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Suspensory Effects of Merger Notifications and Gun Jumping - Note by Estonia

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This document reproduces a written contribution from Estonia submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm

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Estonia

1. The relevance and investigation of gun jumping

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 million euros and the aggregate turnover in Estonia of each of at least two parties to the concentration exceeded 2 million 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. According to the Competition Act it is prohibited to implement the concentration before the Competition Authority has issued a clearance decision.

4. During the years, the Competition Authority has investigated several mergers that were implemented without a clearance decision from the Competition Authority. Most of them have been failures to notify (on time), but also a violation of the standstill obligation has occurred. In the case involving a breach of the standstill obligation, the parties transferred the shares and declared they would not use the rights associated with the shares, but as control is connected with the possibility to use the rights, the Competition Authority considered such a behavior to be a violation of the standstill obligation. One of the gun jumping cases, which involved failure to notify on time, led finally to a Supreme Court decision[1] that has given the Competition Authority a further guidance. The merger (acquisition of control by AS Wõro Kommerts of AS O[2]) was notified to the Competition Authority, but only after the implementation. In this case therefore the submitted merger notification itself was the source of information about gun jumping. There is not a single source to identify concentrations that should have been notified but were not. It cannot be said that a systematic monitoring is conducted, but media is followed and in case of any doubts the e-Business Register is checked to identify the turnover of the parties and ownership of the shares. Once the Competition Authority has opened an investigation based on a competitor´s detailed complaint. The competitor was of the opinion that there had been a merger that should have been notified. After analyzing turnovers of the merging parties and previous acquisitions, the Competition Authority came to the conclusion that the concentration should have been notified. However, it should be mentioned that in this case calculation of turnover was more complex, as the two-year rule (described above) was involved.

[1] 7 December 2007 in case 3-1-1-84-07, AS Wõro Kommerts vs Konkurentsiamet

[2] Full name of the target was not disclosed in the court decision

5. There is no possibility to prioritize gun jumping cases – once it has been discovered that a possible gun jumping has occurred, the Competition Authority is obliged to open misdemeanor proceedings.

2. Legal consequences and fining of gun jumping

6. 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 400 000 euros (legal person) or by a fine of up to 1200 euros or detention of up to 30 calendar days (natural person). The maximum amount of fine was increased in 2015, previously it used be 32 000 euros.

7. 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.

8. 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.

9. According to a decision by the Estonian Supreme Court[3], 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.

10. 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.

11. 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

[3] 7 December 2007 in case 3-1-1-84-07, AS Wõro Kommerts vs Konkurentsiamet

(including enforcement of concentration without permission to concentrate) expire in three years. With the mentioned amendment the investigation of unlawfully enforced concentrations became 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.

12. 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.

13. 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.

14. 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.

3. Practical guidance, rules and derogations

15. The Competition Authority has not issued any guidelines regarding communication between the merging parties during the notification and proceedings of the merger. However, particularly in case of Phase 2 proceedings, the parties should still be aware of the possibility of a prohibition and therefore not exchange more information than necessary.

16. The Competition Authority is available for pre-notification consultations. There are several issues that the parties may wish to discuss prior to notification, mostly related to jurisdiction and market definition.

17. The Competition Act foresees a possibility for a derogation on the standstill obligation based on a reasoned application of the parties to a concentration. In reviewing the application, the Competition Authority shall take into account the effect of the requested acts any danger to competition resulting from the merger. In practice, the Competition Authority has received some applications for derogation, but only once the derogation was granted (regarding a merger with no horizontal or vertical overlaps between the activities of the merging parties). The Competition Authority has been in a position that a derogation can be granted only in situations when it is absolutely clear that the merger does not harm the competitive situation in any manner and there are reasonable justifications for the early implementation.