

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

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**Working Party No. 3 on Co-operation and Enforcement**

**INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS**

-- Estonia --

25 February 2014

*This note is submitted by Estonia to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.*

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– Estonia –

**1. Pre-merger notification regime**

1. In Estonia, there is a pre-merger notification regime. A concentration shall be subject to control by the Competition Authority if, during the previous financial year, the aggregate turnover in Estonia of the parties to the concentration exceeded 6,391,200 euros and the aggregate turnover in Estonia of each of at least two parties to the concentration exceeded 1,917,350 euros.

2. In addition to the general turnover criterion, there is an additional criterion (the so-called two-year rule, Article 24(7) of the Competition Act), according to which, if, within the preceding two years one and the same undertaking or an undertaking belonging to the same group has acquired control of undertakings or parts of undertakings which operate within one and the same sector of economy in Estonia, the turnover of the undertaking over which control is acquired shall include the turnover of the undertakings over which control has been acquired within the two years preceding concentration.

3. The aim of Article 24(7) is to control concentrations in such economic sectors, where the aggregate turnover of undertakings is relatively small or where there a large number of undertakings with a small turnover. By acquiring control of two or more undertakings it is possible to achieve a dominant position, which significantly restricts competition in an economic sector or a narrower product market.

4. According to the Competition Act, it is prohibited to implement the concentration before the Competition Authority has issued a clearance decision.

**2. Review of mergers below notification thresholds**

5. The Estonian Competition Authority does not have a possibility to review mergers that are below notification thresholds (except for the two-year rule described above). There is also no possibility to challenge a concentration that was below notification thresholds.

6. In practice, there have been a few occasions when we have found out about concentration that would potentially restrict competition, but we did not have the competence to review, as the turnover thresholds were not met.

**3. Review of mergers that should have been notified but were not**

7. According to the Competition Act, enforcement of concentration that is subject to control without permission to concentrate, as well as violation of a prohibition to concentrate or the terms of the permission to concentrate is punishable by a fine of up to 32 000 euros (legal person) or by a fine of up to 1200 euros or detention of up to 30 calendar days (natural person).

8. A fine may be imposed on the party who is obliged to submit the merger notification, for the described violations, and in order to impose a fine, misdemeanor procedure shall be conducted.

9. The misdemeanor procedure, which is quite an exceptional method in global practice, was initially meant rather for the simple proceeding of minor violations (such as driving without a seat belt). Proceeding of complex economic violations (such as abuse of dominant position and concentrations enforced without a clearance decision) in misdemeanor procedure is sometimes highly complicated and therefore also inefficient, compared to other countries. In misdemeanor procedure, in order to impose a fine to a legal person, the exact natural person who committed the infringement, i.e. enforced the concentration, has to be identified.

10. Until the recent amendment of the Competition Act, the sanction described above (fine of up to 32 000 Euros etc.) applied both to failure to notify a concentration and enforcement of concentration without permission to concentrate. It was decided to abolish the provision regarding sanctions for a failure to notify a concentration, as enforcement of concentration without permission covers also failure to notify. In practice, identifying the natural person responsible for not notifying, i.e. responsible for inaction would be very complicated in misdemeanor proceedings.

11. According to a decision by the Estonian Supreme Court, also in case of inaction, the specific natural person has to be identified who would have had the obligation to notify a concentration. Regarding enforcement of concentration without permission to concentrate, it was stated that in order to identify the natural person, it was not enough that the only Board Member had signed the Share Purchase Agreement and it could be seen afterwards from the extract from the Central Register of Securities that there had been a change in the shareholding of the Target. As the rights of a shareholder can be exercised from the moment the person has been entered as the shareholder in the share register, it has to be proved which natural person signed the application submitted to the Estonian Central Register of Securities, in order to enter the Acquiring Company as a shareholder of the Target.

12. Generally the provisions concerning criminal procedure apply to misdemeanor procedure, which means that there might be many aspects that make the investigation process more complex, for example the parties may refuse to give testimony with regards to their actions. At the same time, the exact natural person behind the enforcement has to be identified.

13. A misdemeanor expires after two years have passed between the commission thereof and the entry into force of the corresponding judgement or decision. This rule used to apply also to competition law misdemeanors. Since July 2013 an exemption regarding competition law misdemeanors was introduced – now these misdemeanors (including enforcement of concentration without permission to concentrate) expire in three years. With the mentioned amendment the investigation of unlawfully enforced concentrations will hopefully become a little bit more efficient, as two years proved to be a too short period. The reason for that was the fact that the running of the two-year term began with the enforcement of concentration, which the Competition Authority might become aware of a while later. Then the investigation conducted and decision made by the Competition Authority, but also all the court proceedings and decisions (in case the decision of the Competition Authority was challenged) had to take place during the two-year period. In such circumstances, the party responsible for enforcement of concentration has strong incentive to delay the proceedings, so that the misdemeanor would expire.

14. In addition to imposing a fine in misdemeanor procedure, the Competition Authority has the right to issue a precept (in administrative procedure) to a natural or legal person if the person puts into effect a concentration which is subject to control but concerning which a decision has not been made or if a decision prohibiting the concentration has been made or the permission for the concentration has been revoked by the Competition Authority, or violates the conditions of the permission for the concentration or did not comply with the notification obligation.

15. By a mandatory precept, inter alia an obligation to perform the act required by the precept or restore the situation prior the offence may be imposed.

16. In practice, when the Competition Authority identifies a concentration that should have been notified, but was not, two parallel proceedings should be conducted. The Competition Authority issues a precept in administrative proceedings to order to require the notifying party to submit the notification. At the same time, the Competition Authority should commence misdemeanor procedure in order to impose a fine.

**4. Subsequent Review of Previously Cleared and Consummated Mergers**

17. After the decision has been made to give permission to concentrate, there is no possibility for the Competition Authority to challenge the concentration later. There is a possibility for the Competition Authority to revoke a decision to grant permission to concentrate, if the parties to the concentration submitted false, misleading or incomplete information which was a determining factor for the decision; or if the concentration was effected in violation of a term or other condition or obligation.