

# Merger Control

The international regulation of mergers and joint ventures in 65 jurisdictions worldwide

Consulting editor: John Davies

# 2011



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### Consulting editor:

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### Publisher

Richard Davey

### Merger Control 2011

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# Estonia

## Kaupo Lepasepp

Law Firm Sorainen

### Legislation and jurisdiction

#### 1 What is the relevant legislation and who enforces it?

The most important legal act regulating merger control in Estonia is the Competition Act. It is supplemented by two regulations issued by the minister of economic affairs and communications: the Guidelines for Submission of Notices of Concentration; and the Guidelines for Calculation of Turnover of Parties to Concentration.

The Estonian Competition Authority (ECA) investigates a concentration and clears it, with or without conditions, or prohibits it. The ECA operates within the administrative jurisdiction of the Ministry of Economic Affairs and Communications.

#### 2 What kinds of mergers are caught?

The Competition Act applies to concentrations defined as:

- a merger of whole or parts of undertakings within the meaning of the Commercial Code;
- the acquisition of control of the whole or a part of an undertaking;
- joint acquisition of control of the whole or a part of an undertaking;
- the acquisition of control by a natural person who already has control over another undertaking;
- the acquisition of control by several natural persons controlling at least one undertaking jointly; or
- the creation of a joint venture that performing on a lasting and independent basis.

According to the Competition Act, a concentration is not deemed to arise where:

- transactions are carried out as an internal restructuring of a group of companies;
- a credit institution, financial institution, or an insurance company acquires shares in a company with a view to reselling them, provided that:
  - it does not exercise the voting rights attached to such shares to influence the behaviour of such company;
  - 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
  - the shares will be resold within a year as of the date of acquisition;
- control is acquired in relation to liquidation, compulsory dissolution, insolvency or other similar proceedings; or
- 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 the management or supervisory board and not for determining the behaviour of the company.

#### 3 Are joint ventures caught?

Yes. The creation of a joint venture performing on a lasting and independent basis is one type of concentration within the meaning of the Competition Act.

#### 4 Is there a definition of 'control' and are minority and other interests less than control caught?

According to the Competition Act, control is the ability of one undertaking (or natural person) individually or several undertakings (or natural persons) jointly to exercise direct or indirect influence on another undertaking through the holding of shares, on the basis of a transaction or on the basis of articles of association or in any other manner, which may consist in the right to:

- significantly influence the composition, voting or decision-making of the management bodies of the other undertaking; or
- use and dispose of all the assets or an essential part of the assets of the other undertaking.

Minority shareholdings and other interests less than control may establish joint control, and therefore be caught by the merger control rules.

If a minority shareholder exercises de facto control on a basis other than the holding of shares, it will be caught according to the definition of control.

#### 5 What are the jurisdictional thresholds?

A concentration must be notified if the following turnover thresholds have been exceeded (during the previous financial year):

- the combined aggregate turnover in Estonia of the parties to the concentration exceeded 100 million kroons (approximately €6.4 million); and
- the aggregate turnover in Estonia of each of at least two parties to the concentration exceeded 30 million kroons (approximately €1.9 million).

The turnover is considered to arise in Estonia if the buyer is located within the territory of Estonia.

In the calculation of the relevant turnovers, the turnover of the whole acquiring group will be taken into account, whereas of the target's turnover only the amount relating to the target of the acquisition is relevant. If control is acquired over a part of an undertaking, the turnover of the target part of an undertaking is taken into account. If a joint venture is created, the turnovers of the undertakings that jointly create it will be included.

If the same undertakings or natural persons have acquired control over the target undertaking through two or more transactions during a period of two years, these transactions are considered to be the same concentration.

If, within the preceding two years, the acquirer or an undertaking within the same group has acquired control over undertakings that operate within the same economic sector, the turnover of the target includes the turnovers of the targets acquired within the past two years.

Transactions that fall within the scope of European Commission Merger Regulation No. 139/2004 do not have to be notified in Estonia, except when the European Commission has referred them to the national competition authority.

**6** Is the filing mandatory or voluntary? If mandatory, do any exceptions exist?

The filing is mandatory if the turnover thresholds are met, with no exceptions. However, concentrations meeting the thresholds enacted in the European Commission Merger Regulation No. 139/2004 fall under the exclusive jurisdiction of the European Commission.

**7** Do foreign-to-foreign mergers have to be notified and is there a local effects test?

Foreign-to-foreign mergers are caught if the turnover thresholds are met. The Competition Act does not contain any provisions on a particular local effects test.

#### Notification and clearance timetable

**8** What are the deadlines for filing? Are there sanctions for not filing and are they applied in practice?

The concentration must be notified before enforcement of the concentration. The notification must be filed after: conclusion of a merger agreement; making of a transaction for acquisition of control or joint control; or announcement of the public bid for securities. As an exception, the notification may also be filed before these events if the parties to the concentration provide proof to the Competition Authority that they intend to perform one of the above-mentioned acts.

In the case of enforcement of a concentration that not been notified or has been prohibited, the Competition Authority has the right to issue a precept that requires the parties to the concentration to:

- perform the act required by the precept;
- refrain from a prohibited act;
- terminate or suspend activities that restrict competition; or
- restore the situation prior to the offence.

The sanction for not following the precept is a penalty payment of up to 50,000 kroons (approximately €3,200) for natural persons and 100,000 kroons (approximately €6,400) for legal persons. Penalty payments can be imposed repeatedly until the precept has been followed.

The failure to give notice of a concentration or the enforcement of a concentration without clearance is a misdemeanour. If committed by a legal person, it can be punished with a fine of up to 500,000 kroons (approximately €32,000) and if committed by a natural person, the punishment is an arrest or a fine of up to 18,000 kroons (approximately €1,200). If committed repeatedly, such misdemeanours constitute a crime. The maximum fine for legal persons is up to 250 million kroons (approximately €16 million) and for natural persons a fine of up to 500 days' average wages or up to three years' imprisonment, or both punishments cumulatively.

**9** Who is responsible for filing and are filing fees required?

The obligation to notify lies with:

- the undertaking or the natural person acquiring sole control;
- the merging parties jointly; or
- the undertakings or individuals acquiring joint control jointly.

The filing fee is 30,000 kroons (approximately €1,900).

**10** What are the waiting periods and does implementation of the transaction have to be suspended prior to clearance?

Within 30 calendar days from submission of the notice, the Competition Authority must decide on whether to permit the concentration or to initiate supplementary proceedings. Supplementary proceedings can last up to an additional four months. Implementation of the transaction must, as a general rule, be suspended until clearance. However, the Competition Authority might grant an exception and give permission to perform individual acts. Upon giving permission, the Competition Authority may impose obligations related to the performance of acts on the parties to the concentration.

**11** What are the possible sanctions involved in closing before clearance and are they applied in practice?

The same sanctions are applicable to both failure to notify and closing before clearance. They include issuing a precept, imposing a penalty payment (repeatedly, until the precept has been followed), imposing a fine and imprisonment. See question 8 for further details. The Competition Authority has imposed fines on a few occasions.

**12** What solutions might be acceptable to permit closing before clearance in a foreign-to-foreign merger?

Implementation of a concentration before clearance is prohibited under the main rule in foreign-to-foreign mergers as well as national ones. The Competition Authority has, however, the possibility to decide to grant permission to implement individual acts before clearance.

**13** Are there any special merger control rules applicable to public takeover bids?

The Competition Act does not prohibit the last public bid of securities or performance of transactions with securities as a series, when control is acquired from different sellers, provided that the Competition Authority is immediately notified of the concentration and the acquirer of the securities does not use the voting rights related to the acquired securities, or alternatively uses the voting rights only to maintain the value of the investments.

**14** What is the level of detail required in the preparation of a filing?

The Competition Act and Guidelines for Submission of Notices of Concentration provide two types of concentration notification formats – full form and abbreviated form. The abbreviated form means that detailed information regarding the goods market is not required. However, both formats include information on the parties to the concentration and the transaction itself. An abbreviated form can be used if:

- there is no horizontal overlap of and no vertical relations between the relevant market;
- horizontal overlap exists, but the concentration will not lead to a combined market share exceeding 15 per cent, or vertical relations exist, but individual or combined market shares are a maximum of 25 per cent;
- the created joint venture will not operate in Estonia; or
- the party acquiring control was already exercising joint control prior to the concentration.

The full form notification contains detailed information on the notified transaction, including information on the parties to the concentration, information on the legal and financial aspects of the notified concentration (including on ancillary restraints), detailed information on the relevant markets that may be affected as a result of the concentration (including information on the market shares



of the parties to the concentration, information on major competitors, clients and their market shares, information on barriers of entry, information on supply and demand structure, etc) and the statement of purpose for the planned merger transaction. The notifying parties are also required to submit a set of documents with the notification.

**15** What is the timetable for clearance and can it be speeded up?

The Competition Authority has a period of 30 calendar days during which it has to:

- clear the concentration as such or with conditions;
- conclude that the transaction will not be caught by the Competition Act;
- decide to initiate supplementary proceedings; or
- terminate the proceedings if the parties to the concentration decide not to concentrate.

If the Competition Authority decides to initiate supplementary proceedings, it must, within four months of that decision, either clear the concentration, with or without conditions, or block it.

The concentration clearance procedure may be speeded up by pre-notification discussions. However, despite the fact that pre-notification discussions will in most cases speed up the merger review, they do not as such affect or change the time limits prescribed for the review by the law.

**16** What are the typical steps and different phases of the investigation?

**First phase**

The Competition Authority has 30 calendar days to decide if the concentration is subject to control and whether it can be cleared or whether supplementary proceedings should be initiated. The first step is informing the public about the concentration notice submitted through official channels. During the first phase the Competition Authority cannot prohibit a concentration. In the case of doubt about whether the concentration should be allowed, the Competition Authority must always initiate supplementary proceedings.

**Second phase (optional)**

If supplementary proceedings have been initiated, the Competition Authority has four months from initiating to decide whether to permit or to prohibit the concentration.

**Substantive assessment**

**17** What is the substantive test for clearance?

According to the Competition Act, the Competition Authority prohibits the concentration that significantly restricts competition, in particular as a result of the creation or strengthening of a dominant position.

Appraisal of a concentration shall be based on the need to maintain and develop competition, taking into account the structure of product markets and the actual and potential competition in the product market, including:

- the market position of the parties to the concentration and their economic and financial power and opportunities for competitors to access the goods market;
- legal and other barriers to entry into the goods market;
- supply and demand trends for the relevant goods; and
- the interests of the buyers, sellers and consumers.

**18** Is there a special substantive test for joint ventures?

The Competition Authority assesses, in addition to the regular substantive test, whether the object or effect of the creation of a joint

venture is to regulate competition between the undertakings that established the joint venture. The Competition Authority gives its assessment to the following:

- whether the two or more undertakings creating the joint venture will operate in the same relevant market as the joint venture, or in the vertically related market; and
- whether the coordination of behaviour that results from the creation of the joint venture will enable the joint venture to eliminate competition in the relevant market or in a significant part of it.

**19** What are the 'theories of harm' that the authorities will investigate?

Most often the Competition Authority analyses whether the relevant concentration leads to a dominant position. The Competition Authority has a tendency to refer to the practice of the European Commission. On several occasions the Competition Authority has also applied other 'theories of harm' (such as foreclosure effect) and parties to the concentration should expect it.

**20** To what extent are non-competition issues (such as industrial policy or public interest issues) relevant in the review process?

According to the Competition Act, only competition issues should be important in the review process. The Competition Authority has no authority to consider anything but competition issues. However, in some cases the Competition Authority may have taken into account public interest issues.

**21** To what extent does the authority take into account economic efficiencies in the review process?

Most decisions do not reflect on efficiencies, as serious competition concerns have not been raised. However, there is practice where economic efficiencies have been taken into account.

**Remedies and ancillary restraints**

**22** What powers do the authorities have to prohibit or otherwise interfere with a transaction?

The Competition Authority has the right to prohibit the concentration and to impose penalty payments and fines for infringement of the relevant concentration control provisions. Within criminal proceedings, only the court can hand down a punishment, for example a fine of up to 250 million kroons (approximately €16 million).

**23** Is it possible to remedy competition issues, for example by giving divestment undertakings or behavioural remedies?

Yes, it is possible to remedy issues. Both divestment undertakings and behavioural remedies are acceptable.

**24** What are the basic conditions and timing issues applicable to a divestment or other remedy?

If the Competition Authority finds that the concentration should be prohibited, it must inform the parties to the concentration at latest one month before the end of the term of the supplementary proceedings. The parties to the concentration then have the opportunity to propose a divestment or other remedies. If they fail to do so, or the Competition Authority does not consider the remedies to be sufficient, the Competition Authority prohibits the concentration. The parties to the concentration must inform the Competition Authority within 10 days from performing the remedy or after the agreed deadline for performing the remedy has passed.

### Update and trends

The merger market in Estonia has plunged hand in hand with the economic crisis. As the Competition Authority concluded in its annual review of 2009, the number of concentrations has fallen and there were also fewer concentrations with a foreign element. However, the high concentration in the pharmaceuticals market has further evolved in 2009, when one of the two groups governing the pharmaceutical wholesale and retail markets acquired one more independent pharmacy. There was also a significant concentration in the road maintenance sector. In May 2010 there was a concentration that resulted in the acquisition of Kalev Chocolate Factory by a Finnish group Felix operating in the groceries market. Unlike the scandalous pharmaceuticals case of 2008, there were no concentrations prohibited in 2009. However, it seems that in 2010 the merger market is emerging again.

**25** What is the track record of the authority in requiring remedies in foreign-to-foreign mergers?

Up to the time of writing, the Competition Authority has required remedies in two foreign-to-foreign merger cases. The overwhelming majority of the Competition Authority concentration decisions do not reflect upon concerns related to harming effective competition and remedies have not been considered necessary.

**26** In what circumstances will the clearance decision cover related arrangements (ancillary restrictions)?

There are no specific provisions in the Competition Act and related regulations that would address ancillary restrictions a concentration. The usual practice is that the Competition Authority informs the parties to the concentration if the ancillary restrictions contradict the relevant European Commission notice and the parties to the concentration will amend the ancillary restrictions.

### Involvement of other parties or authorities

**27** Are customers and competitors involved in the review process and what rights do complainants have?

The Competition Authority is entitled to require information from any legal and natural persons, such as competitors and clients of the parties to the concentration. Interested third parties, like customers and competitors, have the right to submit their position regarding the concentration within seven days after the Competition Authority notice about the concentration has been published in the official publication Official Notices. This is the opportunity for competitors to step in and take action against a concentration that could harm effective competition.

The competitors also have the right to appeal against decisions of the Competition Authority in the Administrative Court.

**28** What publicity is given to the process and how do you protect commercial information, including business secrets, from disclosure?

The Competition Authority publishes an announcement on the received notifications in the official publication Official Notices. The notice to be published will include the names and business names of the parties to the concentration, their countries of residence and the type of concentration. In addition, the Competition Authority will publish notices on the following decisions:

- decision that the concentration does not require clearance;
- decision that concentration has been cleared;
- decision to initiate supplementary proceedings;
- decision to prohibit the concentration; and
- decision to terminate the proceedings because the concentration has been withdrawn.

The Competition Authority is obliged to protect business secrets disclosed to it within the concentration notice or the annexed documents. Third parties do not have access to the file.

The full text of the Competition Authority decisions is available on the Competition Authority website. Business secrets have been removed from the texts of decisions. The party submitting a notice should indicate information that the parties consider as a business secret.

**29** Do the authorities cooperate with antitrust authorities in other jurisdictions?

The Competition Authority cooperates with other antitrust authorities in other jurisdictions and the European Commission. The Competition Authority is part of the European Competition Network (ECN), which is a cooperation forum of the European Commission and the national competition authorities of the member states. The activities of the ECN are based on EC Regulation No. 1/2003 and enhance the exchange of information and case allocation between the authorities.

**30** Are there also rules on foreign investment, special sectors or other relevant approvals?

There is a special rule for credit, financial and insurance institutions: if those undertakings acquire control over other undertakings with the aim to resell them, and the sale takes place within one year from the acquisition, it is not considered to be a concentration. Therefore, such acquisitions are not subject to merger control.

### Judicial review

**31** What are the opportunities for appeal or judicial review?

The Competition Authority decisions on concentrations can be challenged within the Competition Authority. If the Competition Authority does not change its mind and the challenge is not satisfied, the party to the concentration (or a third party whose rights have been infringed by the decision) can file a claim with the Administrative Court. However, the challenge procedure is not mandatory and instead the party to the concentration can file a complaint directly to the Administrative Court. There is no special court or special judges for review of competition cases.

The decisions can be appealed to the district courts. The judgment of the district court can be appealed in the cassation procedure to the administrative department of the Supreme Court of Estonia.

The essence of Administrative Court proceedings is the courts' control over legality considerations of the administrative act issued by the Competition Authority or actual actions taken by the Competition Authority within the scope of its discretion. In the administrative proceedings the court objectively determines the circumstances of the case and gives a legal opinion in respect of them, reviewing the case within a reasonable term.

**32** What is the usual time frame for appeal or judicial review?

A challenge of the Competition Authority decision must be filed to the Competition Authority within 30 days as of the day when a person becomes (or should become) aware of the challenged decision. The challenge must be adjudicated within 10 days after the challenge is delivered to the Competition Authority. That term can be extended by 30 additional days if it needs further examination.

The Competition Authority decision can be appealed within 30 days after the date on which the decision was made public. The proceedings in the Administrative Court take at least six months. The appellant must take into account that defending its rights in court takes a long time.

**Enforcement practice and future developments**

**33** What is the recent enforcement record of the authorities, particularly for foreign-to-foreign mergers?

In 2009, the Competition Authority issued a total of 17 concentration control decisions. One case required the initiation of supplementary proceedings. There were two foreign-to-foreign concentration in 2009. Six concentration decisions have been made in Q2 of 2010. There have been no foreign-to-foreign concentrations in Q2 of 2010.

In 2008, the total number of concentrations controlled was 27. It means that the number of concentrations has fallen due to the economic crisis. However, lawyers feel that the merger market is becoming active again.

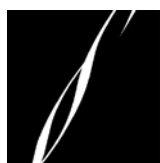
No concentrations were officially prohibited in 2009.

**34** What are the current enforcement concerns of the authorities?

The Competition Authority currently focuses on investigations of violations of prohibited agreements. The Competition Authority has not officially identified any particular sectors or issues as its current enforcement concerns in the field of concentrations. However, on the basis of the recent decisions it appears that the Competition Authority takes a special interest in pharmaceuticals, waste management, road maintenance and security services.

**35** Are there current proposals to change the legislation?

We are not aware of any reform proposals.



# SORAINEN

**Kaupo Lepasepp**

**[kaupo.lepasepp@sorainen.com](mailto:kaupo.lepasepp@sorainen.com)**

Pärnu mnt 15  
10141 Tallinn  
Estonia

Tel: +372 6 400 939  
Fax: +372 6 400 901  
[www.sorainen.com](http://www.sorainen.com)

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