

COMPETITION ECONOMICS HANDBOOK 2020

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Competition Economics Handbook 2020

A Global Competition Review Special Report

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This article was first published in November 2019
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Competition Economics Handbook 2020

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ISBN: 978-1-83862-221-3

Printed and distributed by Encompass Print Solutions

Tel: 0844 248 0112

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CONTENTS

Albania.....	1	Estonia.....	43
Algeria	3	Emmi Martikainen and Anssi Kohonen	
Argentina.....	4	Copenhagen Economics	
Armenia	6	European Union	46
Australia	11	Claus Kastberg Nielsen, Adina Claiici and	
Austria	14	Federico De Michiel	
Azerbaijan	16	Copenhagen Economics	
Barbados.....	17	Fiji.....	53
Belgium	18	Finland.....	54
Bosnia and Herzegovina	20	Emmi Martikainen, Anssi Kohonen and Kalle Kantanen	
Brazil.....	21	Copenhagen Economics	
Bulgaria	24	France.....	58
Canada	26	Germany.....	60
Channel Islands.....	29	Hans W Friederiszick, Simone Kohnz and	
Colombia	30	Rainer Nitsche	
Croatia	32	E.CA Economics	
Cyprus.....	34	Greece	67
Czech Republic.....	35	Hungary.....	68
Denmark.....	36	Iceland.....	70
Henrik Ballebye Okholm and Torben Thorø Pedersen		India	71
Copenhagen Economics		Indonesia.....	73
Egypt.....	41	Ireland.....	75
El Salvador	42	Israel	77
		Italy	79
		Jamaica.....	80
		Japan.....	82
		Kenya.....	84

Korea	87	Russia	124
Latvia	88	Serbia.....	127
Emmi Martikainen and Mindaugas Cerpickis		Seychelles	129
Copenhagen Economics		Singapore	131
Lithuania	92	Slovakia	132
Mindaugas Cerpickis and Emmi Martikainen		Slovenia	134
Copenhagen Economics		South Africa	135
Luxembourg.....	95	Spain.....	137
Malaysia	96	Swaziland	139
Malta.....	98	Sweden.....	140
Mauritius	99	Karl Lundvall and Mattias Almqvist	
Mexico	101	Copenhagen Economics	
Montenegro	103	Switzerland	145
Netherlands	104	Tunisia	147
New Zealand.....	106	Turkey	148
North Macedonia	108	Ukraine	151
Norway	110	United Kingdom	153
Henrik Ballebye Okholm and Erik Lindén		Peter Davis, Vivek Mani, Can Celiktemur and	
Copenhagen Economics		Vikram Kumar	
Pakistan	115	Cornerstone Research	
Peru	116	United States.....	161
Philippines	118	Henry J Kahwaty and Cleve B Tyler	
Poland	119	Berkeley Research Group	
Portugal.....	121	Zambia.....	167
Romania	122	Zimbabwe	169

Global Competition Review is delighted to publish this thirteenth annual edition of the *Competition Economics Handbook*.

With economics at the centre of competition law, this handbook identifies the issues that antitrust economists are tackling today. The book's comprehensive format provides contact details for competition agencies' economists in over 70 jurisdictions. A Q&A format illustrates how the advisers are organised and their input into the regulation and enforcement process.

Much of the information has been provided by the agencies themselves and we are, as ever, grateful for all their cooperation.

The *Competition Economics Handbook 2020* is one of five special reports included in a *Global Competition Review* subscription each year, alongside four issues of the magazine, a survey on a four-year rotation (*Corporate Counsel* published in January 2019 and *40 Under 40*, to be published in January 2020) and two signature surveys, *Rating Enforcement* and *The GCR 100*.

We would like to thank all those who have worked on the research and production of this publication.

The information listed is correct as of October 2019.

Global Competition Review

London

October 2019

Overview

Emmi Martikainen and Anssi Kohonen
Copenhagen Economics

Use of economic analysis in competition law cases is still quite limited in Estonia. For example, in mergers, structural analysis and a focus on concentration levels seem the predominant paradigm. Cartels are criminalised in Estonia, which raises the burden of proof. There have not been any follow-on cartel damage cases. It is an Estonian particularity that there are many excessive pricing cases, with the Estonian Competition Authority (ECA) also being the price regulator in many industries. The knowledge and experience from price regulation cases has led to many excessive pricing cases and affected the economic methods used. The ECN+ directive could, however, lead to economics having larger role investigations.

This article is based on interviews with ECA and esteemed Estonian competition lawyers in Cobalt, Ellex, Eversheds Sutherland, Sorainen and TGS Baltic.

The role of economic analysis is still limited

Economics still has a limited role in Estonian competition cases. For example, as in all Baltic countries, there has been an increasing number of large, more complex mergers in the past few years. Relatively, many mergers have also been prohibited. However, merger review very much relies on market shares, qualitative evidence and opinions from market investigations. For example, customer surveys to calculate diversion ratios and a proper small but significant and non-transitory increase in price test are less frequent.

The ECA is a quite small authority, but it does have several economists and the staff is well appreciated by the private practitioners of Competition Law. However, it appears that much of the personnel has been at the authority for a relatively long time. This is likely to influence the methods employed and routines of investigation. Partly due to the dual role of regulator and competition law enforcer, the economic analysis that is applied is mostly financial analysis. It was the view of many private practitioners that the ECA has become more willing to prohibit mergers, which naturally affects the willingness of the private business to challenge the investigations.

Cartels are criminalised

The role of economics is also quite limited in other competition cases. Cartels are criminalised in Estonia, which means that the barrier is high for a proper cartel investigation as the burden of proof is heavier and procedural aspects are different than if cartels were handled as administrative cases. According to the private practitioners, due to the requirements of a criminal process, there is only a limited number of cartel decisions, which also leads to there not being follow-on cartel damage cases. Estonian law allows fines only in criminal case whereas, although cartel investigations can be run as administrative case, the outcome of such an administrative process is an order to stop any misconduct.

Abuse of dominance and excessive pricing

Like cartel cases, a proper abuse of dominance case leading to fines cannot be run as an administrative process, but a quasi-criminal misdemeanour process would be needed. However, as abuse of dominant cases usually rest quite heavily on analysis of economic effects, the barriers of a proper abuse of dominance case are considered high. For this reason, the abuse of dominance cases are run as administrative processes. Estonia distinguishes itself from mainstream European competition law enforcement as it has many excessive pricing cases compared to its other European peers. The ECA is the price regulator for many industries and is willing to use the regulatory framework to analyse questions of excessive pricing in industries not subject to price regulation. The regulatory approach in economic analysis has been accepted and confirmed by the court in past cases.

ECN+ directive could lead to increase in economic analysis

The ECN+ directive is expected to have substantial effects on the legislation in Estonia as its implementation should lead to an adoption of a full administrative process with the right of imposing fines for an infringement of competition law. Currently, fines are available only for criminal offences. It is still unclear how the Estonian legislation will be adjusted, but one

evident consequence can be that the role of economic analysis in cartel and, especially, abuse of dominance cases increases as there is no longer the need to show the criminal or quasi-criminal offence.



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Copenhagen Economics is one of the leading economic consultancies in Europe. Founded in 2000, we currently employ more than 90 people operating from our offices in Copenhagen, Stockholm, Helsinki and Brussels. Based on established research methods and in-depth sector knowledge, we help our clients make better choices in their political and commercial reality. Our senior team provides pragmatic solutions founded in economics to law firms, private companies, regulators, and policy makers all over the world. We are particularly dedicated to 12 service areas, including competition, dispute support, digital economy, intellectual property valuation and transfer pricing, and postal and delivery. *Global Competition Review* lists Copenhagen Economics among the top 20 economic consultancies in the world and has done so since 2006.

