# Actions against “soft law” acts of the regulatory authorities in Estonia

Ivo Pilving

## I. Introduction

Already historically, the peculiarity of Estonian administrative court procedure is a wide competence of administrative courts. In principle, all administrative activities are subject to the judicial review, including soft law instruments such as administrative rules, warnings and notices. However, not all administrative measures can be challenged directly.

In a narrower sense, the regulatory authorities in Estonia are particularly the Competition Authority and the Consumer Protection and Technical Regulatory Authority. The Competition Authority (CA) is responsible for the general supervision of competition, as well as the energy market, water services and the postal services. Electronic communications are subject to the regulation of Consumer Protection and Technical Regulatory Authority. The regulation of railway services is divided between these two authorities.

Appeals against acts by regulatory agencies are subject to regular judicial review. There are no special procedural rules for cases involving regulatory acts.

Therefore, we can also draw conclusions about the possibilities for challenging the actions of regulators, based on the case law in the field of the state supervisory, taxation, international sanctions etc.

**II. General soft law instruments**

Soft law instruments, like legal acts, could be divided into general and concrete.

On the website of the Competition Authority, we can find a considerable number of various instructions and guidelines for the application of competition law and market regulation: e.g., a Guide for Calculating the Price of Water Services,[[1]](#footnote-1) Guide to Calculating the Weighted Average Cost of Capital for the District Heating Sector,[[2]](#footnote-2) Recommendation to Control Waste Shipment Prices[[3]](#footnote-3) etc. According to the Electricity Market Act Competition Authority publishes, at least once a year, recommendations concerning the setting of the prices of electricity sold to consumers.

On the website of the Consumer Protection and Technical Regulatory Authority, we can find instructions on changing the agreements of communications services.[[4]](#footnote-4)

The Supreme Court explained the nature of such instructions and the possibilities for challenging them in 2017 in case of AS Tallinna Vesi (a company, responsible for a water treatment in our capital Tallinn).[[5]](#footnote-5)

Here, the CA did not approve the price of the water service of the water. The agency referred to its own soft law instructions. In the opinion of the Supreme Court, this was an internal administrative rule, it had only an indirect effect to the company. This was the first step in exercising regulatory discretion. The CA does not have to substantiate the price control methodology each time based on the guidelines. However, the company can justify why it should be exempted from the methodology this time or why the methodology is not suitable at all. In this case, the Supreme Court did not see a conflict with the principles of the Public Water Act in the challenged decision. The applicant's allegations concerning special circumstances were unfounded, for example, the applicant wanted to rely on the arbitrary high privatization price of the company.

Pursuant to § 6 (1) of the Code of Administrative Court Procedure, it is possible to challenge internal regulation of an administrative authority which resolves an individual case and infringes the subjective rights of applicant. However, the guidelines referred above are of a general nature and therefore not directly open to challenge, unlike the French remedy 'recours pour excès de pouvoir'. But, businesses can challenge the application of such guidancies in concrete cases. The court reviews the instructions as a discretionary decision, i.e the courts’ review is relatively restrained and deferencial.

**III. Concrete soft law (informal) instruments**

Regulatory and supervisory authorities issue a wide range of non-regulatory notices on a case-by-case basis. In 2018, the CA examined 21 waste transport procurements in local governments and made several recommendations to increase transparency.[[6]](#footnote-6) In the same year, the CA reviewed the appeal of the [Estonian Traders Association](https://www.kaupmeesteliit.ee/) regarding the standardization of transport packaging and took a stand that the agreement did not restrict competition.[[7]](#footnote-7) In 2019, on the basis of the application of one company the CA published its position regarding the 5G frequencies competition – CA did not agree that instead of three frequency licenses, four licenses should have been put up to the competition.[[8]](#footnote-8)

Regarding to electricity networks, the CA regularly publishes notices on the causes of power outages and, if necessary, on the negligence of the network operator. According to the Competition Act the Competition Authority may make recommendations to the industries to the improvement of the competitive situation. A person who has been given a recommendation must, at the request notify of measures taken in order to follow the recommendation or reasons why measures are not taken (§ 61). Tallinn Court of Appeal has found that this regulation does not give to the industries any right to demand CA making such recommendations to their competitors.[[9]](#footnote-9)

There are no good examples of direct challenging such notices given by regulatory authorities in the Supreme Court,[[10]](#footnote-10) but in recent years we have dealt with several court cases about non-binding warnings and notices given by supervisory authorities.

* In a dispute resolved in January this year, the Financial Supervision Authority issued a warning notice about the applicant, who was - without an activity license - brokering a credit secured by cryptographic assets in Estonia. In the opinion of the Administrative Law Chamber of the Supreme Court, there was no legal basis for publishing such notice. In the field of a state supervision, the general provision for reporting threats and disturbances is provided by the Law Enforcement Act (§ 26), but this provision was not applicable, as the Financial Supervision Authority Act does not allow the disclosure of financial supervision data. As such a notice is not a legal act, it cannot be annulled. Instead, the Court ordered Financial Supervision Authority to remove the notice from its website.[[11]](#footnote-11)
* In October of this year, the Supreme Court dealt with a case where the [Financial Intelligence Unit](https://www.fiu.ee/en) informed the lessor and employees of the Russian news agency *Rossiya Segodnya* in Estonia that *Rossiya Segodnya* was the subject of an international sanction and the contracts concluded with this news agency had to be terminated. The Chamber explained that the disputed notice could not be annulled either. In the opinion of the Supreme Court, it was not necessary to ascertain that the notice was unlawful, because a more effective remedy for the applicants rights was the action of restitution: the elimination of unlawful consequences of an administrative measure. Rossiya Segodnya may seek the rejection of possible erroneous information.[[12]](#footnote-12)
* The Supreme Court has also allowed to challenge an information notice that has not been made available to the public or third parties, i.e which has been sent only to the addressee who has allegedly violated the requirements of road transport for several times. Such notice may contain misleading guidelines for the company.[[13]](#footnote-13) This solution seems similar to the 2017 warning case reffered by the Lithuanian colleagues.
* In one of the largest-ever tax disputes settled in 2009, the applicants relied on a non-binding explanation issued by the [Estonian Tax and Customs Board](https://www.emta.ee/en)  in 2002. This explanation concerned the taxation of share transactions. Later, the [Estonian Tax and Customs Board](https://www.emta.ee/en) changed its position. In opinion of the Administrative Law Chamber of the Supreme Court the previous misleading explanation may be important in assessing the activities of the taxpayer and indirectly lead to the annulment of the tax decision.[[14]](#footnote-14)
* The Supreme Court has dealt extensively with situations where a customer or a competitor has petitioned an authority to start supervisory proceedings over an undertaking, and the authority decides either not to start proceedings or not to take any measures against the undertaking. A person whose rights may be infringed by the third person’s illegal activity has the right to demand that the supervisory authority make these decisions without discretion errors, if the legal norm that provides for these supervisory proceedings is intended to protect the applicant’s subjective rights.[[15]](#footnote-15)

The courts have also allowed to challenge the assessments in the Yearbook of Estonian Internal Security Service.

It can be concluded that in Estonia, contrary to the majority of Member States concrete non-binding notifications and warning given by regulators can be challenged directly in an administrative court. Similarily to Germany, in Estonia a factual or informational consequence may also constitute an infringement of rights (e.g right to engage in enterprise). To make a comparison, according to the Portuguese report such cases can be assesed as a violation of the right to be presumed innocent.[[16]](#footnote-16)

It is possible to seek for termination of the publication of the notice and the rejection of the data, as well the declaration of unlawfulness of a notice if needed. Should such documents, however, happen to include some binding rules, these may be addressed in an action for annulment..

**Final conclusion**

General soft law acts cannot be directly challenged, but the application of a general internal act can be challenged.

Genuine, but individual soft law instruments can be challenged directly, but not by an annulment action, but mainly by a mandatory action.

1. Recommendations for Water price calculation (valid from 07.04.2015). Available in Estonian: [Veeteenuse hinna arvutamise soovituslikud põhimõtted (kehtib alates 07.04.2015)](https://www.konkurentsiamet.ee/sites/default/files/veeteenuse_hinna_arvutamise_soovituslikud_pohimotted_2015.pdf). [↑](#footnote-ref-1)
2. Guide: Weighted Average Cost of Capital (Available in Estonian: [Juhend kaalutud keskmise kapitali hinna arvutamiseks. 20.11.2019, kk nr 1-2/2019-019)](https://www.konkurentsiamet.ee/sites/default/files/juhend_kaalutud_keskmise_kapitali_hinna_ar.pdf). [↑](#footnote-ref-2)
3. Recommendation for the Control of Waste Transport Prices (available in Estonian: <https://www.konkurentsiamet.ee/sites/default/files/1_soovitus_jaatmeveohindade_kontrollimiseks.pdf>). [↑](#footnote-ref-3)
4. Guide: Weighted Average Cost of Capital (Available in Estonian: [Juhend kaalutud keskmise kapitali hinna arvutamiseks. 20.11.2019, kk nr 1-2/2019-019)](https://www.konkurentsiamet.ee/sites/default/files/juhend_kaalutud_keskmise_kapitali_hinna_ar.pdf) [↑](#footnote-ref-4)
5. Judgment of the Administrative Law Chamber of the Supreme Court, 12.12.2017, no. 3-11-1355/319, p 29 ff, available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-11-1355/319. [↑](#footnote-ref-5)
6. Recommendation for the Control of Waste Transport Prices (available in Estonian: <https://www.konkurentsiamet.ee/sites/default/files/1_soovitus_jaatmeveohindade_kontrollimiseks.pdf>). [↑](#footnote-ref-6)
7. Competition Authority's letter 20.11.2018, no 5-4/2018-158-1 on the standardization of transport packaging. (Available in Estonian: <https://www.konkurentsiamet.ee/sites/default/files/konkurentsiameti_vastus_eesti_kaupmeeste_liidule_20.11.18.pdf>). [↑](#footnote-ref-7)
8. Position on the granting of frequency licenses, 10.07.2019 nr 5-5/2019-035 (Available in Estonian:

   <https://www.konkurentsiamet.ee/sites/default/files/konkurentsiameti_seisukoht_5g_sageduslubade_suhtes.pdf>). [↑](#footnote-ref-8)
9. 3-17-2414. [↑](#footnote-ref-9)
10. See however Supreme Court 3-4-1-6-10, para 6, where the recommendation was followed by the attempt to challenge the water price regulation of Tallinn City by the Legal Chancellor. [↑](#footnote-ref-10)
11. Judgment of the Administrative Law Chamber of the Supreme Court, 28.01.2021, no. 3-19-885. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-19-885/20. [↑](#footnote-ref-11)
12. Ruling of the Administrative Law Chamber of the Supreme Court 21.10.2021, no. 3-20-367/14, p 19. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-20-367/14. [↑](#footnote-ref-12)
13. Judgment of the Administrative Law Chamber of the Supreme Court 02.11.2015, no. 3-3-1-22-15. Available in Estonian: https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-22-15. [↑](#footnote-ref-13)
14. Judgment of the Administrative Law Chamber of the Supreme Court 17.06.2009, no. 3-3-1-23-09, p 24. [↑](#footnote-ref-14)
15. See, for example, judgment of the Administrative Law Chamber of the Supreme Court, 01.04.2021, no. 3-18-1442/115, p 16, available in Estonian: <https://rikos.rik.ee/?asjaNr=3-18-1442/115>; ruling of 23.10.2013 in case no. 3-3-1-29-13, p 17, available in Estonian: <https://www.riigikohus.ee/et/lahendid?asjaNr=3-3-1-29-13>, and judgment of 13.10.2010 in case no. 3-3-1-44-10, p 15, available in Estonian: <https://rikos.rik.ee/?asjaNr=3-3-1-44-10>. In the competition case no. 3-3-1-29-13, the Court found, inspired by the case law of the ECJ, that supervision by the Competition Authority is not only aimed at public interests, but must also protect the rights of market participants from activities forbidden by competition law. This right of action even extends to supervisory proceedings initiated by the Competition Authority *ex officio* (pp 17–19). Similarly, in a case concerning data protection, the Court found that the provisions on personal data protection (in conjunction with the constitutional right to privacy and EU law) indubitably protect the rights of physical data subjects, and thus, this must be one of the main purposes of the supervision by the Data Protection Inspectorate (judgment of 23.03.2016 in case no. 3-3-1-85-15, p 15, available in Estonian: <https://rikos.rik.ee/?asjaNr=3-3-1-85-15>). [↑](#footnote-ref-15)
16. 1233/20.9.BEPRT. [↑](#footnote-ref-16)