



Pre-Merger Notification

Estonia

Is there a regulatory regime applicable to mergers and similar transactions?

Yes. Estonian merger control is regulated by the Competition Act (*Konkurentsiseadus*) and by regulations issued by the Minister of Economic Affairs and Communications: Guidelines for Submission of Notice of Concentration and Guidelines for Calculation of Turnover of Parties to Concentration.

Additional Comments

In principle, Estonian merger notification rules are based on the same principles as the EC Merger Regulation. English translation of the Competition Act may be found at <http://www.konkurentsiamet.ee/eng/index.html?id=763>.

Identify Applicable National Regulatory Agency/Agencies

The merger control provisions are enforced mainly by the Estonian Competition Board (*Konkurentsiamet*, the ECB), a governmental agency within the administrative jurisdiction of the Ministry of Economic Affairs and Communications.

Additional Comments

Information on the activities and competence of the ECB may be found on its website www.konkurentsiamet.ee.

Is there a supranational regulatory agency (e. g., the European Commission) that has, or may have exclusive competence? If so, indicate.

Yes. European Commission exercises exclusive jurisdiction over mergers with “Community dimension”, i.e. the mergers meeting the criteria established by European Merger Control Regulation (EMCR).

Are there pre-merger filing requirements; if so, where are they published?

A merger which is subject to control in Estonia must be notified prior to its implementation. The notification requirement is published in Article 25 of the Competition Act. The detailed rules on the content of the notification are provided in the Guidelines for Submission of Notice of Concentration.

What kinds of transactions are "caught" by the national rules? (Identify any notable exceptions)

Estonian merger control rules are based on the concept of "concentration". Pursuant to the Competition Act, a concentration arises in the following situations:

- 1) merger of previously independent undertakings within the meaning of the Estonian Commercial Code, i.e. (i) one undertaking (the undertaking being acquired) merges with another undertaking and the undertaking being acquired is dissolved; or (ii) undertakings merge so that they form a new undertaking and both merging undertakings are dissolved;
- 2) a merger of parts undertakings;
- 3) an undertaking or a natural person already controlling at least one undertaking acquires control over another undertaking (or over a part thereof);
- 4) several undertakings or several natural persons already controlling at least one undertaking jointly acquire control over a third undertaking (or over a part thereof).

The creation of a joint venture performing on a lasting and independent basis is also deemed to be concentration.

Concentration is not deemed to arise where:

- 1) transactions are carried out as an internal restructuring of a group of companies;
- 2) a credit institution, financial institution, or an insurance company acquires shares in a company with a view to reselling them provided that:
 - a. it does not exercise the voting rights attached to such shares for influencing the behavior of such company;
 - b. it exercises the voting rights attached to such shares only with a view to preparing the sale of such shares or the sale of the company or a part thereof; and
 - c. the shares will be resold within a year as of the date of acquisition.
- 3) control is acquired in relation to liquidation, compulsory dissolution, insolvency or other similar proceedings;
- 4) transactions are carried out by undertakings, whose sole aim is to acquire holdings in other companies for investment purposes, provided that the voting rights attached to such holdings are used primarily for determining the members of management or supervisory board and not for determining the behavior of such company.

Additional Comments

Under the Competition Act, "control" over a company is the ability to influence directly or indirectly the company through the holding of shares in such company, on the basis of a transaction or articles of association or through any other manner, which may consist of: (i) the right to materially influence the composition, operation or decision-making of the management bodies of such other company or (ii) the right to use and dispose of all the assets or an essential part of the assets of such other company.

Control may be acquired over another company or a part thereof. For the purposes of the Competition Act, a "part of a company" shall mean the assets of the company or an organisationally independent part of the company, including an enterprise (meaning under the Commercial Code any economic unit through which an undertaking operates) which constitutes a basis for business activities and to which market turnover can be clearly attributed.

Is there a "size of transaction" threshold?

No.

Is there a "size or turnover of the parties" test; if so, what is it and how are size and turnover to be calculated?

A concentration is subject to control and the ECB must be notified if:

- 1) the combined turnover of the parties to the concentration exceeds EEK 100 million (app. EUR 6.4 million) in Estonia, and
- 2) the turnovers of each of at least two parties to the concentration exceed EEK 30 million (app. EUR 1.9 million) in Estonia.

The turnover in Estonia is considered to arise if goods are sold to a buyer located in the Estonian territory.

In calculating the turnover of the buyer, the turnover of the whole group is taken into account. In calculating the turnover of the target, its turnover comprises only the target's own turnover and the turnover of the undertakings controlled by it. If control is acquired over a part of an undertaking, the turnover of comprises only the turnover of that part of the undertaking. In case of creating of a joint venture, the turnovers of undertakings jointly creating the joint venture are taken into account.

If the target company is acquired through two or more transactions during a period of two years, the turnovers of all the parts acquired are taken into account in the turnover calculation. Moreover, if the acquirer has within two years acquired control over several undertakings operating in Estonia in the same sector of economy, the combined turnover of those acquired target undertakings must be taken into account in calculating the turnover.

Further guidance for calculation of turnover is provided in Guidelines for Calculation of Turnover of Parties to Concentration.

Is geographic scope/national market effect of transaction an issue with respect to filing or approval requirements? If so, specify.

Estonian competition rules are applicable to all concentrations that fall within the above turnover criteria, irrespective of where the concentration takes place and whether the undertakings concerned have any subsidiaries or branches in Estonia.

The national market effect of the transaction may have impact on the amount of information to be submitted within the notification.

Additional Comments

Before 1st of July 2006, world-wide turnover of the concentration parties and the target having "commercial activities in Estonia" used to be relevant criteria for determining jurisdiction. Under such criterion, foreign-to-foreign concentrations were subject to control in Estonia, if the target had subsidiary, branch or permanent establishment in Estonia.

Is the filing voluntary or mandatory? What are the penalties for non-compliance?

Provided the jurisdictional thresholds are met, filing is mandatory.

If a person implements a concentration, which is subject to control and for which no clearance has been given, the ECB has the right to issue a precept requiring the parties to:

- perform the act required by the precept;
- refrain from a prohibited act;
- terminate or suspend activities which restrict competition;

- restore the situation prior to the offence.

In case of failure to timely adhere the precept, the ECB may impose a fine of up to EEK 50,000 (app. EUR 3,200) on natural persons, and up to EEK 100,000 (app. EUR 6,400) on legal persons. The fine can be imposed repeatedly until the precept is adhered to.

Failure to give notice of a concentration may also constitute a misdemeanor, which is punishable by a fine of up to EEK 500,000 (app. EUR 32,000), if committed by a legal person. If committed by a member of the management board, of a body substituting for the management board or of the supervisory board of a legal person, they may be punished by a fine of up to 300 fine units (i.e. maximum of EEK 18,000/app. EUR 1,150) or by arrest. Moreover, pursuant to the Penal Code, failure to give notice of a concentration prejudicing free competition, if the offender has previously been imposed misdemeanor penalties, constitutes a crime. The maximum punishment for legal entities in such cases is a fine of up to EEK 250 million (app. EUR 16 million) and for individuals a fine of up to 500 days average wages and/or up to three years imprisonment.

Time in which a filing must be made

Transactions, which are subject to control in Estonia, must be notified and cleared prior to their implementation and following the first of the following triggering events: conclusion of the merger agreement, acquisition of control or joint control, announcement of the public bid for securities. Similarly to Regulation 139/2004/EC, a notification may also be made where parties have demonstrated a clear intention to conclude an agreement or make a public bid.

Form and Content of Initial Filing

There is no official questionnaire to be completed by the notifying party (parties), but the Competition Act and Guidelines for Submission of Notice of Concentration set forth detailed requirements with regard to the content of the notification as well as documents to be appended thereto.

A notice of concentration must set out the following:

- 1) information concerning the parties to the concentration, including business names, registry codes, contact details and areas of activity;
- 2) a description of the concentration;
- 3) data concerning the turnovers of the parties to the concentration during the preceding financial year;
- 4) information on undertakings, which belong to the same group as the parties to the concentration;
- 5) information concerning the goods markets, including information concerning the market shares, main competitors, clients and the market shares of the competitors and clients of the parties to the concentration, and concerning barriers to entry into or exit from the goods market;
- 6) a description of the effects of the concentration;
- 7) information concerning associations of undertakings in which at least one of the parties to the concentration is a member;
- 8) ancillary restrictions;
- 9) information concerning other circumstances, if any, relating to the concentration, including for example commitment proposals;
- 10) list of other competition authorities notified about the concentration.

Detailed information concerning the goods markets can be left out from a notification, where:

- there are no horizontal overlaps or vertical relations between the activities of the parties to the concentration;

- there is an horizontal overlap, but the concentration will not lead to a combined market share exceeding 15%; or there are vertical relations, but individual or combined market shares do not exceed 25%;
- a joint venture is established, which will not be active in Estonia;
- the party acquiring control exercised joint control prior to the transaction.

Are filing fees required?

Yes, the state fee for the proceedings of concentration is EEK 30,000 (app. EUR 1,917).

Is There An Automatic Waiting Period? If so, specify.

As a general rule, a concentration may not be put into effect before the ECB has cleared it. However, at the request of the parties to the concentration, the ECB may grant an exemption of the general rule and permit individual acts of concentration until adoption of a final decision, taking into account the effects of such acts on the parties or a third party, as well as the threat to competition posed by the concentration. Such derogation may be subject to certain conditions.

Public takeover bids are not subject to the full suspension obligation.

Are There Time Limits Within Which The Regulatory Agency Must Act? Can they be shortened by the parties or be extended by the regulatory agency?

From the date of receipt of a complete notification, the ECB has 30 calendar days either to permit the concentration, to initiate supplementary proceedings, or to inform the applicant that the concentration does not fall within the scope of control under the Competition Act. Supplementary proceedings must be carried out within four months as of the initiation thereof.

Additional Comments

The Competition Act does not provide for any means for speeding up proceedings before the ECB. However, the ECB is usually willing hold informal meetings before filing, in order to discuss market definitions or other issues related to a concentration to be filed, in order to speed up its investigations once formal filing has been made.

If there are no affected markets, then the actual time for obtaining the clearance is usually two to three weeks.

What is the substantive test for clearance?

The ECB prohibits a concentration that significantly impedes competition, in particular as a result of the creation or strengthening of a dominant position. Full-function joint ventures are assessed under the same test. However, if a full-function joint venture gives rise to co-operative effects, these are assessed at the same time by reference to the rules on restrictive practices.

What are the common Post-Filing Procedures: Requests for further information, etc?

Having received the notice of concentration, the ECB publishes a notice thereof and invites interested persons to submit their views. Simultaneously, ECB contacts the competitors, customers, other state authorities as well as concentration parties themselves to gather more information, where relevant.

Should the ECB find omissions in the notification, it may suspend proceedings until the notifying parties have eliminated such omissions. Furthermore, the ECB may request additional information and set a deadline for submitting such information. If the parties fail to submit information by the given deadline, the ECB may suspend proceedings until such information is submitted.

Describe the sanctions for not filing or filing and incorrect/incomplete notification.

If the parties submitted false, misleading or incomplete information which was a determining factor for the decision, the ECB demand submission of additional information and it may also decide to revoke a decision to grant permission to concentrate.

As to the sanctions for not filing, please see the answer to the question “Is the filing voluntary or mandatory? What are the penalties for non- compliance?” above.

Describe the procedures if the agency wants to challenge the transaction?

The ECB initiates supplementary proceedings, where it finds that a concentration may raise competition concerns. If supplementary proceedings are initiated, the ECB must, within four months, either permit or prohibit the concentration. If the ECB finds that there are reasons to prohibit the concentration, it must inform the parties to the concentration thereof at least one month before the end of the four month deadline, by setting a deadline for the parties to submit objections or propose remedies. If the proposed remedies are not sufficient, in the ECB’s view, to prevent impairment of competition and the parties are not willing to amend the proposal or if the parties fail to submit any remedies, the ECB will prohibit the merger.

At the request of the parties to a concentration or on the ECB’s own initiative, a meeting may be held for oral hearing of the parties.

Additional Comments

Once a concentration has been cleared subject to conditions, the parties to the concentration must comply with their commitments and inform the ECB within ten days about the performance of their commitments. The parties may ask the ECB to change the conditions or release the parties from the conditions, if the competitive situation in the affected market has changed substantially after the concentration or if there is another good reason for that.

Describe the penalties applicable to the implementation of a merger before clearance or of a prohibited merger?

All acts directed at giving effect to the concentration or doing anything that would hinder execution of a decision prohibiting the concentration are prohibited and void before clearance.

The penalties for the implementation of a merger before clearance or of a prohibited merger are in principle similar to those described under the answer to the question “Is the filing voluntary or mandatory? What are the penalties for non- compliance?” above.

Describe, briefly, your assessment of the regulatory agency's current attitudes/activities

In general, the ECB is rather flexible and expedient in its proceedings. Most of the notified concentrations are cleared within one month. As at 31 May 2006, supplementary proceedings had been initiated in six cases, but there have been no outright prohibitions. One of the cleared concentrations has been overruled by the courts.

Other Important Information

The latest amendments, which have been reflected in the answers above, entered into force as of July 1 2006.

Changes are pending concerning the range of natural persons, who can be made liable for competition offences, besides legal person. Currently, the range of such persons is limited to members of the management board, of a body substituting for the management board or of the supervisory board of a legal person. Such limitation is planned to be abolished, so that in the future, also other natural persons (such as sales managers) will be liable in case of competition offences. These amendments are hoped to be passed in the autumn, taking into effect as of the beginning of next year.

* * * * *

The Lex Mundi member in this jurisdiction is Lepik & Luhaäär LAWIN



Antitrust, Competition and Trade Practice Group

Lepik & Luhaäär LAWIN, Estonia (Contact: Martin Simovart martin.simovart@lawin.ee, Katri Paas katri.paas@lawin.ee, Elo Tamm elo.tamm@lawin.ee)