. Control of concentrations as ex ante regulation plays an essential role in the functioning of competition. By controlling concentrations, it is possible to prevent anti-competitive concentrations and acquisitions, which in turn prevents the creation of a dominant (monopolistic) position.

68. Controlling concentrations helps prevent damage that a monopolistic undertaking could cause consumers or society by ensuring the preservation of competition and preventing the development of a dominant (including monopolistic) position. Since a monopolistic market structure can be expected to lead to output limitation and a decrease in economic efficiency, its natural consequence should be the intolerance of the competition policy to any activities that harm the market structure (in particular activities preventing access to the market or concentrations that reduce the number of market participants)¹. However, it is important to note that controlling concentrations can only limit the growth of undertakings through concentrations and acquisitions, not their organic growth, so concentration control does not eliminate the emergence monopolies.

69. But concentration control is not just about the prevention of potential abuses of dominant positions that may take place in the future. Controlling concentrations helps maintain market structures that promote competition, which in turn leads to increased consumer welfare. Markets with effective competition have many undertakings, and consumers have the opportunity to choose products and services of the price and quality that suits them. The absence of competitive pressure, however, allows undertakings to profitably increase prices, reduce the volume, range or quality of goods and services, and lessen innovation, product development, etc.

70. Concentration control applies if the parties' total turnover of the previous financial year in Estonia exceeds 6,000,000 euros and the turnover of at least two concentration parties in Estonia exceeds 2,000,000 euros each. A concentration that is subject to control by the Competition Authority may not be brought into force before a decision authorising the concentration has been made.

71. The Competition Authority must be notified of the concentration after the agreement has been signed, the transaction or operation to acquire control or the announcement of a public bid, but before the concentration takes effect. The Competition Authority may also be notified of the concentration as soon as parties to the concentration indicate with sufficient certainty their intention to complete the concentration. 2022 was a record year in terms of the number of concentration notifications. The number of concentration notifications submitted in 2022 was 54, with two additional proceedings transferring from 2021. Therefore, there were 56 pending concentration notices in 2022. The Competition Authority made a total of 50 concentration decisions, with 47 permitting decisions made within the 30 days prescribed by law. Supplementary proceedings were launched for six concentrations, and one supplementary proceeding carried over from the previous year.

72. Supplementary proceedings are carried out to gather additional data and determine whether the concentration subject to control includes any anti-competitive circumstances. Supplementary proceedings may last up to four months. In terms of

concentrations subject to supplementary proceedings in 2022, the Competition Authority prohibited the concentration in one case (AS Eesti Post / AS EXPRESS POST), permitted the concentration in three cases on the condition that the parties fulfil the assumed commitments (A/S Dobeles Dzirnāvnieks / AB Baltic Mill; RAGN-SELLS AS / AS Väätsa Prügila; SCHWENK EESTI OÜ / Betoonimeister AS), in two cases the parties withdrew from the concentration (OÜ Biofuel, OÜ CRANFELD INVEST / OÜ Renalis, OÜ Fresenius Medical Care Estonia; Estover SPT OÜ / AS Saaremaa Piimatööstus), and in one case the Competition Authority permitted the concentration (Margus Linnamäe / Confido Healthcare Group OÜ).

73. By type, the distribution of concentrations notified in 2022 is as follows:

- 48 concentrations concerned an undertaking acquiring control of the whole or a part of another undertaking (clause 2 of subsection 1 of § 19 of the Competition Act);
- four concentrations concerned undertakings jointly acquiring control of the whole or a part of another undertaking (clause 3 of subsection 1 of § 19 of the Competition Act);
- two concentrations concerned previously independent undertakings merging (clause 1 of subsection 1 of § 19 of the Competition Act).

4.1. Granting of permission to concentrate to A/S Dobeles Dzirnāvnieks and AB Baltic Mill with obligations

74. At the end of 2021, Latvian undertaking A/S Dobeles Dzirnāvnieks submitted a notice of concentration to acquire control over AB Baltic Mill. On 16 May 2022, the Competition Authority granted the permission to concentrate, subject to the parties fulfilling their obligations.

75. Tartu Mill AS, which is engaged in the production and wholesale of wheat and rye flour, wholesale of cereals, warehousing and transport services in Estonia, is the parent undertaking of A/S Dobeles Dzirnāvnieks. The undertaking is also active in the sale of dry mixes (cake mixes, pizza mixes, semolina mousse mixes, etc), starches (rice, buckwheat, pearl barley, semolina, etc), flakes, kama, breadcrumbs, pasta products, pasta sauces, oil and sugar to both retail and wholesale customers. AB Baltic Mill is a Lithuanian undertaking with subsidiaries AS Rīgas Dzirnāvnieks (Latvia) and Balti Veski AS, among others. Rīgas Dzirnāvnieks is engaged in the production and sale of cereals, milling products and other dry goods, the drying and cleaning of cereals, the repackaging of cereal products and the provision of transport services. Balti Veski AS is active in the processing of cereal products, packaging and wholesale of dry goods.

76. The concentration mainly involves the production and wholesale level, where both parties to the concentration, including the companies belonging to the same group, produce several types of flour (e.g., wheat flour, rye flour, oat flour), which they sell to bakeries and confectioners, wholesale traders, and retailers. During the proceedings, the Competition Authority assessed the competitive situation on goods markets in which both parties to the concentration and the undertakings which are connected to each other through control are active. The Authority found that competition would be the most distorted on the goods market for the production and wholesale distribution of flour (flour products) in Estonia, as the combined market share of the parties to the concentration would be more than 90% of the flour sold (regardless of the type of flour). In particular, after the concentration, the combined market share of the parties would be highest for wheat flour and rye flour.

77. Pursuant to subsection 3 of § 22 of the Competition Act, the Competition Authority prohibits a concentration if it is likely to significantly restrict competition in the goods market above all, by creating or strengthening a dominant position. However, according to the guidelines of the European Commission, an otherwise problematic concentration may nevertheless be permissible if one of the parties is a failing firm and the competitive structure would be restricted to at least the same extent, regardless of whether the concentration is accomplished or not. During the proceedings, as a subsidiary argument for concentration, the parties to the concentration highlighted the need to apply the failing firm defence, insofar as the production of AS Rīgas Dzirnavnieks, an undertaking belonging to the AB Baltic Mill Group, had been inefficient for a long time and its financial condition had deteriorated year by year.

78. According to the guidelines of the European Commission, the failing firm defence can only be applied if: (i) the allegedly failing firm would be forced to exit the market in the near future due to financial difficulties; (ii) there are no other purchasing options that would restrict competition less than the notified concentration; and (iii) without concentration, the assets of the failing firm would exit the market. The Competition Authority found that all three criteria for the failing firm defence were met and that, without the concentration, AB Baltic Mill's subsidiary AS Rīgas Dzirnavnieks would likely have to cease business and its assets would exit the market. In the application of the failing firm defence, it is essential that the productive assets that would otherwise exit the market without the concentration continue to operate through the concentration.

79. In addition, A/S Dobeles Dzirnavnieks proposed the assumption of obligations to prevent competitive distortion resulting from the concentration and to support the defence of an undertaking in difficulty. The content of the obligations is to ensure the continued operation of the production unit of AS Rīgas Dzirnavnieks and to limit price increases.

80. The Competition Authority found that, since AS Rīgas Dzirnavnieks can be considered a failing firm and the proposed assumption of obligations by A/S Dobeles Dzirnavnieks supports the remaining on the market of the production assets of AS Rīgas Dzirnavnieks which would otherwise leave the market without concentration, the concentration will not result in a competitive situation in the affected goods markets that would be worse than if AS Rīgas Dzirnavnieks were to exit the market. The validity period of obligations also provides all undertakings on the market the opportunity to adapt to market changes. Therefore, the Authority granted A/S Dobeles Dzirnavnieks and AB Baltic Mill the permission to concentrate, subject to the parties fulfilling their obligations.

4.2. Prohibition of concentration of AS Eesti Post and AS EXPRESS POST

81. On 5 October 2022, the Competition Authority issued a decision prohibiting the concentration of AS Eesti Post and its sole competitor AS EXPRESS POST. This is the second time the concentration was prohibited. The same undertakings also wanted to concentrate in 2011, but the Competition Authority did not permit the transaction.

82. Both AS Eesti Post and AS EXPRESS POST provide a periodicals delivery service, business letter service and direct mail service (addressed and unaddressed advertising), and AS EXPRESS POST operates in and around larger towns. The Competition Authority found that the concentration would have significantly restricted competition because the concentration would have put AS Eesti Post in a monopolistic position in terms of periodicals delivery, business letters and direct mail in Estonia.

83. Pursuant to subsection 3 of § 22 of the Competition Act, the Competition Authority prohibits a concentration if it is likely to significantly restrict competition in the goods market above all, by creating or strengthening a dominant position. However, according to the guidelines of the European Commission, an otherwise problematic concentration may nevertheless be permissible if one of the parties is a failing firm and the competitive structure would be restricted to at least the same extent, regardless of whether the concentration is accomplished or not. According to the guidelines of the European Commission, the failing firm defence can only be applied if: (i) the allegedly failing firm would be forced to exit the market in the near future due to financial difficulties; (ii) there are no other purchasing options that would restrict competition less than the notified concentration; and (iii) without concentration, the assets of the failing firm would exit the market.

84. During the procedure, as an additional argument for concentration, the parties brought up the need to apply the failing firm defence. The parties to the concentration emphasised that the business of AS EXPRESS POST has been unprofitable in recent years, and that volumes have significantly decreased in the postal sector as a whole. Despite the fact that AS EXPRESS POST has been unprofitable in recent years and the undertaking's future activity may not be sustainable in its current form, the Competition Authority found that the argument of a failing firm defence does not apply. This in particular because the sale process of AS EXPRESS POST lasted for a relatively short period, and the absence of a less anti-competitive buyer and the exit of assets from the market was unclear.

85. In order to prevent anti-competitive effects resulting from the concentration, AS Eesti Post proposed commitments. The proposed commitments related to limiting price increases for the business letter and the direct mail service for the next five years, non-discriminatory treatment of its subsidiary and other customers, and early-morning delivery of periodicals.

86. The Competition Authority was of the opinion that the behavioural commitments proposed by AS Eesti Post would not have fully eliminated competition issues. Even if the commitments could ensure customers price security for a certain period, it would not be equivalent to competition or the natural development of the market. Therefore, the Competition Authority was of the opinion that permitting a concentration that would have immediately eliminated any competition in the delivery of periodicals, the business letter service and the direct mail service was not justified.

4.3. Granting of permission to concentrate to RAGN-SELLS AS and AS Väätsa Prügila with obligations

87. RAGN-SELLS AS is a waste management undertaking whose principal activity is the collection and transport of municipal waste. RAGN-SELLS AS also had a holding in the under-taking OÜ AMESTOP engaged in the management of the landfill in Torma, Jõgeva County. AS Väätsa Prügila operates the landfill located near Väätsa, Järva County (Väätsa landfill). In December 2021, RAGN-SELLS AS submitted a notice of concentration to the Competition Authority to acquire control over AS Väätsa Prügila. It was the second time that the Competition Authority processed the concentration of RAGN-SELLS AS and AS Väätsa Prügila. The Competition Authority prohibited the concentration of OÜ R-S Valdus, a subsidiary of RAGN-SELLS AS, and a part of AS Väätsa Prügila, by its Decision No 5-5/2018- 058 of 21 September 2018. During the concentration proceedings, it became evident that the concentration would primarily impact two vertically related waste management services: (i) the collection and transport of municipal waste, and (ii) the final handling of mixed municipal waste in landfills. The Competition Authority determined that since both goods markets were highly concentrated, the concentration would have distorted competition in both goods markets. The concentration of vertically related municipal waste handling services under a single undertaking would have granted it significant advantages over a limited number of competitors and thereby distorted competition.

88. OÜ R-S Valdus filed a complaint with Tallinn Administrative Court for annulment of the decision of the Competition Authority and determination of permissibility of concentration. In November 2020, Tallinn Administrative Court rendered a judgment in the case, refusing to grant the complaint of OÜ R-S Valdus, after which OÜ R-S Valdus submitted an appeal to Tallinn Circuit Court. In October 2021, OÜ R-S Valdus made a declaration for discontinuation of the complaint, Tallinn Circuit Court terminated the proceedings and annulled the judgement of Tallinn Administrative Court. The complaint was discontinued due to the fact that RAGN-SELLS AS successfully participated in the public auction organised by Paide City Government and Türi Rural Municipality Government for the sale of the shares of AS Väätsa Prügila. In December 2021, RAGN-SELLS AS submitted a notice of concentration to the Competition Authority to acquire control over AS Väätsa Prügila.

89. During the second processing of the concentration, the Competition Authority had to analyse first and foremost whether and which circumstances had changed compared to the previous concentration procedure. It became apparent that the waste management sector had undergone some changes in the meantime, which affected both the competitive situation as well as the business activities of undertakings operating in this sector. The following constitute the most relevant circumstances. Firstly, the acquired undertaking AS Väätsa Prügila no longer deposits waste as of 2022 due to insufficient sorting capacity and is now delivering accepted waste to the Iru Power Plant of Enefit Green. Secondly, Iru Power Plant no longer imports waste as of 2022, leading to increased competition among landfills for accepted waste. It is important to point out that during the previous concentration procedure, the Competition Authority had already determined that the incineration of mixed municipal waste at Iru Power Plant cannot be considered a substitute for the acceptance (and recovery or depositing) of mixed municipal waste at landfills. As the incineration of mixed municipal waste takes priority under the waste hierarchy principle, mixed municipal waste is transported to the Iru Power Plant as a priority for the production of heat and electricity. Any mixed municipal waste left over from the process is primarily disposed of in landfills. Thirdly,

compared to the time of previous proceedings, where the Torma landfill operated by OÜ AMESTOP, controlled by RAGN-SELLS AS, was in the process of closing down, a new depositing area was completed at Torma landfill in 2020 and the business operations of the landfill were resumed. Therefore, RAGN-SELLS AS was already accepting waste at the Torma landfill before the concentration took place.

90. In particular, the concentration primarily affected the collection and transport of municipal waste, and waste acceptance, recovery and depositing at landfills. The principle of proximity still applies to the landfilling of mixed municipal waste, according to which mixed municipal waste must be transported to the nearest landfill. In the light of the above, not all landfills compete with each other for the acceptance of mixed municipal waste from different regions of Estonia. The Competition Authority determined that, in Central and South Estonia, Väätsa landfill primarily competes with Paikre landfill and Torma landfill. The main competitor of RAGN-SELLS AS in the collection and transport of municipal waste in this region is Eesti Keskkonnateenused AS. The Competition Authority maintained that, similarly to previous concentration proceedings, the concentration could distort competition in both goods markets.

91. In order to prevent anti-competitive effects resulting from the concentration, RAGN-SELLS AS proposed the assumption of obligations. The obligations consisted of the transfer of the holding of RAGN-SELLS AS in OÜ AMESTOP, the operator of Torma landfill (thereby eliminating the horizontal overlap between the business activities of RAGN-SELLS AS and AS Väätsa Prügila in the acceptance and depositing of mixed waste), and activities related to the integrated environmental permit of AS Väätsa Prügila.

92. The Competition Authority assessed the proposed obligations and determined that they effectively address the competition concerns resulting from both the horizontal overlaps and vertical relations between the business activities of the parties in the acceptance and depositing of mixed municipal waste at landfills. Therefore, the Competition Authority granted RAGN-SELLS AS and AS Väätsa Prügila the permission to concentrate, subject to the parties fulfilling their obligations.