Kluwer Competition Law Blog

Non-Transposition of the ECN+ Directive in Estonia: Good Things Come to Those Who Wait?

Martin Mäesalu, Miikael Tuus (Ellex Raidla) · Thursday, February 6th, 2025

The ECN+ Directive had to be transposed into the national laws by 4 February 2021. Only five Member States (Germany, Hungary, Lithuania, Sweden, and the Netherlands) adopted their national implementing measures in time. On the date of this blog-post, Estonia remains as the only Member State that has not yet transposed the ECN+ Directive (see European Commission´s status report).

By its decision of 23 January 2025 the ECJ fined Estonia 400,000 EUR for the non-transposition and obliged it to pay a penalty payment of 3,000 EUR per day from the date of the judgement until the infringement is brought to an end. Hence, it would be a good time to ask, what got us here, what is the decision about and what next? Previous is not just a theoretical thought exercise or a narrow legal debate. As Pablo Ibáñez Colomo elegantly demonstrated in his book "The Shaping of EU Competition Law" (see page 328 *et al*) the enforcement model and the substance of competition law are closely interlinked, with institutional features driving and shaping the substantive law. A link that unfortunately does not always get the limelight when flashier substantive law debates take the centre-stage.

Reasons behind the non-transposition

In short, the transposition of the ECN+ Directive in Estonia necessitates a change in the current set-up of regulatory enforcement. Currently, in a very simplistic manner in the Estonian Competition Authority´s toolbox there are two separate proceedings. Within supervisory proceedings the Authority can identify an infringement, impose remedies and oblige to bring the infringement to an end. Any fining occurs within penal law: for infringements of Article 101 of TFEU (and its national equivalent) within criminal proceedings, and of Article 102 of TFEU (and its national equivalent) within misdemeanour proceedings. Prior to the ECN+ Directive implementation, the Estonian Competition Authority had in effect focused more on remedying the possible incompliance with competition law, rather than on fining the culprit. It would go outside the scope of this short article to discuss whether this was due to the institutional set-up of competition law enforcement or due to choices made by the enforcers.

Given the material changes needed, some delay in the ECN+ Directive's transposition was inevitable. What was quite unexpected is the length of such (ongoing) delay. In sort, the delay is

due to policy disagreements on the legal form of future proceedings of competition law infringements, i.e. the question of whether administrative fining proceedings or misdemeanour proceedings are to be used. As explained, the Estonian legal system has not recognized administrative fines for almost 25 years and if it would now turn towards the administrative fining route, the relevant legal framework would have to be built from ground up. Misdemeanour proceedings on the other hand are a functioning institution, with a comprehensive Code and extensive case-law with which the local legal system is familiar. Nevertheless, to transpose the ECN+ Directive into misdemeanour proceedings, only smaller amendments would be needed. This is also a reason why the authors of this blog-post proposed a transposition via modifications to the misdemeanour code already back in 2021. The developments since then have not altered this assessment.

Besides, during the EU legislative procedure of the directive, Estonia based its positions on the assumption that the Directive would be transposed nationally in misdemeanour proceedings (previous was made quite clear in the Explanatory Letter to Estonia´s positions on the draft ECN+ Directive). Despite this, the Estonian Ministry of Justice took the view that the transposition will occur within the framework of administrative law and in 2020 submitted for coordination a concept paper on the law of administrative fines. This step was controversial and somewhat unexpected as prior to this, the Ministry had commissioned a research paper from the University of Tartu on the feasibility of imposing administrative sanctions in Estonia. Said research concluded that the relevant EU directives (incl. the ECN+ directive) should be transposed into Estonian law in misdemeanour proceedings, instead of establishing a new administrative fine procedure. Reason for the conclusion was that although various EU directives (including the ECN+ Directive) could be transposed through both types of proceedings, using misdemeanour proceedings would be easier in the Estonian legal system. In particular, establishing administrative fines had required the creation of a comprehensive procedural code. This would be necessary to avoid fragmentation of the administrative sanctions system, particularly regarding procedural guarantees. In contrast, using misdemeanour proceedings would only require a relatively simple revision of the existing rules, which should be undertaken regardless of the directives. Additionally, the research paper argued that there seem to be no legitimate reasons to prefer administrative fines, as the level of protection of procedural rights must be equivalent in both procedures.

The published plan from the Ministry of Justice was to create a uniform code of procedural law for the administrative fine proceedings under which all EU directives that recommend establishing administrative fines would be transposed. One of the first administrative fines to be introduced into the national law would have been the fining procedure for competition law infringements. However, it was already foreseen that this approach would have been used for data protection and financial sector-related fines, too (among others). The referred concept paper was followed by a draft Code of Administrative Fine Proceedings. Following public consultations, the draft code was abandoned. It is understood that the primary reason for abandoning the initial document was the predominantly negative feedback received during the public discussions. To a very large part, the criticism concerned a possible conflict with different constitutional provisions and procedural guarantees. Moreover, the overarching comment was that administrative process (as it is used under Estonian national law) is not designed for sanctioning persons or undertakings. As such, the process itself would need material changes and updates.

Instead of changing course and drawing up a misdemeanour-based solution, a concept for administrative fines in competition cases was developed. Between 2021 and 2024 the Ministry worked on different iterations of the act amending the Competition Act and other laws. The new

plan was to create a proceeding (the competition supervision procedure) just for the transposition of the ECN+ Directive into Estonian law. The focal argument for administrative fines was a (mis)conception that Estonian misdemeanour proceedings could amount to “criminal judicial proceedings” that are excluded by the directive. This was due to the fact that formally misdemeanours are penal offences, i.e. part of the criminal law. Nonetheless, some commentators argued that misdemeanour proceedings were not criminal proceedings in the context of the ECN+ Directive because the power to initiate proceedings rests with the Competition Authority and not the prosecutor’s office. Also (although not directly applicable here), within the transposition of the so-called hate speech directive, an argument has been put forth by the EU Commission that Estonian misdemeanour proceedings are not criminal law (as explained in January 2025 by the Estonian Minister of Justice). Furthermore, the Ministry of Justice historically preferred administrative fine proceedings as arguments have been made that misdemeanour proceedings can be too formalistic (due to the level of procedural guarantees) while administrative fine proceedings were seen as an option to facilitate sanctioning. This position was not in compliance with the ECtHR´s jurisprudence, e.g. in Engel, clarifying that some procedural guarantees (e.g. *nemo tenetur se ipsum accusare*) apply also to administrative sanction laws if the sanctions amount to quasi-criminal nature. In addition, the argument that misdemeanour proceedings are overly formalistic is in itself debatable. From a practical perspective, misdemeanour proceedings were designed to be used in a wide range of circumstances (from small-scale traffic violations to breaches of complex business regulations by large companies). As such the norms themselves allow for considerable flexibility, which just has to be effectively utilized both when designing sector-specific norms and when applying such norms in various circumstances.

In the beginning of 2024, the respective draft law was submitted to the Estonian Parliament. It has not been passed by the Parliament and the legislative proceedings have been paused. This delay was caused by further comments and feedback, as with its predecessor draft.

The decision of the ECJ

While the discussions within Estonia were ongoing, the European Commission brought infringement proceedings under Art. 258 TFEU against Estonia for failing to implement the ECN+ Directive in time. In its action, the European Commission asked the ECJ to calculate the fine based on the following formula: fine per day (600 EUR) = 1000 (base amount) x 10 (coefficient of infringement gravity) x 0,06 (Estonia´s coefficient). Estonia requested to reduce the fine amount by half.

Finally, on 23 January 2025, the ECJ found that due to the fact that the existing competition law regulation in Estonia is partially in compliance with the ECN+ Directive, the coefficient of infringement gravity corresponding to full non-transposition cannot be applied automatically without assessing the impact of the current infringement on private and public interests. The ECJ decided to reduce the coefficient of infringement gravity accordingly and set the fine amount to 400,000 EUR. The Court did not include a detailed calculation of the fine in its decision.

For the penalty payment, the European Commission requested from the ECJ to calculate it based on the following formula: penalty payment per day (5220 EUR) = 3000 (base amount) x 10 (coefficient of infringement gravity) x 2,9 (coefficient of duration) x 0,06 (Estonia´s coefficient). Similarly to the fine, Estonia asked to reduce the penalty payment by half, i.e. to 2610 EUR. The

ECJ reduced the penalty payment to 3000 EUR per day using its discretionary power without mentioning details on the calculation of the fine. However, it considered the same arguments as for the gravity.

Where do we go from here?

As an un-expected, but welcome U-turn, a new draft law has been prepared that would transpose the ECN+ Directive into Estonian law via misdemeanour proceedings (at the date of this blog-post not available publicly yet). Hence, years after the transposition date, there are still ongoing policy discussions on the fundamental question: whether to harmonize the ECN+ Directive into Estonian law via administrative fine proceedings (i.e. continue with the draft law currently in the Parliament) or submit a new draft law which uses the framework of misdemeanour proceedings to the Parliament (such a draft law has been prepared by the Ministry of Justice). It seems that the Government is leaning towards the second, more sensible alternative in the Estonian context. However, there is no certainty to this date.

The new draft law still requires some amendments and revisions. Drafting such amendments should not take significant time. Although in the wake of the above-referred ECJ decision, there seemed to be pressure to move on fast, progress seems to have stopped again. Regardless of an existing first draft, at the date of this article, the final draft law has not yet been forwarded to the parliament for legislative debate and adoption. This means that the ECJ's fine keeps on accruing.

The new draft law which would harmonize the ECN+ Directive into Estonian law by misdemeanour proceedings would largely maintain the current logic of Estonian competition enforcement. Remedies would be applied within the supervisory proceedings, however in a new format: competition supervision proceedings, where the Competition Authority is granted investigatory powers in compliance with the ECN+ Directive. Applying fines to undertakings would take place in misdemeanour proceedings. As opposed to regular Estonian misdemeanour proceedings, in case of competition law infringements, the Competition Authority would not apply fines by its own decision, but the fines would be applied by the court (similar to the model currently in use in some Member States, notably in the Nordic countries).

The Estonian case of non-transposition of the ECN+ directive indicates that harmonising substantive law in the EU is far easier than taking steps at harmonizing procedural law. Different Member States have significantly diverging legal systems and harmonization of procedural law could require considerable changes to the foundations of their legal system. This is even more difficult when such harmonization takes place in respect of criminal procedural law and where changes in national procedures are necessitated in one relatively narrow field of law. A clear indication of the complexities involved is the fact that only five Member States transposed the ECN+ Directive in the correct timeline. This underlines the need on the Union level to take specific care prior to enacting legislation that includes specific requirements for procedural rules within a Member State. If nothing else, then the *Estonian ECN+ Directive* saga demonstrates that regardless of previous harmonization of substantive competition rules procedural harmonization can still be an extremely daunting challenge.

To make sure you do not miss out on regular updates from the Kluwer Competition Law Blog, please subscribe here.

This entry was posted on Thursday, February 6th, 2025 at 10:00 am and is filed under Competition policy, ECN, Estonia, European Court of Justice, Legislation
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.